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38 AFLR 1, Cleanup Costs at Contractor Facilities

Title of Article

Defense Contractor Recovery of Cleanup Costs at Contractor Owned and Operated Facilities

Author

Lieutenant Colonel Cheryl Lynch Nilsson, USAF*

Text of Article

I. INTRODUCTION

This article discusses the obligation of the Department of Defense (DOD) to reimburse defense contractors for environmental cleanup costs when hazardous substances occur at contractor owned and contractor operated (COCO) facilities [1] or disposal sites for which the contractor is held responsible. The focus of this analysis is on the recovery of cleanup costs under Federal Acquisition Regulation (FAR) cost principles, [2] as well as the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), [3] which allows for contractor reimbursement if the Government "arranged" for the treatment or disposal of hazardous substances used in the performance of a government contract. [4]

The DOD enters into thousands of contracts each year with COCOs for the performance of work ranging from simple paint contracts to manufacture of sophisticated multi-million dollar weapon systems -- many with significant environmental cleanup costs. [5] Environmental laws result in contractor cleanup liability long after wastes are discarded. [6] The costs are staggering and the stakes are high. [7] In addition to the high cost of the actual cleanup, there are substantial costs for remedial investigations and evaluations, governmental administration, future monitoring, fines, penalities, legal and professional fees, personal and property damages, and regulatory overhead.

Defense contractors are involved in the cleanup of hazardous materials and wastes that are stored, shipped, dumped, or used without adequate containment. They face substantial liability under state and federal law for damage caused by contaminants leeching into the soil and ground water. A General Accounting Office (GAO) study on COCO liability noted:

[A]ggregate projections range from $0.9 billion to $1.1 billion . . . . [O]ne contractor, spending $9 million for investigation of one site . . . projected that another $91 million would be needed to construct and operate ground water treatment facilities for cleaning up the site. . . . [A]nother contractor said it could be responsible for cleanup costs at 100 sites involved with defense contracts. [8]

Liabilities created by environmental statutes are broad in scope and almost limitless in time. [9] The debate today for contractors and the Government is not whether environmental cleanup costs are necessary, but "who picks up the tab." [10] This article outlines the extent to which the contractor can recover costs from the Government under existing statutory and regulatory contract principles, or in the alternative, as a "potentially responsible party" under CERCLA "arranger" liability. [11]

A. Federal Environmental Law Governing Liability for Past Activities

CERCLA [12] and the Resource Conservation and Recovery Act of 1976 (RCRA) [13] are the primary federal statutes governing hazardous waste activities. RCRA regulates current hazardous waste practices to prevent releases, but also requires current and past hazardous waste generators and handlers to remedy harmful releases. [14] CERCLA, however, is the most comprehensive federal statute and was designed to remedy contamination from past practices. It is, therefore, the primary focus of this article.

CERCLA provides the legal framework under which federal and state Governments (as well as private parties) respond to and cleanup contamination in land, air, and water caused by releases of hazardous substances. The act requires responsible parties to either clean up a contaminated site or reimburse the Government or other private parties for the cost of cleanup.

[15] Liability for cleanup under CERCLA extends to past and present owners, transporters, and generator of hazardous substances (also called "arrangers") and is strict, joint and several. [16] Current owners are normally liable for cleanup costs even if they did not own the property at the time of the disposal or cause or contribute to the release of the contaminant. [17]

CERCLA imposes liability on four categories of "persons," [18] also called potentially responsible parties (PRPs), who (1) currently own and operate a facility; [19] (2) owned or operated a facility at the time of the disposal of a hazardous substance; [20] (3) by contract, agreement, or otherwise, arranged for disposal or treatment of hazardous substances; [21] or (4) accepted a hazardous substance for transport to a disposal or treatment facility selected by that person. [22] CERCLA's 1986 amendments -- the Superfund Amendment and Reauthorization Act (SARA) -- specifically provides that CERCLA applies to facilities owned or operated by a department, agency, or instrumentality of the United States "in the same manner and to the same extent" it applies to nongovernmental facilities. [23]

Government liability exists if DOD owned or operated a facility at "which such hazardous substances were disposed of" or if DOD "arranged" for disposal or treatment of hazardous substances related to the performance of a government contract. [24] Causation requirements are minimal. Potential arranger liability requires only that (1) generator disposed of, or arranged for, the disposal or treatment of a hazardous substance at the site; (2) hazardous substances like the generator's are still present at the site; (3) a release of a hazardous substance has occurred; and (4) the release has triggered response costs. [25]

PRPs are liable for response costs, including short-term removal and long-term remedial actions, incurred by the Federal Government, a state, or others that are consistent with the National Contingency Plan. [26] PRPs also are liable for damage to government owned or controlled natural resources, the cost of health assessments or studies, and interest from the date payment is demanded. [27]

CERCLA liability and costs are triggered by a release or a substantial threat of a release (spilling, leaking, pumping, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing) into the environment of a hazardous substance. [28] These costs, by their very nature, may be the result of conditions existing prior to the creation of a government contract. They may or may not be the subject of a citation from federal or state authorities, and it does not matter whether the actions leading to the contamination were intentional or unintentional. The costs may be the result of standard business practices at the time, during which the contractor may or may not have been working on government contracts and often arise from conditions and practices from which the liability and impact were unknown or unforeseeable at the time they were undertaken. [29]

As a "no fault" statute, CERCLA imposes liability even when the contractor's activities were in full compliance with the law at the time. A claim of due care or a lack of negligence cannot be used to avoid liability. Only three complete defenses to CERCLA liability exist and, as a practical matter, they provide little protection to contractors. They are: (1) an act of God; (2) an act of war; and (3) an act or omission of a third party exercising due care, other than an employee, agent of, or one whose act or omission occurs in connection with a "contractual relationship" with a PRP. [30]

DOD and its contractors will rarely avoid liability using these defenses, since contractors typically experience a release in the course of normal operations not easily characterized as an act of God or an act of war. Nor will the third party defense be available, because the release and resulting damages typically arise as a result of some act or omission of a contractor's employee, agent, or subcontractor. [31]

B. Government Procurement Principles Relevant to Environmental Liabilities

Part 23 of the FAR sets forth the Government's procurement policy in support of environmental compliance. The regulation states that it "is the Government's policy to improve environmental quality. Accordingly, executive agencies shall conduct their acquisition activities in a manner that will result in effective enforcement of the Clean Air Act and Clean Water Act." [32] The fact that procurement policy supports environmental compliance does not translate into a separate obligation to fund the program at Government expense and does not confer any special status on contractors as to compliance with federal, state, and local laws. [33] The FAR does not expressly address the risk of loss for environmental liabilities, although it requires contractors to comply with clean air and water standards and the applicable state and local laws on hazardous materials management. [34] No FAR provisions directly address whether environmental costs are allowable under the contract. The closest thing to FAR guidance is a controversial draft cost principle that, to date, has not been published as a proposed rule. [35]

The proposed cost principle would allow contractors to recover costs for preventing pollution, complying with applicable environmental laws and regulations, and disposing of waste. However, to recover cleanup costs, the contractor must show that it (or the previous owner responsible for the contamination) was performing a government contract at the time the condition requiring cleanup occurred and that performance of the government contract contributed to the creation of the condition. The contractor also must show that it exercised reasonable business judgment, complied with all environmental standards (applicable at the time the condition was created), acted promptly to mitigate the condition, and exhausted (or is diligently pursuing) all available legal avenues to recover or defray the cleanup costs. In addition, under the proposed draft, costs resulting from liability to a third party are unallowable. [36]

Pending final FAR guidance, defense contractor recovery of environmental cleanup costs for past activities will be treated like other costs not specifically addressed in the FAR. Recovery will depend on the type of contract (cost-reimbursement or fixed-price), the existing standard FAR clauses, contract provisions unique to the contract, and agency guidance. [37]

In cost reimbursement contracts, the contractor is reimbursed for the allowable costs incurred in the performance of the contract, while in fixed price contracts the contractor is paid a price for performing the work regardless of the actual cost of performance. In cost reimbursement contracts, a cost is allowable if reasonable, allocable, determined in accordance with generally accepted accounting principles, and not specifically disallowed by the FAR or the contract. In contrast, in a firm fixed-price contract, the price is pre-established and additional costs incurred during performance generally will not be reimbursed. [38] Thus, in a cost-type contract, contractors are reimbursed for their reasonable and allocable environmental cleanup costs, whereas in fixed-price contracts, recovery of unanticipated environmental costs is significantly more limited.

In sections II and III of this article, I will cover the conditions under which environmental cleanup costs incurred during performance of a government contract are reimbursed in fixed-price and cost-reimbursement contracts. This discussion will be followed by sections IV and V, which will discuss post-contract performance recovery of cleanup costs under CERCLA to the extent the contract "arranged for" the disposal of hazardous substances.

II. FIXED-PRICE CONTRACTS

The most frequently used type of contract is the fixed-price contract. Such contracts can be either firm-fixed-price or fixed-price with provisions for adjustment. [39] FAR 16.202-1 states that "A firm fixed price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places upon the contractor maximum risk and responsibility for all costs and resulting profit or loss."

Generally, in fixed-price contracts all environmental costs are borne by the contractor unless there are specially negotiated provisions or the cost is treated as a compensable change to the contract. [40] The courts and boards have allowed recovery of additional costs for compliance with environmental regulations on grounds of "differing site conditions" and post-award constructive changes in the contract requirements, notwithstanding the significant limits of the "Permits and Responsibility" clause. [41] No published case addresses recovery of environmental cleanup costs from the contractor's past activities, [42] however, there are cases illustrative of what it takes to recover any environmental costs incurred during the performance of a fixed price contract.

A. Differing Site Conditions

Under the "Differing Site Conditions" clause, a contractor may recover additional costs of performance when: "(1) subsurface or latent physical conditions at the site differ materially from those indicated in the contract, or (2) unknown physical conditions at the site, of an unusual nature, differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract." [43]

This clause was designed to relieve the contractor of the risks associated with unexpected conditions encountered during performance. [44] However, to take advantage of the relief offered, the contractor must conduct a reasonable inspection and review the relevant contract documents. In Frank Lill & Sons, [45] the contractor was successful in securing a price adjustment for the increased cost of asbestos removal, even though the contract gave notice of the existence of asbestos. The contractor was unable to determine the extent of the asbestos after a reasonable preperformance inspection of the site. The board concluded that the contractor

encountered a latent physical condition materially different from that indicated in the contract specifications. . . . . This

latent condition was not as to the existence of asbestos at the site, which the contract indicated, but as to the quantity of asbestos which required removal. This is consistent with the Differing Site Conditions Clause policy of permitting contractors to rely on contract indications unless simple inquiries might have revealed contrary conditions. [46]

Similarly, in D. J. Barclay & Co., [47] the board granted the contractor partial relief for the added expense of removing asbestos insulation because neither the Government nor the contractor knew it existed or could have discovered it during a reasonable site inspection. In another case, however, the board denied a contractor's $49,000 differing site conditions claim for the removal of asbestos in areas allegedly not indicated in the contract because the contractor failed to make a pre-bid site inspection, which would have revealed the likelihood of asbestos. [48] In addition, its subcontractor recognized the likelihood of asbestos prior to is bid and the contractor instructed them to ignore it.

Contractors have also been entitled to relief when the Government knew or should have known of a condition that necessitated an increased cost of performance and failed to disclose the information to the contractor. In one of the first published environmental cost recovery cases, the Government was ordered to pay additional costs for asbestos removal when it failed to disclose its existence. The court noted:

We have found no case, like the instant one, in which the information withheld relates to the presence of a toxic substance affecting the public health. In these circumstances, we believe, the party possessing actual knowledge has a higher duty to reveal because of the greater likelihood that the presence of such a substance would affect the cost of the project and because a reasonable contractor who is not required by contract to test for toxic substances would be lulled into complacency by the failure to reveal the presence of such substances. [49]

Similarly, the contractor in Darwin Construction Co., [50] was entitled to an equitable adjustment because the Government knew that the asbestos required more than ordinary procedures and did not inform the bidders, and the contractor had no way of knowing of the asbestos problem, even with a reasonable inspection.

B. Changes During Contract Performance

The changes clause gives the Government the unilateral right to order changes during the course of performance and gives the contractor the corresponding right to an "equitable adjustment" if the change increases the cost or time of performance. [51] Compensable changes can be the result of direct oral or written orders by the contracting officer or other governmental acts or omissions that result in changes (1) in the specifications; (2) the method or manner of performance of the work; (3) in the government-furnished facilities, equipment, materials services, or site; or (4) by directing acceleration in the performance of the work. [52] In Active Fire Sprinkler Corp., [53] the contracting officer ordered changes mandated by the Environmental Protection Agency (EPA). The contractor was entitled to an equitable adjustment because the order changed the method of performance of the work. Generally, there is no recovery for the added cost of compliance for changes required by environmental regulations during the course of performance. [54] However, in Active Fire Sprinkler Corp., the imposition of special procedures and precautions not found in the statutes or regulations were compensable. [55] The court noted:

Although the parties recognized the existence of the Clean Air requirements in the contract provisions, neither envisioned that the NESA [sic] [National Emissions Standards for Asbestos] emission standard was to be implemented to require special procedures for handling asbestos, and neither assumed the risk of performing in accordance with them. [56]

Similarly, contractors have successfully recovered additional costs when they performed work beyond that required by the contract without a formal change order, if they perceived the work was informally ordered by the Government or caused by government fault, [57] i.e., "constructive" change. There are four general categories of constructive changes: (1) disagreements between the parties over the contract requirements; (2) defective specifications and government nondisclosure of information; (3) acceleration; and (4) failure of the Government to cooperate during performance. [58] In Long Services Corp., [59] where the parties disagreed on the interpretation of the contract requirements, the board found a constructive change when the Government did not permit the contractor to use a less expensive asbestos removal method that was consistent with industry standards, in compliance with the law, and not prohibited by the terms of the contract.

However, there was no recovery in those cases where the increased costs were the result of a contractor's negligence or the expense was covered by the "Permits and Responsibility" clause or another clause in the contract. [60] The contractor in D. J. Barclay & Co. [61] was not entitled to the additional costs for asbestos removal caused by its failure to protect the insulation from the effects of sandblasting. Absent the contractor's negligence, the insulation would not have required

removal or presented a health hazard. Likewise, reimbursement for the cost of cleaning up a PCB spill during the removal of a transformer was denied in the case of McCullough Engineering and Contracting [62] because the proximate cause of the spill was mishandling by contractor employees.

C. Permits and Responsibilities Clause

A significant limitation on cost recovery in fixed-price contracts is the "Permits and Responsibility " Clause required in all fixed-price construction, dismantling, demolition, or removal or improvement contracts. [63] It provides:

The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, state, and municipal laws, codes, and regulations applicable to the performance of the work. The Contractor shall also be responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence, and shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others. [64]

The thrust of the clause is to impose on the contractor the cost of incurring all necessary expenses, including the unexpected. [65] This clause requires contractors to comply with laws and regulations passed subsequent to award without additional compensation, unless another clause in the contract limits it to laws and regulations in effect at the time of award. [66] In Shirley Construction, [67] the contractor claimed additional testing expenses required by state regulation promulgated after award. The Government's denial of the claim was upheld. Similarly, in Holk Development, Inc., [68] the contract requirement to have a Maryland asbestos removal license did not limit the application of the "Permits and Responsibilities" clause when a Virginia licensing requirement was passed during contract performance. In Inman Associates, [69] the "Permits and Responsibilities" clause precluded contractor reimbursement for the additional cost of cleaning a PCB spill to stricter state levels. It was immaterial that the state policy, consistently enforced for many years, was not a formalized regulation.

The fact that a contractor does not have knowledge of the applicable federal, state, or local requirements does not relieve the contractor of liability. R.P.M. Constr. Co. [70] highlights the significant risks imposed upon the contractor by the "Permits and Responsibilities" clause. Here, the contractor installed underground storage tanks and was cited by the state after a reported fuel loss. The state required the contractor to install monitoring wells. In addition, the contractor had warranted that the tanks would be "leakproof," which under state law required a leakage rate of not greater than .05 gallons per hour. The contractor could get the tank leakage rate down to only .065. After the contractor devoted four months of extensive analysis, testing, fixing, and considerable expense, the state increased the allowable rate to .088 gallons per hour. The contractor was not entitled to an equitable adjustment for any of its expenses. The contractor's only remedy for the costs of the monitoring wells, as a result of the citation, was to challenge the state citation. Similarly, the costs to bring the tanks into compliance with state leakage standards were not reimbursable because "under the Permits and Responsibilities clause, the contractor had the burden of ascertaining the scope and extent of the local requirements which might impinge upon the work, including the warranties." [71]

The risks imposed on the contractor by the "Permits and Responsibilities" clause are not without limits. The boards look at the conduct of the Government and its compliance with contract responsibilities before denying recovery. In Maitland Bros. Co., [72] the contractor was not required to reimburse the Government for costly mitigation measures by the state, after the contractor filled wetlands without a permit. The board held that the contractor was entitled to rely on the Government markings of the environmentally sensitive areas. Similarly, in Alonso & Carus Iron Works, Inc., [73] the Navy was held liable for fuel spill cleanup costs due to its unreasonable refusal to allow the contractor to perform a test that would have prevented the spill. Even though the leak was the result of the contractor's negligent workmanship, it would have been discovered and the spill averted by the preliminary test requested by the contractor.

The "Permits and Responsibilities" clause does not make a contractor an insurer for damage at the site regardless of cause. [74] In Morrison-Knudsen & Harbert, [75] the contractor was entitled to reimbursement for the cost of a fuel spill cleanup where the Government shared security responsibilities and the Government failed to show by a preponderance of the evidence that the contractor's negligence caused the damage.

D. Summary

There are very limited opportunities to recover the costs of additional environmental expenses incurred during contract performance for a fixed-price contract. [76] The "Differing Site Conditions" and "Changes" clauses offer relief only when

the conditions causing the increased costs differ materially from what the contractor could have expected or were the result of a government order or fault. Notwithstanding these clauses, the mandatory "Permits and Responsibilities" clause, requiring contractor compliance with all Federal, state, and local laws is a significant limitation on any environmental cost recovery in a fixed-price contract.

III. COST-TYPE CONTRACTS: RECOVERY OF COSTS DURING PERFORMANCE

A. Introduction

The recoverability of a contractor's cleanup costs is treated much differently under cost-type contracts than it is in fixed-price contracts. At present, there are no specific provisions governing the allowability of cleanup costs in either CERCLA, Federal procurement statutes, [77] the FAR, or agency FAR supplements. [78] Cost-reimbursement contractors may, as a matter of accounting practice, treat CERCLA cleanup costs as "ordinary and necessary" business overhead expenses which would be reimbursable if otherwise "allowable" under federal procurement regulations. [79]

Allowability of costs in cost-type contracts is a complex determination governed by the general allowability criteria found in FAR 31.201-2 and, as a practical matter, guidance from the Defense Contract Audit Agency (DCAA). [80] Contractors will be reimbursed for environmental cleanup costs if the costs are (1) reasonable, (2) allocable, (3) in conformance with applicable Cost Accounting Standards (CAS) and generally accepted accounting principles or practices, (4) appropriate to the particular circumstances, and (5) not made specifically unallowable by regulation or the contract. [81] The following discussion analyzes the "reasonableness" and "allocability" of cleanup costs.

B. Reasonableness

To recover an incurred cost, the contractors' conduct and the cost in nature and amount must be reasonable. [82] The contractor has the burden of demonstrating reasonableness if the contracting officer challenges a specific cost. [83] According to FAR 31.201-3:

(a) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. Reasonableness of specific costs must be examined with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints. No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable.

(b) What is reasonable depends upon a variety of considerations and circumstances, including-

(1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;

(2) Generally accepted sound business practices, arm's length bargaining, and Federal and State laws and regulations;

(3) The contractor's responsibilities to the government, other customers, the owners of the business, employees, and the public at large; and

(4) Any significant deviations from the contractor's established practices.

Applying these principles, one mayconclude that environmental cleanup costs (including litigation, settlement, and removal and remediation costs for cleanup of the contractor's property and third party sites) incurrred while in the performance of a government contract are "reasonable" if the contractor caused the contamination without negligence. The more difficult question is whether a contractor will be reimbursed for costs resulting from failure to exercise due care, willful misconduct, or violations of environmental laws.

DCAA audit guidance addresses the reasonableness of environmental expenses as follows:

Contamination must have occurred despite due care to avoid the contamination, and despite the contractor's compliance

with the law. Increased costs due to contractor delay in taking action after discovery of contamination are not allowable. [84]

Cleanup costs that are the result of contractor violation of laws, regulations, orders or permits, or in disregard of warnings for potential contamination would be unreasonable. [85]

Payments to third parties for health impairment, property damage, or property devaluation near the contamination site due to fault based liabilities, such as those arising from legal theories of tort and trespass, would be unreasonable. In the absence of a specific court finding of tort or trespass by the contractor, the facts of each case should be carefully exmained to determine if the contractor payments are none-the-less based on those or other fault based legal theories. [86]

No published cases address the reasonableness of environmental cleanup costs at contractor owned and operated facilities; however, when the Comptroller General (Comptroller), courts, and boards decide on the reasonableness of "must pay" expenses necessitated by regulation, statute, or judicial or administrative order, the focus is on the contractor's conduct relative to the performance required under the contract. Guidance on what is considered "reasonable" under these circumstances is found primarily in labor cases. The focus is on the contractor's acts or failure to act under the prevailing circumstances. [87] According to the board in General Dynamics Corp., [88] "if the [contractor] is to bear the costs claimed, it must do so on the basis that their incurrence was unreasonable in that they were caused by appellant's folly, fault, or dereliction in discharging contractual duties for which [the contractor] was paid a fee." [89]

Negligence. Contracting officers and auditors, pursuant to the DCAA audit guidance, will be looking for "due care" in the handling of hazardous wastes and materials before reimbursing environmental expenses. This includes "due care" of the contractor as an entity and its employees. [90] Losses resulting from the negligence of the employees which could be attributed to the contractor because of the contractor's practices, systems, or guidance can preclude recovery. [91] The Comptroller, deciding on reimbursement of additional costs resulting from theft, noted:

It appears that the contractor, by its careless and negligent conduct, permitted one of its employees to perpetrate upon it the fraud which resulted in the loss and it now cannot recoup the loss by passing the burden to the government. The contractor set up the system which resulted in the loss and employed the man who is alleged to have committed the theft. It was the plain duty of the contractor to observe due and reasonable diligence to protect itself against such fraud. . . . Since the facts of record fail to show a proper regard for this contractual obligation, it follows that, as between the government and the contractor, the loss justly must fall on the contractor, whose acts and omissions facilitated the fraud and primarily made possible the loss. [92]

How far the contracting officers, courts, and boards will go in denying environmental cleanup costs on the basis of negligence or that the contractor "knew or should have known" of the effects of a particular business practice is yet to be determined. The DCAA audit guidance advises that costs incurred in disregard of warnings of potential contamination and costs that could have been avoided would be unreasonable and thus unallowable. [93] The contamination must have occurred despite due care and compliance with the law. [94]

Violations of the Law. The consensus among commentators is that costs resulting from violations of the law are not reasonable. [95] Questions remain as to who determines whether a violation occurred and under what circumstances. These questions are not answered in the FAR and no courts have resolved them for violations of environmental laws. There are, however, some useful conclusions that may be drawn by looking at cases involving the reasonableness of costs surrounding labor disputes. Caution should be exercised in making this analysis because the direct application to environmental "violations" has yet to be determined.

In dealing with the reasonableness of labor costs for regulated utilities, the Supreme Court has held that costs resulting from discrimination, unfair labor practices, or back pay awards were not reasonable when the costs have been "demonstrably quantified by judicial decree or final action of an adminstrative agency charged with consideration of such matters." [96] The concept of "demonstrably quantified" was further defined in a Board of Contract Appeals case entitled Joint Action. [97] The board held that costs for labor violations were "demonstrably quantified" when the agency making the decision had the authoirty to make conclusive findings of fact and the contractor had a right to appeal. In Joint Action, the contractor sought reimbursement of attorneys fees and settlement costs after the Office of Federal Contract Compliance Programs (OFCCP) issued a "Notification of Results of Investigation" that the employee "had been terminated in an impermissibly discriminatory manner." [98] The contractor had a right to appeal, but elected to settle. This left the question: What is to be done when the merits of the complaint have not been determined? [99] The board

stated:

For the Department of Labor to reimburse the costs of such a "settlement" whould remove all motivation for any contractor to bother with any concern to observe the Federal employee protection provisions with respect to which the Secretary of Labor has been given responsibility . . . by providing in effect that payment in full by the contractor for any violations that were charged and were confirmed upon investigation by the OFCCP would ultimately be made good by the same Federal Government that had imposed the requirements in the first place. To hold in this way that the Government is for all practical purposes an insurer against enforcement of its own regulations would be altogether irrational. [100]

In Westinghouse Learning Corp., [101] the National Labor Relations Board determined that the contractor violated the law. After reviewing all the facts and circumstances, the Board of Contract Appeals held that the costs were unreasonable, stating that the contractor's "illegal discharge of the original counselors and the increased costs occasoined thereby, resulted in no tangible benefit to the Government nor were such actions incidental to the proper performance of the contract." [102]

A finding by a state court of a violation does not necessarily preclude reimbursement; however, costs will be found unreasonable if the contractor fails to show: (1) the state judgment was erroneous, (2) that it had not breached the government contract, or (3) that the acts were committed by the contractor in the faithful performance of the government contract. [103]

The stated principle that costs are unallowable when there is a finding of a violation by the proper authority from which the contractor had the right to appeal does not obviate the need to examine the contractor's conduct under the circumstances. There are no hard and fast rules for determining reasonableness. After examining a contractor's conduct in Joint Action and attempting to distinguish that case from a long line of cases finding labor dispute costs reasonable, the board recognized the "situation was a close one." [104] Generally, the Government has been unsuccessful in disallowing costs on the basis of unreasonableness when the decision to incur the cost involves the exercise of sound business judgment. [105] The Comptroller, courts, and boards have consistently looked behind the Government's determination and made a de novo decision on whether, under the circumstances, the contractor's conduct was reasonable. In Boeing Airplane Co., [106] even though the Labor Relations Board found the contractor had illegally discharged three employees, the Comptroller found the violations excusable and the court ordered back pay reimbursable, noting the relatively few errors in judgment on the part of the contractor who was involved in very serious labor difficulties. In Hirsch Tyler Co., [107] the contractor entered into a stipulated judgment in district court to resolve the plaintiff's claim that the contractor "filled a position with a less qualified male and refused to consider her solely because she was a female." [108] The board concluded that the stipulated judgment reflected the district court's finding of only a "technical violation." [109] Because the judgment and record did not provide a firm basis to conclude either intentional discrimination or that the contractor acted in bad faith, the costs were reasonable and allowable.

CERCLA liability, unlike the liability in the labor cases discussed above, does not necessarily depend on contract wrongdoing. Contractors are liable for cleanup costs under CERCLA by virtue of their status as owners or prior owners of contaminated property, generators, or transporters of hazardous substances. [110] Under this strict liability standard, the contractor is liable for cleanup costs even if its disposal practices were consistent with industry standards at the time. Accordingly, these costs would be reasonable, if the hazardous or damaging nature of the waste or materials were known at the time the contract was negotiated and performed and the contractor was operating in conformance with the law and generally accepted sound business practices.

Nonetheless, just because CERCLA is a "no fault" statute, does not mean that the contamination was not the result of improper disposal practices and past violations of federal, state, or local law. The "reasonableness" of incurring these costs depends on the contractor's compliance with current law and the law at the time the contamination occurred. This requires an evaluation of the contractor's present conduct, its conduct at the time of the contamination, the finality of and the reasoning behind any violation determination, and business practices at the time. This will not be an easy task. Claimed costs for reimbursement can be the result of CERCLA reporting violations, failure to comply with cleanup orders, or a violation of other hazardous substance laws. [111] The Solid Waste Disposal Act/RCRA, [112] Clean Air Act, [113] and the Clean Water Act [114] are just a few of the relevant federal statutes, to add to a long list of state environmental statutes. Each of these statutes has a range of enforcement options to include informal measures such as a verbal or written notice of violation (NOV), as well as the formal -- administrative orders (orders requiring remedial action or to refrain from specified behavior), administrative penalties, injunctive relief, and court-imposed civil and criminal penalties. States have similar enforcement options, to include: citations and NOVs, "cease and desist" orders, permit suspension or

revocation, remedial actions, injunctions to enforce permit conditions, and civil and criminal enforcement. [115]

Even if there is a violation of environmental law, however, the contracting officer must further examine the law, in addition to the circumstances of the violation and its connection to the contamination. However, agency "enforcement" actions (such as those by EPA or state regulators) are indications of unreasonable conduct and should trigger "the challenge," which would then place the burden on the contractor to show the reasonableness of the costs. [116]

The following discussion highlights the complexities of this evaluation. Generally, informal enforcement options such as a notice of noncompliance, NOV, or a warning letter are unilateral agency actions that are advisory in nature and which a contractor cannot challenge in court. [117] In these actions, EPA advises the manager of the facility what violation was found, what should be done to correct it and by what date. [118] They are not final actions under the Administrative Procedures Act. [119] Appeals and court challenges are provided only when the agency takes formal administrative, civil, or criminal action. [120] Given the limited right to appeal a NOV, should it be the sole basis upon which to deny reimbursement of cleanup costs? Formal administrative orders and penalty assessments afford a contractor the right of appeal; however, they can be imposed for "one-time" failures to monitor or submit timely reports or similar technical violations.

Should "minor" or "technical" violations of the law preclude recovery of cleanup costs under the contract? What about violations of stringent federal, state, or local standards that are technologically infeasible? What is the impact of government specifications or actions of the contracting officer requiring or knowingly acquiescing in the contractor's hazardous waste treatment and disposal practices? No clear answers exist. The consistent guidance from contract case law is that a contracting officer must look behind the agency's regulatory actions and evaluate all the facts and circumstances to determine the reasonableness of the contractor's conduct. Because of the range of enforcement options, the unilateral nature of many of them, and the nature of the conduct regulated, federal and state environmental regulatory actions should only be evidence of negligence and violations of the law, and not necessarily dispositive.

In some respects, this was how the Aerojet case was handled. [121] When Aerojet General Corporation filed a claim for reimbursement of cleanup costs for its Rancho Cordova site near Sacramento, California, the contracting officer denied Aerojet's claim after discovering that the company had discharged hazardous materials in violation of its state permit and was found in violation by the State Water Resources Board. [122] The company argued that its disposal practices, complied with government and industry practices, were known and approved by the state, and were not prohibited by the permit. The Government settled the case, agreeing to partially reimburse the contractor because, in part, the state discharge permits were not specific enough to be considered strong evidence of negligence. [123] In addition, the 1952 State Water Board order did not prohibit the contractor's actions that ultimately caused the contamination. [124]

In a case involving Boeing Company and the Seattle Waste Disposal Sites, the contracting officer recognized Boeing's cleanup costs for forward pricing and interim billing purposes. This recognition was based upon a preliminary finding that the contractor did not violate federal, state, or local pollution laws when it used the sites and that Boeing incurred the cleanup costs as a result of subsequent, more stringent, environmental laws. [125] According to the General Accounting Office (GAO),

to determine if Boeing violated then-existing laws and regulations, the contracting officer relied on information developed during extensive discussions with Boeing and information gathered by DCAA. This included (1) a statement from Boeing that it had not violated then-existing laws and regulations; (2) a report of the special master appointed by the court to oversee the project [finding] no evidence of wrongdoing . . . (3) the 1986 consent decree . . . which stated that the costs were not the result of fines or penalties. [126]

The GAO suggests that the contracting officer is reconsidering the allowability of a portion of the costs on the basis of evidence that Boeing "expected or intended" pollution to occur at the site in 1971, but continued to use the site until 1977. [127]

Effect of Settlement or Other Disposition. Whether a contractor settles or litigates a case to final disposition does not determine the reasonableness or allowability of cleanup costs, unless the contractor is fined or assessed penalties. [128] According to the Board of Contract Appeals in Hirsch Tyler Co. [129]

[A] contractor's failure to prevail in the litigation is not dispositive of the issue of allowability. A determination of allowability must be made on a case-by-case basis and will be controlled by considerations of the reasonableness of the

costs in nature and amount and whether their reimbursement is otherwise prohibited by some exclusionary cost principle. Factors to be considered include, but are not limited to, the facts and circumstances giving rise to the judgment or award and the punitive or compensatory nature of the ultimate award. [130]

It is not the terms of the settlement or method of assessment, [131] but the facts and circumstances of the case that are critical. [132]

This is particularly important in CERCLA environmental cost reimbursement cases because most cases are "settled" administratively and liability is defined by a formal consent decree approved by a federal district court. [133] These consent decrees are of limited value in determining the reasonableness of the contractor's actions that triggered the cleanup costs because liability is not dependent on fault. As a general rule, neither the EPA nor the state make any effort to determine negligence or establish a violation of law in finding CERCLA liability. [134] Their focus is on securing an agreement to ensure responsible parties cleanup the property, rather than on identifying any wrongdoing. In fact, in many cases the consent decree states specifically that the payments are not penalties or monetary sanctions. This practice is typified in the Aerojet case. In 1979, California filed suit against Aerojet for environmental violations, but subsequently agreed not to bring suit if the company entered into a consent decree to cleanup the contamination and pay monetary claims to the state for environmental damage. The consent decree stated that Aerojet's payments under the decree were not fines or penalties. [135]

A contracting officer must look beyond the terms of a settlement to determine whether reimbursement is proper. A close review of the facts may establish that the contamination occurred as a result of negligence or violations of environmental laws. [136] If the underlying facts indicate unreasonable conduct, notwithstanding the terms of the settlement agreement, the costs are not reimbursable. [137]

Fines or Penalties. Fines and penalties are not only indicators of unreasonable conduct but also are expressly unallowable under FAR 31.205-15, which provides:

Costs of fines and penalties resulting from violations of, or failure of the contractor to comply with, federal, state, local, or foreign laws and regulations, are unallowable except when incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer.

Fines assessed for "merely technical violations" [138] and penalties assessed regardless of reasonable efforts to comply are not reimbursable. [139] However, just because the assessment is called a penalty, disallowance is not automatic. The Board of Contract Appeals looks behind the assessment decision and reexamines the contractor's conduct and the extent of fault. In McDonnell Douglas Corp., [140] the board allowed reimbursement of costs in a worker's compensation case after a state court finding of misconduct. Under state law, the award was characterized as being "in the nature of a penalty." The Comptroller, nonetheless, allowed reimbursement, finding "no violation of law or willful misconduct." [141]

Even though incurring cleanup costs to remedy contamination resulting from past activities is, in a sense, a legal obligation and generally not the result of fines or penalties, CERCLA actions are often intertwined with the imposition of fines and penalties for violations of the other environmental statutes. Unless these fines and penalties were incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer, they are unallowable. [142] In addition, the imposition of fines and penalties resulting from violations of CERCLA or other environmental statutes can be strong evidence of unreasonable conduct which makes the cleanup costs and legal and other professional costs unallowable. [143]

Legal Costs. To determine the allowability of legal expenses, the contracting officer must look at the nature and the result of the proceeding, the reasonableness of the underlying conduct, the terms of the contract, and the involvement of the contracting officer. Costs incurred in connection with the defense or prosecution of claims or appeals against the Federal Government are unallowable. [144] If the proceeding is brought by a third party, FAR 31.205-33 ("Professional and Consultant Services Costs") applies to retained counsel and contracted legal services, the general principles of allowability govern the reimbursement of costs for in-house legal services. Proceedings brought by the Government are governed by FAR 31.205-47.

Proceeding Brought by Third Parties. The cost of professional and consultant services, including legal services, are generally allowable under FAR 31.205-33 if the costs are well-documented, necessary and reasonable in nature and scope (considering the contractor's capability in the particular area), and not made unallowable by any other cost principle. [145]

Similarly, the costs of in-house legal services are allowable if reasonable, allocable, and in conformity with CAS and generally accepted accounting principles. [146] Reimbursement is generally not contingent on the outcome. [147]

According to the Board of Contract Appeals in Hirsch Tyler Co., [148] legal fees and the costs of satisfying an award or judgment are separate and distinct and "the distinction between these types of costs must be observed in determining their allowability." [149] The board noted:

[A]n ordinarily prudent person in the conduct of competitive business is often obliged to defend lawsuits brought by third parties some of which are frivolous and others of which have merit. In either event, the restraints or requirements imposed by generally accepted sound business practices dictate that, except under the most extraordinary circumstances, a prudent businessman would incur legal expenses to defend a litigation and that such expenses are of the type generally recognized as ordinary and necessary for the conduct of a competitive business. [150]

The board held that legal expenses incurred in defending civil litigation brought by a third party, regardless of the outcome, are prima facie reasonable and allowable, unless unreasonably incurred or when reimbursement is expressly prohibited by an exclusionary cost principle. [151]

Case law and the FAR allow reimbursement for legal costs, notwithstanding the allowability of the costs of satisfying an award or judgment. Exactly how this will be applied to environmental litigation is unclear. DCAA audit guidance advises that payments to third parties (for property damage or devaluation paid to residents or property owners near a contaminated site) due to fault-based liabilities arising from legal theories of tort and trespass "would be unreasonable in nature for payment on a government contract." [152] The courts and boards have not decided the issue of allowability of legal fees under these circumstances. If these expense are reasonable and allocable to the government contract, however, there is no basis for denying reimbursement. [153] With regard to Potentially Responsible Parties (PRPs), DCAA audit guidance advises that allowable environmental costs should only include the contractor's share of the cleanup costs based on the actual percentage of the contamination attributable to the contractor. Any costs, including legal fees, the contractor cannot collect pursuant to its contribution and subrogation rights, are unallowable because they are in their essential nature "bad debts." [154]

Proceedings Brought by the Government. FAR 31.205-47 disallows reimbursement for legal fees in civil or administrative proceedings when they result in monetary penalties or the underlying conduct or other disposition was such that it could have led to a monetary penalty. [155] Specifically, FAR 31.205-47(b) in relevant part provides:

Costs incurred in connection with any proceeding brought by a Federal, state, local or foreign government for violation of, or a failure to comply with , law or regulations by the contractor (including its agents or employees) are unallowable if the result is . . . (1) In a criminal proceeding, a conviction; (2) In a civil or administrative proceeding, imposition of a monetary penalty . . . (4) Disposition of the matter by consent or compromise if the proceeding could have led to any of the outcomes listed in (1) and (2). [156]

Notwithstanding the above, legal costs may be allowable if the contracting officer determines that the costs may be allowable if the contracting officer determines that the costs were incurred as a direct result of a specific term or condition of the contract or were in compliance with the written direction of the contracting officer. [157]

The overall approach of this cost principle is to render unallowable the costs of certain proceedings. [158] Costs covered are (1) administrative and clerical expenses, (2) legal services costs, whether performed by in-house or retained counsel, (3) costs of accountants, and (4) the costs of employees, officers, and directors. [159] As stated in the DCAA Contract Audit Agency Manual, this includes:

All costs which would not have been incurred but for the proceeding. This includes costs incurred before, during and after the proceeding. The concept of "before the proceeding" should be interpreted to cover the following: (1) when a contractor anticipates and begins to prepare for a proceeding before it has been officially notified that a government has initiated a proceeding and (2) when the contractor is conducting its own investigation or inquiry preparatory to initiating a proceeding. [160]

What kind of governmental action constitutes a proceeding is not precisely defined in the FAR. It depends primarily on the outcome. A working definition in the DCAA Contract Audit Agency Manual states:

A proceeding includes any investigation, administrative process, inquiry, hearing, or trial conducted by a local, state, Federal, or foreign governmental unit and appeals from such proceedings. Note that for the purposes of this cost principle, the term proceeding includes, but is not limited to, those related to actions which in nature are criminal, noncriminal, fraud, non-fraud, contract-related, or non-contract-related. The definition is very broad. [161]

The cleanup of a contaminated site under CERCLA is an administrative process which frequently involves a combination of investigations, [162] inquiries, [163] hearings, [164] and trials. [165] However, it is still an open question as to what, if any, part of the CERCLA cleanup process will be considered a "proceeding" and what legal costs will be allowed.

The primary goal of CERCLA is to get the contaminated site promptly cleaned up and paid for by those parties responsible for the contamination, not to ferret out violators and assess penalties. Nonetheless, the EPA has the power to take administrative and judicial actions to penalize recalcitrants, if in the course of the CERCLA cleanup process, responsible parties do not cooperate, comply with the law, or violate the terms of a settlement agreement. Whether legal costs will be "allowable" will depend on the purpose and the outcome of the "proceedings" initiated in the course of the CERCLA process.

For example, under CERCLA the EPA is authorized to require information and documents regarding a potential CERCLA site to determine the appropriate response action or to enforce CERCLA. [166] Failure to comply fully with such a request could result in civil penalties of up to $25,000 per day if the failure to respond is unreasonable. [167] The investigation or inquiry initiated to secure this information would be a "proceeding" under the broad terms of the FAR. The allowability of legal costs would depend on compliance with the request, since failure to comply could result in the imposition of a monetary penalty. If the contractor's actions in failing to provide the requested information or documents were unreasonable, the legal costs would be unallowable if a penalty was imposed or the matter was disposed of by settlement in a consent decree. [168] Similarly, the EPA can issue Unilateral Administrative Orders (UAO) "as may be necessary to protect public health and welfare and the environment" when the EPA "determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." [169] UAOs include findings of fact, conclusions of law, and administrative determinations. [170] The PRPs are afforded an opportunity to participate in a nonevidentiary conference with the EPA. The scope of the conference is limited to "issues of implementation of the response actions required by the order and the extent to which the respondent intends to comply with the order." [171] Failure to comply with the order could result in a penalty of $25,000 per day for the duration of the noncompliance. [172] If the EPA takes the required response actions, a cost recovery lawsuit in Federal district court can result in punitive damages of up to three times the response costs incurred by the Superfund. [173] These administrative actions are "proceedings;" however, the allowability of legal costs is not an issue until judicial or administrative enforcement actions are taken to enforce the UAO or recover the EPA's response costs. Legal costs will be allowed unless the "proceedings" result in a monetary penalty or there is a settlement in lieu of a penalty.

Without case law or further regulatory guidance on the question of the allowability of legal costs in CERCLA cases, each "proceeding" in the CERCLA process must be evaluated to determine the allowability of these costs. If the "proceeding" does not involve a violation of the law which could result in monetary penalties, the CERCLA action is not a "proceeding" that precludes reimbursement for legal fees -- when otherwise reasonable.

C. Allocability

Not only must environmental costs be reasonable to be reimbursable, but they must be allocable to a contract. The fundamental precepts of allocability are that the contractor's costs of doing business be charged to the Government on the basis of relative benefit, relationship to, and connection with the contract. If there is little or no benefit to the Government, the costs may be allocable only if they are necessary to the overall operation of the business. [174] In addition, costs must be properly allocated to the Government work in the period that the costs were incurred. According to the AFR:

A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefit received or other equitable relationship. Subject to the foregoing, a cost is allocable to a government contract if it -

(a) is incurred specifically for the contract;

(b) benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or

(c) is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown. [175]

These three separate categories of allocable costs are stated in the disjunctive. For environmental costs to be allocable, they must comply with only one of the three requirements. All three cost categories are subject to the requirement in the first sentence that the cost must be assignable "in accordance with the relative benefits received or other equitable relationship." [176]

If an environmental release occurs during an existing contract and there is a direct connection with the contract, it will be a direct cost. [177] More typically, however, a cleanup will have no identifiable relationship to the existing contract and thus can only be allocated on the basis of proportional benefit or necessity to the overall operation of the business. [178]

Whether costs will be recovered on the basis of their necessity to the overall operation of the business depends on the relative necessity of the costs. [179] The relationship between benefit and necessity was addressed by the Board of Contract Appeals in TRW Systems Group of TRW:

[I]t is clear and we hold that scope must be given to the element of "benefit" or other equitable consideration when determining the allowability of a necessary cost under ASPR 15-201.4iii. Expenses which are absolutely necessary are for that reason alone beneficial to or bear an equitable relationship to government contracts. As the absolute necessity decreases, the contractor's burden to show some benefit or other equitable relationship with the government contract increases. [180]

There must be a showing by the contractor either that the costs incurred are "absolutely" necessary to the survival of the contractor's business, or if not "absolutely" necessary, that the Government benefited from the costs incurred. [181]

Whether it is sufficient to show benefit which is general in scope or whether a more direct benefit is required, depends on the analysis of the cost and the facts and circumstances under which it was incurred. [182]

A showing of a general in scope benefit was sufficient in TRW Systems Group of TRW. The board held that United States patent costs were allocable to the Government contract, finding the benefit to be "the protection afforded to the contractor which facilitated performance of the contracts and the . . . protection directly afforded the government against the payment of royalties [to others]." [183] In Lockheed Aircraft Corp. v. United States, [184] local taxes assessed solely on commercial inventory were allowed on the basis that the taxes were to be used to provide community services of benefit to all the business undertaken by the contractor. "It was the price of membership in that community. . . . [T]he benefits flowed to government contracts . . . in a general way . . . by the very fact that Lockheed was meeting its responsibilities as a corporate citizen, and specifically benefited by the services provided by the community." [185] Similarly, in Machine Products Co., [186] payment of costs (attorneys fees, back wages, and arbiter expenses) incurred in a grievance procedure were found to benefit the Government on the basis that "every element of the cost was payment in support of a system to maintain harmonious industrial relations." [187]

In General Dynamics Corp., the board allowed allocation of commercial bid and proposal costs even though not an absolute necessity "in the sense that absent their incurrence the contractor would have had to close its doors." [188] The board noted, "In a period when government business was on the decline, the costs were basic to appellant's viability as a commercial enterprise." [189] Even though there are no published decisions on the allocability of environmental cleanup costs, it is apparent that cleanup costs, in many respects, fit squarely in the "absolute necessity" rationale (mandatory payments, a responsibility as a corporate citizen, basic to the corporation's viability as a commercial enterprise).

However, allocation based on "necessity" is not without limits. In TRW Systems Group of TRW, the board found the necessity for incurring foreign patent costs too remote to be allocable. [190] In other cases, the board has cautioned,

We are not saying that any expenditure 'necessary' to a business generally, and therefore beneficial to all output, should be allocated to government contracts. . . . We are saying that necessity and benefit may have a somewhat different meaning for certain kinds of costs both as a matter of logic and policy. This may be an extremely limited area. In the present situation, we attribute much significance to the fact that the challenged cost was a tax. It happens that this tax was a local tax levied to cover community costs. Payment was not voluntary. These factors put it in a different category from charitable contributions, image-building or public relations expenses, and perhaps some other taxes. This distinction should illustrate that our approach does not lead to any litmus paper test for allocability. [191]

If the costs are not "absolutely necessary," there must be a showing of benefit. [192] For example, costs incurred in the operation of an international division are not allocable to a contract without a showing that the Government's interests were enhanced by the international development. [193] Similarly, costs of retraining employees for commercial operations after losing a follow-on contract are not allocable to a contract. As was noted in the case of Metropolitan Life Ins. Co.:

[M]orale enhancement [did] not supply the requisite benefit to charge the contract with retraining costs. . . . Benefit accruing to the government contract [need not] be susceptible to precise mathematical measurement. . . . [B]ut whether one takes a broad or narrow view of the benefit concept, there must be some reasonable relationship of the incurred costs to the contract to be charged. [194]

Whether environmental cleanup costs will be considered "absolutely necessary" to the overall operation of the business will require a case-by-case determination. DCAA Audit Guidance does not require that environmental damage be caused in the performance of a contract if the costs are properly allocable and charged to a proper period. [195] Whether this is another way of saying that cleanup costs are "absolutely necessary" and therefore no benefit or causation analysis is required, remains an open question. The guidance provides:

Costs to clean up environmental contamination caused in prior years will generally be period costs. In accordance with CAS 403, clean up cost should be allocated to the segment(s) associated with the contamination which in turn should allocate the costs to contracts as part of the segment residual G&A costs under CAS 410.

If the site is no longer occupied, costs are allocated to the segment where the work was transferred. . . . [W]hether the costs incurred for the closed segment should be directly allocated to other segments, be allocated as residual home office costs, or be treated as an adjustment of the extraordinary costs associated with the closing of the segment depends on the facts of the particular situation. [196]

In determining the proper period to charge costs, the DCAA audit guidance applies the Generally Accepted Accounting Principles outlined by the Emerging Issues Task Force (EITF): [197]

Environmental costs would normally be expensed in the period incurred, unless costs constitute a betterment or an improvement, or were for fixing up a property for sale. Betterments and improvements which exceed the contractor's capitalization threshold must be capitalized. Costs of fixing up a property for sale are generally considered to be a part of the sales transaction, if realizable from the sale. [198]

According to this audit guidance, the test for allocability of environmental cleanup costs is different than the test for other types of costs. Environmental costs will be allocable whether or not they were connected with or benefited a contract, as long as the costs were allocated to the proper segment. This is contrary to existing law which requires at least some showing of Government benefit. With mandatory payments such as taxes or assessments, a showing of "general benefit" to the contract is sufficient for allocation. Many EPA or court-ordered cleanup costs fit into this category. On the other hand, voluntary cleanup at third party sites of wastes unrelated to past or present government contracts may have insufficient connection or benefit to the allocable to the Government. To be consistent with existing case law, allocation to a government contract of a contractor's cleanup costs should not be automatic. Some showing of the absolute necessity of the expense or a benefit to the government contract is required.

D. Summary

No checklist exists to determine whether environmental cleanup costs are allowable cost under a cost-reimbursement type contract. Allowability will depend primarily on reasonableness, since in today's climate, many environmental cleanup costs have become an absolute necessity in the operation of a business. The reasonableness of costs depends on the contractor's conduct and the response of the enforcement agency. If the contractor's conduct results in fines or penalties, cleanup and legal costs will be disallowed. If there is a finding that a violation of law caused the problem now requiring cleanup, cleanup costs -- as well as legal costs -- should be disallowed if unreasonable under the circumstances. The contractor must show that its actions at the time of the release were reasonable in light of the law and sound business practices. Negligent conduct by the contractor or its employees may preclude reimbursement if the costs were avoidable. A review of all the facts and circumstances is required to determine if the costs were incurred by a "prudent person in the conduct of a competitive business" in the "proper performance of the government contract."

IV. ARRANGER LIABILITY

A. Introductiion

When the cleanup site is owned, operated, or used by a DOD contractor, there is potential government liability for hazardous waste cleanup under CERCLA, which provides:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a). . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. [199]

CERCLA casts a wide net to ensure the ultimate responsiblity for cost falls on those who caused the problem. [200] Liability falls on "the owner or operator" of a facility, as well as "any person who at the time of disposal . . . owned or operated a facility at which such hazardous substances were disposed of; any person who . . . arranged for disposal or treatment, and . . . any person who accepted any hazardous substances for transport." [201]

This section of the article and the next address the issue of whether a contrator owned and operated facility (COCO) can shift all, or part of, the cleanup costs to the Government on the theory that the Government "arranged for the disposal and treatment of the hazardous substances" that caused the contamination. This section reviews the environmental law on "arranger liability" in general. Section V focuses on the application of that law to the Federal Government as an "arranger" under 42 U.S.C.A. Sec. 9607(a)(3).

Potentially responsible parties are vulnerable under the act as "arrangers." This term is defined as:

any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or posssessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substance. [202]

No single rule identifies when an entity becomes liable as an "arranger" under this provision. Courts have interpreted CERCLA broadly to achieve the remedial purposes of Congress, and, therefore, they have expanded arranger liability well beyond situations involving parties who intentionally sent wastes to a superfund site for disposal. [203] Potential liability as an "arranger" ranges from a situation where one intentionally disposes of waste oil along the road [204] to contracts for product processing which result in disposal of hazrdous wastes. [205] To establish liability under CERCLA, the contractor must prove the Government: (1) was a person who owned or possessed hazardous substances; (2) by contract agreement or otherwise, arranged for the treatment or disposal, or arranged with a transporter for transport for disposal or treatment of those substances; (3) at a facility containing such substances; (4) there was a release or threatened release of a hazardous substance at the site that resulted in response costs. [206]

Because of the large number of hazrdous waste site cleanups and the high stakes associated with superfund liability, there has been a flood of recent litigation interpreting the key terms in CERCLA, section 107(a)(3), in an attempt to enlarge the body of PRPs. [207] The critical requirements triggering "arranger liability" (also called "generator liability") are: "ownership/possession," "otherwise arranged for," "treatment," disposal," "hazardous substance," and "facility." Each of these requirements are addressed below in turn.

Ownership/Possession. The ownership requirement includes not only actual ownership and possession, but also constructive ownership. To have constructive ownership, "a nexus must exist in which a party has assumed responsiblity for, or control over, the disposition of the hazardous waste." [208] The necessary nexus has been found where a party took affirmative action which resulted in disposal or treatment at a site which ultimately resulted in the release of a hazardous substance, [209] or where the party retained the authority to control the handling and disposition of a hazardous substance and, by failing to act, in effect decided upon the disposition. [210] Constructive possession was found when a responsible party was given authority by the actual waste owner (either as an employee of the owner corporation or as a broker paid by the owner) to decide on the owner's behalf where and how to dispose of the waste. [211] "It is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme." [212] For example, a state agency formed to increase ridership on commuter rail lines was potentially responsible for the leakage of oil from transformers as a result of the state's control over the design and use of the rail cars. [213] A plant supervisor who actually knew about, had immediate supervision over, and was directly responsible for disposal was liable as an arranger. [214] Even though the concept of control is the most important factor, there is no requirement that the "arranger" control the disposal, [215] choose, the site, [216] have knowledge of the facility where the waste is disposed, [217] or have

knowledge that the substance was hazardous. [218]

In 1984, the District Court in the Southern District of Illinois set forth an often quoted rule: " [T]he relevant inquiry is who decided to place the waste into the hands of a particular facility that contains hazardous waste." [219] This rule has been expanded by what has become known as the Aceto line of cases, to include those who make decisions on the treatment of hazardous substances, not necessarily the decision on the waste. [220] The appeals court in United States v. Aceto Agricultural Chemical stated: "Generator liability is imposed when the responsible person retains ownership of the raw materials during the manufacturing or refining process and can be seen to have retained authority to control the work in process and disposition of the hazardous bi-product." [221] The defendant in this case manufactured pesticides and contracted with the plaintiff "formulator" to take active pesticide ingredients and process them to produce a commercial grade product, which was then sold to farmers and other consumers. The court found arranger liability because the manufacturers: (1) "owned the technical grade pesticide, the work in process, and the commercial grade pesticide while in the formulator's possession," and (2) "the generation of pesticide-containing waste through spills, cleaning of equipment, mixing and grinding operations, and production of 'out of spec' batches was an inherent part of the formulation process." [222] It was irrelevant that the contract was for the processing of a valuable product (not the disposal of a waste) and that the formulator alone controlled the processes, as well as any waste disposal that resulted therefrom. [223] Ownership of raw material, not control, also was key to the holding in a Ninth Circuit case. In Jones Hamilton Co. v. Beazer Materials & Services, Inc., the court of appeals held the defendants liable because they retained ownership of all materials they supplied, the materials were hazardous substances, and the agreement "contemplated the spillage. [224] Similarly, in United States v. Shaner, liability was imposed upon companies that provided hazardous substances to another company for "processing and return," [225] and in Levin Metals Corp., v. Parr-Richmond Terminal, there was potential responsibility when waste and disposal were inherent in the process. [226]

In general, liability "ends with that party who both owned the hazardous waste and made the crucial decision how it was to be disposed of or treated, and by whom." [227] Several examples illustrate this concept. In one case, a state's manifest system giving permission to deposit hazardous waste did not create the necessary nexus to find "arranger" liability, because it was the owners, not the state, who made the critical decisions. [228] In another case, a secured creditor in bankruptcy, which sold property in order to protect its security interest did not "arrange for disposal of the wastes subsequently found on the land, where the bank made no "crucial decisions regarding disposal of hazardous substances or take any other affirmative action regarding disposal." [229] Compare this to United States v. Fleet Factors Corp. [230] In this case, the secured creditor, having knowledge of the existence of large quantities of hazardous substances, made an agreement with a third party to prepare the site for and conduct an auction, and "leave the plant in a broom clean condition." [231] The court held that the creditor had arranged for disposal.

As a rule, entities which merely have the opportunity or ability to control a third party's waste disposal practices, or the mere existence of economic bargaining power which would permit one party to impose certain terms and conditions on another does not create an obligation under CERCLA. In General Electric v. AAMCO Transmissions, [232] the oil company encouraged the sale of waste oil, leased the underground tanks from which the release occurred, and periodically inspected the premises according to the lease agreement, but the court held there was not a sufficient nexus to the disposal to find arranger liability. The dispositive facts were that the company did not own the hazardous substance, control the processes by which waste motor oil was generated, or require the oil changes be performed. [233] However in FMC Corp. v. United States (the case that opened the door for COCO contractors to seek cleanup cost recovery from the Government), ability and the opportunity to control the disposal were significant factors in finding liability. [234] The court found the Federal Government liable as an "arranger" for contamination resulting from the production of rayon cord used for airplane and jeep tires. The Government contracted with FMC for production but did not own any of the raw materials, work in process, hazardous substances, or make any of the decisions on disposal. The court focused on the Government's involvement in the production and held they "knew, or should have known" the disposal or treatment of a hazardous substance would result, noting that the War Production Board "ordered the company to convert and expand the plant, . . . set production levels, . . . arranged for and oversaw the design and installation of the government equipment at the site, . . . and during the time that government personnel were at the site, there was a large amount of highly visible waste disposal activity." [235]

Otherwise Arranged For. The determination of whether a "person" has "otherwise arranged for" the disposal or treatment of a hazardous substance is not straightforward and hinges on whether the transaction was a bona fide sale or an agreement for treatment or disposal. The phrase "otherwise arranged for" is not defined by the statute and the legislative history sheds little light on the interpretation of the phrase. [236] The courts have, nonetheless, consistently concluded that a liberal judicial interpretation is consistent with CERCLA's "overwhelmingly remedial" statutory scheme. [237]

The Agreement. There must be an agreement, but it does not have to be formal, written, or for the disposal of a waste. An oral agreement may be sufficient to impose liability. [238] In United States v. Conservation Chemical, a contractual agreement for disposal at one site was extended by the court to include subsequent removal to another site where the release occurred. [239] In Aceto, the agreement was not for disposal of waste, but for processing a product; yet the court imposed liability because waste disposal was "inherent in the processing." [240]

In CPC International v. Aerojet, however, the court found no agreement or arrangement for disposal in a "Stipulation and Consent Order" for the cleanup of contaminated ground water. The court held "the agreement was for cleanup and not for the contamination that resulted." [241] Similarly, another company did not "arrange for disposal" by issuing technical advice on the proper disposal of herbicide in the event of a spill or leak. [242]

State of Mind. Although state of mind is generally not a factor in finding liability, [243] knowledge and motive do play a role. [244] In determining whether there is an agreement for disposal, courts look to the motivation of the defendant and the reason for the contract. In United States v. Ward, liability was found in part because the defendant clearly intended to "get rid of" the PCB-laden oil which had become a problem for him to maintain. [245] In another case, a company was held liable for the sale of used transformer oil when they arranged with a dragstrip to remove the substances from company plants "with knowledge or imputed knowledge" that the substances would be deposited on the land surrounding the dragstrip. [246]

Sales. Bona fide sales of a "useful" substance will not result in liability, even if the product is subsequently disposed of and causes a release. [247] However, courts look closely at these arrangements and beyond the defendants' characterizations to determine whether a transaction, in fact, involves an arrangement for the disposal/treatment of a hazardous substance. [248] Generator liability under CERCLA does not depend on the product's commercial value, but on whether the arrangement was for disposal or treatment. [249] For example, in States v. BFG Electroplating and Mfg., [250] the sale of cinder blocks pursuant to a "Consent Order and Agreement" to dispose of the contaminated blocks, was an arrangement for disposal even though the blocks were a useful substance for construction. Similarly, the sale of used transformer oil to a dragstrip for dust control, [251] the sale of scrap metal which the operator of the site used as raw material in its manufacturing process, [252] and the sale of a caustic solution generated as a by-product in the manufacture of jet engines for use by a waste oil purchaser in a neutralization process were "arrangements" for treatment/disposal. [253] The common thread in these cases is the transferred substances were wastes, scrap, or by-products of the generator's manufacturing process and "could no longer be used for their intended purposes," i.e., they could not be used productively without processing. [254]

In United States v. Summit Equipment, [255] sellers of used, surplus equipment at a blind auction were liable as generators, even if they did not know that the purchaser intended to scrap their equipment rather than reuse it. In United States v. Conservation Chemical, the sale of lime slurry and fly ash by-products to a recycler, which then was used to neutralize and treat other hazardous substances at a hazardous waste site, was "arranging for disposal." [0] In contrast, a seller in another case was not liable as an "arranger" for the sale of fly ash when the broker was to use its "best efforts" to sell it for use in road construction. [1]

Courts have refused to impose CERCLA liability if a party merely sells a product containing a hazardous substance, without additional evidence that the transaction involved an "arrangement" for the ultimate treatment or disposal. [2] In one of the earliest arranger cases, Westinghouse was not able to recover costs from Monsanto for cleanup of PCB-contaminated soil resulting from transformers purchased from Monsanto forty years previously. [3] In another case, the sale of a chemical for use in a wood treatment process did not constitute arranging for the disposal or treatment of a hazardous substance, even when "process run-off containing the substances [was found] at the same site." [4] In yet another case, a chromium ore processing business was not an arrangement for disposal of the contaminated waste mud, even though the original owner foresaw that the waste mud might be sold as landfill by future owners. [5] Liability ended when the subsequent owner contracted independently to remove the mud from the property for use as landfill in an excavation project which was subsequently found to be contaminated. [6]

Treatment or Disposal of a Hazardous Substance. CERCLA liability encompasses hazardous wastes and primary products; however, liability attaches only to those parties who transact in a hazardous substance in order to dispose of or treat the substance. [7]

Treatment. CERCLA incorporates the definition of treatment found in the Solid Waste Disposal Act: [8]

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 neutralize such waste. . . . Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous. [9]

Under CERCLA, treatment applies to hazardous substances and hazardous wastes. Persons who arrange for treatment of hazardous wastes are liable for contamination caused by treatment. For example, scrap metal sold to a company for resale which required melting, shearing, cleaning, crushing, sawing, banding, drilling, or tapping to make alloys was deemed "treatment," since the buyer's "processing necessarily acted to: "change the physical, chemical, or biological character or composition of a hazardous waste." [10] Similarly, the generator of lime slurry sold to a landfill to treat and neutralize other wastes, was liable. [11]

Disposal. Disposal is defined as:

the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters. [12]

The definition is broad, but the application can be surprisingly fact specific. [13] There is an ongoing debate on whether "disposal" includes the general movement of and migration of a hazardous substance which has been previously spilled ("passive disposal") or requires an affirmative act. The courts are about evenly split. [14] Ecodyne Corp. v. Shah is the leading case interpreting disposal as requiring an affirmative act. [15] The court examined the definitional components and found that the "three nouns (discharge, deposit, and injection) and four gerunds (dumping, spilling, leaking, and placing) when read together, all have in common the idea that someone do something with hazardous substances." [16] In asbestos cases, it is clear that disposal requires an affirmative act. [17] Depositing hazardous waste into enclosed containers is enough of an affirmative act to fit within the definition of disposal; [18] however, leakage and leaching from barrels do not necessarily trigger CERCLA liability. [19]

Hazardous Substances. CERCLA was "designed to cover hazardous materials which were of nominal commercial value and which were sometimes sold or reused and sometimes discarded." [20] The statue defines "hazardous substance" broadly to include:

(A) any substance designated pursuant to Sec. 311(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution or substance designated pursuant to Sec. 9602 of CERCLA, (C) any hazardous waste having the characteristics identified or listed under RCRA, . . . (D) any toxic pollutant listed under Sec. 1317(a) of Title 33, (E) any hazardous air pollutant listed under the Clean Air Act, . . . and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to Sec. 2606 of Title 15. . . . The term does not include petroleum . . . or natural gas. [21]

There has been extensive litigation on the parameters of "hazardous substance" under CERCLA. In every case, if the substance or waste (or any element thereof) could be defined as hazardous in any of the listed statutes, liability was found, no matter the level of concentration. [22] A material that is not hazardous waste under the Resource Conservation and Recovery Act (RCRA) may still be considered a hazardous substance under CERCLA, [23] and there is no quantitative requirement of what constitutes a "hazardous substance." [24] A waste is a hazardous substance if it contains substances listed as hazardous under any of the statutes listed in 42 U.S.C.A. Sec. 9601(14), regardless of the volume or concentration of those substances. [25] A waste material that is not specifically listed as a hazardous substance in 40 C.F.R. Sec. 302.4 is nonetheless hazardous under CERCLA if it contains a CERCLA hazardous substance. [26] Hazardous metals in grinding sludge, even if "permanently bonded into alloys that will not break down into their constituent elements" are covered under CERCLA. [27]

Facility. CERCLA also defines the term "facility" very broadly and "dispels any notion that CERCLA was designed to cover only traditional dump sites." [28] A facility is considered to be any site or area where a hazardous substance is deposited, stored, disposed of, or placed, or otherwise come to be located. [29] In United States v. Conservation Chemical, the term was defined as, "every place where hazardous substances come to be located." [30] There is no requirement for preexisting disposal of hazardous substances. [31] In fact, Congress sought to deal with every conceivable area where hazardous substances may be located, including "dirt roads in Texas contaminated with nitrobenzene and cyanide as a result of oiling," [32] and radium waste sites "under restaurants, in empty lots where children play, [and] near

factories." [33] In one case, the area into which a contractor installed a water main was a "facility" because it contained hazardous substances. [34] The federal district court in that case wrote: "There does not appear to be a limit to the number of facilities that can be created by the migration of hazardous substances." [35] The term facility has also been defined to include: a real estate subdivision, [36] railroad cars which used transformers containing PCBs, [37] and "spinning machines" the Government provided a contractor. [38]

B. Summary

All the elements of arranger liability are interpreted broadly to ensure the burden of hazardous waste cleanup is borne by those who produced and profited by the production and use of hazardous materials. The key factual issues in "arranger liability" are the ownership and control over the hazardous substances, control over the process that cause the contamination, and who made the decisions on disposal. To be liable under CERCLA as an "arranger," the "person" must own, possess, or control the hazardous substance, make or control the decision on its disposal, or have the authority to control and take control over its treatment, handling, or disposition. If the person is not directly involved with the ultimate disposition of the waste, there is liability if the person: (1) supplied the raw material, (2) owned or controlled the work in process, or (3) the generation of hazardous substances was inherent in the production process. [39] The obvious trend is expansion of arranger liability; however, there was some sign of new limits in General Electric Co. v. AAMCO. In this case, the district court held that the opportunity or ability to control a third party's waste disposal practices or the mere existence of economic bargaining power which would permit one party to impose certain terms and conditions did not create an obligation under CERCLA. [40] Similarly, in United States v. Peterson Sand and Gravel, [41] the district court for the first time appeared to consider the impact of continual expansion of CERCLA liability on manufacturing. The court adopted arguments, uniformly rejected previously, that the sale of a hazardous by-product (fly ash) was a sale of a useful product (even though some admittedly was purely waste). The court stated, "seller liability for the later misuse by the buyer of a useful product was not intended by CERCLA." [42] Nevertheless, caution is in order. Absent these and other isolated cases, few avenues of escape are available for those involved with hazardous materials. Few will avoid arranger liability given the expansive interpretations of hazardous substance (less than background sufficient); [43] facility (anywhere a hazardous substance comes to be located); [44] disposal (leakage sufficient); [45] and treatment (any process designed to change the character). [46] Whether, and under what circumstances, DOD will share cleanup costs with contractors as an "arranger" will be determined by the Government's control over the contractor's disposal practices and the interpretation and application of CERCLA's waiver of sovereign immunity. This article now turns to a review of these issues.

V. THE FEDERAL GOVERNMENT AS "ARRANGER"

A. Introduction

The liability of the United States is limited by the terms of CERCLA's waiver of sovereign immunity. [47] CERCLA includes the "United States Government" in the term "person" and expressly waives sovereign immunity. [48] CERCLA's express waiver, however, is not unlimited. [49] It provides:

Each department, agency, and instrumentality of the United States (including the executive, legislative and judicial branches of government) shall be subject to, and comply with this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this title. [50]

Waivers of sovereign immunity must be construed narrowly in favor of the Government. [51] Thus, the courts have interpreted the waiver as limiting the waiver to activities analogous to a business concern and not to acts done in its sovereign or regulatory capacity. [52]

Federal Government Liable as "Arranger." FMC v. United States, [53] was the first published case finding the Federal Government liable for "arranging for" the disposal and treatment of hazardous substances as a result of entering into supply contracts with a COCO facility. [54] The United States District Court in Pennsylvania found the Government liable as an "arranger" for groundwater contamination resulting from the production of high tenacity rayon cord during World War II. [55] FMC was the third owner of the company since the war, and as the only remaining "responsible party," [56] incurred significant cleanup costs. [57]

The court made 182 findings of fact. These findings highlighted the Government's involvement with FMC in the production or rayon cord, as well as the urgency of the "High Tenacity Rayon Yarn Program." Other factors included the

Government's need to increase quantities and to convert and expand its plant; "active control and hands-on participation" in the facilities conversion; control of the supply of raw materials; participation in obtaining and retaining a labor force; on-site presence at the facility; specifications; control of price and profit; receipt of information relating to "virtually all aspects of the facility"; and knowledge that disposal or treatment of hazardous substances are inherent in the manufacturing process. [58] Although there were extensive factual findings, it is not clear which of the Government's activities made it liable as an "arranger," as the court did not discuss its factfinding as it related to its ultimate legal conclusions.

The court in United States v. Berks Associates (deciding whether the EPA became a potentially liable party under 42 U.S.C.A. Sec. 9607(a)(2) and (3) as a result of their cleanup operations) interpreted FMC as finding government liability because of the "detailed involvement and high interest of the United States in running a plant for some pecuniary gain." [59] The court noted, "thus in that [FMC] instance the United States was the very sort of actor expected to internalize the cost of its pollution as a cost of doing business." [60] Under this interpretation, the Government's involvement as a party to a commercial contract involving hazardous substances appeared to be the significant factor for liability. Neither case determined which actions in FMC were immune from liability under CERCLA or addressed the liability of the Government when contract performance involved regulatory and non-regulatory activities.

Failing to distinguish regulatory actions from direct operational controls, the court in FMC in effect held that the Government may be liable whenever its regulatory or operational activities result in "detailed involvement" or otherwise significantly impact the operations at privately owned and run facilities. Accordingly, it is arguable (but illogical) that the Government can be liable as an "arranger" merely as a result of its involvement or interest in the production as a result of wartime procurement policy, regulatory controls, or the inherency of hazardous waste in the manufacturing process. Ownership, possession, or control over the handling of the hazardous substance was not a prerequisite to a finding of liability. Apparently it was sufficient that the Government "knew or should have known" of the disposal practices that caused the contamination.

It is not surprising, with broad application of CERCLA liability and expansive parameters for "arranger" liability, that COCO contractors have filed numerous suits against the Federal Government seeking contribution for cleanup costs on these grounds. [61]

Case Summaries: Basis of Pending "Arranger" Claims Against the Federal Government. The counterclaim in the case of United States v. Shell Oil Co. [62] against the Secretaries of Commerce, Interior, Treasury, Defense, Navy, Army, Air Force, and the Administrator of General Services alleges the Government "deposited or arranged for the deposition of" World War II refinery wastes associated with the manufacture of high octane fuel and, therefore, is liable for $15 million in cleanup costs. According to the complaint, "during the course of the war, the United States Government" exercised "total and pervasive control over the day-to-day operations of refiners' manufacture of high octane aviation gasoline, including disposal of acid waste." [63] The defendant's counterclaim alleged that the Government: determined which refineries would manufacture which components of high octane aviation grade gasoline; coordinated the development of and disseminated new operating techniques; financed and assisted in the construction of new facilities; allocated materials needed for construction, conversion, and expansion; set prices and limits on profit; arranged for and controlled the transportation of critical raw materials; required on-site inspections to determine the quantity and quality of such fuel and otherwise supervised the management of the refineries; reviewed the operations to determine the appropriateness of extraordinary costs; despite full knowledge of the increase in sulfuric acid waste, refused to allocate the necessary resources to build reclamation plants for solid waste; and to save resources, intentionally required the employment of disposal practices which caused the damage to the environment and resulted in the response costs. [64]

United States v. Occidental Chemical Corp. (Love Canal). In Occidental Chemical Corporation's (OCC) counterclaim against the United States, OCC sought contribution from the Federal Government for the cleanup of the Love Canal resulting from the dumping of industrial wastes from chemical production involved in the procurement of chemical weapons and components for the atomic bomb during World War II. [65] Occidential Chemical Corporation alleges the Government arranged for the disposal and treatment of hazardous substances that caused the contamination because the Government ordered six different chemicals; the Government supplied the raw materials for production of one of the chemicals; inspected the work-in-process; and the contractor complied with Government specifications, conferred with the contracting officer, used Government-owned equipment. In addition, it was alleged that the War Production Board was aware that the disposal of hazardous substances was inherent in the manufacture of chemicals for the war effort, and under the terms of the cost reimbursement contracts the United States owned the waste materials because "title to all materials purchased by the contractor vests in the government." [66]

Maxus Energy Corp. v. United States. Maxus Energy claims contribution for response action costs to remediate dioxin contamination at the Diamond Alkali superfund site in Newark, New Jersey, on the basis that "much of the dioxin resulted from emanations that occurred during the mandated manufacture of phenoxy herbicides (Agent Orange) for the United States from 1961 to 1968 pursuant to the Defense Production Act of 1950." [67] Maxus claims government "arranger" liability on the basis that: Agent Orange, formulated by the United States, was a new herbicide containing active hazardous ingredients in "unprecedented quantities"; [68] the United States knew that dioxin was formed as a by-product and that production entailed the release of hazardous substances; and the United States inspected shipments and operations. In addition, they allege the Government was familiar with the production process, increased demand which represented 100 percent of the plant's production capacity, and required the contractor to submit monthly reports of production and shipments. Furthermore, they allege the priority rating systems controlled raw material supplies, Department of Labor health and safety inspectors visited on a regular basis, the Defense Production Act mandated production, [69] and under the Walsh-Healey Public Contracts Act waste practices were controlled by providing that: "All sweepings, solid or liquid waste, refuse, and garbage shall be removed in such a manner as to avoid creating a nuisance or menace to health and as often as necessary to maintain the place of employment in a sanitary condition." [70]

The recurring theme in most of the pending "arranger" cases is that the requisite control required under the Northeastern Pharmaceutical & Chemical Co. [71] and Aceto [72] line of cases is met by varying degrees of government involvement. This involvement can be the result of war procurement policy, compliance with the Walsh-Healey Public Contracts Act, or compliance with contract specifications and other terms of a cost reimbursement contract as overseen by government contract compliance personnel.

War Procurement Policy. During World War II, the War Production Board coordinated wartime procurement and ensured sound resource allocation critical to the war effort. The board was the designated agency used to coordinate the industrial mobilization of the nation, to encourage expansion of critical industries, to oversee the shift of resources and production from civilian to military uses, and to review supply and demand requirements. [73] The board's power was based in the Priorities and Allocation Act [74] and the Second War Powers Act, [75] which required contractors to give priority to military contracts and allowed the President to allocate the supply of raw materials. The board's power also was based on the Selective Training and Service Act of 1940, [76] which permitted the takeover of a manufacturing facility if a firm refused to give priority to military orders, and the Emergency Price Control Act of 1942, [77] which regulated price and profit.

During the Vietnam Conflict, for which Agent Orange was in critical need, selected contracts received priority ratings under the Defense Production Act, which provided in relevant part,

The President is authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense. [78]

The act gave the Government the authority to rate orders by priority and require acceptance. Rated orders and directives ensured a raw materials supply in critical wartime commodities.

Depending on the particular industry, each of these statutes authorized significant government control and involvement. To determine "arranger" liability, the issues which must be resolved by an examination of the facts in each case are: (1) the extent to which the activities of the United States were economic regulatory activities during wartime that only a sovereign could undertake or whether a private party could have undertaken them, and (2) whether the Government exercised the requisite control over the decisions on disposition and handling of the hazardous wastes, or owned the raw materials and work-in-process.

Acts Pursuant to Sovereign Authority

The success of a contractor's "arranger" claim depends on whether it relies on the provisions of its supply contract and government actions pursuant to that contract or whether it relies on the sovereign's authority to mobilize the economy in support of the national defense. [79] There is little chance for recovery if the relevant government actions are pursuant to that sovereign authority dictated in wartime procurement policy. [80] In Gothwaite v. United States, the Claims Court held

that the Second War Powers Act "was an act of general and public character affecting all persons similarly situated, authorizing the exercise of sovereign powers in the defense of the nation." [81] Three years later, the Claims Court in Kelly Co. v. United States, held the priority system was an essential wartime policy and an act of sovereignty which was applied on a national scale to essential materials. [82] "Since the Government was acting in this capacity it is not liable to the contractor for any damages due to that system." [83] According to the court in Gothwaite,

The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they are public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons. [84]

Therefore, there would be no "arranger" liability as a result of allocation and supply of war materials, mandated production and quantities, production reports, limitation on profits, and other government wartime activities of general and public application. On the other hand, the issue of whether supervising management, reviewing operations, or requiring use of certain disposal practices are sovereign acts depends on the facts, the terms of the contract, and the breadth of CERCLA's waiver.

Control or Ownership. Whether the Government had the requisite control in these wartime contracts for arranger liability depends not only on the terms of the respective contracts. Liability also depends upon whether there is evidence of actual control over the disposal decision or evidence of control, ownership, or possession of the hazardous substance. Assisting the contractor in securing raw materials does not necessarily provide the control required. In United States v. Consolidated Rail, Corp., [85] the defendant assisted the contractor in obtaining raw materials and purchased all of the output produced. The court held, however, that there was no support for an inference that the defendant had control over the hazardous substances sufficient to trigger CERCLA liability. [86] Similarly, developing operating techniques and instructions, [87] financing and consulting on the construction of new facilities, [88] inspecting work-in-process, placing orders for hazardous chemicals, or compelling a contractor to increase production is not alone sufficient for arranger liability. Ownership, possession, or control over the hazardous substances or control over the disposal decision are minimum requirements. [89] Moreover, ability or authority to control waste disposal practices without taking active control will not result in arranger liability. [90] "It is the obligation to exercise control over the waste, and not the mere ability or opportunity to do so that makes an entity an arranger." [91] If the Government is not acting in the capacity of an arranger while it carried out its regulatory functions, there is no CERCLA liability. [92]

Compliance with Walsh-Healey Public Contracts Act. Whether the Government exercised authority to control waste disposal activities pursuant to its responsibilities under the Walsh-Healey Act depends not only on the sovereign immunity issue discussed above, but also on the interpretation and application of the act and the Government's conduct in implementing its mandates. Contractors rely on section 35, which provides: "All sweepings, solid or liquid waste, refuse, and garbage shall be removed in such a manner as to avoid creating a nuisance or menace to health and as often as necessary to maintain the place of employment in a sanitary condition." If the Walsh-Healey standards are solely occupational, safety, and health standards that do not authorize the Department of Labor to regulate waste disposal or impose a duty on them to ensure compliance with health or safety, then there is neither the authority nor the control required for arranger liability. In Shuman v. United States, [93] the First Circuit held that the Government had no such duty, explaining that the act:

did not impose a set of explicit, enforceable obligations on the government. . . . Walsh Healey merely required that the government contractors stipulate in their contracts with the government that they would not subject their employees working on government projects to hazardous substances. The promise is made by the contractor to the government, not by the government to the contractor's employees. [94]

Even if the act was interpreted to give the Department of Labor the authority to regulate waste disposal, negligent regulatory activity does not result in CERCLA liability. [95] The fact that Department of Labor inspectors came to the contractor's facility does not support the contractor's control argument if there was no authority (and they did not) inspect the contractor's waste disposal activities. If they inspected waste disposal activities because worker health or safety was impacted, there still is not the control necessary to trigger arranger liability, if the inspector identifying the violation had no authority to control the manner in which to remedy the problem. [96]

Compliance with Specifications and Other Cost Reimbursement Provisions. In general, standard cost-reimbursement supply contracts with COCO facilities do not grant the Government the requisite authority to control the contractors' waste

disposal activities that would result in CERCLA arranger liability. Cost-reimbursement contracts provide for payment of allowable incurred costs and provide the Government with the authority to exert the control necessary to ensure that the work is done in a particular manner. [97] Nonetheless, even though cost-type contractors are subject to direction from the Government, they are in most circumstances independent contractors. [98] Commentators note that,

When the Government enters into a cost-plus-fixed-fee contract with a contractor, the Government engages the knowledge, the skill, the judgment and the capabilities of the contractor to perform the contract. It is the contractor's right, as well as his duty, to use all of those qualifications to employ men and women who will comprise his "team" to perform the contract, to buy materials, and to use his discretion, not that of the contracting officer, in carrying out all of the factors involved in performance of the contract. The contracting officer's function is not that of a boss over the contractor, telling him what he can and cannot buy, whom he shall employ and how much he is allowed to pay employees. [99]

However, a contractor's discretion is not unlimited. It is controlled by regulation and the terms of the contract:

While the contractor has the right and the duty to use his own best judgment on how to accomplish the job, this does not give him the unqualified right to spend the Government's money as he sees fit, regardless of the Government's wishes and instructions, and in the face of Government disapproval. [100]

Cost contracts control reimbursable expenditures and ensure the production of the products ordered. These goals are achieved by using product specifications and such standard clauses as the changes clause, [101] subcontract approval clauses, [102] inspection clauses, [103] and other clauses that spell out the functions of government representatives and technical personnel. [104] Specifications in government contracts describe the work required and may be in the form of drawings, technical documents, and product descriptions; requirements also may be incorporated by reference. [105] To trigger arranger liability, the specifications must go beyond mere statements of quality, characteristics, testing, and inspection of the products ordered. At a minimum, the specifications must impose requirements and give direction on day-to-day processing, handling, or disposing of the hazardous waste generated by contract performance. [106] Mere compliance with specifications for a product which involves hazardous waste, as alleged in the Occidental and Maxus Energy claims, [107] would not necessarily result in arranger liability.

This is apparent from the decision in General Electric Co. v. AAMCO Transmissions, [108] where the oil companies entered into a detailed lease agreement with their dealers. This agreement set forth specific responsibilities requiring maintenance of the premises in a certain manner, scheduled checks on underground waste oil storage tanks, the emptying of tanks, and keeping pipes free of waste. [109] Even with this explicit direction in the contract on how to handle waste, the oil company was not liable for CERCLA cleanup costs caused by the waste oil because they had no obligation to, and did not, control its disposal. [110] Likewise, mere inspection of the work-in-process to ascertain whether the contractor is in compliance with the terms of the contract (without taking actual control over the disposal process) does not amount to the control required for arranger liability. [111] In General Electric Co. v. AAMCO Transmissions, oil company representatives periodically inspected the waste oil tanks and other equipment leased to the dealer; however, because none of the inspectors made any recommendations regarding the proper way to dispose of the waste motor oil or participated in the decision of how, when, or where to dispose of the oil, there was no arranger liability. [112]

Similarly, none of the standard clauses in cost-reimbursement contracts would necessarily trigger CERCLA liability. In United States v. Occidental Chemical Corp., [113] the contractor claimed that standard provisions in a cost reimbursement contract vests title to the materials in the Government, making the Government the owner of the raw materials and work-in-process, and, therefore, liable for the hazardous wastes generated from the use of these materials. Three standard provisions govern transfer of title for cost-reimbursement contracts: acceptance, termination, and government property. FAR subpart 46.5 on acceptance provides: "Title to supplies shall pass to the Government upon formal acceptance regardless of when or where the Government takes physical possession, unless the contract specifically provides for earlier passage of title." [114] FAR 52.249-6, "Termination (Cost Reimbursement)" provides:

After receipt of a Notice of termination, and except as directed by the Contracting Officer, the Contractor shall immediately proceed with the following obligations:

Transfer title (if not already transferred) and, as directed by the Contracting Officer, deliver to the Government (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated. [115]

FAR 52.245-5, "Government Property, Cost Reimbursement Contracts" provides: "Title to all property purchased by the Contractor for which the Contractor is entitled to be reimbursed as a direct item of cost . . . shall pass to and vest in the Government upon the vendor's delivery of such property." [116]

FAR 52.245-5(c)(3)iii provides: "Title to all other property, the cost of which is reimbursable to the Contractor, shall pass and best in the Government upon . . . reimbursement of the cost of the property by the government." [117]

Under these provisions, ownership of the hazardous end items vests in the Government upon delivery from the vendor, cost reimbursement, or acceptance of the items, and ownership of the work-in-process vests upon termination of the contract. [118] Under CERCLA, liability of an "owner" of hazardous substances depends on the authority to control and actual control of the handling and disposal of the hazardous materials and waste, the terms of the contract, and the nature of the hazardous waste generated. [119] The FAR, agency operating procedures, and the contract terms outline the responsibilities and functions of the "Government Property Administrator." [120] An examination of this information would shed light on the Government's authority and obligation to control "contractor-acquired" [121] hazardous materials. A close look at the property administrator's actual involvement in the handling or disposal of the hazardous substances will determine the extent of the government's liability as an arranger under CERCLA.

Occidental and the Mead Corporation also claimed that the standard provisions for use of government-furnished property is evidence of ownership and control over manufacturing. [122] A standard provision on government-furnished property provides:

Title to Government-furnished property shall remain in the Government. The Contractor shall use the Government-furnished property only in connection with this contract. . . . The contractor assumes the risk for its loss or damage [and] upon completing this contract, the Contractor shall follow the instruction of the Contracting Officer regarding the disposition. [123]

The mere use of government-furnished property during performance, pursuant to this or similar standard contract provisions, does not provide the basis for arranger liability. Further inquiry is required. One must consider the type of equipment or materials furnished, how it relates to the production of hazardous waste, its intended and actual use, and the disposal directions given. Depending on the particular facts, a contractor could make a strong case against the Government for CERCLA contribution, either on the basis of arranger or owner liability. Furnishing government-owned equipment triggers arranger liability only if it is accompanied by evidence of control over the hazardous waste disposal decision. Owner liability is assessed differently -- it depends on the ownership of a "facility" at which hazardous substances were disposed. [124] "Facility" is broadly defined in the statute to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." [125] This includes portions of a site and machinery containing hazardous substances on the site. [126] In FMC v. United States, the court found:

In order to implement the required plant expansion, the Government, through the Defense Plant Corporation, leased certain Government-owned equipment and machinery to the facility, including 50 spinning machines, an acid spin bath system, piping for the spinning machinery and spin bath system, slashing equipment and viscose waste trucks. [127]

The court held that because these machines disposed of hazardous substances, they were "facilities" and, therefore, the Government, as owner, was liable under CERCLA. [128]

B. Summary

The Federal Government will not be liable as an arranger under CERCLA if the acts causing the contamination were done in its sovereign or regulatory capacity. Government actions pursuant to contracts for supplies may be sovereign or contractual, depending on the authorizing legislation, the terms of the contract, and the actual conduct of government personnel. The key to imposition of CERCLA arranger liability is control -- control or ownership of the raw materials and work in process or control over the disposal decision. Acts done pursuant to war procurement policy that are public and general are immune from CERCLA liability. Government involvement with the contractor on the basis of the Walsh-Healey Public Contracts Act or other legislation authorizing government control or intervention, will provide a basis for arranger liability only if the act gives the Government the authority and duty to control waste disposal activities, the Government takes control, and it is not acting in a sovereign capacity. Finally, there is nothing inherent in a cost-reimbursement type contract which alone would trigger CERCLA liability. However, the Government contract could establish liability if specifications, other terms of the contract, or governing contract regulations require a specific disposal

practice or impose an obligation on the Government to control the handling, use, or disposal of the hazardous substances required for the performance of the contract. Similarly, if the government provides government-owned equipment to be used in production which results in a release of hazardous substances, there is potential liability as either owner or arranger.

Footnotes

*Lieutenant Colonel Nilsson (B.A., Purdue University; J.D., Wayne State University Law School; LL.M., The George Washington University National Law Center) is assigned to Headquarters Air Force Material Command, Wright-Patterson AFB, Ohio. She is a member of the Michigan Bar.

1. A contractor owned/contractor operated facility is a non-government owned, privately operated facility that provides goods and/or services to a federal agency under contract.

2. FAR pt. 31.

3. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C.A. Secs. 9601-9675 (West 1983 & Supp. 1994)). A myriad of state hazardous waste programs also exist.

4. 42 U.S.C.A. Sec. 9607(A)(3). The mechanism for "reimbursement" under CERCLA is a suit by the contractor for contribution pursuant to 42 U.S.C.A. Sec. 9613(f)(1) to recover damages from the Government for its share of the costs as a "Potentially Responsible Party" under Para. 9607(a).

5. The term "cleanup costs" used throughout this article refers to costs of all remedial obligations relating to past activities of the contractor or former owners of the property. 42 U.S.C.A. Sec. 9607(c). According to the General Accounting Office (GAO), the cleanup estimates from 15 of DOD's largest contractors for past environmental costs range from $5.4 million to $423 million and future costs range from $1.1 million to $710 million. GAO Report, Environmental Cleanup: Unresolved Issues in Reimbursements to DOD Contractor, GAO/T-NAIAD-93-12.

6. Robert T. Lee, Environmental Liability: Uncertain Times for Government Contractors, 23 Nat'l Contr. Mgmt. J. 45 (1990).

7. The average cost of cleaning up a site on the Environmental Protection Agency Superfund list is $25 million, with a cost of some sites nearing $100 million. Regulatory Outlook, BNA Fed. Contr. Daily, Feb. 13, 1991.

8. United States General Accounting Office, DOD Environmental Cleanup: Information on Contractor Cleanup Costs and DOD Reimbursements, (June 26, 1992).

9. Marc F. Effron & Devon Engle, Recovery of Environmental Costs, in 93-3 Cost, Pricing & Acctg. Rep. 3-14, Mar. 1992.

10. Jerry A. Batschi & Lynda T. O'Sullivan, Recovery of Environmental Prevention and Cleanup Costs by Government Contractors, 32 Contr. Mgmt. 20 (1992); Peter A. McDonald & Scott P. Isaacson, Environmental Costs for Government Contractors, Gordian Knot Redux, 57 FCR 22 (1992); John F. Seymour, Liability of Government Contractors for Environmental Damage, 21 Pub. Contr. L. J. (1992).

11. 42 U.S.C.A. Sec. 9607(A)(3).

12. 42 U.S.C.A. Secs. 9601-9675.

13. 42 U.S.C.A. Secs. 6921-6939e (West 1983 & Supp. 1994).

14. RCRA provisions governing past activities are 42 U.S.C.A. Secs. 6924(u), 6924(v), 6928(h), 6973.

15. 42 U.S.C.A. Secs. 9604, 9611.

16. 42 U.S.C.A. Sec. 9607(a).

17. New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2nd Cir. 1985).

18. "Person" is defined as an individual, firm, corporation, association, partnership, consortium, commercial entity, United States Government, state, municipality, commission, political subdivision of the state, or any interstate body. 42 U.S.C.A. Sec. 9601(21).

19. 42 U.S.C.A. Sec. 9607(a)(1). According to Sec. 9601(9), "facility" is defined as any building, structure, installation, equipment, pipe or pipeline, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container or any site or area where a hazardous substance has been deposited.

20. 42 U.S.C.A. Sec. 9607(a)(2).

21. 42 U.S.C.A. Sec. 9607(a)(3).

22. 42 U.S.C.A. Sec. 9607(a)(4).

23. 42 U.S.C.A. Sec. 9620(a)(1).

24. 42 U.S.C.A. Sec. 9607(a)(2)&(3).

25. United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983). No requirement exists that the "arranger" control the disposal, United States v. Aceto Agric. Chem., 699 F. Supp. 1384 (S.D. Iowa 1988), aff'd in part, rev'd in part, 872 F.2d 1373 (8th Cir. 1989), or have knowledge of the facility where waste was disposed, Missouri v. Indep. Petrochem. Corp., 610 F. Supp. 4 (E.D. Mo. 1985).

26. The National Oil and Hazardous Substances Pollution Contingency Plan (also referred to as The National Contingency Plan) 40 C.F.R. Sec. 300 (1990), provides the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants. Pursuant to 42 U.S.C.A. Sec. 9607(a)(4)(A), a PRP is liable for "all costs or removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." Under Sec. 9607(a)(4)(B) a PRP is liable for "any other necessary costs or response incurred by any other person consistent with the national contingency plan."

27. 42 U.S.C.A. Sec. 9607(a)(4)(C) & (D).

28. 42 U.S.C.A. Secs. 9604(a), 9601(22).

29. John F. Seymour, Liability for Government Contractors For Environmental Damage, 21 Pub. Con. L.J. 492 (Summer 1992); Margaret O. Steinbeck, Liability of Defense Contractors for Hazardous Waste Cleanup Costs, 125 Mil. L.Rev. 55 (1989).

30. 42 U.S.C.A. Sec. 9607(b).

31. Letter from the GAO General Counsel to John Conyers, Chairman, House Committee on Government Operations B-246822.2 (Feb. 3, 1992).

32. FAR 23.103(a). In addition, with limited exceptions, FAR 23.103(b) precludes executive agencies from entering into, renewing, or extending contracts with firms proposing to use facilities listed by the EPA as violating the Clean Air and Water Acts.

33. Thomas H. Truit, Et Al., The Environmental Liabilities of Government Contractors and Agencies 301 (1992).

34. FAR 52.223-2, 52.223-3.

35. Proposed FAR 31.204-9, agreed upon by federal agencies in May 1992, is unpublished due to the Bush

administration's moratorium on new federal regulations imposed in February 1992. According to Sherri Wasserman Goodman, Deputy Under Secretary of Defense (Environmental Security), the current administration is "reexamining" the draft cost principle. Statement of Sherri Wasserman Goodman Before the United States House Representatives Committee on Government Operations, Subcommittee on Legislation and National Security, May 20, 1993. See also, 59 Fed. Contr. Rep. No. 20, 681,682 (May 24, 1993).

36. Proposed FAR 31.205-9. Numerous industry and bar groups have opposed the cost principle primarily because it makes environmental costs presumptively unallowable. In addition, it is their view that expecting the contracting officer to determine compliance with then-applicable environmental laws and industry standards is unrealistic and unworkable. Letter from Allan J. Joseph of Rogers, Joseph, O'Donnell & Quinn to Mrs. Eleanor Spector, Director of Defense Procurement (Jan. 14, 1992). DOD Environmental Cost Principle, BNA Fed. Contr. Daily, Aug. 13, 1992.

37. For examples of judicial decisions on the treatment of environmental costs for fixed-price contracts, see RPM Constr. Co., ASBCA No. 36,965, 90-3 BCA Para. 23,051 (specific warranty clause guaranteeing the underground tank will be leak proof); Holk Dev. Inc., ASBCA No. 40,137, 90-2 BCA Para. 22,852 (specific requirements in specifications for asbestos removal); Gulf Contr. Inc. ASBCA No. 27221, 84-2 BCA Para. 17,472 (clause requiring payment of applicable federal, state, and local taxes made contractor responsible for taxes imposed after award); and Permis Const. Corp., ASBCA No. 39,613, 90-3 BCA Para. 23,070 (protection of environmental resources clause). There are no cases deciding reimbursement of environmental cleanup cost on cost-type contracts. In October 1992, the Defense Contract Audit Agency (DCAA) and DOD jointly issued audit guidance on the allowability of environmental costs (DCAA Memorandum for Regional Directors, 92-PAD-163(R)), which governs auditors at present. The guidance provides that "environmental costs are generally allowable costs if reasonable and allocable." According to Sherri Wasserman Goodman, Deputy Under Secretary of Defense (Environmental Security),

If environmental damage occurred despite the exercise of due care by a contractor which complied with specific laws and regulations and conducted its business in accordance with standard industry practices, if that contractor has spent reasonable amounts in a cost-effective manner to remedy environmental damage, and if that contractor has vigorously sought reimbursement from all available contributory sources . . . it may be that the U.S. government should pay its fair share, but only its fair share, of that contractor's cost.

Statement of Sherri Wasserman Goodman, Deputy Under Secretary of Defense (Environmental Security) Before the United States House Representatives, Committee on Government Operations, Subcommittee on Legislation and National Security, May 20, 1993, as quoted in 59 Fed. Contr. Rep. 680 (May 24, 1993).

38. John Cibinic, Jr. & Ralph C. Nash, Jr., Formation of Government Contracts 705 (2d ed 1986).

39. Id. at 715.

40. Marcia G. Madsen, et al., Management Contractors and Environmental Damage, Who Shall Pay?, 37 Fed. B. News & J. 601 (1990).

41. FAR 52.236-2 (Differing Site Conditions Clause); FAR 52.243-1 (Changes Clause, Fixed-price Supply Contracts); FAR 52.243-4 (Changes Clause, Fixed-price Construction Contracts). The "Permits and Responsibility" clause (FAR 52.236-7) requiring the contractor to comply with all federal, state, and local laws, ensures that contractor recovery of environmental costs is the exception rather than the rule.

42. There is virtually no basis for post-performance cleanup cost reimbursement under fixed-price contracts. See Atlas Corp. v. United States, 895 F.2d 745 (Fed. Cir. 1990), cert. denied, 498 U.S. 811 *[cited at]* (1990), where the court rejected theories of mutual mistake, implied contract, constructive contract, and "taking."

43. FAR 52.236-2.

44. Cibinic, supra note 38, at ch44.

45. 1988 WL 63464, ASBCA No. 35,774, 88-3 BCA Para. 20,880.

46. Id.

47. ASBCA Nos. 29005 and 30250, 88-2 BCA Para. 20,741.

48. Diamond Pacific, NASA BCA No. 45-0391, 92-1 BCA Para. 24,615.

49. Active Fire Sprinkler Corp., 1984 Wl 13904 *56 (GSBCA).

50. ASBCA No. 27,596, 86-1 BCA Para. 18,645.

51. FAR 52.243-1 (changes clause used in fixed-price supply contracts and, with minor modifications, for service contracts) and FAR 52.243-4 (changes clause for fixed-price construction contracts).

52. FAR 52.243-4.

53. GSBCA No. 5461, 85-1 BCA Para. 17,868. The court also found relief based on "mutual mistake" because both the Government and the contractor were mistaken as to the cost impact of the regulations. See Cibinic, supra note 38, cht. 3, for a discussion on remedies for mutual mistake. See also Atlas Corp. v. United States, 895 F.2d 745 (Fed. Cir. 1990) cert. denied, 498 U.S. 811 *[cited at]* (1990) (court rejected a mutual mistake theory for recovery of cleanup costs incurred as a result of performance of prior government contracts).

54. Warner Elec., Inc., VABCA No. 2106, 85-2 BCAPara. 18,131. The contractor was not reimbursed for the extra costs of polychlorinated biphenyl (PCB) removal from a Veterans Administration Medical Center because the board determined it was not the discovery of the PCBs, but the change in the EPA regulations which increased the cost. The Government is not liable for the increased costs resulting from regulations issued in the exercise of the sovereign power of the United States.

55. GSBCA No. 5461, 85-1 BCA Para. 17,868. The case dealt with costs incurred pursuant to the Clean Air Act and the National Emissions Standards for Asbestos (NESA). Subsequent cases with a "Permits and Responsibility" Clause in the contract have not followed this logic. See discussion infra part II.C.

56. GSBCA No. 5461, 85-1 BCA Para. 17,868.

57. Cibinic, supra note 38, at 322.

58. Id. at 324.

59. PSBCA No. 1606, 87-3 BCA Para. 20,109, aff'd on reconsideration, 88-1 BCA Para. 20,270. Cf. Permis Const. Corp., ASBCA No. 39613, 90-3 BCA Para. 115,835, where the contractor's interpretation was found unreasonable, and failure to continue performance pursuant to the contracting officer's direction (pending resolution of the dispute) was grounds for default termination.

60. See e.g., CECOS Int'l Inc., IBCA No. 1667-3-83, 84-1 BCA Paras. 85,069, 85,070, where the contractor was not reimbursed for an assessment on hazardous waste disposal imposed after contract award, where the contract provided that the "contract price includes all applicable Federal, state, and local taxes and duties."

61. ASBCA Nos. 29005 and 30250, 88-2 BCA Para. 20,741.

62. VABCA No. 3088, 91-3 BCA Para. 24,056.

63. FAR 36.507, 52.236-7.

64. FAR 52.236-7.

65. Vasallo Const., Inc., 1992 WL 196153; BSBCA No. 3067 (July 14, 1992). See also C'n R Ind. of Jacksonville, ASBCA No. 42,209, 91-2 BCA Para. 23,970 (contractor was required to reimburse the Government for a state fine imposed on its subcontractors).

66. Gulf Cont'g. Inc., ASBCA No. 27221, 84-2 BCA Para. 17,472; Norair Eng'g Corp., ENGBCA No. 3375, 73-1 BCA Para. 9955.

67. 1991 WL 242884 *3, 92-1 BCA Para. 24,563.

68. ASBCA No. 40,137, 90-2 BCA Para. 22,852.

69. ASBCA Nos. 37869 et al., 91-3 BCA Para. 24,048. According to the board,

The contractual requirement of particular relevance [was] the general mandate in para. 1.3 [of the contract] that the contractor comply with all federal, state and local regulations pertaining to hazardous waste. Generally the state's power is restricted only if there is a clear conflict between state and local regulations and federal policy or the Federal government has assumed exclusive legislative jurisdiction over real property in the state . . . . Rather than conflict, there was agreement between Texas and EPA officials that the stricter standard should apply because of the high water table. . . . Appellant argued that the Texas "policy" was unenforceable because it was not a formal regulation. . . . We find that the clear, long standing Texas policy, implemented by legislative mandate, has the full force and effect of a published regulation.

70. ASBCA No. 36,965, 90-3 BCA Para. 23,051.

71. Id.

72. ASBCA No. 30089, 90-1 BCA Para. 112,366. The contractor was terminated for default and assessed $138,064.80 for its share of the Federal Government's payment to the State of Florida pursuant to a negotiated consent decree. The board converted the default termination to a termination for convenience (on other grounds) and held that the contractor was not liable for half the cost associated with the consent agreement.

73. ASBCA No. 38,312, 90-3 BCA Para. 23,148.

74. Morrison-Knudsen & Harbert, ASBCA No. 43,683, 92-2 BCA Para. 24,989.

75. Id.

76. If the contractor anticipates incurring significant environmental costs, advance agreements pursuant to FAR 31.109, a reserve fund, or specific indemnity coverage pursuant to Pub. L. No. 85-804, 50 U.S.C. Secs. 1431-1435 (1982) may be alternatives. See Gen. Dynamics Corp., ASBCA No. 39,500, 92-1 BNA Para. 24,657 (the importance of an advance agreement to ensure recovery of litigation costs related to a fixed-price contract, incurred after contract completion).

77. See 10 U.S.C.A. Sec. 2324 (West 1983 & Supp. 1994) (Allowable Costs Under Defense Contracts).

78. See 48 C.F.R. Secs. 2-52.

79. Letter from James F. Hinchman, GAO General Counsel, to the Honorable John Conyers, Jr., Chairman, Committee on Government Operations, House of Representatives (Feb. 3, 1992).

80. Memorandum from DCAA Director to Regional Directors (Audit Guidance on the Allowability of Environmental Costs) [hereinafter DCAA Audit Guidance] PAD 73.31/92-6 (14 Oct. 1992).

81. FAR 31.201-2. Relevant costs specifically unallowable include: fines and penalties (FAR 31.201); bad debts (FAR 31.205-3) and some costs related to legal proceedings (FAR 31.205-47).

82. FAR 31.201-3; DCAA Audit Guidance, supra note 80.

83. FAR 31.201-3(a).

84. DCAA Audit Guidance, supra note 80, at 2.

85. Id., at 5.

86. Id. Payments to third parties for personal injury or damage to property not owned, occupied, or used by the contractor arising out of the performance of the contract, whether or not caused by the negligence of the contractor, are governed by FAR 52.228-7, Insurance-Liability to Third Persons, which is required in most cost-reimbursement contracts by FAR 28-311-2. Funds must be available at the time the contingency occurs, and at the time of the final payment, exact or estimated amounts of the liability must be included in the release. FAR 52.216-7(h). If liability is unknown at the time of final payment, the contractor must give notice to the Government within six years of the release date or notice of final payment. FAR 52.228-7(c)(2) & (d).

87. See, e.g., Stanley Aviation Corp., ASBCA No. 12292, 68-2 BCA Paras. 7081, 32,788 (1968). The board permitted contractor recovery of overhead expenses that the contracting officer disallowed as being "unreasonably high," stating:

The proper way for applying the standard of reasonableness to appellant's overhead costs is to examine them on an item by item basis and exclude them from the allowable overhead pools the specific overhead cost items or parts of items found to be unreasonable under the prevailing circumstances. The Government has not cited a single cost item in the overhead pools as having been incurred unnecessarily or in a larger amount than was necessary under the circumstances. On the other hand, the record shows that apppellant, acting under the strongest possible economical motivation, namely, the desire to survive, did everything it possibly could to eliminate and reduce its overhead costs.

88. ASBCA No. 5166, 60-1 BCA Para. 2556 (1960).

89. Id. at Para. 12,399.

90. DCAA Audit Guidance, supra note 80.

91. Generally, wrongful acts of employees will be a basis for cost disallowance only if the conduct can be attributed to the contractor's management. Gen. Dynamics Corp., ASBCA No. 5166, 60-1 BCA Para. 2556 (1960); Nolan Bros., Inc., ENGBCA No. 2680, 67-1 BCA Para. 6095 (1967), aff'd, 437 F.2d 1371 (Ct. Cl. 1971); Morton-Thiokol, Inc., ASBCA No. 32629, 90-3 BCA Para. 23,207 (1990).

92. 23 Comp. Gen. 421 *[cited at]* , 422 (1943).

93. DCAA Audit Guidance, supra note 80, at 2.

94. Id.

95. Margaret O. Steinbeck, Liability of Defense Contractors for Hazardous Waste Cleanup Costs, 125 Mil. L. Rev. 55 (1989); John F. Seymour, Liability of Government Contrators For Environmental Damage, 21 Pub. Contr. L. J. 482,520 (1992). It is the American Bar Assocation's position that a violation of the law should not be deemed to have occurred unless a final and unappealable judicial or administrative order has been entered in an enforcement proceeding by a court or administrative agency having jurisdiction over environmental matters. ABA Letter to Col. Nancy L. Ladd, Director, Defense Acquistion Regulations System (Aug. 24, 1992).

96. NAACP v. Fed. Power Comm'n, 425 U.S. 662 *[cited at]* , 668 (1976).

97. LBCA No. 83-BCA-18, on reconsid., 88-3 BCA Paras. 20,949, 105,866.

98. Id.

99. Joint Action in Comm. Ser., Inc., LBCA No. 83-BCA-18, 87-1 BCA Paras. 19,506, 98,601.

100. Id. at Para. 98,605.

101. 76-1 BCA Para. 11,795 (CCH) Para. 56,286 (1976).

102. Id.

103. Dade Bros., Inc. v. United States, 325 F.2d 239 (Ct.C. 1963), cert. denied, 377 U.S. 916 *[cited at]* (1964).

104. Rehearing of Joint Action in Comm. Serv., 88-3 BCA Paras. 20,949, 105,867, distinguishing Hirsch Tyler Co., 76-2 BCA Para. 12,057; Machine Prods. Co., 58-1 BCA Para. 1704; Ravenna Arsenal, Inc., 74-2 BCA Para. 10,937; Hayes Int'l Corp., 75-1 BCA Para. 11076 (ASBCA); John Doe Co., 80-2 BCA Para. 14,620 (ASBCA); Gen. Dynamics Corp., 82-1 BCA Para. 15,616 (ASBCA); Hewitt Contr. Co., 83-2 BCA Para. 16,816 (ENGBCA). Cf. Olin Corp., 72-2 BCA Paras. 44,440 (1972).

105. See Cibinic & Nash, supra note 38, and cases cited therein.

106. B-131962 (1957) (unpublished decision of the Comptroller General).

107. ASBCA No. 20962, 76-2 BCA Para. 12,075 (CCH) Paras. 57,981, 57,985.

108. Id.

109. Id.

110. 42 U.S.C.A. Sec. 9607(a).

111. Enforcement provisions of the major media statutes include: 42 U.S.C.A. Sec. 7413 (Clean Air Act); 33 U.S.C.A. Sec. 1319 (Clean Water Act); 42 U.S.C.A. Sec. 6928 (RCRA); 42 U.S.C.A. Sec. 9606 (CERCLA). See also, Arnold Reitze, Goals of Enforcement 7-20 (1992).

112. 42 U.S.C.A. Secs. 6901-6992k (West 1983 & Supp. 1994).

113. 42 U.S.C.A. Secs. 7401-7671g (West 1983 & Supp. 1994).

114. 33 U.S.C.A. Secs. 1251-1387 (West 1986 & Supp. 1994).

115. Reitze, supra note 111, at 20.

116. FAR 31.201-3(a) provides: "If an initial review of the facts results in a challenge of a specific cost by the contracting officer . . . the burden of proof shall be upon the contractor to establish that such cost is reasonable."

117. United States Environmental Protection Agency, LE-133, Environmental Enforcement, A Citizens Guide (Mar. 1990). Informal responses carry no penalty or power to compel action, but if they are ignored, they can lead to more severe actions.

118. Id.

119. 5 U.S.C.A. Sec. 701(a) (West 1977).

120. See 42 U.S.C.A. Sec. 6928 for formal enforcement options for RCRA violations and 42 U.S.C.A. Sec. 9606 for CERCLA violations.

121. GAO Report to Congressional Requesters, Environmental Cleanup, Observations on Consistency of Reimbursements to DOD Contractors, GAO/NSIAD-93-77 (Oct. 1992).

122. The GAO noted, "one permit issued in 1952 specifically prohibited discharges of hazardous materials, including trichlorethylene, at the Aerojet facility in a manner that would result in contamination of ground water or the American River." Id.

123. Id. The other reasons for settlement included: the Government was a potential contributor, the indemnification clause

could be interpreted to include groundwater contamination, and some of the DOD contracts required the use of the chemicals contributing to the contamination.

124. Letter from Roger I. Ramseier, President, Aerojet General Corporation, to Paul E. Steiger, Managing Editor, The Wall Street Journal (Sept. 16, 1992) (in response to a Aug. 31, 1992 Journal article by Bill Richards and Andy Pasztor, Why Pollution Costs of Defense Contractors Get Paid by Taxpayers).

125. GAO Report to Congressional Requesters, Environmental Cleanup, Observations on Consistency of Reimbursement to DOD Contractors, GAO/NSIAD-93-77, App. II at 26 (Oct. 1992).

126. Id.

127. Id. See also Letter from Eleanor R. Spector, Director, Defense Procurement, Office of the Secretary of Defense, to Brad Hathaway, Associate Director for Air Force Issues, National Security and International Affairs Division, U.S. General Accounting Office (Jan. 5, 1993) (presenting DOD's response to GAO/NSIAD-93-77). In contrast to Aerojet, Boeing has not submitted final overhead rate proposals containing environmental restoration costs, and therefore the contracting officer has not yet conducted the detailed fact-finding necessary to make final allowability determinations.

128. See FAR 31.205-47 for rules governing the recovery of legal costs upon settlement of a government proceeding.

129. ASBCA No. 20962, 76-2 BCA Para. 12,075 (CCH) Para. 57,981.

130. Id. at Para. 57,985.

131. CERCLA gives the EPA numerous mechanisms to recover costs and assess penalties. Using the "Superfund," the EPA can clean up the contamination and assess the contractor. In addition, EPA can seek injunctive relief to require the responsible parties to clean up the site, issue an administrative order requiring the responsible parties to clean up the site, or enter into an agreement with responsible parties to perform any necessary response action. 42 U.S.C.A. Sec. 9604(a). The characterization of the remedy in terms of "restitution" or "damages" is not dispositive of the allowability of the costs. Hirsch Tyler Co., ASBCA No. 20962, 76-2 BCA Para. 12,075, at Para. 57,985.

132. In one of the first decisions on this issue, the Comptroller General stated, "whether or not a [contractor] has failed to discharge its obligations . . . is a question of fact to be ascertained from the record in evidence presented to the Board." 22 Comp. Gen. 349 *[cited at]* , B-28322 (1949).

133. See 42 U.S.C.A. Sec. 9607; 42 U.S.C.A. Sec. 9622(d)(1)(A). See also United States Environmental Protection Agency, Enforcement Accomplishments Report, Superfund Enforcement 6-5, Office Of Enforcement LE-133, EPA 230-R-93001, Apr. 1993.

134. GAO Report to Congressional Requesters, Environmental Cleanup, Observations on Consistency of Reimbursements to DOD Contractors, GAO/NSIAD-93-77, at 19, 26 (Oct. 1992).

135. Id. at 19.

136. DCAA Audit Guidance, supra note 80, at 5 provides that because there is no requirement that a contractor be guilty of a violation to force payment of cleanup costs, "contractors should be requested to provide documents sufficient to allow a determination as to how the contamination occurred."

137. Id.

138. See Appeal of Columbia University, ASBCA No. 3862, 57-1 BCA Para. 1340 (reimbursement disallowed on fines imposed for failure to get proper approvals from the Immigration and Naturalization Service before dismissing alien crew members).

139. Metropolitan Denver Constr. Opp. Policy Comm., 74-2 BCA Para. 10,749 (reimbursement of the cost of a penalty for late payment of taxes disallowed).

140. NASA BCA No. 865-28,68-1 BCA Para. 7021. See also Joint Action in Comm. Ser. 87-1 BCA at Para. 98,603.

141. Id.

142. FAR 31.205-15.

143. FAR 31.205-47; FAR 31.205-33.

144. FAR 31.205-47(f)(1). "Claim" means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. FAR 33.201.

145. FAR 31.205-33(a) & (b).

146. FAR 31.201-2.

147. But see Joint Action in Comm. Serv., LBCA No. 83-BCA-18, 87-1 BCA Para. 19,506.

148. ASBCA No. 20962, 76-2 BCA Para. 12,075 (CCH) Paras. 57,981, 57,985.

149. Id. at Para. 57,985.

150. Id.

151. Id. See also Hayes Int'l Corp., ASBCA No. 18447, 75-1 BCA Para. 11,076 (CCH) Paras. 57,721, 52,727, where, even though the Equal Employment Opportunity Commission found evidence of discrimination, legal fees were reimbursed because there was no finding of willful or malicious conduct. But see Joint Action in Comm. Serv., LBCA No. 83-BCA-18, 87-1 BCA Para. 19,505 (board found legal costs were unreasonable incurred when the contractor violated a federal statute).

152. DCAA Audit Guidance, supra note 80, at 5.

153. See FAR 52.228 (Insurance-Third Party Liability). See also infra text accompanying notes 175 to 199 (Allocability).

154. DCAA Audit Guidance, supra note 80, at 4.

155. FAR 31.205-47. The "Proceedings" cost principle, as amended, became effective on Jan. 22, 1991.

156. It is important to note that a penalty does not include a payment to make a unit of government whole for damages or the interest accrued on the damages. A penalty is in the nature of a punitive award. DCAA Audit Manual, supra note 80.

157. FAR 205-47(d).

158. Ronald Schechter & Maureen T. Kelly, The Proceedings Cost Principle, CP & A Rep. 15, 19 (Mar. 1991).

159. FAR 31.205-47(a).

160. Department of Defense, Defense Contract Audit Agency, DCAA Contract Audit Manual, DCAAM 7640.1, Vol. 1, Sec. 7-1918.3 (1992).

161. Id. at Sec. 7-1918.2(b).

162. 42 U.S.C.A. Sec. 9604(b) authorizes the EPA "to undertake such investigations, monitoring, surveys, testing, and other information gathering as deemed necessary or appropriate to identify the existence and extent of the release or threat thereof." 42 U.S.C.A. Sec. 9604(e)(3) allows the EPA to enter property to inspect and obtain samples of suspected hazardous substances, either after consent of the property owner, or if consent is refused, the EPA may issue an order,

enforced by judicial action. The court may assess a civil penalty not to exceed $25,000 for each day of compliance against any person who unreasonably fails to comply.

163. See Negotiations and Information Exchange, 53 Fed. Reg. 5298, 5306-7 (1988). 42 U.S.C.A. Sec. 9604(e)(2) authorizes the EPA to require any person who has or may have information relevant to the contamination and cleanup to furnish relevant information and documents. In addition, that person must grant the EPA access to inspect and copy all documents or records relating to such matters.

164. See 42 U.S.C.A. Sec. 9622 (Settlements); 40 C.F.R. Sec. 304.11(a) (Use of Arbitration). 42 U.S.C.A. Sec. 9607 (l) gives the EPA the authority to impose liens enforced by an action "in rem" in the appropriate Federal district court.

165. See 42 U.S.C.A. Sec. 9613 (Civil Proceedings).

166. 42 U.S.C.A. Sec. 9604(e)(1).

167. 42 U.S.C.A. Sec. 96049(e)(5)(b)(ii).

168. FAR 31.205-47(b).

169. 42 U.S.C.A. Sec. 9606(a).

170. Marie M. Fogelman, Hazardous Waste Cleanup, Liability and Litigation Sec. 4.6 (1992).

171. Id. at 83. Liability issues or reasons for issuance of the order are outside the scope of the conference.

172. 42 U.S.C.A. Sec. 9607(b).

173. 42 U.S.C.A. Sec. 9607(c)(3).

174. John Cibinic, Jr. and Ralph C. Nash, Jr., Cost Reimbursement Contracting (manuscript on file with the author).

175. FAR 31.201-4.

176. General Dynamic Corp., ASBCA No. 18503, 75-2 BCA Para. 11,521.

177. FAR 31.202(a).

178. Memorandum for Regional Directors, DCAA Director, Field Detachment, Audit Guidance on the Allowability of Environmental Costs, from Michael J. Thibault, Assistant Director, Policy and Plans (14 Oct. 1992).

179. Cibinic & Nash, supra note 174, at 46.

180. ASBCA No. 1149, 68-2 BCA Paras. 7119, 32,967.

181. Cibinic & Nash, supra note 174, at 46.

182. General Dynamics Corp., ASBCA No. 18503, 75-2 BCA Para. 11,521, at Para. 54,973.

183. ASBCA No. 1149, 68-2 BCA Paras. 7119, 32,970.

184. 375 F.2d 786 (Ct.Cl. 1967).

185. Id. at 793.

186. ASBCA No. 4577, 58-1 BCA Para. 1704.

187. Id.

188. ASBCA No. 18503, 75-2 BCA Para. 11,521.

189. Id. at Para. 54,973. See also Daedalus Enterpr., ASBCA No. 43,602 1992 WL 114961 (May 18, 1992) (allowing foreign sales commissions); Boeing Company, ASBCA No. 11,866, 69-2 BCA Para. 8298, aff'd on reconsideration 70-1 BCA Para. 8298, aff'd on appeal 480 F.2d 854 (Ct.Cl. 1973) (allowing personal taxes assessed on commercial inventories); and Martin Marietta Corp., ASBCA No. 14,152, 71-1 BCA Para. 8783 ("ad valorem" state property taxes assessed on work-in-process inventories used solely in connection with its fixed-price government contracts were properly allocable to all its government work where general benefit was shown.).

190. ASBCA No. 1149, 68-2 BCA Paras. 7119, 32,970.

191. Lockheed Aircraft Corp., as cited in General Dynamics Corp., 75-2 BCA at Para. 11,528.

192. The Match Inst., HUDBCA No. 87-1850-C2, 91-2 BCA Para. 23,994.

193. Id.

194. Metropolitan Life Ins. Co., ASBCA No. 27,161, 85-2 BCA Para. 17,973.

195. DCAA Audit Guidance, supra note 80, at 3.

196. Id. When determining allocability of a closed segment, consider the following information: (1) Are any aspects of the closed segment's business being continued by the remaining segments? (2) Is the site still owned by the contractor? If so what is its current use? (3) If the site is not presently owned by the contractor, what were the terms of the sale in relation to environmental costs? The contractor may have retained environmental cleanup liability in exchange for a higher sale price, or the buyer may have accepted full liability in exchange for a lower price.

197. ETIF Abstracts, Capitalization of Costs to Treat Environmental Contamination, J. of Accountancy 591 (June 1991).

198. DCAA Audit Guidance, supra note 80, at 3.

199. U.S.C.A. Sec. 9613(f).

200. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) ("Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs of remedying the harmful condition they created.").

201. 42 U.S.C.A. Sec. 9607(A)(1)-(4); United States v. A&F Materials Co., 582 F. Supp. 842, 844 (S.D. Ill. 1984).

202. 42 U.S.C.A. Sec. 9607 (a)(3)-(4).

203. Reading Co. v. Philadelphia, 1992 WL 392595 (E.D. Pa. 1991).

204. United States v. Ward, 618 F. Supp. 884 (E.D. N.C. 1985).

205. United States v. Aceto Agric. Chem., 699 F. Supp. 1384 (S.D. Iowa 1988), aff'd in part, rev'd in part, 872 F.2d 1373 (8th Cir. 1989); FMC Corp. v. United States, 786 F. Supp. 471 (E.D. Pa. 1992).

206. 42 U.S.C.A. Sec. 9607; United States v. Ward, 618 F. Supp. at 893.

207. Outlook 1993 Litigation, 23 Env. Rep. 2530 (Jan. 22, 1993).

208. CPC Int'l, Inc., v. Aerojet-General Corp., 777 F. Supp. 549 (W.D. Mich. 1991).

209. United States v. Bliss, 1988 WL 169818 (E.D. Mo. 1988); United States v. Ward, 618 F. Supp. at 844.

210. United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 743 (8th Cir. 1986), cert. denied, 484 U.S. 848 *[cited at]* (1987); United States v. Mottolo, 629 F. Supp. 56, 58 (N.H. 1984) (the person who arranges for disposal or transportation for disposal need not own or possess the hazardous waste).

211. Hassayampa Steering Comm. v. Arizona, 768 F. Supp. 697, 700 (Ariz. 1991), citing United States v. Northeastern Pharm & Chem. Co., 810 F.2d at 744.

212. 810 F.2d at 743.

213. Reading Co. v. Philadelphia, 1992 WL 392595 at *5.

214. 810 F.2d at 744.

215. United States v. Aceto Agric. Chem., 699 F. Supp. at 1384; Jones-Hamilton v. Beazer, 750 F. Supp. 1022 (N.D. Cal. 1990), aff'd in part, rev'd in part, 959 F.2d 126 (2d Cir. 1992), amended and superseded on denial of rehearing, 973 F.2d 688 (9th Cir. 1992); United States v. Velsicol Chem. Corp., 701 F. Supp. 140, 142 (W.D. Tenn. 1987); Levin Metals Corp., v. Parr-Richmond Terminal, 781 F. Supp. 1448 (N.D. Cal. 1991).

216. United States v. Bliss, 1988 WL 169818 at *5; United States v. Ward, 618 F. Supp. at 894-95; Missouri v. Independent Petrochem. Corp., 610 F. Supp. 4 (E.D. Mo. 1985).

217. 610 F. Supp. at 4.

218. 1988 WL 169818 at *5.

219. United States v. A&F Materials, 582 F. Supp. at 845.

220. See supra note 215.

221. United States v. Aceto Agric. Chem., 872 F.2d at 1373.???

222. Id.

223. Id. at 1382.

224. 959 F.2d 126, 131 (9th Cir. 1992).

225. 1990 WL 115085 (E.D. Pa. 1990).

226. 781 F. Supp. at 1451. Cf. Kelly v. Arco Indus., 739 F. Supp. 354 (W.D. Mich. 1990).

227. United States v. Westinghouse, 22 Env. Rep. (BNA) 1230, 1233 (S.D. Ind. 1983); Jersey City Redev. v. PPG Ind., 655 F. Supp. 1257, 1260 (D. N.J. 1987).

228. Hassayampa Steering Comm., 708 F. Supp. at 770.

229. Ashland Oil v. Sonford Prod., 1993 WL 6455 at *3 (D. Minn. 1993).

230. 1993 WL 156633 *14 (S.D. Ga). Fleet Factors was liable as "owner" because of its involvement in the operations of the plant. This finding, however, precluded "arranger" liability under CERCLA. "Fleet's holding of title through its deed to secure debt renders it an owner and thereby precludes finding Fleet liable under Sec. 9607(3)." Id.

231. Id.

232. 962 F.2d 281 (2d Cir. 1992).

233. Id. at 286.

234. 786 F. Supp. 471 (E.D. Pa. 1992).

235. Id. at 472-85.

236. United States v. Aceto Agric. Chem., 699 F. Supp. at 1386; United States v. Mottolo, 605 F. Supp. at 902.

237. United States v. Northeastern Pharm. & Chem., 810 F.2d at 733; United States v. Conservation Chem. Co., 619 F. Supp.162, 192 (W.D. Miss. 1985); United States v. Aceto Agric. Chem., 872 F.2d at 1380, n. 8 ("Although the 96th Congress had considered numerous proposals concerning liability and compensation for environmental pollution, the bill which ultimately became law was hurriedly put together . . . and passed after very limited debate by a lame duck Congress.").

238. United States v. Ward, 618 F. Supp. at 894.

239. 619 F. Supp. at 234.

240. 872 F.2d at 1273.

241. 777 F. Supp. at 576.

242. Jordan v. Southern Wood Piedmont Co., 805 F. Supp. 1575 (S.D. Ga. 1992).

243. New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985).

244. United States v. Pesse, 794 F. Supp. 151, 157 (W.D. Pa. 1992).

245. 618 F. Supp. at 911.

246. New York v. General Elec. Co., 592 F. Supp. 291, 297 (N.D. N.Y. 1987). See also United States v. Vesicol Chem. Corp., 701 F. Supp. 140 (W.D. Tenn. 1987) (liability found when defendants arranged for a company to formulate and package products, and defendants knew or should have known there would be losses through spills or leaks and that wastes would be generated in the process); FMC v. United States, 785 F. Supp. at 471 (Federal Government held liable for contamination resulting from a contractor's activities because the Government "knew or should have known" how the wastes were being disposed). But cf. Hines v. Vulcan Material Co., 685 F. Supp. at 655.

247. United States v. Westinghouse, 22 Env. Rep. (BNA) 1230, 1233 (S.D. Ind. 1983) (original supplier of PCBs was not liable for the ultimate disposition); Florida Power & Light v. Allis-Chalmers Corp., 893 F.2d 1313, 1314 (manufacturer of transformers was not liable for the ultimate disposal since it sold the utility new, useful products and the utility made the decision to dispose); General Electric v. AAMCO, 962 F.2d at 286 (sale of virgin oil used in oil changes did not result in liability for the ultimate disposal of waste oil).

248. United States v. Aceto Agric. Chem., 872 F.2d at 1380.

249. United States v. A&F Materials, 582 F. Supp. at 845.

250. 1990 WL 67983 at *1 (W.D. Pa.).

251. New York v. General Elec. Co., 592 F. Supp. 291 (N.D. N.Y. 1984).

252. United States v. Pesses, 794 F. Supp. at 151.

253. United States v. A&F Materials, 582 F. Supp. at 845.

254. United States v. Pesses, 794 F. Supp. at 157.

255. 805 F. Supp. 1422 (N.D. Ohio 1992).

0. 619 F. Supp. 162 (W.D. Miss. 1985).

1. United States v. Peterson Sand & Gravel, Inc., 806 F. Supp. 1346, 1354 (N.D. Ill. 1992) ("Seller liability for later misuse by the buyer of useful but hazardous ingredients in a manufacturing process was not intended by CERCLA's authors; such liability would chill permissible manufacturing.").

2. United States v. Pesses, 794 F. Supp. at 156.

3. United States v. Westinghouse, 22 Env. Rep. at 1230. See also Florida Power & Light Co. v. Allis-Chalmers Corp., 893 F.2d at 1313 (the manufacturer of transformers was not liable for arranging the disposal, where the purchaser used the product for 40 years and made all the arrangements for disposal).

4. Hines v. Vulcan Material, 655 F. Supp. at 655. See also Kelly v. Arco Indus., 739 F. Supp. 354, 359 (W.D. Mich. 1990) (supplier of a compound containing a hazardous substance not liable).

5. Jersey Cit Redev. v. PPG Indus., 655 F. Supp. 1257, 1260 (N.J. 1987). The court distinguished this case from those where the defendant engaged in a specific transaction concerning the hazardous substance. See also AM Int'l, Inc., v. International Forging Equip., 982 F.2d 989 (6th Cir. 1993).

6. 655 F. Supp. at 1259.

7. Hines v. Vulcan Materials, 655 F. Supp. at 655.

8. 42 U.S.C.A. Sec. 9601(29); 42 U.S.C.A. Sec. 6903(34).

9. Id.

10. United States v. Pesses, 794 F. Supp. at 157.

11. United States v. Conservation Chem., 619 F. Supp. 162 (W.D. Mo. 1985).

12. 42 U.S.C.A. Sec. 6903(3).

13. See Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988). In this case, a subdivision was built on highly contaminated land once used for a wood treatment facility. The contractor filled in open pools and regraded the land to make the property presentable to future landowners.

14. Compare Nurad, Inc. v. Hooper & Sons, 966 F.2d 837, 844-46 (?? Cir. 1992) ("passive" disposal is enough) and United States v. Waste Indus., Inc., 734 F.2d 159, 164 (4th Cir. 1984) (disposal includes passive disposal under RCRA) and Stanley Works v. Syndergeneral Corp., 781 F. Supp. 659 (E.D. Cal. 1990) (passive disposal is enough) with Ecodyne v. Shah, 718 F. Supp. 1454, 1455-57 (N.D. Cal. 1989) (rejecting passive disposal based on grammatical construction).

15. 718 F. Supp. at 1456.

16. Id.

17. Prudential Ins. Co. v United States Gypsum, 711 F. Supp. 1294 (N.J. 1989).

18. Westwood Pharm. Inc. v. National Fuel Gas Distrib., 737 F. Supp. 1272, 1278 (W.D. N.Y. 1990), aff'd, 964 F.2d 85 (2d Cir. 1992).

19. United States v. Petersen Sand & Gravel, 806 F. Supp. 1346 (N.D. Ill. 1992).

20. United States v. A&F Materials, 582 F. Supp. 842, 894 (S.D. Ill. 1984).

21. 42 U.S.C.A. Sec. 9601(14).

22. United States v. Wade, 577 F. Supp. 1326, 1339 (E.D. Pa. 1983).

23. United States v. Conservation Chem. Corp., 619 F. Supp. 162, 237 (W.D. Miss. 1985).

24. Louisiana-Pacific Corp. v. ASARCO, 735 F. Supp. 358, 361 (W.D. Wash. 1990).

25. Hassayampa Steering Comm. v. Arizona, 768 F. Supp. 697 (Ariz. 1991).

26. Eagle-Picher Indus., Inc. v. United States, 759 F. Supp. 665, 673 (D.C. Cir. 1985).

27. Arizona v. Motorola, 774 F. Supp. 566 (Ariz. 1991).

28. New York v. General Elec. Co., 592 F. Supp. 291, 296 (N.D. N.Y. 1984).

29. 42 U.S.C.A. Sec. 9601(9)(b).

30. 619 F. Supp. at 185.

31. New York v. General Elec. Co., 592 F. Supp. at 296.

32. Id., citing 126 Cong. Rec. H9447 (daily ed. Sept. 23, 1980).

33. Id., citing 126 Cong. Rec. S14975 (daily ed. Nov. 24, 1980).

34. Brookfield North Riverside v. Martin Oil Marketing, 1992 WL 63274 at *4.

35. Id.

36. United States v. Metate Asbestos Corp., 584 F. Supp. 1143, 1148 (Ariz. 1984).

37. Reading Co. v. Philadelphia, 1992 WL 392595 (E.D. Pa. 1991).

38. FMC v. United States, 786 F. Supp. at 485-87.

39. See supra note 215.

40. 962 F.2d 281 (2d Cir. 1992).

41. 806 F. Supp. 1346 (N.D. Ill. 1992).

42. Id.

43. United States v. Alcan, 964 F.2d 252 (3d Cir. 1991).

44. 42 U.S.C.A. Sec. 9601(29).

45. Reading Co. v. Philadelphia, 1992 WL at 392595.

46. 42 U.S.C.A. Sec. 9601(29).

47. United States v. Sherwood, 312 U.S. 584 *[cited at]* , 586 (1941).

48. 42 U.S.C.A. Sec. 9613(f) allows that "any person may seek contribution from any other person." Person is defined by 42 U.S.C.A. Sec. 9601(21) as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body."

49. Pennsylvania v. Union Gas Co., 491 U.S. 1 *[cited at]* , 10 (1989); United States v. Western Processing Co., 761 F. Supp. 725 (W.D. Wash. 1991).

50. 42 U.S.C.A. Sec. 9620(a)(1) [emphasis added].

51. United States v. Sierra Club, 463 U.S. 680 *[cited at]* (1983); Environmental Protection Agency v. California, 426 U.S. 167 *[cited at]* , 182-99 (1976); Hancock v. Train, 426 U.S. 167 *[cited at]* (1943).

52. United States v. Dart Indus., 847 F.2d 144, 146 (4th Cir. 1988) (a state's negligent enforcement of environmental regulations does not constitute ownership or control as defined by 42 U.S.C.A. Sec. 9601); McKay & Sons v. United States, 633 F. Supp. 1290, 1296 n.9 (Utah 1986) (CERCLA's waiver of sovereign immunity does not allow claims against the United States as regulator)..

53. 786 F. Supp. at 471.

54. Id. at 471. The court also hold the Government liable as an "operator" under 42 U.S.C.A. Sec. 9607(a)(3).

55. Id. at 485.

56. Id. at 473. The plant was owned and operated by American Viscose (now out of business) from 1940 to 1963, by FMC from 1963 to 1976, and by Avtex Fibers (in bankruptcy reorganization) from 1976 to 1989.

57. Id. at 474.

58. Id. at 472-85.

59. 1992 WL 68346 at *1.

60. Id. at *2. This court, like the court in FMC, did not explain the facts upon which their interpretation was based. There was no mention of "detailed involvement" in hazardous waste disposal decisions or the nature of the Government's "pecuniary gain."

61. See, e.g., Kelly v. Tiscornia, Docket No. 5:90-CV-62 (W.D. Mich.) (for contribution for soil, ground water, and surface water cleanup costs resulting from production of artillery shells, automobile, heavy equipment and aircraft parts and other activities of the Defense Plant Corporation/Reconstruction Finance Corporation from 1943-1954); United States v. Publicker Indus., Docket No. 92-7954 (E.D. Pa.) (for contamination resulting from contracts for alcohol production, and controls and demands of the War Production Board, Reconstruction Finance Corporation, and the Defense Plant Corporation during World War II); Motor Ave. Co. v. Liberty Indust. Finishing Corp., Docket No. CV 91-0968 (E.D.N.Y.) (alleging the Government was liable as sole shareholder of sites and aircraft production facilities owned by the contractors where contamination from wartime production occurred); M.A. Hanna Co. v. United States, Docket No. 83-4179 (Idaho) (for its involvement with mining activities and contracts for cobalt from 1942-1960, which resulted in disposal of waste rock and overburden which allegedly caused the release of hazardous substances); Mead Corp. v. United States, Docket Nos. 2-90-156 and 2-92-326 (S.D. Ohio) (resulting from contracts with the Government to construct and operate a munitions facility which the contractor contends the Navy owned and operated from 1942-1945, during which TCE and solvent distillation residues from the degreaser machines caused contamination of soils and groundwater); United States v. Federal Pac. Elec., Docket No. 92-11924t (Mass.) (as a result of wartime production contracts with the Navy from 1942-1946 and where the Navy maintained full-time on-site inspectors).

62. Docket No. 91-0589 (C.D. Cal.).

63. Id. Defendant's counterclaim, Apr. 22, 1991.

64. Id. at 6-11.

65. Docket No. 79-990 (W.D. N.Y.).

66. Id. Post-Trial Memorandum of the United States of America in Opposition to the Counterclaim of Occidental Chemical Corporation, Sept. 20, 1991, pages 1-96.

67. Docket No. 3:92-CV-1655-X (N.D. Texas). See also United States v. Vertac, Docket No. LR-C-80-109 (E.D. Ark.) where the contractor contends that the United States should be held liable under 42 U.S.C.A. Sec. 9607(a)(2) & (3) as a result of the Government's purchase of Agent Orange from 1964 to 1968.

68. See also Ryan v. Dow Chem. Co., 781 F. Supp. 934, 950 (E.D. N.Y. 1992) where the court noted that while the manufacturers were compelled to deliver Agent Orange to the Government,

it is necessary to recall that Agent Orange was a mix of pre-existing chemical formulae that had long been put to domestic commercial use to reduce unwanted vegetation . . . . [T]he Government bought the components for Agent Orange . . . and used them in mixtures which were derived from defendant's standard recipes. Thus, the "compulsion" under which the defendants operated predominantly concerned marketing rather than design and manufacture.

69. Docket No. 3:91-CV-1655, Plaintiff's Original Complaint, Oct. 27, 1992.

70. Id. at 11.

71. United States v. Northeastern Pharm & Chem. Co., 579 F. Supp. at 823 ("arranger" liability exists when there was actual authority to control the disposal even though the person did not own or have physical possession); General Elec. v. AAMCO Transmissions, 962 F.2d at 281 (must have the obligation to exercise control over hazardous waste); CPC Int'l, Inc. v. Aerojet, 731 F. Supp. at 789 (there is no requirement to actually own or possess the waste if that defendant was responsible for making the decision on how to dispose of the substance); United States v. Bliss, 667 F. Supp. at 1306. See supra section IV.

72. United States v. Aceto Agric. Chem. Corp., 872 F.2d at 1382 (throughout the entire manufacturing process the contractor owned all of the raw materials, the work-in-process, and the final product); Jones Hamilton Co. v. Beazer Materials & Serv., Inc., 959 F.2d 126, 131 (9th Cir. 1992) (liability exists when the defendant retained ownership in all materials it supplied).

73. Johns-Mansville Corp. v. United States, 13 Cl. Ct. 72, 87 (1987), vacated, 855 F.2d 1571 (Fed. Cir. 1988).

74. Chapter 440, 54 Stat. 676 (1940), as amended by the Act of May 31, 1941, Chapter 157, 55 Stat. 236 (1941).

75. Second War Powers Act, Chapter 199, 56 Stat. 176 (1942).

76. Selective Service Training Act of 1940, Chapter 720, 54 Stat. 885, 892 (1940).

77. Emergency Price Control Act, 56 Stat. 23 (1942).

78. Defense Production Act, 50 U.S.C.App. Sec. 2071(a) (West 1991).

79. See supra section V, Introduction.

80. See Barbour & Sons v. United States, 75 F. Supp. 246 (Ct. Cl. 1945) (delay in granting priority is a sovereign act); McCrary Co. v. United States, 84 F. Supp. 368 (Ct. Cl. 1949) (executive order "freezing" workers in current jobs was a sovereign act).

81. 102 Ct. Cl. 400, 401 (1944).

82. 69 F. Supp. 117, 118 (Ct. Cl. 1947).

83. Id.

84. 102 Ct. Cl. at 401.

85. 729 F. Supp. 1461 (Del. 1990).

86. Id. at 1470.

87. See Jordan v. Southern Wood Piedmont Co., 805 F. Supp. 1575 (S.D. Ga. 1992) where the court determined that Dow Chemical Corporation did not "arrange for disposal" by issuing technical advice on the proper disposal of herbicide in the event of a spill or leak.

88. Hines v. Vulcan Mat. Co., 685 F. Supp. at 770 (defendant incurred no liability despite a close relationship with a contractor, including offering advice and consultation concerning the design and location of treatment systems).

89. United States v. New Castle County, 727 F. Supp. 854, 871 (Del. 1989).

90. General Elec. Co. v. AAMCO Transmission, 962 F. 2d 281 (2d Cir. 1992).

91. Id. at 286.

92. United States v. Western Processing Co., 761 F. Supp. 725, 730 (W.D. Wash. 1991).

93. 765 F.2d 283 (1st Cir. 1985). See also H.R. Rep. No. 2946, 74th Cong., 2d Sess. 4 (1936).

94. Id. at 290.

95. See United States v. Western Processing Co., 761 F. Supp. 725, 730 (W.D. Wash. 1991) where the EPA was not liable under CERCLA for failure to regulate, even though they had direct knowledge that the company was operating, storing, and disposing in violation of the law.

96. See United States v. A&F Materials Co., 582 F. Supp. 842, 845 (S.D. Ill. 1984) (liability "ends with that party who both owned the hazardous waste and made the crucial decision how it was to be disposed of or treated, and by whom.").

97. FAR 16.301-1, 16.301-2, and 16.301-3. Cost reimbursement contracts are used when the procuring agency is unable to describe the work with a sufficient degree of accuracy to permit the use of a fixed-fee contract.

98. See Ralph C. Nash, Jr. & John Cibinic, Jr. Federal Procurement Law, Vol. 1, at 435 (3d ed. 1977).

99. Id., citing Ross & Co., ASBCA 2326, 6 CCF 61801, Para. 52,497 (1955).

100. General Dynamics, ASBCA 7650, 1963 BCA 3685 at Para. 18,448.

101. FAR 52.243-2, Changes-Cost Reimbursement.

102. FAR 52.244-2, Subcontracts (Cost Reimbursement and Letter Contracts).

103. FAR 52.246-3, Inspection of Supplies-Cost-Reimbursement.

104. See Nash & Cibinic, supra note 354, at 438 for a sample of an unpublished "Technical Direction" clause used by the National Aeronautics and Space Administration.

105. John Cibinic, Jr. & Ralph C. Nash, Jr., Formation of Government Contracts 337 (2d ed. 1986).

106. General Elec. Co. v. AAMCO Transmissions, 962 F.2d at 281.

107. United States v. Occidental Chem. Corp., Docket No. 79-990 (W.D. N.Y.), Post Trial Memorandum of the United States in Opposition to the Counterclaim of Occidental Chemical Corp., Sept. 20, 1991; Maxus Energy Corp. v. United States, Docket No. 392CV1655-X, Plaintiff's Original Complaint, Aug. 14, 1992.

108. 962 F.2d at 281.

109. Id. at 283.

110. Id.

111. Id. See also United States v. Arrowhead Ref. Co., 1992 WL 437429 (Minn. 1992).

112. 962 F.2d at 284.

113. Docket No. 79-990 (W.D. N.Y.), Post Trial Memorandum of the United States of America in Opposition to the Counterclaim of Occidental Chemical Corporation, Sept. 20, 1991, at 70 ("title to all material purchased by the contractor vests in the government").

114. FAR 46.505, Transfer of title and risk of loss.

115. FAR 52.249-6(c)(6).

116. FAR 52.245-5(c)(2).

117."Property" means both real and personal. It includes facilities, material, special tooling, special test equipment, and agency-peculiar property. FAR 45.101, "Definitions."

118."Termination" as used in this clause is termination for the convenience of the Government and default terminations. FAR 52.249-6(a)(1) & (2).

119. See supra section IV.

120. A single property administrator is designated for all contracts involving government property at each contractor location. They are primarily responsible for property administration, including the surveillance of the contractor's control of government property. DCAA Contract Audit Manual, Sec. 14-404.1. "Government property" means all property owned by or leased to the Government or acquired by the Government under the terms of the contract. It includes both government-furnished property and contractor-acquired property. "Contractor-acquired property" means property acquired or otherwise provided by the contractor for performing a contract and to which the Government has title. FAR 45.101. The Department of Defense FAR Supplement (DFARS) No. 3 states procedures and techniques for DOD personnel engaged in the administration of government property in the possession of contractors. Annex 1 to the DFARS provides guidance as to specific functional areas requiring consideration and surveillance by the property administrator.

121. Id.

122. United States v. Occidental Chem. Corp., Docket No. 79-990, Post Trial Memorandum of the United States of America in Opposition to the Counterclaim of Occidental Chemical Corporation, Sept. 20, 1991, at 70; Mead Corp. v. United States, Docket No. 62-92-326, Complaint filed Apr. 10, 1992, at 7.

123. FAR 52.245-4(b). "Government-furnished property" means property in the possession of or directly acquired by the Government and subsequently made available to the contractor. FAR 45.101.

124. 42 U.S.C.A. Sec. 9607(a)(1) & (2).

125. 42 U.S.C.A. Sec. 9601(9)(b). See also supra section IV, part 4.

126. See Brookfield North Riverside Water Commission v. Billakis, 1992 WL 63274 at *4 (N.D. Ill. 1992) (when

hazardous substances entered the water main it became a "facility"); Reading Co. v. Philadelphia, 1992 WL 392595 (E.D. Pa. 1991) (railroad cars using electrical transformers containing PCBs were deemed facilities).

127. 786 F. Supp. 471, 485.

128. Id. at 486.

Title of Article

Will the Dike Burst? Plugging the Unconstitutional Hole in Article 66(c), UCMJ

Author

Captain David D. Jividen, USAF*

Text of Article

I. INTRODUCTION

Among the unique powers Courts of Military Review possess by virtue of the Uniform Code of Military Justice (UCMJ) [1] is the power to make appellate factual findings from the record of trial. Enshrined in Article 66(c), [2] this appellate fact-finding power starkly demarcates military appellate courts from their federal and state brethren. [3] Originally devised to provide an extra layer of protection to servicemembers who, in the judgment of Congress, might find themselves inappropriately convicted as a result of command influence, [4] some military courts have strayed from this intended purpose in their recent use of Article 66(c). In particular, the Army and Air Force Courts of Military Review (ACMR and AFCMR respectively) increasingly have used this article to justify their selection of "facts" from conflicting appellate ex parte affidavits involving post-trial issues, thereby avoiding the need for limited hearings. [5]

This article explores the constitutionality of this novel use of Article 66(c) by focusing on its legislative history, as well as precedent both prior and subsequent to the judicial promulgation of the DuBay [6] hearing, the military's version of the post-trial limited evidentiary hearing. [7] Also analyzed is a recent decision by the United States Court of Military Appeals (USCMA) that, despite its laudable attempt to set a standard to determine when courts of review should order post-trial hearings, threatens to give the lower courts of military review continued license to use Article 66(c) improperly to resolve contradictory post-trial factual assertions on appeal. Finally, this article proposes a constitutional solution and a new Rule of Courts-Martial (R.C.M.) regarding the thorny problem of resolving conflicting appellate post-trial claims.

II. THE CONGRESSIONAL GRANT OF ARTICLE 66(c)

A. Overview

An analysis of the congressional intent behind the grant of appellate fact-finding authority pursuant to Article 66(c) must necessarily begin by exploring the military justice system during and immediately after World War II. Prior to World War II military justice, as characterized by constitutional due process and appellate review guarantees, simply did not exist. [8] The post-World War II genesis of Article 66(c) was inextricably intertwined with the painful process by which military law was slowly converted from a commander's private disciplinary tool to a respected and equitable justice system which maintains discipline without the abrogation of fundamental constitutional rights. [9] In particular, the grant of fact-finding power by Article 66(c) to Military Courts of Review had everything to do with preventing command influence and nothing to do with providing the courts with a method to avoid the need for limited hearings to resolve certain post-trial issues.

B. World War II and the Elston Act

During World War II, each military service operated under its own court-martial procedures. The Army operated under the Articles of War, [10] while the Naval justice system was governed by the Articles for the Government of the Navy. [11] Military justice in the Coast Guard also was prescribed by its own statute. [12] None of these early statutes provided a true appellate review of courts-martial convictions or sentences. Noncapital cases in the Army were reviewed by a three member Board of Review, which, with the concurrence of the Judge Advocate General, could find a conviction "legally

insufficient," and remand the case to the convening authority for a rehearing or "such other action as may be proper." [13] Power to reverse a Navy conviction remained with the convening officer, who could be overturned only by the Secretary of the Navy. [14]

Intense public criticism of the military justice system arose during and after World War II. As a result, the Department of War established a War Department Advisory Committee on Military Justice, known as the Vanderbilt Committee. Members were nominated by the American Bar Association. The primary recommendation, reached after numerous hearings held in Washington and eight other cities, was " [t]he checking of command control." [15] Indeed, the Committee was convinced that "in many instances the commanding officer who selected the members of the courts made a deliberate attempt to influence their decisions." [16] On the heels of this report, reform legislation, known as the Elston Act, was introduced in Congress in 1947 to amend the Articles of War. Ambitiously titled, "Amending the Articles of War to Improve the Administration of Military Justice, To Provide for More Effective Appellate Review, To Insure the Equalization of Sentences, and For Other Purposes," it was eventually passed into law as an amendment to the Selective Service Act of 1948. [17] As part of its reforms, the Elston Act for "the first time, authoriz [ed] reviewing authorities to weigh the evidence in addition to determining the law." [18] Specifically recognizing that "absence of this authority heretofore has been a common cause of criticism," [19] Congress created Article 50(g) in the Articles of War that read: "Weighing Evidence - In the appellate review of records of trials by courts-martial as provided in these articles the Judge Advocate General and all appellate agencies in his office shall have authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact." [20]

C. The Drafting of Article 66(c), UCMJ

The year following the passage of the Elston Act, Congress began work on a bill to unify the disparate military justice systems of the Army, Navy, and Coast Guard, a goal characterized as "a high priority in the National Military Establishment" by Defense Secretary James Forrestal. [21] As part of its overhaul of military law, Congress revisited its then-recent Elston Act amendments to the Articles of War to determine if some of those same reforms should be made applicable to all the military services under the newly proposed UCMJ. Article 50(g) of the old Articles of War was accordingly redrafted into Article 66(c), UCMJ, [22] which, to this day, delineates the powers of Courts of Military Review. That statute states:

In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. [23]

Indeed, Harvard Law Professor Edmund J. Morgan, chairman of the Department of Defense special committee that helped draft the legislation which created the UCMJ, specifically noted in testimony before the House of Representatives Subcommittee on the Armed Services that the Board of Review was "a counterpart of the present board of review of the Army. As the amendment of 1948 provides, it reviews the records of the trial for law, facts, and sentence. To this extent, the Navy system is changed." [24]

Professor Morgan also specifically identified the prevention of command influence as one of the motivations behind incorporating the Elston Act's 1948 Article 50(g) change in the Articles of War into Article 66(c) of the UCMJ:

We think also that we have lessened the command influence by making for all the services the provision which was in the 1948 bill as to the extent of review by the Judge Advocate General's Office; namely, that they can review for law, fact, and sentence, so that they need approve only so much of it as they think entirely justified.

Now the board of review in the Judge Advocate's Office will be far away from the scene of the commanding officer who convened the court. Before that 1948 act the Judge Advocate General's Office could act only on questions of law and not on questions of fact.

Now they can act on the facts. We think that a means of lessening command influence. And when it is a question of law, the case then--in the severe cases--will go the Judicial Council, which will be a civilian court and, of course, entirely outside the influence of any officer. [25]

The Armed Services subcommittee also heard testimony from General Franklin Riter, who, appearing on behalf of the American Legion, discussed how Article 66(c) was needed to provide a method to insure detached and impartial justice on review. General Riter had served in the branch office of the Judge Advocate General in Cheltenham, England, as the chairman of the original board of review established by Presidential decree to review courts-martial arising in the European Theater of Operations during World War II. As chairman, he also served as coordinator of what eventually expanded into five review panels, functioning in effect as a circuit court of appeals, with jurisdiction over European courts-martial. [26] Commenting on the proposed Article 66(c), General Riter testified that the reviewing panels' attempts to adjudicate justly were hampered by principles of law necessarily borrowed from United States Courts of Appeals. He observed:

[The Court] was not defined by statute. The President defined it in setting up the court. As a consequence we found ourselves having to develop our own principles of law. And I had no place to turn except the circuit court of appeals.

And there we ran against that rule of where there is evidence to support the verdict. We have all lost our case on that. They would not go behind that. And time and time again, if we would have had the right--we knew that certain witnesses must have been plain liars that stood there--to judge the credibility of witnesses and weigh the evidence our results would have been different. [27]

In addition to establishing the rationale behind the proposed Article 66(c), the subcommittee was compelled to consider two related issues raised by its potential passage. The first issue was whether the appellate fact-finding power of Article 66 (c) given to the Courts of Review should also be entrusted to the newly created civilian Judicial Council, the predecessor of the USCMA. The second issue was whether the Article 66(c) grant of power to Military Courts of Review to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact," was equivalent to acquittal power. [28]

Several witnesses who appeared before the committee raised the first issue, based mainly on the fear of command influence. Urging the committee to broaden the Judicial Counsel's scope of review, California Congressman Doyle, who was allowed to sit with the subcommittee while not formally a member, believed very "strongly that a military court is not comparable to a civilian court and that we ought to permit the Judicial Council to review the facts as well as the law." [29] Similarly, Mr. John Finn, testifying on behalf of the American Legion, stated:

[T]he Judicial Council should have its powers so broadened that it will be able to review the facts and the law. And I believe that if they are civilians that is the only way that you will be able to get away from this command influence that has been talked about on the review level. [30]

Despite these appeals to broaden the Judicial Council's jurisdiction, subcommittee members refused to amend the proposed draft of the UCMJ. They were apparently swayed by witnesses such as Mr. Frederick P. Bryan, Chairman of the Special Committee on Military Justice of the New York City Bar Association, who noted that with a "judicial council of this nature and with competent boards of review as intermediate appellate bodies it is not necessary to have the final arbiter review questions of fact. The Supreme Court of the United States does not do that either, of course." [31] Significantly, Mr. Bryan's opinion in this regard was based on his perception of the military review boards as "independent" of command influence. [32]

The lighting rod which focused the committee on the second issue (double jeopardy) was a proposed Article 66(e), which read: "Within ten days after any decision by a board of review, the Judge Advocate General may refer the case for reconsideration to the same or another board of review." [33]

Criticized by General Riter as an "insidious thing" because it permitted the Judge Advocate General to "shop around in his command" to obtain a board of review that he agreed with. [34] This proposed article was roundly denounced as improper by many other subcommittee witnesses. [35] Congressman Brooks, the Chairman of the House Subcommittee, stated that "it seems to me it is very close to double jeopardy, when one tribunal finds a man to be innocent and then turns him over to another one for hearing." [36] There were, however, witnesses in support of the proposed Article 66(e). Representative Elston engaged in the following colloquy with Captain Woods, who testified in support of this provision on behalf of the Navy. Captain Woods had indicated that this provision could work in favor of an appellant because "the second board's decision may be favorable." [37]

Mr. Elston: Sometimes that would happen, there is no doubt about that. I am not worried about those cases. If that is all

we were concerned about, then all right. But I am concerned about a case where a board says that a man is not guilty, the facts in the case do not establish his guilt beyond a reasonable doubt and they feel that the case should be dismissed. Then the Judge Advocate General refers it to another board. They have exactly the same authority and they have exactly the same record in front of them and have exactly the same power. And yet you say their decision should be taken as final rather than the decision of the first board. Where is there any precedent for that?

Capt Woods: I have no precedent in the civil practice. Nevertheless we feel rather strongly that the public at large looks to the Judge Advocate General for the administration of justice. In these particular cases he would have nothing whatever to say. [38]

Opposition to Article 66(e) led first to an amendment that limited to one any reconsideration requests by the Judge Advocate General to a Board of Review. [39] This was followed by a unanimous vote by the Congressional Subcommittee to delete subsection Article 66(e) in toto from the proposed UCMJ legislation. [40] Interestingly, immediately prior to the second vote, the committee heard comments from a member of the committee staff, Mr. Smart, who, referencing potential mistakes a board of review could make when exercising its authority under Article 66(c), indicated that "it is commonly held that the accused is entitled to the benefit of that error or doubt." [41]

The proposed UCMJ was soon thereafter favorably reported out of both the Senate and House Subcommittees on the Armed Services, passed both chambers, and signed into law in 1950. [42] Later, President Truman promulgated the 1951 Manual for Courts-Martial (MCM). [43]

III . THE LIMITS OF ARTICLE 66(c)

A. Jurisprudential Limits to Article 66(c)

Military jurisprudence has endeavored to define the parameters of Article 66(c) ever since Military Courts of Review were bestowed their powers in 1950. In accordance with its legislative history, cases have held that the congressional grant of appellate fact-finding power in Article 66(c) actually allows Military Courts of Review to provide convicted military members with a "de novo trial on the record at the appellate level." [44] In addition to providing the Courts of Military Review with appellate acquittal power when they are not "convinced beyond a reasonable doubt" of an accused's guilt, [45] Article 66(c), by its very nature, has been interpreted as giving Courts of Military Review the concomitant ability to "reinterpret facts" found by a military judge on the record, [46] as well as the authority to determine that evidence was unduly prejudicial to an accused. [47] Nevertheless, the powers of the Military Courts of Review under Article 66(c) are neither omnipotent or limitless. In fact, as clearly stated in Article 66(c), the exercise of the Air Force Court of Review's unique appellate powers is limited to "the entire record." Although recognizing the need to allow consideration of extraneous matters in certain cases involving issues such as insanity [48] or jurisdiction, [49] USCMA has long recognized the necessity of limited hearings to properly and fairly develop a factual record prior to adjudicating certain issues on appeal, rather than merely using Article 66(c).

For example, in an early speedy trial case, United States v. Schalck, the USCMA observed: " [t]here are numerous, unanswered factual questions here that should be resolved at a level where testimony can be taken, witnesses examined, and testimony offered in rebuttal. In this matter, the rights and interests of the accused and the Government will be preserved." [50] Indeed, in United States v. Hood, the USCMA actually convened a limited hearing and secured evidence itself in a case involving conflicting affidavits on appeal. [51] In Hood, the appellant attacked the providency of his guilty plea to assault and alleged in an affidavit that, despite his expressed innocence, his defense attorney and the law officer threatened him with eleven years confinement if he did not go through with a previously arranged guilty plea. [52] Both the appellant's defense attorney and the law officer "categorically" denied the accusations in affidavits of their own. [53] Although recognizing "the penchant of convicted felons for turning on their counsel," the court stated: "out of a superabundance of caution and because of the direct conflict in the facts set out in the sworn statements of the accused and his defense counsel and the law officer, we determined to hear testimony from each of the affiants." [54] Eventually, the court was forced to define a clear, uniform means by which a record of trial could be supplemented in an orderly fashion to deal with a growing host of post-trial issues. Absent a provision in the UCMJ, the court was forced to use case law to accomplish this task.

B. The DuBay Hearing

After previously holding that it could consider an extra-record pre-trial conference transcript when deciding whether to

remand an early command influence case back to trial, [55] the USCMA issued a seminal decision in United States v. DuBay. [56] DuBay reemphasized and commended for use the court's practice of requiring limited hearings to sort out conflicting allegations in cases prior to their resolution and adjudication on appellate review. Specifically, the USCMA set forth quite clearly the procedure the Courts of Review were to use when faced with conflicting allegations of command influence on appeal:

In the nature of things, command influence is scarcely ever apparent on the face of the record, and where the facts are in dispute, appellate bodies in the past have had to resort to the unsatisfactory alternative of settling the issue on the basis of ex parte affidavits, amidst a barrage of claims and counterclaims. . . . The conflicts here make the resort to affidavits unsatisfactory and we determine upon the following as the means of settling the matter herein, as well as in the future cases in which a similar issue may be raised either here or before a board of review. . . . In each such case, the record will be remanded to a convening authority other than the one who appointed the court-martial concerned and one who is at a higher echelon of command.

Procedurally, the USCMA noted that the law officer at the proceeding convened to hear the allegations of command influence would:

hear the respective contentions of the parties on the question, permit the presentation of witnesses and evidence in support thereof, and enter findings of fact and conclusions of law based thereon. If he determines the proceedings by which the accused was originally tried were infected with command control, he will set aside the findings or sentence, or both, as the case may require, and proceed with the necessary rehearing. If he determines that command control did not in fact exist, he will return the record to the convening authority, who will review the findings and take action thereon. . . . The convening authority will forward the record, together with his action thereon, to the Judge Advocate General for review by a board of review, in accordance with [Article 66] From the board's decision, the accused may appeal to this Court on petition, or the decision may be certified here by the Judge Advocate General. [57]

Subsequent cases have further defined the procedural characteristics of the DuBay evidentiary hearing. USCMA has held that a DuBay hearing may be ordered by all appellate authorities (including convening authorities), as well as on a military judge's own motion. [58] "A DuBay proceeding," the USCMA held in United States v. Flint, "is utilized to gather additional evidence or to resolve conflicting evidence before determining an issue presented to the appellate tribunal." [59] Almost two decades ago, the ACMR, in United States v. Robinson, recognized the need for appellate defense counsel to frame the issue on which a DuBay hearing is requested. [60] In rejecting the use of a DuBay hearing to "obtain light on the issue [of disqualification of a staff judge advocate to accomplish post-trial review of a case]," the court, stressing the inaction of Robinson's trial and appellate defense counsel in developing the issue for appellate purposes, [61] wrote: "Our functions are not inquisitorial. They are judicial, operative upon the record and other matters properly before us. As the interested party has not laid facts before us, omitting to use the several opportunities to do so, we are not disposed to lead a chase of some ignis fatuus." [62]

Using language from Flint, the ACMR in United States v. Martin, rejected the request of an appellant that his appellate defense counsel represent him at a DuBay hearing since:

a DuBay hearing ordered by this Court is not a part of the appellate function as it has no immediate direct connection with the determination of an issue before the appellate Court but is . . . a hearing utilized to gather evidence in order that an appellate issue may be decided in the future and as such, is an extension of the initial trial proceeding. [63]

USCMA has also characterized the DuBay hearing as the "functional equivalent of appointing a special master and report to [the USCMA]." [64] The right of an appellant to be personally present at a DuBay hearing was explicitly recognized in United States v. Campbell, where the Navy Board of Review held that the DuBay hearing was a "proceeding of the court" pursuant to Article 39, which requires all court proceedings to be held in the presence of an accused. [65] In addition, the accused testifying at a DuBay hearing may, like any other witness, be cross-examined. [66]

C. Resolving Post-Trial Issues via DuBay Hearings

Overview of Case Survey. Since the USCMA's decision in DuBay, cases raising command influence and other issues involving conflicting post-trial factual allegations have usually been remanded for limited hearings. Some lower courts have suggested, however, that the USCMA has signaled recently that, at least regarding ineffectiveness of counsel claims, the practice of remanding post-trial evidentiary conflicts for DuBay hearings has changed. [67] When both the recent

decision in United States v. Dykes [68] and these ineffectiveness cases are examined, however, these assertions are far from convincing.

Guilty Pleas and Pretrial Agreements. Since its pre-DuBay decision in Hood, [69] USCMA has held that normally an appellate court should not consider matters outside the record in setting aside a guilty plea. [70] The USCMA, however, has remanded for DuBay evidentiary hearings the issue of whether secret, or sub rosa, agreements, existed prior to the entry of guilty pleas. As the USCMA stated in United States v. Green:

Judicial scrutiny of plea agreements at the trial level not only will enhance public confidence in the plea bargaining process, but also will provide invaluable assistance to appellate tribunals by exposing any secret understandings between the parties and by clarifying on the record any ambiguities which lurk within the agreements. More importantly, a plea bargain inquiry is essential to satisfy the statutory mandate that a guilty plea not be accepted unless the trial judge first determines that it has been voluntarily and providently made. [71]

Recently, the USCMA revisited the issue of ambiguous pretrial agreements in United States v. Olson. [72] In Olson, the USCMA noted that a DuBay hearing could be used to dispel any doubt as to an appellant's understanding of a pretrial agreement that revolved around the appellant's agreement to reimburse the Government for overpayment resulting from allegedly false travel vouchers. [73] The court refused to do so in that case "because it would be impossible for the Government to disprove appellant's claim as to his understanding of the pretrial agreement [limiting reimbursements to vouchers which were the subject of the charge]." [74] Accordingly, the court set aside the fine in order for the appellant to receive the benefit of his bargain, commenting, "the Government can hardly complain if we accept [appellant's] understanding, for he promptly requested a post-trial hearing when it could have been more readily provided, and his request was denied by the military judge and the convening authority." [75]

Attorney/Client Relationships. A number of post-DuBay cases reflect the USCMA's desire to insure the integrity of the right to counsel and the attorney-client privilege. In United States v. Perez, a right-to-civilian counsel case, USCMA compared an appellant's affidavit with the affidavit of his appointed defense counsel and found contradictions. [76] The USCMA then observed:

The evidence before us does not so compellingly demonstrate an accuracy of recollection by one as opposed to the other on the question of the accused's desire to obtain civilian counsel to represent him as to justify determination of the issue on the basis of the affidavits. In our opinion, a hearing is required at which witnesses may testify and be cross-examined. [77]

Likewise, in United States v. Payton, the USCMA was disturbed by "inconsistencies and omissions" found by its examination of "various post-trial attachments," including affidavits. [78] In Payton, the appellant alleged that information provided by him to an appointed legal representative for his defense in a foreign criminal trial was inappropriately disclosed to the Government. [79] The USCMA observed the importance of the attorney-client relationship to the fairness, integrity, and public reputation of the military justice system and remanded the case back to the trial level for a DuBay hearing on the client confidentiality issue, stating: " [o]n the basis of such a record, we are not convinced beyond a reasonable doubt that appellant was not prejudiced at his court-martial." [80] The USCMA was similarly reluctant in United States v. Moreno to resolve several post-trial issues involving an appellant's confession in light of the fact the appellant's interview occurred subsequent to his arrest and after he had asserted his right to counsel. [81] Accordingly, the USCMA remanded the case for a DuBay evidentiary hearing to determine "the extent of the appellant's attorney-client relationship and whether appellant properly waived his Sixth Amendment right to counsel prior to interview." [82]

Jurisdictional Issues. During pre-Solorio [83] days, the USCMA relied on the DuBay evidentiary hearing to flesh out jurisdictional post-trial issues. In United States v. McCarthy, for example, the court specifically refused to use an Article 32 investigation to resolve a subject-matter jurisdictional issue, noting that evidence outside the record should be "limited to determining whether a rehearing to gather additional evidence is warranted," since evidence bearing on a courts-martial's jurisdiction "should be subject to cross-examination before it is adopted by an appellate tribunal." [84]

Immunity. The USCMA reversed an appellant's conviction in United States v. Zayas and remanded the case for a DuBay hearing to determine the substance and quality of a witness' exculpatory testimony which was the subject of an improperly denied defense witness immunity request. [85] The court reaffirmed the practice of remanding for DuBay hearings improperly denied immunized testimony in the more recent case of United States v. Thomas. [86]

Pretrial Punishment. Although R.C.M. 905(c)(d), and R.C.M. 906 require that appropriate relief for improper pretrial

punishment must be raised before the adjournment of a court-martial under pain of waiver, in United States v. Cruz, the USCMA apparently carved out an exception for cases presenting unique circumstances such as the possibility, raised by post-trial matters, of the existence of a sub rosa "agreement between the staff judge advocate and defense counsel to prevent [the issue's] litigation." [87] In such cases, the USCMA indicated that a DuBay hearing could be ordered "to resolve these post-trial questions." [88]

Fraud. In the 1968 case of United States v. Whitley, the USCMA clearly expressed its preference that DuBay hearings be used to explore fraud allegations. [89] The USCMA noted that the witness perjury allegations in Whitley were turned over to the Navy Investigative Service over defense objection, and how subsequently "no notice was given to the defense as to the time and place of questioning, but on several occasions, trial counsel appeared and participated in the proceedings." [90] Citing DuBay and putting "aside the threshold questions as to the propriety of the procedure used in the investigation, especially the allowance of participation by trial counsel, but disregard of defense counsel's request that the investigation be conducted [like an Article 32 investigation]," the USCMA found the witnesses lied to the prejudice of the appellant and reversed the case, granting a petition of a new trial. [91] A DuBay hearing was used by the USCMA in United States v. Giambra for further inquiry into whether a post-trial recanting prosecutrix actually gave perjured testimony at the appellant's court-martial. [92] Noting that DuBay hearings are ordered "to take testimony and resolve these factual controversies," the court found that such a hearing was appropriate for the fair resolution of the accused's appeal. [93] Ordering the military judge at the evidentiary hearing to dismiss the findings and sentence if he found the victim had lied at trial, the USCMA requested the case be returned to it for further consideration if the victim, at the DuBay hearing, refused to testify under oath or was found to have lied regarding her recantation. [94] Recognizing that alleged victims are not the only ones who are capable of injecting fraud into the military justice system, the USCMA, in United States v. Queen, "prefer [ing]. . . not to decide the case on inferences from a skimpy record," remanded a case for a DuBay hearing on the issue of whether an affiant's statements to a commander-search authority was "intentionally false or made with reckless disregard for the truth." [95]

Court Personnel. In at least two cases, the USCMA has endorsed the use of DuBay evidentiary hearings to investigate potential improprieties on the part of trial personnel. In United States v. Coping, the court reviewed a case in which the ACMR had ordered a DuBay hearing to investigate the circumstances behind some ex parte communications between a military judge and a trial counsel. [96] In United States v. Stone, the USCMA granted review in a case in which appellant alleged post-trial that he failed to receive a fair and impartial trial because the court members had engaged in loud and boisterous laughter while in the deliberation room, and that during a recess from the deliberations on findings, one panel member had expressed to another the belief that appellant was guilty. [97] After an investigation under Air Force Regulation 120-4 was ordered by the convening authority, the investigating officer concluded that there "was no evidence to substantiate improper conduct by the court members. [98] Despite affirming the appellant's conviction, the USCMA registered its displeasure with the manner in which the allegations of court member misconduct was explored. Noting that the convening authority used an administrative investigation to deal with the allegations of misconduct by the court members, the USCMA stated that "judicial, rather than administrative, inquiry is the appropriate method of resolving allegations of misconduct by court-martial members." [99] If such a record has already been transmitted to the Court of Military Review, the USCMA noted that then a DuBay hearing should be convened, wherein the "appellant would be represented by counsel, have an opportunity to cross-examine witnesses, have findings of fact and conclusions of law entered on the . . . issue, and have a verbatim record of the proceedings." [100]

Discovery. DuBay evidentiary hearings also have been used to assess prejudice to appellants who were improperly denied the opportunity to request or obtain evidence, both documentary and testimonial. The failure of a military judge to examine defense-requested social service and mental health records prompted the USCMA to remand a case for a DuBay hearing in United States v. Reece. [101] the USCMA instructed the judge to set aside the findings and sentence and remand the case to the convening authority if at the subsequent hearing the judge were to find the information relevant. [102] Similarly, in United States v. Killebrew, the USCMA reviewed a case in which the Government had intentionally blocked defense access to an informant-witness. [103] Because the record failed to establish what information was available from this witness and its usefulness, the USCMA remanded the case for a DuBay evidentiary hearing to determine what information might have been provided if access had been granted to the defense counsel . [104]

Courts-Martial Procedural Rights. In United States v. Hilow, the ACMR ordered a DuBay hearing to investigate the panel selection procedures used at the appellant's court-martial. USCMA relied on the results of the hearing in holding that "even the unknowing selection by the convening authority of stacked members from [an orchestrated] pool" violated Article 37, UCMJ. [105] In two other lower court cases, the selection procedure of a convening authority and the preferral rational of a commander also were investigated by means of a DuBay evidentiary hearing. [106] In cases raising the issue

of improper preemptory challenges by trial counsel, the USCMA resolved to remand cases for DuBay hearings in the absence of a "clearly articulated" affidavit explaining trial counsel's motions for peremptorily challenging panel members of appellant's race. [107] In so holding, the USCMA acknowledged the split among Federal Circuit Courts regarding whether the use of ex parte affidavits were a proper means of resolving this issue. [108] Finally, the USCMA recently added one more issue amenable to DuBay investigation in United States v. Holloway -- whether an officer who orders an accused into pretrial confinement qualified as a neutral and detached magistrate in order to meet the forty-eight hour requirements of R.C.M. 305(d) or (h). [109]

Ineffectiveness of Counsel. DuBay precedent involving ineffectiveness of counsel claims is necessarily more complicated than that involving other post-trial issues. This complication is the result of two factors. The first complication involves the confusion engendered by the use of the two-prong test found in Strickland v. Washington, which requires a reasonable doubt as to guilt even if the court finds a counsel ineffective. [110] Second, confusion exists over the difference between what one might call "external" or nonstrategic actions by trial counsel and "internal" or strategic actions by counsel. The USCMA requires a DuBay hearing when factual allegations underpinning the asserted ineffectiveness claim are directly contested by trial defense counsel and, if true, would result in an unreliable verdict or sentence. Confusion regarding this distinction evidently prodded USCMA to issue the guidelines in United States v. McGillis, a case in which an ineffectiveness claim was submitted "on the merits" and summarily affirmed by the ACMR as "correct in law and fact." [111] The USCMA noted that "unless such [ineffectiveness] claims are investigated below or briefs are filed by both sides, we have no means of determining if they amount to 'good cause shown' entitling appellant to review of his case." [112] The USCMA addressed the three basic questions it confronts in every ineffectiveness allegation case:

1. Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions in defense of the case?

2. If they are true, did the level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers"? United States v. DiCupe, 21 M.J. 440 *[cited at]* , 442 (C.M.A.), cert. denied, 479 U.S. 826 *[cited at]* , 107 S.Ct. 101 *[cited at]* , 93 L.Ed.2d 52 (1986).

3. If ineffective assistance of counsel is found to exist, "is . . . there . . . a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." United States v. Scott, 24 M.J. 186 *[cited at]* , 189 (C.M.A. 1987), quoting Strickland v. Washington, 466 U.S. 668 *[cited at]* , 695, 104 S.Ct. 2052 *[cited at]* , 2069, 80 L.Ed.2d 674 (1984). [113]

"Absent some explanation to support the allegations from appellate defense counsel," the USCMA noted, "we are left to speculate" and "our decision to grant a petition for review should not be based on our speculation on such important matters." [114]

The USCMA focused on the "internal" strategy aspect of post-trial ineffectiveness claims in United States v. Cordes. [115] Highlighting the fact that an ineffectiveness claim is "ultimately a question of law," the USCMA rejected a defense request for a DuBay hearing, stating that "prejudicial impact resulting from counsel's conduct, however, does not alone establish a claim of ineffective assistance of counsel." [116] Even assuming prejudice, the USCMA found a reasonable explanation for defense counsel's conduct from the record, pleadings, and a post-trial affidavit from trial defense counsel. [117]

The USCMA further refined the notion that information received by way of affidavit could be used to determine legal, tactical questions in United States v. Mays. [118] In Mays, the appellant attacked the defense counsel's affidavit referencing the appellant's post-trial admissions submitted in response to a "broad claim of ineffective assistance of counsel that extended to virtually every portion of the trial." [119] The USCMA rejected the appellant's suggestion that the ACMR improperly used the trial defense counsel's affidavit in its factual review of the case. The court held that "the post-trial admission of appellant reported in defense counsel's affidavit rebutted [the contention of undiscovered exculpatory evidence] in an effective way," providing "a logical explanation why counsel's efforts in his pretrial investigation were futile," and that furthermore, the lower court's opinion "expressly considered this affidavit on the competence-of-counsel issue." [120] The absence of an expressed disavowal of its use on the factual question of guilt creates no doubt, the USCMA stated, because the USCMA "will presume the military appellate judges, like military judges, will follow the law." [121]

The USCMA was again forced to deal with a post-trial ineffectiveness allegation with insufficient information in United

States v. Wean, a case involving indecent acts with a minor. [122] The allegations against the trial defense counsel dealt with both internal "trial strategy" actions as well as external actions. The internal allegations included: counsel's failure to object to government "play therapy" evidence; his failure to request funds for a defense expert consultant; and his admission during sentencing argument that "an illness of the mind then compelled [appellant] to do these things." [123] The external allegations involved defense counsel's purported failure to use an alibi defense or call a potential key witness. [124] The USCMA returned the record to the ACMR. The court declined to decide the case "on the basis of the record before" them, stating that the ineffectiveness claim requires "answers to certain factual questions which are not clear from the record." [125] The court further noted that " [i]n view of the inadequate or nonresponsive affidavits of defense counsel already filed in this case," the Court of Military Review should order an evidentiary hearing or additional affidavits. [126] Nowhere, it should be noted, did the USCMA approve of using Article 66(c) power to pick and choose disputed facts from among directly conflicting ex parte affidavits regarding allegations involving a defense counsel's external actions, although some courts have started to assert their authority to do just this in some ineffectiveness cases. [127]

Command Influence and Collateral Hearings. Military courts have never clearly identified the intimate and explicit link between the promulgation of Article 66(c) and the prevention of command influence. Nevertheless, the USCMA has expressed an aversion to allowing appellate courts to decide command influence issues on appeal by merely choosing among disputed facts from ex parte affidavits submitted during the appeals process. Indeed, in command influence cases, the "mortal enemy of military justice," [128] findings and sentences may not be affirmed unless the appellate court is "convinced beyond a reasonable doubt that the command influence which the appellant alleges had no affect on the findings and sentence." [129]

When faced with allegations of command influence, the USCMA usually relies on testimony developed at trial hearings or on uncontroverted facts adduced via depositions or interrogatories on appeal. In United States v. Thomas, in which a general officer was alleged to have made inappropriate comments amounting to command influence, the facts were developed at either the accused's actual trial or at limited hearings ordered after affidavits were submitted to the Army Court of Review. [130] In United States v. Allen, the courts relied on evidence that included, in part, the use of interrogatories, when holding that attempts to select a military judge did not infect trial. [131] Furthermore, with regard to the interrogatory evidence, USCMA clearly noted that the Court of Review, prior to holding that the appellant did not suffer from the lack of a witness's personal appearance, found that the interrogatories were "themselves sufficient to raise the issue of unlawful command control of [the appellant's trial]," and thus "the appellant was not deprived of the ability to present his case because he was forced to use the interrogatories as evidence rather than a live witness." [132] USCMA also pointed out that the interrogatories were not the "only evidence on this subject," and, more importantly, the truthfulness of the answers to the pertinent questions was not in doubt. [133] Similarly, in United States v. Mabe, [134] charges of command influence by the Chief Judge of the Navy-Marine Corps Trial Judiciary were first raised on appeal by an incomplete letter from the appellant to USCMA. [135] They were factually explored by way of depositions generated by the Navy-Marine Corps Court of Review and appellate defense counsel. [136] The facts, thus elicited, were uncontroverted, and the issue in dispute on appeal involved the legal interpretation to be given those facts. [137]

In two cases, USCMA has criticized the use of investigative proceedings instead of DuBay hearings to look into allegations of command influence. In United States v. Cruz, the USCMA, with no apparent defense objection, relied on facts garnered by way of an official army investigation into an appellant's post-trial command influence assertions. [138] After noting that a "post-trial hearing similar to that ordered in [DuBay] is the preferred method for dealing with these matters," the USCMA remanded the case for a new sentence, holding the appellant suffered command imposed pretrial punishment when apprehended. [139] The USCMA likewise relied on, but criticized, the use of an investigative rather than a judicial DuBay hearing to adduce evidence regarding pretrial command influence by an accused military commander in United States v. Levite. [140] The USCMA highlighted the fact that in a DuBay hearing, unlike an administrative investigation, "an appellant would be represented by counsel, have an opportunity to cross-examine witnesses, have findings of fact and conclusions of law entered on the command influence issue, and have a verbatim record of the proceedings." [141] The USCMA concluded that an informal administrative investigation "is an inadequate substitute" for a DuBay hearing. [142] After stating that "neither party disputes the facts developed by an informal investigation," The USCMA nevertheless reversed the case because of "pervasive" and "pernicious" command influence. [143]

The USCMA itself has ordered DuBay hearings to investigate command influence allegations prior to disposing of the issue on appeal. In United States v. Kitts, the USCMA granted review in a case in which appellant alleged post-trial that the actions of the staff judge advocate aboard the ship on which he was court-martialed constituted unlawful command influence. [144] The USCMA found that the matters raised by appellant -- such as commanders contacting witnesses prior

to trial and the staff judge advocate appearing on the ship's television system via videotape to discuss the pending court-martial and requiring the defense to submit a motion list prior to any pretrial agreement -- called into question the fairness of the sentencing proceedings, but were inadequate to resolve the issue. [145] The USCMA accordingly ordered a DuBay hearing to determine if command influence was involved and whether the sentence was adversely affected. [146] Likewise, in United States v. Smith, the USCMA, after receiving post-trial affidavits from both the appellant and the Government, remanded a case for a DuBay hearing to explore allegations that the decision to refer charges to trial was the result of unlawful command influence on the convening authority. [147]

Summary. This survey of DuBay precedent establishes that neither USCMA nor the majority of the Military Courts of Review have ever been comfortable with choosing disputed facts from contradicting affidavits when deciding appellate issues. Instead, military appellate courts have consistently recognized the need to have conflicting post-trial allegations tested in an adversarial proceeding. [148] Judge Cox's observation in Parker that DuBay hearings are ordered when "extra-record fact determinations were necessary predicates" to the resolution of the appellate post-trial issues was, indeed, entirely accurate. [149] So too was his observation that there is no mechanism set out in the Uniform Code of Military Justice for the court to evaluate such post-conviction claims that come to the court in "the form of affidavits or even unsworn allegations." [150] The practice of remanding disputed appellate predicate facts for DuBay adjudication, however, was broken dramatically by the AFCMR in United States v. Dykes, when that court, citing Article 66(c), rejected an appellant's post-trial allegations of command influence by electing to adopt the facts contained in one ex parte affidavit over directly conflicting claims found in the appellant's affidavit. [151]

IV. IN SEARCH OF A STANDARD: UNITED STATES V. DYKES

In Dykes, the USCMA directly confronted the practice of using Article 66(c) to resolve appellate issues disputed in conflicting post-trial affidavits. During the lower court's review of the case, the AFCMR had used Article 66(c) to reject Dykes' post-trial claims of command influence by choosing to believe a conflicting affidavit from the trial defense counsel denying the claims. [152] Specifically, Sergeant Dykes pled guilty to using a false writing to obtain the approval and payment of a claim against the United States. [153] On appeal and via affidavit, Dykes asserted, inter alia, that six individuals were discouraged from providing character evidence on his behalf and that his trial defense counsel was the subject of command influence. [154] In response, appellate government counsel submitted an affidavit from Dykes' defense counsel that denied the existence of a sub rosa agreement; denied that he was "unduly influenced" by his conversations with the appellant's commander; and contended that he interviewed two unnamed persons whom the appellant and his mother identified as being improperly influenced and that they made no undue influence claims to him. [155] In rebuttal, Sergeant Dykes submitted affidavits from those two individuals who asserted that they were never contacted by the defense counsel before, during, or after the appellant's court-martial. [156]

Faced with these contradictory claims, the AFCMR, citing Article 66(c), made extensive findings of fact and conclusions of law when rejecting the appellant's contentions of unlawful command influence. [157] The USCMA reversed and remanded the case for a limited hearing on the issue of command influence. [158] Chief Judge Sullivan, in an opinion joined by Judge Wiss, noted that Article 66(c) does not "expressly provide for the appellate resolution of collateral claims not raised at the court-martial," and noted that the USCMA long ago in DuBay recognized the procedure by which the record of trial may be expanded through an evidentiary hearing. [159] With regard to cases alleging command influence, Chief Judge Sullivan noted that the quantum of proof is "beyond a reasonable doubt, with the burden of persuasion on the Government." [160] A post-trial evidentiary hearing is not required, Dykes held, "if no reasonable person could view the opposing affidavits in [the] case, in light of the record of trial, and find the facts averred by the appellate to support his claim of unlawful command influence." [161]

Finding that "the Government's affidavit does not provide a sufficient basis in fact to reject beyond a reasonable doubt appellant's unlawful-command-influence claims," the USCMA concluded that the "post-trial affidavit submitted by the Government does not compellingly demonstrate the invalidity of appellant's collateral claims." [162] Although Chief Judge Sullivan, in dicta, cautioned that "mere submission of post-trial affidavits does not usually require an evidentiary hearing in order to resolve a post-trial collateral claim," [163] he nevertheless opined in the opinion's single footnote that the court has "not clearly articulated a standard for determining when resorting to affidavits is unsatisfactory for resolving such collateral matters." [164] Judge Cox, who concurred separately, highlighted the fact that the adoption of a procedural rule is the prerogative of the President, and suggested that "perhaps the Joint Services Committee might consider how collateral attacks on courts-martial should be litigated." [165]

V. BREAKS IN THE DIKE: EVALUATING THE NEW STANDARD FOR REHEARINGS A. Overview

This section reviews some basic issues raised by the Dykes "reasonable person" standard for determining when to convene a DuBay evidentiary hearing. In particular, after noting the impropriety of using Article 66(c) as the statutory source for an evidentiary rehearing, this article highlights several potential conceptual pitfalls associated with this new standard. Also discussed is how these pitfalls could lead to the misuse of the Dykes test in a manner not contemplated by USCMA when deciding Dykes.

B. A Hijacked Article

The Dykes opinion in all likelihood prevented further improper use of Article 66(c) as a substitute for remanding appropriate predicate facts for DuBay hearings. Nevertheless, USCMA failed to clearly enunciate the fact that Article 66 (c) was never intended by Congress to be a vehicle through which the courts of military review could determine contested post-trial facts necessary to resolve appellate claims. [166] Unless this congressional intent is clearly understood, the USCMA will no doubt be facing future appellate issues regarding the misuse of Article 66(c).

At the very least, this misuse of Article 66(c), a statute intended to confer a benefit on military members by enabling appellate courts to acquit on factual "reasonable doubt" grounds, [167] raises several serious due process constitutional concerns. Allowing military appellate courts to use Article 66(c) to decide which of two conflicting predicate facts found in ex parte affidavits is true also raises due process concerns because such a process is inherently unreliable. In misusing Article 66(c) in this way, military courts effectively would be using the statute to accept as fact an affiant's ex parte testimony against an appellant without the evidence being tested by cross-examination, "the greatest legal engine ever invented for the discovery of truth." [168] Indeed, the Supreme Court recently reemphasized the fact that the raison d'tre of the Sixth Amendment's Confrontation Clause is "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversarial proceeding before the trier of fact." [169]

For example, the AFCMR in Dykes used its purported fact-finding authority under Article 66(c) [170] to resolve "the conflicting contentions [regarding command influence] contained in the flurry of affidavits submitted by the parties," and adopted unreliable, untested, evidence upon which to base their appellate findings. AFCMR's opinion was founded on evidence not "subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings" -- testing characterized by the elements of confrontation: "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." [171] The AFCMR's "findings" against the appellant in that case thus cannot be considered, by any measure, factually reliable or grounded in legal principles. [172] It is beyond dispute that the drafters of Article 66 (c) never intended this result, for they never intended it to be used to adopt predicate appellate facts asserted in untested adversarial ex parte affidavits. Moreover, such a practice heretofore has never been countenanced in military jurisprudence.

B. The Reasonable Person Standard-- An Unneeded and Unreasonable Test?

The Reasonable Person Pitfall. A post-trial evidentiary hearing is not required under the Dykes test if, in a given case, "no reasonable person could view the opposing affidavits" in "light of the record of trial," and "find the facts averred by the appellant to support his claims of unlawful command influence." [173] The potential pitfalls of this standard are twofold: first, lower courts of review could apply the methodology subjectively, and second, the incorporation of the record into a "reasonableness" analysis fosters the unrealistic assumption that valid post-trial appellate claims are always related to the trial record -- a drastic break from well-established precedent.

The potential subjective application of the ideally objective "reasonable person" test stems from its facial ambiguity. Nowhere does the Dykes opinion clearly define what would constitute sufficient corroboration of issues raised in an appellant's post-trial affidavit such that a post-trial evidentiary hearing would be needed. Is a "scintilla of evidence" adduced from the facts in the record sufficient to support a post-trial evidentiary hearing by a Court of Review? Or is a court of review required to find that an appellant's main averments are "substantially supported" by the record of trial?

Similarly, what impact does an opposing affidavit have on the issue of whether the record would lead a reasonable person to determine that there was no way to find the facts averred by the appellant to be true? Will an ex parte, detailed denial coupled with a counter-assertion (e.g., a trial defense affidavit that denigrates or improperly reveals client confidences) offset an appellant's assertion? Would such an affidavit provide a "sufficient basis in fact" to reject an appellant's post-trial claims, the condition precedent lacking in the Government's counter-affidavit according to the USCMA in Dykes? Or would an innocent explanation regarding a questionable factual scenario resolve a post-trial allegation? In the absence of an articulable, reasoned basis grounded in precedent and legal principles on which to reject a service member's post-trial

claims, the Dykes standard threatens to become a mantra cited by the courts of review to justify a "best-guess" decision. [174]

Command Influence - Reality v. Fiction. In addition to being open to misinterpretation, the Dykes "reasonable person" standard could collide with the unfortunate reality described so aptly in DuBay, namely that "in the nature of things, command influence is scarcely apparent on the face of the record." A standard in which a post-trial allegation is tested too strictly in "light of the record of trial" is one that would effectively extinguish the appellate command influence searchlight. Indeed, command influence often does not leave footprints in a record of trial. [175] As Mr. Bryan noted decades ago in his testimony to the congressional subcommittee considering the passage of the UCMJ, "when we talk of the commander, the words are not a part of the record at all. They are completely extra record, and nobody knows what was said, and no reviewing authority has anything before it." [176] To now hold, as Dykes could be construed, that the records of trial must give a reasonable person some undefined grounds to find that claims raised in a post-trial affidavit are supportable runs counter to this truism. The unfortunate consequence of permitting such an interpretation is the weakening of the military justice system's ability to diagnose and ferret out command influence, as well as other practices inimicable to military law such as sub rosa agreements, conflicts of interest, and fraud. [177]

In sum, the USCMA's reasonable person standard in Dykes, although it dampens the wholesale use of Article 66(c) powers, nonetheless fails to close the door completely on its unauthorized citation by lower courts when attempting to resolve conflicting affidavits. Moreover, the standard, without being firmly rooted in precedent, could be misapplied by the courts of review as requiring the veracity and validity of a post-trial affidavit to depend in part on adverse ex parte affidavits and to be tethered firmly to the record of trial. In the absence of a carefully crafted procedural rule to deal with post-trial collateral claims, a constitutionally valid approach to the Dykes test for resolving appellate claims can be measured by recourse to federal appellate practice and its accompanying case law.

VI. REINFORCING THE DIKE-- A DEFENDABLE DYKES' REHEARING STANDARD

A. Constitutional Due Process

Military members, like their civilian counterparts, are protected by the Due Process Clause of the Fifth Amendment in criminal proceedings. [178] Interpretation of the Dykes rehearing standard accordingly must incorporate this constitutional requirement. [179] As Chief Judge Sullivan intimated by citing federal habeas corpus cases in Dykes, [180] lower military courts of review attempting to apply the Dykes standard could benefit from an examination of federal jurisprudence. Indeed, some conclusions regarding the constitutional mandates of the Due Process Clause can be discerned from three areas. The first area is the Supreme Court case of Burns v. Wilson, which held that military appellate courts must "fully and fairly" deal with appellate issues raised by military accused to avoid de novo review by federal courts. [181] The second area is subsequent federal case law reviewing military cases. And finally, conclusions may be drawn from federal statutes and opinions involving habeas corpus attacks on state criminal convictions. An evidentiary DuBay standard that violates due process by either misusing Article 66(c) or by failing to provide the requirement of a "full and fair" hearing, or both, increases the vulnerability of military cases to subsequent collateral habeas corpus due process attack.

Burns v. Wilson. In the Burns case, two military petitioners mounted a habeas corpus due process attack on two rape and murder convictions. The petitioners alleged that they had been illegally detained, forced to provide confessions, denied choice and effectiveness of counsel, denied exculpatory evidence, convicted on procured perjured testimony, and subjected "to a trial conducive to mob violence." [182] The district court dismissed the habeas corpus applications without hearing evidence and without further review. The court of appeals affirmed the district court's decision only after giving full consideration to the military petitioners' allegations on the merits, and reviewing in detail the "mass of evidence" found in the transcripts of the trial and other proceedings before the military court. [183] The Supreme Court, while observing that "the military courts like state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights," affirmed the district court's dismissal of the applications without an evidentiary hearing. [184] The Court held that although a district court is empowered to review courts-martial convictions de novo should the military courts "manifestly refuse to consider [a petitioner's] claims," [185] such was not the case in Burns, where "records make it plain that the military courts have heard petitioners out on every significant allegation they now urge." [186] Specifically, the Court noted that the military reviewing courts scrutinized the record and concluded, "in lengthy opinions," that "the petitioners were given a complete opportunity to establish the authenticity of their allegations." [187]

The Court specifically commented on the opinions of the military appellate court that resolved the petitioners' post-trial

allegations. In so doing, the Court noted that: 1) the trial court fully explored whether the petitioners' original counsel was not "available to participate" at trial (counsel having been arrested for serious misconduct and moral turpitude); [188] 2) that the petitioners had declared at the beginning of trial that they were "ready to proceed;" [189] 3) that the trial proceeded in "an orderly fashion" and "a calm degree of dispassion;" [190] 4) that the forced confessions allegations were the focus of "exhaustive inquiry" that included witness testimony; and 5) that the charges relating to the use of perjured testimony and planted evidence were "either explored or were available for exploration at trial," with the opportunity "to question each witness about his or her relationship with the investigation of the case." [191] Noted also was a special investigation by the Army Inspector General which concluded that the allegations were unfounded. The Court noted: "This report is not a part of the record, and we cannot rely upon it to sustain our conclusions, but we can cite it as an example of the efforts of the military to resolve and not ignore petitioners' charges." [192]

Subsequent Federal Opinions. Interpreting Burns in Watson v. McCotter, the Court of Appeals for the Tenth Circuit held, in dismissing an applicant's habeas corpus application, that "full and fair consideration" of a military member's claim does not equate to an "evidentiary hearing on an issue to avoid further review in the federal courts." [193] Specifically declining "to adopt a rigid rule requiring evidentiary hearings for ineffective assistance claims," the court held that the military did give fair and full consideration to Watson's ineffectiveness claims, finding that he did receive a hearing on his claim in his appeal to the ACMR. [194] The Army court, the Tenth Circuit held, expressly considered the post-trial affidavit of the appellant's counsel and demonstrated that they examined the trial record, and that "under the circumstances of this case, it was unnecessary for the District Court to issue [a show cause order] or to hold an evidentiary hearing," as the application shows, "even without the trial record," that "Watson was not entitled to relief." [195] The Watson court, while holding that an evidentiary hearing was not needed to resolve Watson's particular ineffectiveness of counsel claims, specifically cited DuBay, [196] when noting how "military courts have set up procedures for supplementary evidentiary hearings when a convicted person raises issues about which there is a factual dispute that cannot be settled with mere examination of the record." [197]

After reviewing federal case law, the Court of Appeals for the Fifth Circuit, in Calley v. Callaway, concluded that the power of federal courts to review military convictions, where military courts have previously considered and rejected the same contentions, "depends on the nature of the issue raised," and accordingly set forth a four-part inquiry: 1) the asserted error must be of substantial constitutional dimension; 2) the issue must be one of law rather than of disputed fact already determined by the military tribunal; 3) military considerations may warrant different treatment of constitutional claims; and 4) the military courts must give adequate consideration to the issues involved and apply the correct legal standards. [198] With regard to the second factor, the court noted that federal courts may not "retry the facts or reevaluate the evidence, their function being limited to determining whether the military has fully and fairly considered contested factual issues." [199]

The court used the second factor in reversing the district court's grant of a habeas corpus writ to Calley. The decision had been premised in part on the military judge's handling of a command influence issue in which Calley had requested the issuance of subpoenas to several prominent public and high ranking military figures. [200] The court noted that the military judge "conducted an extensive hearing on Calley's [command influence] contentions," [201] which included making the Government rebut Calley's allegations through the testimony at trial of all the witnesses involved in the pretrial processing of the case. [202] The court of review's decision in this case, the court also observed, "discussed fairly and at length" [203] the testimony of these individuals prior to affirming the trial judge's determination that "there was no evidence to support the accusations of command influence," [204] which effectively dissipated the basis of the subpoena request. Accordingly, the court held that the conclusions of the military judge, which were fully and fairly considered and reaffirmed by the Court of Military Review, amply support the decision not to subpoena the witnesses in question and rendered the district court's holding to the contrary outside the "proper scope of review." [205]

State Evidentiary Hearings. Like military convictions, state criminal convictions have been subject to habeas corpus attack in federal court on evidentiary grounds. Townsend v. Sain [206] lists the factors which entitle a state habeas corpus applicant to a federal evidentiary hearing involving a state conviction. The Supreme Court in Townsend held that a federal court has the power to receive evidence and try the facts anew if the applicant for a writ of habeas corpus alleges facts that, if proved, would entitle him to relief. [207] In such cases, an evidentiary hearing is mandatory if:

(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the

habeas applicant a full and fair hearing. [208]

Driving this decision was the belief that detention in violation of the "fundamental liberties of the person, safeguarded against state action by the constitution" is "intolerable," thus the "opportunity to be heard, to argue, and present evidence, must never be totally foreclosed." [209]

These criteria were later incorporated by Congress in 28 U.S.C.A. Sec. 2254(d), a 1966 amendment to the Federal Habeas Corpus Act of 1867. [210] Recently, the Supreme Court in Keeney v. Tamayo-Reyes, [211] held that, although the Townsend factors were categories of cases in which evidentiary hearings would be required, the requirements of 28 U.S.C.A. Sec. 2254(d) were the exceptions to the normal presumption of correctness of state court factual findings. [212] Kenney also stressed the importance of "ensuring that the full factual development of a claim takes place in state court channels" so as to resolve the claim most appropriately. [213]

Two other Supreme Court decisions are also instructive as to the need for evidentiary hearings. In Blackledge v. Allison, the Supreme Court considered an attack on a guilty plea by a prisoner who alleged his guilty plea was induced by a promise of a ten-year sentence. [214] The Court upheld the Fourth Circuit Court of Appeals' reversal of the district court's dismissal of the habeas corpus petition. The Supreme Court held that the respondent's allegations were not in themselves "so vague or conclusory" as to warrant dismissal for that reason alone, and that the allegations, when "viewed against the record of the plea hearing," were not "so palpably incredible" or "patently frivolous or false" as to warrant summary dismissal. [215] The respondent, the Court concluded, "was entitled to careful consideration and plenary processing of [his claim] including full opportunity for presentation of the relevant facts." [216] If, as the respondent noted, he was advised by counsel to conceal any plea bargain, his courtroom denials that any promises had been made "might have been a court-room ritual more sham than real." [217] The Court noted that the Blackledge case would have "been cast in a very different light" if "a careful explanation of the legitimacy of plea bargaining, the questioning of both lawyers, and the verbatim record of their answers at the guilty plea proceedings" had occurred, a process which would have "almost surely shown whether any bargain did exist and, if so, insure that it was not ignored." [218]

In Franks v. Delaware, the Supreme Court addressed whether an appellant could challenge, subsequent to the ex parte issuance of a search warrant, the veracity of a sworn statement used by police to procure the search warrant. [219] The Court held that a hearing challenging the warrant must be held at an appellant's request if the appellant makes a "substantial preliminary showing that a false statement, knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." [220] Allegations of deliberate falsehood or of reckless disregard for the truth, to be substantial, must be more than conclusory and supported by more than a mere desire to cross examine. "The allegations must be accompanied by an offer of proof," pointing out "specifically the portion of the warrant affidavit that is claimed to be false" and "accompanied by a statement of supporting reasons." [221]

Summary. When one examines the military opinions attacked in unsuccessful habeas corpus cases, it is striking to see the complete and open opportunity given to military appellants to establish the authenticity of their post-trial factual claims. Indeed, from the observation of the Supreme Court in Burns that the petitioners were able to question witnesses forming the basis of their fraud allegations, [222] to the Watson court's approval of the DuBay hearing for resolving factual disputes that cannot be settled with mere examination of the record, [223] federal courts have denied habeas corpus applications where the relevant evidence on disputed predicate facts were garnered and reviewed by military courts prior to a decision. Furthermore, a review of the Keeney, Townsend, Franks, and Blackledge decisions, as well as 28 U.S.C. Sec. 2254(d), further indicates that the Supreme Court and Congress are loath to dismiss nonfrivolous, undeveloped post-trial claims that, if true, entitle the petitioner to relief. [224] Moreover, it is instructive to recall a footnote in the Allison case, which states: "When the issue involves one of credibility," as is usually the case with the battle of the affidavits, "resolution on the basis of affidavits can rarely be conclusive, but that is not to say they may not be helpful." [225] Any misinterpretation of the Dykes reasonable person test by military courts -- especially opinions predicated on a misuse of Article 66(c) -- would risk de novo review by federal courts. [226]

B. A Constitutional Interpretation of the Reasonable Person Rehearing Standard After Dykes

With the foregoing federal precedent as a guide, the "reasonable person" standard in Dykes for triggering post-trial evidentiary hearings can be interpreted in a manner that both ensures the finality of a military court decision as well as protects a service member's due process rights. Quite simply, if a reasonable person, after examining the record of trial and opposing affidavits, finds that contested facts averred in an appellant's affidavit or other evidence are irrelevant for

resolution of an asserted post-trial error, or directly contradicted by what was earlier established or admitted at trial, no DuBay hearing need be granted. [227] This interpretation of the reasonable person test has several positive attributes.

First, it eliminates due process constitutional problems arising from the improper use of Article 66(c) by Military Courts of Review to resolve disputed predicate, relevant facts. By so doing, this standard eliminates unreliable and irrelevant arguments about which "factors" break appellate credibility disputes, as opposed to which are merely neutral, thereby insuring the continued integrity of, and confidence in, military appellate decisions. [228] Military Courts of Review would instead determine whether a dispute on essential predicate facts indeed exists, focus all appellate parties on asserted valid issues, and weed out non-consequential, speculative, or unduly vague allegations.

Second, this interpretation of the Dykes reasonable person standard is flexible enough to encompass the myriad of post-trial issues explored by way of DuBay hearings, yet easy to understand as a legal principle. [229] As the legal survey in Section III. C. of this article revealed, which asserted facts would be considered predicate disputed facts triggering a DuBay hearing would depend on the asserted post-trial issue, and court opinions denying or granting such evidentiary hearings would be able to clearly enunciate this reasoning in written opinions, thus fortifying their holdings against post-trial collateral habeas corpus attack.

Finally, this interpretation of the reasonable person test has the advantage of being derived from, and consistent with, the long line of DuBay precedent. Indeed, despite the USCMA's assertion in Dykes that precedent did not clearly articulate standards to determine when appellate issues in a case should be remanded for a post-trial evidentiary hearing, [230] the common thread in military jurisprudence with regard to collateral post-trial issues is the need to have conflicting factual allegations, "scarcely apparent on the record," tested in an adversarial proceeding when such facts are predicates to resolving the appellate issues. [231] A military habeas corpus petitioner, if given such a hearing on disputed predicate facts in the course of appellate military review, would have an uphill battle convincing a federal district or appellate court that he was either not given a "full and fair" hearing, or that his due process rights were violated during the military's processing of his case.

C. A Proposed Procedural Rule

Although the use of the constitutional interpretation of the Dykes standard should diminish the chances of a successful post-trial collateral habeas corpus attack on military decisions, the Joint Services Committee should accept Judge Cox's invitation and consider a procedural rule dealing with post-trial evidentiary hearings for Presidential promulgation under Article 36(a). Such a rule, derived from DuBay precedent, would prevent the misuse of Article 66(c) and establish the manner in which post-trial appellate evidentiary hearings are held.

Specifically, R.C.M. 1203 should be amended to include a subsection (c)(6), incorporating DuBay precedent and reading:

(6) Post-trial Factual Determinations and Collateral Hearings during Appellate Review. An appellate authority may not affirm any findings or sentence in which there exists an asserted valid appellate issue(s), [232] the resolution of which depends on the validity of disputed predicate fact(s) asserted on appeal, [233] if such facts have not been resolved on the record at the court-martial or a previous hearing involving the appellant. [234]

(A) To resolve the appellate issues involving disputed predicate fact(s), appellant authorities may, with the concurrence of appellant;

(i) permit the taking of depositions by the appellant and government attorneys, [235]

(ii) propound interrogatories drafted by the court, with input, if requested and desired by, the appellant, and government attorneys, [236]

(iii) consider other records of trial, affidavits, or other statements submitted by any interested party, [237] and/or

(iv) consider stipulations of fact entered into by appellate parties and use the information found therein, after argument and briefs by all parties, to resolve the dispute involving the predicate facts.

(B) Should an appellant nonconcur with (i) - (iv), the appellate authority may direct that the record be forwarded for an evidentiary hearing in front of hearing officer or, should the appellate authority so desire, in front of the military judge

who presided over the lower court proceedings. [238]

(C) A hearing officer must be a commissioned officer with legal training, certified by the appropriate Judge Advocate General as competent to perform the duties of trial and/or defense counsel. The order of the appellate authority will instruct the hearing officer as to the nature of the appellate dispute, the findings of fact needed to resolve the same, and any relevant post-hearing instructions regarding disposition of the record of trial. [239] During the evidentiary hearing, the hearing officer on the record, [240] in the presence of the appellant, and in open court, [241] should

(i) hear the direct testimony of relevant witnesses, including the appellant, should the accused so desire, and permit each to be cross-examined. [242]

(ii) permit the presentation of other relevant evidence. [243]

(iii) permit argument by both parties. [244]

(D) The findings of the hearing officer need not be announced in open court before the parties. If not announced in open court, the findings must be reduced in writing and be included in the record of the collateral evidentiary hearing forwarded back to the appellate authority who ordered the collateral hearing. [245]

(E) If applicable, the appellate authority, after receipt of the collateral hearing findings of the hearing officer, continues its normal review of the case pursuant to its charter under Articles 59(a), 66, or 67. [246]

As can be gleaned in this suggested rule, military appellate practitioners and military courts must still properly identify those disputed facts that are the legal predicates to the proper resolution of asserted post-trial issues. A procedural rule, however, would bring clarity and certainty to appellate practice in this confusing area of the law.

VII. CONCLUSION

Appellate review of courts-martial has evolved from its non-existent status at the beginning of this century to the well-respected judicial review of present day. Nonetheless, a lack of familiarity with the legislative origins and intent of Article 66(c) has lead to its misuse as a substitute for "full and fair" DuBay evidentiary hearings. Such misuse threatens the confidence in, and the constitutionality and finality of, the military appellate process. The USCMA decision in Dykes commendably highlighted the issue of when DuBay evidentiary hearings are appropriate. Unfortunately, Dykes did not unequivocally proscribe Article 66(c)'s improper use by Courts of Review, and instead promulgated a difficult-to-apply "reasonable person" standard for triggering DuBay hearings.

The Dykes "reasonable person" test, nevertheless, can be interpreted in a constitutional manner, the use of which could help military cases withstand a federal habeas corpus attack. Based on principles of law derived from DuBay precedent, such an interpretation encompasses the requirement to have conflicting predicate factual allegations tested in adversarial hearings. Amendment of R.C.M. 1203 would preclude the improper use of Article 66(c) and establish the need for collateral evidentiary hearings. Military justice has struggled to reach a level of appellate review equal to, if not surpassing, other jurisdictions. With its rich precedent to build on, the military justice system is equal to the task of returning Article 66(c) to its proper role in appellate adjudication while providing, when appropriate, a full and fair post-trial evidentiary hearing. Failure to do so deals a severe blow both to the finality of military criminal cases and the reputation of military justice.

Footnotes

*Captain Jividen (B.S., B.A., Miami University; J.D., University of Cincinnati College of Law, is a member of the Utility Litigation Team, Tyndall AFB, Florida. He is a member of the Ohio and District of Columbia Bars.

1. Act of 5 May 1950, ch. 169, 64 Stat. 107 (current version at 10 U.S.C.A. Secs. 801-946 (West Supp. 1993) [hereinafter UCMJ].

2. Id. at Sec. 866(c).

3. Indeed, these powers have been characterized as "unparalleled among civilian appellate tribunals" by the United States Court of Military Appeals (USCMA). United States v. Baker, 28 M.J. 121 *[cited at]* , 122 (C.M.A. 1989).

4. See infra Section II.

5. See e.g., United States v. Tripp, 38 M.J. 554 *[cited at]* (A.F.C.M.R. 1993); United States v. Lewis, 38 M.J. 501 *[cited at]* (A.C.M.R. 1993); United States v. Burdine, 29 M.J. 834 *[cited at]* (A.C.M.R. 1993); United States v. Hamilton, 36 M.J. 723 *[cited at]* (A.C.M.R. 1992); United States v. Fullard, ACM S28698 (A.F.C.M.R. Oct. 4, 1993); United States v. Daffron, 32 M.J. 912 *[cited at]* (A.F.C.M.R. 1991); United States v. Dykes, ACM S8412 (A.F.C.M.R. 19 Feb. 1992), rev'd, 38 M.J. 270 *[cited at]* (C.M.A. 1993); United States v. Johnson, ACM 29744 (A.F.C.M.R. Oct. 29, 1993), rev'd, 38 M.J. 270 *[cited at]* (C.M.A. 1993).

6. United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

7. This article does not discuss rehearings or new trials. A rehearing is authorized when, under certain circumstances, error is found post-trial of "such magnitude that a conviction or sentence cannot stand." United States v. Parker, 36 M.J. 269 *[cited at]* , 271 (C.M.A. 1993). In contrast, a new trial occurs when an accused's petition meets the test set forth in R.C.M. 1210(f)(2). Id. As Judge Cox observed, these two proceedings "may be indistinguishable once you get there, but it's how you get there that matters." Id.

8. A good overview of the evolution of military jurisprudence with particular focus on the lack of procedural and constitutional protections in early military statutes governing the Armed Forces can be found in J. D. Droddy, King Richard to Solorio; the Historical and Constitutional Bases for Court-Martial Jurisdiction in Criminal Cases, 30 A.F.L. Rev. 91 (1989) [hereinafter Droddy].

9. As one court succinctly put it, " [m]ilitary law has evolved a long way since Chief Justice Chase said, nearly 120 years ago, that 'the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment.'" Mendrano v. Smith, 797 F.2d 1538, 1541 (10th Cir. 1986) (citing Ex parte Milligan, 71 U.S. (4 Wall.) 2, 138 (1866) (Chase, C.J., concurring)).

10. Act of June 4, 1920, ch. 227, 41 Stat. 787, 10 U.S.C.A. Secs. 1471-1593, repealed by UCMJ, supra note 1 [hereinafter Articles of War].

11. Act of April 2, 1918, 40 Stat. 501, repealed by UCMJ, supra note 1 [hereinafter Articles for the Government of the Navy].

12. Act of May 26, 1906, 34 Stat. 200, repealed by UCMJ, supra note 1.

13. Articles of War, supra note 10, at 41 Stat. 798, Art. 50. Any disagreement between the Board of Review and the Judge Advocate General regarding the legal sufficiency of a conviction was forwarded to the President through the Secretary of War for the President's resolution. Id. Presidential approval was required prior to the execution of a death sentence. Id. at 41 Stat. 796, Art. 48.

14. Articles for the Government of the Navy, supra note 11, at Article 54.

15. Rep. of War Department Advisory Comm. on Military Justice 6 (1946), cited in Farmer & Wells, Command Control or Military Justice, 24 N.Y.U.L. Q. Rev. 162 (1949) [hereinafter Farmer & Wells].

16. Id. at 6, 7, cited in Farmer and Wells, supra note 15.

17. Act of June 24, 1948, 62 Stat. 604 (1948).

18. H. Rep. No. 1034, 80th Cong., 1st Sess. 7 (1948).

19. Id.

20. Articles of War, supra note 10, at Art. 50(g).

21. Hearings Before A Subcomm. of the Comm. on Armed Services on H.R. 2498, A Bill to Unify, Consolidate, Revise, and Codify The Articles of War, The Articles for The Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish A Uniform Code of Military Justice, 81st Cong., 1st Sess. 597 (1949) [hereinafter House Hearings on the UCMJ].

22. 10 U.S.C.A. Sec. 866(c) (West Supp 1993).

23. Id.

24. House Hearings on the UCMJ, supra note 21, at 604 (testimony of Prof. Edmund M. Morgan, Jr., Professor at Harvard Law School). Accordingly, when the draft of Article 66(c) was formally read to the House Subcommittee, Article 50(g) of the Articles of War was referenced with the comment " [t]his article adopts the Army system of review by a formally constituted board." Id. at 1187. See also, H. Rep. No. 491, 81st Cong., 1st Sess. 31 (1949); Hearings Before a Subcomm. of the Comm. on Armed Services, United States Senate on S. 857 and H.R. 4080, Bills to Unify, Consolidate, Revise, and Codify The Articles of War, The Articles for The Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish A Uniform Code of Military Justice, 81st Cong., 1st Sess. 42 (1949) (testimony of Edmund M. Morgan, Jr.) [hereinafter Senate Hearings on the UCMJ] (both referencing the Elston factual review provision as being incorporated into the UCMJ).

25. House Hearings on the UCMJ, supra note 21, at 608.

26. Id. at 662.

27. Id. at 676.

28. Id. at 1194-95.

29. House Hearings on the UCMJ, supra note 21, at 632 (statement of Congressman Doyle).

30. Id. at 689. (statement of John J. Finn, Judge Advocate, District of Columbia, Department of the American Legion). Mr. George A. Speigelburg, Chairman of the Special Comm. on Military Justice of the American Bar Association, also testified that he would "add to the Judicial Council's rights of review the right to review the facts as well as the law." Id. at 725. Arthur J. Keeffee, Professor at Cornell Law School, argued during the Senate hearings on the proposed UCMJ that the code "chains the Judicial Council to the facts as found by command. This is not the kind of civilian review that we ought to have." Senate Hearings on the UCMJ, supra note 24, at 254.

31. House Hearings on the UCMJ, supra note 21, at 626 (testimony of Mr. Frederick P. Bryan, Chairman, Special Comm. on Military Justice of the New York City Bar Association) See also similar comments by Professor Morgan. Id. at 611.

32. Specifically, while being pressed by Congressman Doyle on his refusal to back an increase in the Judicial Council's jurisdiction, Mr. Bryan observed that "if I may say another thing: It does seem to me that the independence of the review board is an important factor in the consideration of how much power, that is how much scope or jurisdiction, you are going to give to the Judicial Council." Id. at 632.

33. Id. at 621.

34. Id. at 673.

35. Mr. Bryan criticized proposed Article 66(e) as a "sort of a double-take proposition," and not a "very salutary provision." Id. at 624; Arthur Farmer, Chairman of the Committee of Military Law, War Veterans Bar Association, stated that, in light of the Judge Advocate General's right to submit a case to the Judicial Council, "no reason exists" why Article 66(e) should allow the Judge Advocate General to "peddle the case among other boards of review until he obtains the decision which he desires." Id. at 650. John J. Finn, on behalf of the American Legion, adopted General Riter's criticism of this article and "earnestly hoped that the Congress will not pass any law which includes such a provision." Id. at 686.

George A. Spiegelberg, Chairman of the Special Committee on Military Justice of the American Bar Association, testified that "I do not think the Judge Advocate General should be allowed to go shopping around among the boards of review as he is under the present bill, that is the present draft, where the first board of review does not do what he wants. He has the right to go to the Judicial Council." Id. at 725. Colonel John P. Oliver, Army Reserve, Legislative Counsel of the Reserve Officers Association of the United States, told the subcommittee that proposed Article 66(e) was not "sound judicial procedure to permit the Judge Advocate General who is displeased with an opinion by a board of review, to refer the case back or to another board of review. Surely no board of review can act honestly and independently under such supervision and restriction." Id. at 757-58.

36. Id. at 1193.

37. Id. at 1204.

38. When Captain Woods complained that the Judge Advocate General, absent proposed Article 66(e), would not be able to appeal an erroneous factual insufficiency dismissal by a board, Congressman Elston replied, " [t]here has been many a case in the civil courts where the appellate court has erred, and a guilty person has been permitted to go scot free. Of course, the theory of the law is that it is better that 99 guilty persons escape than that 1 innocent person be convicted." Id. at 1205.

39. Id. at 1194-95.

40. Id. at 1207.

41. Id. at 1206.

42. Act of 5 May 1950, 64 Stat. 107 (current version at 10 U.S.C.A. Secs. 801-904, ch 47 (West Supp. 1993)).

43. Manual for Courts-Martial, United States, 1951 (MCM).

44. United States v. Crider, 22 U.S.C.M.A. 108, 46 C.M.R. 108, 111 (1973); see also, United States v. Turner, 25 M.J. 324 *[cited at]* , 325 (C.M.A. 1987).

45. Although not usually published, the AFCMR, in appropriate cases, has in fact sporadically acquitted on appeal in serious cases. See e.g., United States v. Stidman, 29 M.J. 999 *[cited at]* (A.F.C.M.R. 1990) (sodomy and indecent acts upon a child); United States v. Ward, ACM 29083 (A.F.C.M.R. June 2, 1992) (indecent language with a child); United States v. Johnson, ACM 28761 (A.F.C.M.R. July 18, 1991) (forcible sodomy); United States v. Johnson, ACM 27761 (A.F.C.M.R. Sep. 29, 1989) (noncommissioned officer drug use).

46. United States v. Givens, 30 M.J. 294 *[cited at]* (C.M.A. 1990).

47. United States v. Cole, 31 M.J. 270 *[cited at]* (C.M.A. 1990).

48. See, e.g., United States v. Massey, 27 M.J. 371 *[cited at]* (C.M.A. 1989); United States v. Burns, 2 U.S.C.M.A. 400, 9 C.M.R. 30 (C.M.A. 1954). In these cases, the extra-record material usually consisted of a psychiatric examination or sanity board results obtained post-trial pursuant to specific guidelines. Burns, 9 C.M.R. at 31; Massey, 27 M.J. at 374. Lower courts have generally remanded sanity issues for DuBay hearings. See, e.g., United States v. Bell, 34 M.J. 937 *[cited at]* , 941 (A.F.C.M.R. 1992); United States v. Thomas, 34 M.J. 788 *[cited at]* (A.C.M.R. 1992); United States v. King, 32 M.J. 558 *[cited at]* (A.C.M.R. 1991).

49. United States v. Ferguson, 5 U.S.C.M.A. 68, 17 C.M.R. 68 (1954). But see United States v. Perkinson, 16 M.J. 400 *[cited at]* (C.M.A. 1983) (court-martial lacked jurisdiction to proceed when purported oral modification to the convening order apparently detailing members who sentenced accused was not reduced to writing and made part of the authenticated record and the only confirmation was in the form of an affidavit executed eleven months after the trial.)

50. 14 U.S.C.M.A. 371, 34 C.M.R. 151, 154 (1964). See also United States v. Chancellor, 16 U.S.C.M.A. 297, 36 C.M.R. 453, 456 (1966) where the court noted that a rehearing is preferable to evaluating a "veritable blizzard" of conflicting

affidavits in cases involving the providency of guilty pleas.

51. 9 U.S.C.M.A. 558, 26 C.M.R. 338 (1958).

52. 26 C.M.R. at 339-40.

53. Id. at 340-342.

54. The court concluded that the guilty plea was provident, stating:

The accused took the witness chair before the members of this Court. His testimony before us largely repudiated the material assertions in his affidavits. The charges of coaching, threatening and promising vanished into nothingness when he was on the witness stand. His testimony concerning the circumstances surrounding his pretrial agreement to plead guilty did not run counter in any material respect to the affidavit of his trial defense counsel, up to the point shortly before the trial commenced when they met and conversed with the law officer . . . . It is patent from the foregoing, plus other evidence developed at the hearing, that the accused was fully informed on every subject by his counsel, and he does not point out one instance of dereliction of duty, misadvice, or failure to advise. . . . [W]e find that the accused's decision to plead guilty upon terms obtained by his counsel was a free exercise of his own will, with the full and fair understanding of his right to contest the case at any time before sentence.

Id. at 342-43.

55. United States v. Furguson, 5 U.S.C.M.A. 68, 17 C.M.R. 68 (1954). In Furguson, USCMA rejected a strict reading of the term "record of trial" with regard to the exercise of the Court of Review's powers. In that case, court members met with the convening authority, the staff judge advocate, the chief of staff, and the law officer, during which time they were told that firm and prompt action was needed in such cases. A record of the remarks was made, reduced to transcript, and then submitted to the court. USCMA rejected the Government's contention that the court could not consider the transcript and remanded the case for retrial. Id. at 73, 82.

56. 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

57. 37 C.M.R. at 413.

58. United States v. Brickey, 16 M.J. 258 *[cited at]* , 264 (C.M.A. 1983).

59. 1 M.J. 428 *[cited at]* (C.M.A. 1976). See also United States v. Parker, 36 M.J. 269 *[cited at]* (A.F.C.M.R. 1993). USCMA, when discussing a dispute regarding pretrial discovery, referenced DuBay when the court stated that the proper appellate resolution is through "a fact-finding tribunal before which all material evidence may be presented and the parties may be heard." Brickey, 16 M.J. at 265.

60. 49 C.M.R. 183 (C.M.A. 1974).

61. USCMA specifically noted the fact that:

Trial defense counsel neither cross-examined on the issue to bring out more information nor submitted a brief under Article 38(c), UCMJ, 10 U.S.C. Sec. 838(c), not even to inquire from the witness or ascertain from other sources and record the names of the purported staff judge advocate and person who relayed his purported declarations to the witness. Appellate defense counsel have not moved to file affidavits or other documents to lay a detailed foundation for our ordering a DuBay hearing.

Id. at 188.

62. Id. Similarly, in two relatively recent Air Force decisions, United States v. Fox, 32 M.J. 747 *[cited at]* (A.F.C.M.R. 1991) and United States v. Serino, 24 M.J. 848 *[cited at]* (A.F.C.M.R. 1987), the court found that the appellant had not provided sufficient evidence to warrant a DuBay hearing. In Fox, the court declined to reverse the military judge's finding regarding the absence of any evidence whatsoever of any discriminatory practices on the part of any authority involved in

the appellant's case, 32 M.J. at 746. In Serino, the court held that the evidence was insufficient to raise a justiciable issue of unlawful command influence. The court further held that a DuBay hearing was not appropriate, and wrote:

[O]n its face [the appellant's allegation] does not allege the commander concerned was addressing testimony by witnesses; no witnesses are identified by name; witnesses did testify, or gave statements, for the appellant, and the alleged command influence was apparently known to the appellant before trial and not raised there.

24 M.J. at 852. See also United States v. Huet-Vaughn, 39 M.J. 545 *[cited at]* , (A.C.M.R. 1994) ("collective speculation," rather than specific facts, alleging that a military judge's actions gave the appearance of unlawful command influence, does not merit a DuBay hearing).

63. 4 M.J. 852 *[cited at]* , 856 (A.C.M.R. 1978).

64. United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328 *[cited at]* , 340 (C.M.A. 1988).

65. 45 C.M.R. 925, 927 (N.C.M. 1971). Recently, in United States v. Sanders, 37 M.J. 1005 *[cited at]* , 1006 (A.C.M.R. 1993), the ACMR held that a military judge presiding over a DuBay hearing is not required to announce his DuBay findings in open court before all parties, yet like "special findings," they must be made orally or in writing and when written, must be made during or after a court-martial but before authentication and must be included in the record.

66. United States v. Johnson, 21 M.J. 211 *[cited at]* , 215 (C.M.A. 1986).

67. See infra notes 110-127 and accompanying text.

68. 38 M.J. 270 *[cited at]* (C.M.A. 1993).

69. 9 U.S.C.M.A. 558, 26 C.M.R. 338 (C.M.A. 1958). See supra notes 51-54 and accompanying text for a discussion of the Hood case.

70. United States v. Davenport, 9 M.J. 364 *[cited at]* , 367 (C.M.A. 1980). See also United States v. Chancellor, 16 U.S.C.M.A. 297, 36 C.M.R. 453 (1966) (holding that congressionally-imposed guilty plea regulations mandating that records of trial contain a full plea hearing, including the explanation of every element of the offense charged and the admission of same by accused, "insures providence upon the record and gives the lie to . . . later claims of impropriety").

71. 1 M.J. 453 *[cited at]* , 456 (C.M.A. 1976). USCMA has continued its vigilant stance regarding potential sub rosa agreements raised by post-trial affidavits. See, e.g., Petitions For Grant of Review - Other Summary Dispositions in United States v. Wiggins, 35 M.J. 186 *[cited at]* (C.M.A. 1991) and United States v. Sanders, 35 M.J. 221 *[cited at]* (C.M.A. 1992). USCMA returned both cases for a DuBay hearing on whether an "undisclosed understanding" was involved in the appellants' courts-martial proceedings. In accord, United States v. Wirth, 25 M.J. 863 *[cited at]* (A.C.M.R. 1988) (holding that in appropriate cases limited DuBay hearings may be held to resolve providency of a plea or pretrial agreement and that at such a rehearing, it was appropriate for the accused's former counsel to testify at the rehearing); United States v. Hounslea, 5 M.J. 546 *[cited at]* (A.F.C.M.R. 1978) (returning a case for a DuBay hearing to resolve the "factual issue" of whether a pretrial agreement existed in light of the ambiguities presented at trial). See also United States v. Stringer, 34 M.J. 667 *[cited at]* , 670 (A.C.M.R. 1992) (where military judge "makes a thorough inquiry into the providence of the appellant's plea and obtains the appellant's and defense counsel's assurances that a facially proper pretrial agreement was voluntary and uncoerced, their post-trial assertions to the contrary will not be countenanced by this court").

72. 25 M.J. 293 *[cited at]* (C.M.A. 1987).

73. Id. at 297-98.

74. Id. at 298.

75. Id. USCMA also remanded a case for a DuBay hearing to determine if an accused's attempts to fulfill a pretrial agreement by repaying stolen money may have been thwarted by a government official. Summary Disposition, United

States v. Lee, 22 M.J. 122 *[cited at]* (C.M.A. 1986). See also United States v. Davis 48 C.M.R. 892, 893 (N.C.M. 1974) where the Navy Board of Review returned a case for a DuBay hearing on the issue presented in post-trial affidavits alleging trial defense counsel pressured appellant into pleading guilty and participated in pretrial negotiations without appellant's consent, stating: " [i]n view of the seriousness of the attack on the keystone of our justice system, we chose not to decide the matter on conflicting affidavits").

76. 18 U.S.C.M.A. 24, 39 C.M.R. 24 (1968).

77. 39 C.M.R. at 26 (citations omitted). In United States v. Johnson, 21 M.J. 215 *[cited at]* (C.M.A. 1986), USCMA's desire to insure that an accused was properly informed of the right to request individual military counsel led the court to affirm the NMCMR's authorization of a DuBay hearing to determine if appellant misunderstood his right to request counsel. In United States v. Jacintho, 21 M.J. 356 *[cited at]* (C.M.A. 1986), USCMA affirmed a case in which the NMCMR remanded the record for a DuBay hearing, if practical, to explore whether the accused would have exercised his right to request individual military counsel and retain detailed counsel if apprised of his right to do so.

78. 23 M.J. 379 *[cited at]* (C.M.A. 1987).

79. Id.

80. Id. at 381-82.

81. 36 M.J. 107 *[cited at]* (C.M.A. 1992).

82. Id. at 111. USCMA, in United States v. Davis, 3 M.J. 430 *[cited at]* (C.M.A. 1977), went ahead and reversed a case involving dual representation without the benefit of a DuBay hearing. The Court held that although it was "normally precluded from considering allied papers," id. at 431, n.1, such information, establishing that one counsel represented both the appellant and the immunized key government witness against the appellant, merited the case's reversal. Id. at 435. In United States v. Devitt, 22 M.J. 940 *[cited at]* (A.F.C.M.R.), aff'd, 24 M.J. 304 *[cited at]* (C.M.A. 1987), the AFCMR ordered a DuBay hearing to explore whether actual conflict existed between two married people who were jointly represented at their courts-martial, and if so, whether a conflict was waived. USCMA's and Devitt's sensitivity with regard to the integrity of attorney representation contrasts sharply with the AFCMR's approach in United States v. Tripp, 38 M.J. 554 *[cited at]* (A.F.C.M.R. 1993), in which the court denied a DuBay request to explore allegations that trial defense counsel, who had been disciplined for doing civilian business in his military office and later was employed in the same legal practice as the prosecutor after appellant's trial, may have been distracted or legally conflicted from representing the appellant. In so ruling, the AFCMR erected its own test as to when evidentiary hearings would be granted:

First, there must be some issue presented to us by the record or by the appellant. Second, the issue must be one for which the scope of review permits resort to matters outside the record under review, if necessary. Third, the issue must be justiciable: if it is moot, if the appellant lacks standing to assert the rights involved, or if the issue is not yet ripe, then a remand would be wasteful. Fourth, the issue must be presented in such a way that resolution depends at least in part upon facts. Fifth, those facts must not yet be clear in the record. Sixth, the needed facts must be such that resort to affidavits would be unsatisfying. Seventh, the movant must establish that a fact-finding hearing is likely to be effective, that the facts can be found, or that the likely ineffectiveness of the hearing is itself conclusive. There is nothing to be gained diverting a case from the appellate march if there is nothing to be gained by the side trip.

Id. at 556 (citations omitted).

83. Solorio v. United States, 483 U.S. 435 *[cited at]* (1987). In Solorio, the United States Supreme Court eliminated the "service connection of an offense" test for courts-martial jurisdiction, holding that an accused's status as a servicemember at the time of the charged offense gave a court-martial jurisdiction over the accused. See Droddy supra note 8 for an in-depth analysis of Solorio.

84. 6 M.J. 26 *[cited at]* , 28 n.2 (C.M.A. 1976). See also Miscellaneous Orders in United States v. Martin, No. 29,720, 50 C.M.R. 920 (1975) and United States v. Jones, No. 30,041, 50 C.M.R. 921 (C.M.A. 1975), both cases in which a limited DuBay hearing was ordered to ascertain whether unlawful enlistment deprived the court-martial of in personam jurisdiction. Similarly, in a recent case, the ACMR rejected a government affidavit on the issue of whether an accused was a commissioned officer during his court-martial and remanded the case to a DuBay hearing. United States v. Carbo, 35

M.J. 783 *[cited at]* ,787 (A.C.M.R. 1992). But see United States v. Irvin, 21 M.J. 184 *[cited at]* (C.M.A. 1986) (USCMA refused to allow a DuBay hearing to allow the Government to establish federal jurisdictional status over the situs of appellant's alleged offenses which were prosecuted pursuant to the Assimilated Crimes Act under Article 134 of the UCMJ).

85. 24 M.J. 132 *[cited at]* , 135-36 (C.M.A. 1987).

86. 37 M.J. 302 *[cited at]* (C.M.A. 1993). In Thomas, USCMA rejected the ACMR's use of an objective "credibility test" to evaluate whether, beyond a reasonable doubt, "no reasonable trier of fact would credit the [defense requested] testimony sought to be immunized" since "it is fundamental error to deny an accused use of such [unambiguous and exculpatory] testimony." Id. at 306. In so holding, USCMA noted that "it is virtually impossible to predict what evidence might influence the decision of a jury." Id.

87. 25 M.J. 326 *[cited at]* , 329 (C.M.A. 1987).

88. Id. at 330. Lower courts have generally, in the absence of sub rosa agreements, analyzed the issue of pretrial confinement as an ineffectiveness issue. See United States v. Foster, 35 M.J. 700 *[cited at]* , 705 (N.M.C.M.R. 1992), where the court held that a trial defense counsel's tactic "of placing the pre-trial treatment of the appellant into the sentencing crucible with the objective of avoiding the imposition of any further confinement, vice pursuing a nominal arithmetic credit" was not ineffective. The court stated:

[DuBay] hearings are a poor substitute for action at trial. . . . [T]hey should generally be reserved to issues that were not susceptible to resolution by the trial court because the matter was not reasonably discoverable during trial or to issues that go to the integrity of the military justice process itself.

See also United States v. Newberry, 35 M.J. 777 *[cited at]* (A.C.M.R. 1992) (holding trial defense counsel was not ineffective in agreeing to a specific number of days credit for illegal pretrial confinement prior to trial). Cf. United States v. Huffman, 36 M.J. 636 *[cited at]* (A.C.M.R. 1992) (although recognizing USCMA's apparent embracing of a waiver in sub rosa agreement cases, the court nevertheless held that in the absence of a definitive decision on waiver from USCMA, waiver applies to violations of Article 13 issues raised for the first time on appeal).

89. 18 U.S.C.M.A. 20, 39 C.M.R. 20 (C.M.A. 1968).

90. 39 C.M.R. at 24.

91. Id.

92. 33 M.J. 331 *[cited at]* (C.M.A. 1991). USCMA subsequently ordered a rehearing in the case on the basis that the erroneous admission of a hearsay statement by the victim's mother prejudiced the appellant. United States v. Giambra, 38 M.J. 240 *[cited at]* (C.M.A. 1993).

93. Id. at 335.

94. Id. The AFCMR had earlier used a DuBay hearing to investigate a recanting victim's testimony in United States v. Taylor, 30 M.J. 1008 *[cited at]* (A.F.C.M.R. 1990). The Air Force Court specifically directed that the original judge at the appellant's court-martial preside over the DuBay hearing so as to be in the "advantageous position to compare the credibility of the recanting prosecutrix at the DuBay hearing with her credibility at trial." Id. at 1010. After the military judge found that neither the victim nor the victim's mother orchestrated a false recantation, the AFCMR dismissed the rape charge. United States v. Taylor, 32 M.J. 684 *[cited at]* , 685-86 (A.F.C.M.R. 1991).

95. 26 M.J. 136 *[cited at]* , 142 (C.M.A. 1988). See also United States v. Damatta-Olivera, 37 M.J. at 474, 477 n.3 (C.M.A. 1993), which records how an allegation by a prosecution witness that the trial counsel in that case "directed him to testify falsely" was thoroughly investigated in a DuBay hearing and found to be without merit.

96. 34 M.J. 28 *[cited at]* .

97. 26 M.J. 401 *[cited at]* , 402 (C.M.A. 1988).

98. Id. In United States v. Bishop, 21 M.J. 541 *[cited at]* , 544 (A.F.C.M.R. 1985), the AFCMR relied in part on the results of a DuBay hearing ordered by a convening authority to set aside a conviction where a member fell asleep during findings. In United States v. Haston, 21 M.J. 559 *[cited at]* , 561 (A.C.M.R. 1985), the ACMR relied on the findings of a DuBay hearing to hold that "there were no sleeping, dozing, or inattentive [court] members at any time during trial."

99. Id. at 403. For a case in which allegations of court member misconduct were not deemed sufficient to trigger a DuBay hearing, see United States v. Rollins, 25 M.J. 803 *[cited at]* (A.C.M.R. 1989) (holding that allegations of court member misconduct premised on presence of Stars and Stripes newspaper in deliberation room was without foundation).

100. Id. (quoting United States v. Levite, 25 M.J. 334 *[cited at]* , 339 (C.M.A. 1987)). See also Summary Disposition in United States v. Miller, 27 M.J. 191 *[cited at]* (C.M.A. 1988), a case involving post-trial affidavits which raised the issue of "whether trial counsel engaged in misconduct affecting appellant's ability to receive a fair trial." Id. In ordering a post-trial evidentiary hearing, the court noted that affidavits, "while sufficient to raise an issue of fact on appellate review, do not allow this Court to resolve such issues." Id. Other allegations involving court personnel have been explored by way of DuBay hearings ordered by lower Courts of Military Review. In United States v. Aue, 37 M.J. 528 *[cited at]* , 529-30 (A.C.M.R. 1993), a DuBay hearing was held to investigate allegations of judicial misconduct against a military judge who allegedly told his driver that he had made up his mind about a case prior to deliberations. In United States v. Berman, 28 M.J. 615 *[cited at]* (A.F.C.M.R. 1989), a DuBay hearing was held to investigate the facts surrounding a sexual relationship between a trial judge and a trial counsel which was ongoing during courts-martial in which both were participants. See also United States v. Blanchette, 17 M.J. 512 *[cited at]* (A.F.C.M.R. 1983) (potential prosecutorial misconduct explored at DuBay hearing ordered by convening authority). One recent anomaly however, stands out in this line of cases. In Washington v. Richards, No. 93-21 (A.C.M.R. Oct. 29, 1993) 1993 WL 442568, the ACMR declined to reverse a military judge's refusal to order a DuBay hearing to explore an ineffectiveness allegation stemming from an adulterous relationship between a military and civilian defense counsel representing the accused. The petitioner alleged that the adulterous relationship could have affected their ability to provide him with effective assistance of counsel. He also alleged that the defense counsel "engaged in an illegal attempt to bribe a government witness and agreed with the prosecution not to submit good character evidence for petitioner in exchange for the prosecution deleting from the witness deposition tapes a statement that the witnesses had been bribed." Id. at 1. The ACMR held that "the petitioner failed to establish that sufficient facts necessary for resolution of the issues are not already clear in the record." Id. at 3. The Court of Review believed it could confidently review the issues based on the record and the affidavits collected from both defense and prosecuting attorneys by the military judge prior to the judge's determinations of "fact." These "findings of fact" included: that the defense counsel did carry on an adulterous affair; arranged to pay a potential witness to cover the witness's inconvenience and time spent in talking to them (with the accused's knowledge); and that the defense did not introduce into evidence six good character letters because of government rebuttal evidence of uncharged briberies. The military judge declined to make any finding regarding bribery of witnesses by either side "since it is unnecessary to the determination of the issue of whether a post-trial 39a session is required" as "petitioner admitted knowing of this at the time of trial, and he was actively pursuing a bribery strategy himself." Id. at 2, 3.

101. 25 M.J. 93 *[cited at]* (C.M.A. 1987).

102. Id. at 95-96.

103. 9 M.J. 154 *[cited at]* (C.M.A. 1980).

104. Id. at 162. The ACMR used a DuBay hearing for discovery in yet another way -- to determine whether the subject matter of a sidebar conference not included in a verbatim record of trial was substantial, and if so, amenable to reconstruction so as to comply with the statutory mandates regarding record of trials. United States v. Church, 23 M.J. 870 *[cited at]* , 871 (C.M.A. 1987). See also United States v. Brickey, 16 M.J. 258 *[cited at]* (C.M.A. 1983) (DuBay hearing could be used to explore allegation trial counsel withheld information regarding key government witness).

105. 32 M.J. 439 *[cited at]* , 441 (C.M.A. 1991).

106. See United States v. Gaspard, 35 M.J. 678 *[cited at]* (A.C.M.R. 1992) (exploring whether the convening authority personally selected the members); United States v. Miller, 31 M.J. 798 *[cited at]* (A.F.C.M.R. 1990) (exploring whether a preferral was the result of improper command pressure).

107. United States v. Moore, 23 M.J. 366 *[cited at]* , 368 (C.M.A. 1989).

108. Id. at 369 n.8.

109. 38 M.J. 302 *[cited at]* (C.M.A. 1993).

110. 466 U.S. 668 *[cited at]* (1984).

111. 27 M.J. 462 *[cited at]* (C.M.A. 1988).

112. Id.

113. Id.

114. Id. at 462-63. Similar aversion to deciding an ineffectiveness issue in the face of a factual appellate dispute led the ACMR to return a case for a DuBay hearing in United States v. Gaillard, 49 C.M.R. 471 (A.B.R. 1974), wherein an appellant alleged "external" ineffectiveness -- failure of the attorney to prepare for his defense and to use an alibi witness. The court noted that " [a]lthough ex parte affidavits may be sufficient to formulate an issue or motion before an appellate court, alone it is insufficient to decide disputed questions of law and fact." Id. at 476. In accord, United States v. Babbit, 22 M.J. 672 *[cited at]* , 674 (A.C.M.R. 1986) (court held that "residual contradictions [in appellate affidavits disputing ineffectiveness of counsel allegations] are of a minor nature and that their resolution at a [DuBay] evidentiary hearing would have no effect on the resolution of the issues" and thus be "superfluous"). See also United States v. Scott, 18 M.J. 629 *[cited at]* (N.C.M.R. 1984) (remanding case for DuBay hearing on alleged failure to prepare accused's alibi defense); United States v. Scott, 21 M.J. 889 *[cited at]* (N.M.C.M.R. 1986) (court found no ineffectiveness of counsel after DuBay hearing investigated alleged failure to call alibi witness).

115. 33 M.J. 462 *[cited at]* (C.M.A. 1991).

116. Id. at 466.

117. Id. at 467-68. One must also consider the likelihood of successfully impeaching the mental thought processes of an attorney in internal strategy cases.

118. 33 M.J. 455 *[cited at]* (C.M.A. 1991).

119. Id. at 458.

120. Id. at 459.

121. Id.

122. 37 M.J. 286 *[cited at]* (C.M.A. 1993).

123. Id. at 258.

124. Id. at 287.

125. Id.

126. Id. at 288.

127. In United States v. Tripp, 38 M.J. 554 *[cited at]* , 556 (A.F.C.M.R. 1993) the AFCMR read Wean very broadly to support their view that prior to DuBay hearings being ordered, a "resort to affidavits must be unsatisfactory." In an earlier case, the ACMR in United States v. Burdine, 29 M.J. 834 *[cited at]* , 836 (A.C.M.R. 1989), was faced with an appellant who asserted vague and unspecified ineffectiveness claims pursuant to United States v. Grostefon, 12 M.J. 431 *[cited at]* (C.M.A. 1982). The appellant refused to submit an affidavit. The Court decided that it was empowered pursuant to its

"unique Article 66, UCMJ powers" to "determine if appellant's [ineffectiveness] allegations are true, and if so, if he is entitled to any relief," id. at 836, rather than merely holding, as the ACMR did in Robinson, 49 C.M.R. at 188, that the failure to frame the issue doomed the DuBay request and any potential relief. Burdine's approach was further endorsed in United States v. Lewis, 38 M.J. 501 *[cited at]* , 513 (A.C.M.R. 1993), where the court held that just because "we may employ evidentiary hearings to resolve factual conflicts does not prohibit us from considering affidavits." In Lewis, trial defense counsel simply refused to comply with the ACMR's order to file affidavits in response to a detailed assertion of ineffectiveness by appellant, and merely submitted a motion to "Stay and Quash" the court's order. The Court considered this motion itself "an acceptable substitute" and the "functional equivalent of an affidavit" since " [w]hen filing a pleading before a court, counsel are obliged to be candid and not knowingly misrepresent material facts or the law." The ACMR in Lewis then went on to decide the case, including resolving controverted factual disputes and drawing various inferences against the appellant. Id. at 518-21. Likewise, the AFCMR in United States v. Fullard, ACM S28698 slip op. at 4 (A.F.C.M.R. Oct. 4, 1993), without any explanation or cited justification, merely opined that "we find appellant's [trial defense] counsel more worthy of belief than appellant," with regard to controverted facts found in competing affidavits. The dissent in Fullard agreed that the Court had "fact-finding power," but took issue with the court's siding with the trial defense attorney, noting that there was "nothing else in the record to break the credibility tie." Id. slip op. at 7. See also United States v. Johnson, ACM, 29744 slip op. at 4 (A.F.C.M.R. Oct. 29, 1993); United States v. Starks, 36 M.J. 1160 *[cited at]* (A.C.M.R. 1993); United States v. Scott, 18 M.J. 629 *[cited at]* , 630 (N.M.C.M.R. 1984).

128. United States v. Thomas, 22 M.J. 388 *[cited at]* , 393 (C.M.A. 1986), cert. denied, 479 U.S. 1085 *[cited at]* (1987).

129. 22 M.J. at 394. As USCMA observed, when the UCMJ was enacted, Congress recognized "command influence involves a corruption of the truth-seeking function of the trial process." Id. at 394.

130. 22 M.J. 388 *[cited at]* , 392 (C.M.A. 1986).

131. 31 M.J. 572 *[cited at]* , 610 (N.M.C.M.R. 1990), aff'd, 33 M.J. 209 *[cited at]* (C.M.A. 1991).

132. 33 M.J. at 214.

133. Id.

134. 33 M.J. 200 *[cited at]* (C.M.A. 1991).

135. Id.

136. Id. at 202, 203.

137. Id. See also United States v. Treakle, 18 M.J. 646 *[cited at]* (A.C.M.R. 1984) (court set aside sentence for command influence after considering evidence which included record of trial from other courts-martial admitted on motion of appellate defense counsel). Cf. United States v. Cox, 19 M.J. 721 *[cited at]* , 723 (A.C.M.R. 1984) (no DuBay ordered when, on the record below, trial defense counsel assured the court his initial concern about a witness being subject to command influence was a misunderstanding and that no additional action was required).

138. 25 M.J. 326 *[cited at]* (C.M.A. 1987).

139. Id. at 330.

140. 25 M.J. 334 *[cited at]* (C.M.A. 1987).

141. Id. at 339.

142. Id.

143. Id. at 340.

144. 23 M.J. 105 *[cited at]* (C.M.A. 1986).

145. Id. at 108.

146. Id. at 109.

147. 36 M.J. 2 *[cited at]* (1992). See also United States v. Madril, 26 M.J. 87 *[cited at]* , 88 (C.M.A. 1988) (summary disposition returning case for a limited hearing on unlawful command influence as to sentencing). Lower courts also have ordered DuBay hearings to investigate charges of command influence. Recently, in United States v. Caritativo, 37 M.J. 175 *[cited at]* , 179-81 (C.M.A. 1993), USCMA relied on the results of a DuBay hearing ordered by the Coast Guard Court of Military Review to reject an appellant's claim of unlawful command influence by the staff judge advocate. See also United States v. Jones, 33 M.J. 1040 *[cited at]* (N.M.C.M.R. 1991) (ordering a DuBay hearing to investigate command influence because of dissatisfaction with the manner the trial judge treated issue at trial). In United States v. Redman, 33 M.J. 679 *[cited at]* (A.C.M.R. 1991), the ACMR relied on facts adduced by an administrative investigation and testimony in a prior case involving the same command influence issue. Although the lower court recognized that "a DuBay hearing is the preferred method to obtain information to resolve allegations of command influence," they opined it was "unnecessary to order a DuBay hearing" because it was "satisfied" that it had sufficient information from the investigation and testimony in the prior case to decide the appellate issue. Id. at 682. In United States v. Scott, 20 M.J. 1012 *[cited at]* , 1013 (A.C.M.R. 1985), the ACMR remanded for a DuBay hearing the issue of whether a convening authority was disqualified from acting on appellant's case after receiving affidavits -- at odds with the other evidence before the court -- alleging that the convening authority attempted to discourage favorable character witnesses. See also United States v. Glidewell, 19 M.J. 797 *[cited at]* (A.C.M.R. 1984). Apparently swimming against this tide of precedent is the ACMR's decision in United States v. Hamilton , 36 M.J. 723 *[cited at]* (A.C.M.R. 1992). In Hamilton, the Army court relied solely on an affidavit to resolve a post-trial command influence issue raised by a trial defense counsel's affidavit. In this affidavit, the trial defense counsel related that the senior legal clerk for the special court-martial (SPCM) convening authority had told him that the SPCM had been subject to unlawful command pressure with regard to the preferral of charges in appellant's case. Holding that this incident was "one of those rare cases in which we have sufficient credible information before us to decide the issue without returning the case for a limited hearing," id. at 729, the court found, pursuant to Article 66(c), "as a matter of fact" that the SPCM's decision to prefer charges was a legitimate "independent decision," having discerned "no convincing evidence to cause [the court] to conclude the [SPCM's statement dismissing feeling any pressure from his commanding officer or the legal office] was not credible." Id. In stark contrast to the ACMR, the NMCMR in United States v. Hall, 36 M.J. 1043 *[cited at]* (N.M.C.M.R. 1993) rejected a witness's testimony that no one attempted to influence his sentencing testimony and remanded the issue for a DuBay hearing. The Hall case is likely the correct result, as USCMA has quite logically held that the Government must produce more than mere assertions of impartiality by the person alleged to have been the subject of the command influence. See United States v. Rosser, 6 M.J. 267 *[cited at]* , 272 (C.M.A. 1979); United States v. Zagar, 5 U.S.C.M.A. 410, 18 C.M.R. 34, 38 (1955) (both holding that perfunctory statements on the effect of command influence are inherently suspect).

148. As illustrated in the case survey at Section III. C. supra, precedent bears out the proposition that appellate courts are loath to affirm convictions when evidence is in the form of contradictory post-trial ex parte affidavits. As USCMA has emphasized in numerous cases, the appropriate method to resolve these inconsistencies, discrepancies, and conflicts is at a level where "testimony can be taken, witnesses examined, and testimony offered in rebuttal," Schalck, 34 C.M.R. at 154.

149. 36 M.J. 269 *[cited at]* , 272 (C.M.A. 1993).

150. Id. at 272 (quoting Polk, 32 M.J. at 152). This was, coincidentally, the same observation that USCMA initially made in DuBay itself:

Normally, collateral issues of this type would, on remand in the civil courts, be settled in a hearing before the trial judge. The court-martial structure, under the Uniform Code of Military Justice, however, is such that this cannot be accomplished. Accordingly, it is necessary to refer the matter to a court as such, although it is to be heard by the law officer alone.

37 C.M.R. at 411.

151. ACM S28412 (A.F.C.M.R. 19 Feb. 1992).

152. United States v. Dykes, 38 M.J. 270 *[cited at]* , 271 (C.M.A. 1993).

153. Id.

154. Id.

155. Id. at 270-71.

156. Id.

157. Id. at 271.

158. Id. at 273.

159. Id. at 271-72.

160. Id. at 272.

161. Id. at 272-73.

162. Id. at 273.

163. Id.

164. Id. at 272 n.*.

165. Id. at 274 (Cox, J. concurring in the result). Also concurring separately in the result, Judge Gierke, joined by Judge Crawford, stated that they were not prepared at this time to agree with the majority's implication that Article 66(c) does not give the Court of Military Review fact-finding authority "to resolve contradictory affidavits, except in the rare situation where 'no reasonable person could view the opposing affidavits . . . in light of the record of trial, and find the facts averred by the appellant to support his claim of unlawful command influence.'" Id. at 274 (citing the majority opinion at 272).

166. See supra Section II. Chief Judge Sullivan took a commendable step toward clarifying this confusion when he noted that the factfinding power of courts of review derived from Article 66(c) does not "expressly provide for the appellate resolution of collateral claims not raised at the court-martial," id. at 271-72, while Judge Cox specifically called the lack of a procedural mechanism to the attention of the Joint Services Committee. Id. at 273.

167. See supra Section II.

168. California v. Green, 399 U.S. 149 *[cited at]* , 158 (1970).

169. Maryland v. Craig, 111 L.Ed. 2d 666, 678 (1990). In Craig, the Court noted:

The primary object of the [Sixth Amendment's Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id. at 678 (quoting Mattox v. United States, 156 U.S. 237 *[cited at]* , 242-43 (1895)) (holding that Confrontation Clause was intended to prevent conviction by affidavit) (emphasis added).

170. United States v. Dykes, ACM S28412 (A.F.C.M.R. 19 Feb. 1992) slip op. at 2.

171. Craig, 111 L.Ed. 2d 678-79.

172. As one military appellate judge noted, "how is it possible to intelligently assess credibility [in the absence of a DuBay

hearing]?" United States v. Moses, 26 M.J. 980 *[cited at]* , 985 (A.F.C.M.R. 1988) (Michalski, J., dissenting). Similarly, just as one cannot predict what unambiguous and exculpatory evidence might influence a jury, United States v. Thomas, 22 M.J. at 394, a military court of review cannot, ipso facto, chose which of two asserted contradictory facts is true. See, e.g., United States v. Bahr, 33 M.J. 288 *[cited at]* (C.M.A. 1991) (error in limiting cross-examination of prosecutrix was not harmless beyond a reasonable doubt and required reversal).

173. Dykes, 38 M.J. at 272-73.

174. See United States v. Fullard, ACM S28698 (A.F.C.M.R. Oct. 4, 1993) discussed supra at note 127 and infra at 228.

175. See supra Section III. C. and accompanying text for examples of post-trial evidence of command influence not initially found in the record.

176. House Hearings on the UCMJ, supra note 22, at 629 (testimony of Mr. Frederick P. Bryan, Chairman of the Special Comm. on Military Justice of the New York City Bar Association).

177. This is particularly true with regard to the potential ramifications of the test for evidentiary hearings erected by the AFCMR in Tripp, 38 M.J. at 554. Nowhere does the court identify what constitutes "the record" with regard to the fifth Tripp standard, which requires that the facts must not yet be clear in the record prior to ordering a DuBay hearing. Does "a record" include adverse ex parte affidavits submitted in response to a post-trial allegation, as the court implies in n.8 of the Tripp opinion? The court also fails to identify the conditions under which affidavit credibility wars "would be unsatisfactory," the sixth Tripp element. These flaws are not surprising in light of the division on these very issues by this same AFCMR panel in Fullard, ACM S28698 (A.F.C.M.R. Oct. 4, 1993), discussed supra at note 127 and infra at note 228. These weaknesses stem from AFCMR's inaccurate assumption that Article 66(c) empowers them to select the "true" predicate facts from among several post-trial contentions. See supra note 127. Finally, the seventh element -- that appellants must "establish that a fact-finding hearing is likely to be effective . . . in a rational and concrete way" -- creates a heretofore nonexistent, unconscionable additional burden on appellants. Not only must appellants establish the existence of a valid dispute on predicate appellate facts, appellants must show that a DuBay hearing is "likely to be effective" in establishing their allegation -- an impossible requirement in the absence of prescience powers. This seventh element highlights how far courts, in misusing Article 66, can stray from the very purpose hearings are convened.

178. United States v. Graf, 35 M.J. 450 *[cited at]* , 454-55 (C.M.A. 1992), citing Middendorf v. Henry, 425 U.S. 25 *[cited at]* , 43 (1976).

179. The application of the Due Process Clause of the Fifth Amendment to any military standard for evidentiary hearings arises out of its language that no "person . . . be deprived of life, liberty, or property, without due process of law."

180. Dykes, 38 M.J. at 272-73.

181. 346 U.S. 137 *[cited at]* , 145-46 (1953). Federal district and appellate cases have reviewed constitutional issues in military cases without an explicit "full and fair" predicate analysis as referenced in Burns. See, e.g., Mendrano v. Smith, 797 F.2d 1538 (10th Cir. 1986); Wallis v. O'Keefe, 491 F.2d 1323 (10th Cir.), cert. denied 419 U.S. 901 *[cited at]* (1974); Kenney v. U.S. Disciplinary Barracks, 377 F.2d 339, 342 (10th Cir. 1967). Since these constitutional issues are generated and subsequently reviewed through habeas corpus applications in cases where military post-trial evidentiary procedure are not dispositive, they are not relevant for analysis here.

182. Burns, 346 U.S. at 138.

183. Id. at 138-39.

184. Id. at 142.

185. Id.

186. Id. at 144.

187. Id.

188. Id. at 145 n.11.

189. Id. at 145.

190. Id.

191. Id. at 145-46 n.13.

192. Id. at 145 n.13.

193. 782 F.2d 143, 145 (10th Cir.), cert. denied 476 U.S. 1184 *[cited at]* (1986).

194. Id.

195. Id. An examination of the ACMR's decision in United States v. Watson, 15 M.J. 784 *[cited at]* (A.C.M.R. 1983) bears out the appellate court's conclusion. Specifically, the majority of Watson's ineffectiveness issues, as well as two other allegations, were predicated on facts which were already in the record and subject to judicial scrutiny. Although part of the ineffectiveness claim dealt with the failure to call a physician-witness who testified at a companion case stemming from identical charges of rape and sodomy, the ACMR was able to review and describe the doctor's previous testimony in the prior case when concluding that failure to call this witness was a tactical decision, and that the appellant received effective assistance of counsel. Id. at 785-86.

196. 17 C.M.A. 147, 37 C.M.R. 411 (C.M.A. 1967).

197. 782 F.2d at 145 n.4. In an earlier 10th Circuit decision, Kehrli v. Sprinkle, 524 F.2d 328, 331-32 (10th Cir.), cert. denied, 426 U.S. 947 *[cited at]* (1976), the court held that the Air Force Board of Review (ACM) provided the appellant with "full and fair" consideration of his court-martial procedure and search and seizure claims, and thus they were precluded from reviewing those issues on the merits. An examination of the Review Board's decision in that case indicates that these legal issues were not contingent on an evidentiary hearing for their resolution. United States v. Kehrli, 44 C.M.R. 582, 583 (ACM 1971). See also Dodson v. Zelez, 702 F.Supp. 607 (D. Kan. 1988) (holding that the military court of review in United States v. Dodson, 16 M.J. 921 *[cited at]* (N.M.C.M.R. 1983) gave "full and fair" consideration of petitioner's claims involving speedy trial, witness exclusion, and court-martial selection and composition issues).

198. 519 F.2d 184, 199-203 (5th Cir.), cert. denied, 425 U.S. 911 *[cited at]* (1976).

199. Id. at 203.

200. Id. at 216. The requested witnesses were Secretary of Defense Melvin R. Laird, Secretary of the Army Stanley R. Resor, and Chief of Staff of the Army William Westmoreland. Id. at 213.

201. Id. at 217.

202. Id. at 215-216.

203. Id. at 216.

204. Id. at 217.

205. Id.

206. 372 U.S. 293 *[cited at]* (1963).

207. Id.

208. Id. at 313.

209. Id. at 312.

210. The factors in 28 U.S.C.A. Sec. 2254 (1977) are:

(1) that the merits of the factual dispute were not resolved in the State court hearing; (2)that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing; (3) that the material facts were not adequately developed at the State court hearing; (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding: (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; (7) the applicant was otherwise denied due process of law in the State court proceeding; (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determinations, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record concludes that such factual determination is not fairly supported by the record.

211. 112 S.Ct. 1715 *[cited at]* (1992).

212. Id. at 1720 n.5. Specifically, Keeney overruled Townsend to the extent that now a petitioner's failure to develop material facts regarding a post-trial issue in a collateral state proceeding bar the grant of a habeas corpus application. Id. at 1717.

213. Id. at 1714.

214. 431 U.S. 63 *[cited at]* (1977).

215. Id. at 75-76.

216. Id. at 82-83.

217. Id. at 78.

218. Id. at 79-80.

219. 438 U.S. 154 *[cited at]* , 155-56 (1978).

220. Id.

221. Id. at 171.

222. 346 U.S. at 145-46 and n.13.

223. 782 F.2d at 145, n.4.

224. See also Ex parte Hawk, 321 U.S. 114 *[cited at]* , 116 (1953) (an evidentiary hearing is appropriate in a habeas corpus case where resort to state court remedies has failed to afford a full and fair adjudications of the federal issues because of inadequate or unavailable state law remedy).

225. 431 U.S. at 82 n.25.

226. State jurisdictions, like military courts, also are attuned to the vulnerability of their criminal decisions to federal habeas corpus attack on evidentiary procedural grounds. See Calene v. Wyoming, 846 P.2d 679 (Wyo. 1993).

227. Opposing government affidavits should be considered only to the extent of determining whether there indeed exists a disputed predicate fact necessary for appellate resolution rather than for cases involving undisputed facts alleged in an appellant's affidavit regarding a post-trial issue.

228. For an example of a case in which military appellate judges engaged in such a dispute revolving around why a government affidavit rather than the appellant's ex parte affidavit was more worthy of appellate belief, see United States v. Fullard, ACM S28698 (A.F.C.M.R. 1993), discussed supra at note 127.

229. For example, a post-trial attack on a guilty plea involving tactical matters would not receive a hearing, but one involving a sub rosa pretrial agreement just might.

230. 38 M.J. at 272.

231. See supra note 172 and accompanying text.

232. See, e.g., United States v. Serino, 24 M.J. 848 *[cited at]* (A.F.C.M.R. 1987); United States v. Robinson, 49 C.M.R. 183 (A.C.M.R. 1974).

233. See, e.g., United States v. Parker, 36 M.J. 269 *[cited at]* (C.M. A. 1993); United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

234. See, e.g., United States v. Davenport, 9 M.J. 364 *[cited at]* (C.M.A. 1980); United States v. Stringer, 34 M.J. 667 *[cited at]* (A.C.M.R. 1992); United States v. Babbit, 22 M.J. 672 *[cited at]* (A.C.M.R. 1986). .

235. United States v. Mabe, 33 M.J. 200 *[cited at]* (C.M.A. 1991).

236. United States v. Allen, 33 M.J. 209 *[cited at]* (C.M.A. 1991).

237. United States v. Treakle, 18 M.J. 646 *[cited at]* (A.C.M.R. 1984).

238. United States v. Taylor, 30 M.J. 1008 *[cited at]* (A.F.C.M.R. 1990).

239. See, e.g., United States v. Reece, 25 M.J. 93 *[cited at]* (C.M.A. 1987).

240. See, e.g., United States v. Levite, 25 M.J. 334 *[cited at]* (C.M.A. 1987).

241. United States v. Campbell, 45 C.M.R. 925 (N.C.M. 1971).

242. See, e.g., United States v. Johnson, 21 M.J. 211 *[cited at]* (C.M.A. 1986); DuBay, 37 C.M.R. at 413.

243. Id.

244. Id.

245. See, e.g., United States v. Sanders, 37 M.J. 1005 *[cited at]* (A.C.M.R. 1993).

246. DuBay, 37 C.M.R. at 413.

Title of Article

Motions for Summary Judgment in Mixed Cases: Using Matsushita and the MSPB Adjudication to Increase Plaintiff's Pretrial Burden

Author

Major Leonard F. Rippey, USAF*

Text of Article

I. INTRODUCTION

"Mixed cases" [1] present some of the most interesting litigation issues confronting federal agency attorneys practicing in the employment law arena. They combine the administrative and judicial resolution mechanisms of civil service appeals with federal anti-discrimination complaints. Mixed case litigation is, by definition, among the most complicated within the federal sector. For the agency trial attorney, disposing of a mixed complaint in federal district court through a motion for summary judgment represents a noteworthy legal accomplishment indeed.

This article is intended to provide agency employment counsel with a structured analytical framework to address and attack mixed case lawsuits against the Federal Government. While directed primarily toward agency practitioners with personnel and discrimination litigation experience, this article also will serve as an introduction to mixed case litigation for new government lawyers. Toward this end, an abbreviated overview of the administrative dispute resolution process and a discussion of the dual standards of review applicable in federal district court are provided. Additionally, the analytical paradigm for individual disparate treatment discrimination [2] is addressed as this is the most often occurring of discrimination cases arising in the federal sector and is the type with which the author has greatest experience.

A considerable portion of this article is used to discuss Matsushita Electric Industries v. Zenith [3] and two other 1986 Supreme Court cases which examine federal summary judgment practice and procedure. The purpose here is twofold: first, to extract and distill the holdings of these cases which, arguably, manifest a dramatic shift of the Court in favor of more pretrial dispositions of factually weak claims; and second, to highlight the language and policy judgments in these three cases which are particularly useful for application in mixed cases. To narrow the scope and depth of this article to manageable proportions it is, of course, necessary to make some assumptions. The first, obviously, is that counsel for the Government has evaluated the case and determined that a motion for summary judgment is appropriate. [4] Second, we must assume that the federal employee complainant has not elected, if eligible, to adjudicate his claim through a negotiated grievance procedure. [5] Third, it is assumed that the plaintiff has pursued the mixed case through the Merit Systems Protection Board (MSPB) administrative process to include a hearing before a Administrative Judge (AJ), the agency has prevailed on all issues, and the plaintiff has timely filed a judicial complaint in the appropriate federal district court. Fourth, all previously adjudicated personnel and discrimination issues are contested in the suit filed in federal court. Fifth, the discrimination theory propounded in the federal court action is individual disparate treatment. The terms "discrimination" and "Title VII" [6] are used broadly to encompass all discrimination causes of action available to federal employees. [7]

This article is written from a pro-government, pro-defense perspective. It is intended that agency counsel will be able to use the analyses, arguments and authorities included herein to the best advantage of their client agencies during the course of mixed case litigation. Fundamental to this approach is the view that the prior MSPB adjudication, affirming the agency action on both personnel and discrimination issues, can lead to summary pretrial disposition of many mixed complaints. Although ever cognizant of the plaintiff's right to a trial de novo on the discrimination issues, [8] federal courts can, and will, accord significant weight to previous administrative findings on the same facts and issues that are now present before the court. If presented and argued precisely by agency counsel, the MSPB decision and accompanying record can be used to increase substantially the threshold evidentiary burden that these plaintiffs must carry in order to survive a government

motion for summary judgment. Rather than undercut the right to a full hearing, this approach simply holds mixed case plaintiffs to the same pretrial evidentiary standards that apply to all other civil litigants in federal court.

II. AN OVERVIEW

A. Mixed Case Defined

A mixed case has two essential components. First, the underlying personnel action must fall within the class of actions appealable to the MSPB. [9] Second, the complaint also must raise an allegation that a basis for the action was prohibited discrimination. [10] If the mixed case is not resolved to the complainant's satisfaction during the administrative process, the case may be filed in the appropriate federal district court and the district court has jurisdiction to hear the entire claim. [11]

B. The Administrative Process [12]

A complainant with a mixed case has the choice of three fora: (1) an appeal to the MSPB; [13] (2) a complaint of discrimination filed with the agency; [14] or, (3) a grievance under an applicable negotiated grievance procedure. [15] A complainant must choose only one of these available routes and the choice, once made, is irrevocable. [16] Irrespective of the administrative channel taken, the federal complainant retains the right to MSPB review of the merits of the entire mixed complaint as well as a review by the Equal Employment Opportunity Commission (EEOC) of the discrimination portion of the case. [17] If the complainant elects the agency EEOC mixed complaint procedure, the EEOC hearing is bypassed and the agency is required to issue a final decision on the matter within 120 days. [18] The complainant then has the option of appealing to the MSPB or filing a complaint in district court. [19] If filed with the MSPB, the Board must issue a decision on the entire case within 120 days. [20] As a practical matter, this means the AJ must issue an initial decision within this time period.

After the MSPB has issued its decision, the complainant may choose to petition the EEOC for consideration of the discrimination part of the claim. [21] The complainant may instead, however, proceed directly to federal district court. [22] The EEOC has discretion whether to accept a petition for review and also whether to direct the MSPB to take additional evidence in order to supplement the existing record should it decide to accept the petition. [23] The EEOC must accept or reject the petition within thirty days. [24] If the EEOC accepts the petition, it has sixty days to concur or disagree with the MSPB's decision. [25] The basis for any EEOC disagreement is limited to whether the MSPB decision incorrectly interpreted the discrimination statutes administered by the EEOC, or -- as it pertains to such statutes -- is not supported by the record as a whole. [26]

If the EEOC disagrees with the MSPB, the case is sent back to the Board, which has thirty days to concur with the Commission, or, find that the EEOC decision constitutes an incorrect interpretation of any civil service law, rule, or regulation, or -- as it pertains to such law -- is not supported by the record. [27] If the MSPB does not concur, it then reaffirms its previous decision, after making any appropriate revisions, and the matter is immediately certified to a Special Panel for resolution. [28] The panel is comprised of a chairperson, who is a presidential appointee, one MSPB member and one EEOC member. [29] The Special Panel must decide the issue within forty days and this decision is, of course, judicially reviewable. [30]

C. The MSPB Initial Decision and Administrative Record

Prior EEOC or agency findings are admissible in federal trials regarding employment discrimination claims. The seminal case governing their admissibility is Chandler v. Roudebush. [31] The principal evidentiary basis for admission of the administrative record and findings of the AJ is the well-established "public records" exception to the hearsay rule:

> Prior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial de novo. See Fed. Rule Evid. 803 (8)(C). Cf. Alexander v. Gardner-Denver Co., 415 U.S. 36 *[cited at]* , 60 n.21. Moreover, it can be expected that, in light of the prior administrative proceedings, many potential issues can be eliminated by stipulation or in the course of pretrial proceedings in the District Court. [32]

Although these reports may contain conclusions as well as factual recitations, they are nonetheless admissible provided they are factually based and trustworthy. [33]

At this point then, it is appropriate to discuss briefly the nature of the MSPB administrative process and the record that is created as a result. [34] The trial-type nature of the post-action administrative hearing provides the mixed case plaintiff with full due process on the claim prior to the district court action. [35] Furthermore, a record is developed at the hearing which includes findings of the AJ, accompanying documents, and exhibits. [36] The full consideration given to the complainant's civil service and Title VII rights, along with the record developed at the MSPB hearing, provide agency counsel with the legal basis for accomplishing twin objectives in the pretrial litigation. First, the record developed at the MSPB hearing, or portions of it, furnishes the evidence or exhibits used in support of the motion for summary judgment. [37] Second, under Alexander v. Gardner-Denver Co., [38] based on the high degree of procedural fairness of the hearing, the completeness of the record and the competence of the MSPB AJ, the findings of the MSPB should be accorded "great weight." [39]

The due process protections afforded all federal employees facing adverse agency actions are extensive. [40] The statutory framework governing employee appeals to the MSPB after the agency has acted is as follows:

An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right--

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board. [41]

Pursuant to this delegated authority, the MSPB has promulgated regulations that provide procedures which assure that all appeals are adjudicated fully and fairly. Thus, an agency, as part of its notice of decision to take action, must advise the affected employee of her appeal rights before the MSPB, to include the right to a hearing before an Administrative Judge. [42] As part of these appeal rights, the complainant is entitled to be represented at all stages of the appeal and to call witnesses in her behalf at the hearing. [43] In a typical case, following the agency action, the complainant will file an appeal of that action. Discovery is then permitted and a trial-type hearing is held to litigate the civil service issues and the affirmative defense of prohibited discrimination. [44]

The powers and duties of the AJ assigned to the matter closely parallel those of the trial judge in a federal court, as do the procedures utilized. [45] The AJ has the authority, inter alia, to: (1) administer oaths; (2) issue subpoenas; (3) make evidentiary rulings; and, (4) rule on discovery motions. [46] Moreover, to ensure the complainant receives a fair and impartial hearing, the AJ must resolve credibility issues and ensure the record is fully developed as to important issues. [47] Finally, the AJ is charged with the responsibility for the official record of the proceedings. [48] A verbatim record of the hearing must be kept; ordinarily this record is a tape recording. [49] If requested by one of the parties, however, a transcript is prepared. [50]

Following the hearing, the AJ issues an initial decision which becomes final after thirty-five days unless one of the parties files a petition for review with the Board, or the Board reopens the case on its own motion. [51] If the Board reviews the matter, it may affirm, reverse, modify, or vacate the initial decision in whole or in part. [52] And, where appropriate, the Board issues a final decision and order compliance with that decision. [53] Judicial review of a final decision or order is then available to the adversely affected employee in the United States Court of Appeals for the Federal Circuit for non-mixed cases and the appropriate United States district court for mixed cases. [54] As the preceding discussion illustrates, the mixed case complainant receives a full, fair, and complete opportunity to contest his allegations of agency wrongdoing on both the personnel and discrimination issues. Ultimately then, the "Official Record" of the case consists of the verbatim record, exhibits, pleadings, and all of the orders and decisions of the AJ and the Board. [55]

A problem arises for the agency lawyer in trying to sort through this record and determine which parts of it to use in support of the agency motion for summary judgment. The administrative record frequently contains declarations with multiple levels of hearsay as well as irrelevant and redundant documentation. Agency counsel should evaluate each of the individual documents within the administrative record and develop, where possible, a theory of admissibility apart from the public records and reports doctrine. [56] In developing alternate theories for admission, government counsel should be prepared to meet potential objections to the factual basis or trustworthiness of summary judgment evidentiary matters. [57] Additionally, agency counsel may seek to enter into stipulations with opposing counsel regarding the admissibility of documents and extracts from the administrative record. Once these potential evidentiary problems are resolved, the

findings and record developed below may be used the same as other pretrial evidence. [58]

The weight to be accorded the administrative record and findings of the MSPB is within the discretion of the trial court. In Alexander, the Supreme Court spoke to the matter within the context of a Title VII claim heard by an arbitrator pursuant to a collective bargaining agreement: " [t]he arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate." [59] In a footnote following this passage, the Supreme Court elucidated a number of factors to be used in determining the weight to be assigned prior arbitral decisions. These factors literally mirror the MSPB administrative process:

Relevant factors include . . . the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided on the basis of an adequate record. [60]

Given that MSPB hearings are fully litigated trial-type hearings, agency counsel should argue to the trial judge that the case for affording "great weight" to the MSPB determination of the matter is indeed compelling. [61]

It should be anticipated, however, that counsel for plaintiff, or the court if the plaintiff is pro se, will certainly stress the de novo nature of the federal court proceedings as militating against undue emphasis being placed on the administrative record and findings. Nevertheless, agency counsel should maintain that a right to be heard in federal court does not necessarily guarantee a trial on the merits, whether the filing is a mixed case or any other judicial complaint. Rather, it should be emphasized that although the plaintiff who complains of employment discrimination may be guaranteed access to the federal courts, there is no statutory scheme which grants mixed case plaintiffs preferential treatment once there. Mixed case plaintiffs must, as do all other civil plaintiffs, abide by the procedural and substantive burdens applicable in federal court litigation. In this particular context, that means proving initially that there is at least some likelihood of a court result which will differ from the administrative adjudication of their claim. Stated another way, the plaintiff must establish that the dispute is indeed genuine. [62]

D. Standards of Judicial Review in Mixed Cases

The "Personnel Side": Petitions for judicial review of MSPB decisions are ordinarily filed in the United States Court of Appeals for the Federal Circuit. [63] In the Federal Circuit, the MSPB decision is reviewed on the administrative record and the standard applied is familiar under administrative law:

[T]he court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence. [64]

The district court applies this same standard in reviewing the "personnel side" of a mixed case. [65] Its review is confined to the administrative record. [66] Thus, in effect, the trial court conducts appellate review over the pure MSPB aspect of the case.

The "Discrimination Side:" On any discrimination claim, federal complainants retain "the right to have the facts subject to trial de novo by the reviewing court." [67] Thus, in spite of being afforded a full trial-type hearing by the MSPB, unsuccessful federal complainants can obtain a second de novo trial in the district court on the discrimination claim. Private sector employees enjoy the same substantive protections against illegal discrimination, but only federal employees are allowed two complete hearings to litigate the same claim. [68]

The Options for Presenting the Motion to the District Court: In analyzing the mixed case to determine whether a motion for summary judgment is appropriate, agency counsel must also develop a strategy as to how to present the motion to the trial court. Various options exist and the following proposals are not exhaustive. One option is to move for summary judgment on all issues contained in plaintiff's judicial complaint. If this approach is used, agency counsel should request the court to review the civil service issue(s) first. In this manner, the agency will get the benefit of the lower standard of review applicable to the MSPB decision. [69] Assuming the court agrees with this method and subsequently affirms the MSPB decision as supported by substantial evidence, counsel can use this ruling to support the motion for summary judgment on the Title VII claim. Here, the defense position can be that in affirming the underlying agency action, the court has, at a minimum, changed the pretrial posture of the case in two ways. First, the court has determined that the agency

action against the plaintiff was not arbitrary or capricious. [70] Thus, the agency's burden to produce evidence of a legitimate non-discriminatory reason for its action has been met. [71] And second, in light of this initial judicial review of the merits of the case, which is favorable to the defendant, the plaintiff must come forward with more and better evidence than would have been required previously in order to survive the agency's motion. [72] Both of these points will be addressed in more detail below.

Another option is for counsel to sever the two components of the complaint and move for judgment on the personnel side of the case first. Then, assuming the motion was granted, counsel might attach this order, along with any other exhibits in support of the motion, to a second motion for summary judgment on the discrimination portion of the complaint. Although the analysis for the court is essentially the same as with the first option, this method may have the psychological advantage of using the court's previous order in support of a second motion on the Title VII part of the case.

Still a third strategy is to move for summary judgment only on the personnel side of the case. If this motion is granted, the agency can then move to have the pure MSPB part of the case transferred to the U.S. Court of Appeals for the Federal Circuit. [73] This approach, if warranted by the facts of the case, has a strategic, albeit cynical, advantage. In the current era of congested court dockets, this tactic offers the trial court with a means to readily dispose of the case by transferring it to another court. Furthermore, it can be argued that this transfer does not work to deny the plaintiff his day in court because the MSPB decision will be reviewed in the federal circuit.

III. THE DISCRIMINATION ISSUE

A. The Reason for Action

At the heart of every mixed case is this fundamental question: was the action against the complainant taken for the reason (s) stated by the agency, or was the action based on impermissible discrimination? In other words, what was the real reason that the agency took adverse action against the employee? As stated by the U. S. Court of Appeals for the Federal Circuit in Williams v. Department of Army, the battle lines in a mixed case are drawn thusly: " [i]n a district court suit, the employee will charge that discrimination motivated the adverse action and the Government defense inevitably must include the merits of the administrative action to justify the action taken and negate discrimination." [74] This interrelationship between the two components of a mixed case was clearly anticipated by Congress. The Senate report on the Civil Service Reform Act of 1978 explained: " [i]n [mixed] cases, questions of the employee's inefficiency or misconduct, and discrimination by the employer, will be two sides of the same question and must be tried together." [75] In order to frame the agency's argument for summary disposition, an attorney must understand the analysis used in discrimination cases.

B. Discrimination Analysis

The model for examining individual claims of disparate treatment based on prohibited discrimination is well known. First, the plaintiff must bear the burden of establishing a prima facie case. [76] Although the facts and precise specifications of the prima facie proof will inevitably vary from case to case, [77] a plaintiff is generally required to show that: (1) he is a member of a protected group; (2) he was similarly situated to an individual who was not a member of his protected group; and (3) he was treated more harshly or disparately than the individual who was not a member of his protected group. [78] The plaintiff is also required, ultimately, to show that the difference in treatment was motivated by an intent to discriminate. [79] Thus, in order to establish a prima facie case of discrimination, a plaintiff must establish facts which, if otherwise unexplained, are more likely than not due to intentional consideration of an impermissible factor such as race. [80]

Second, if a plaintiff succeeds in establishing a prima facie case, the burden of producing evidence shifts to the agency defendant. [81] For the agency to prevail, it must articulate a legitimate, non-discriminatory reason for its treatment of the plaintiff. The burden which shifts to the agency after a plaintiff establishes a prima facie case is simply to produce [82] evidence to rebut the presumption of discrimination created by the prima facie case. [83] The agency has no obligation to prove by a preponderance of the evidence that it was motivated by the proffered reasons and the ultimate burden of persuasion never shifts from the plaintiff. [84] It is sufficient to meet a plaintiff's case if the defendant agency's evidence raises a genuine issue of fact as to whether its actions were based on prohibited discrimination. Indeed, once the defendant has offered evidence of its reason for its actions, the McDonnell-Burdine presumption "drops from the case." [85]

Third, the plaintiff is then afforded the opportunity to show, by a preponderance of the evidence, the reasons proffered by

the agency for its action were pretextual. Here, the plaintiff's burden is to show that the stated reasons were merely a pretext for discrimination based on proscribed factors. [86] It is an underlying premise of this paper that based on the MSPB's finding that the agency acted for a legitimate, non-discriminatory reason, this determination being subsequently affirmed by the trial court, that the plaintiff's burden to prove pretext is, or at least should be, higher than in non-mixed discrimination lawsuits.

IV. THE STANDARD FOR GRANTING SUMMARY JUDGMENT

A. Federal Rule of Civil Procedure 56

The language of F.R.C.P 56 is familiar to all civil litigators:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. [87]

This admonition applies no less to agency counsel. It is the potential lack of a genuine issue on the discrimination side of a mixed case that provides the opportunity for the Government to dispose of the entire case without the expense of going to trial. The MSPB adjudication and decision on the merits of both the personnel and discrimination issues of the case provide the basis for such a pretrial disposition.

The agency practitioner must also be diligent in holding the mixed case plaintiff to the requirement to go beyond the pleadings in order to defeat the agency's motion. As stated in Rule 56(e):

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial (emphasis added).

To counter the agency's motion for summary judgment then, a mixed case plaintiff must establish that there is a genuine issue of material fact as to whether the defendant's stated reason for its personnel action against the plaintiff is a pretext to mask prohibited discrimination. [88] The plaintiff may make this showing in one of two ways. She may persuade the court that a reason other than the one proffered by the agency was the likely motivation behind the action. [89] The plaintiff may also establish that the agency's stated reason is not worthy of belief. [90] The issue of fact must indeed be "genuine." [91] Once the agency has met its burden under Rule 56(c), the plaintiff must "do more than simply show that there is some metaphysical doubt as to the material facts." [92] To prevent an adverse ruling the plaintiff must come forward with "specific facts showing that there is a genuine issue for trial." [93] If a rational trier of fact, based on a review of the entire record, could not find for the plaintiff, then there is no "genuine issue for trial." [94] This standard matches that for a directed verdict under the Federal Rules of Civil Procedure, [95] which require the trial judge to direct a verdict, when, under the controlling law, reasonable minds can reach but one conclusion as to the verdict. [96]

B. The Matsushita Trilogy

In 1986, the United States Supreme Court issued three decisions which exhaustively discussed and clarified summary judgment doctrine and practice. Ordinarily, matters relating to civil procedure litigation are decided by the district courts and the courts of appeal. That the Supreme Court should decide three cases involving a single federal rule in such a short time span makes it clear that the Court intended to place its imprimatur on summary judgment procedure and policy. [97]

In Matsushita, [98] Anderson v. Liberty Lobby Co., [99] and Celotex Corp. v. Catrett, [100] the Supreme Court, though stating that it was only applying traditional rules of civil procedure, effectively rewrote the rules in a manner that has strengthened the motion and broadened its applicability far beyond the factual contexts of those cases. [101] As a result, summary judgment can be used as a bench trial on the paper before the district judge. [102] For the agency practitioner, armed with a favorable MSPB decision and the accompanying administrative record, the "paper" can lead to the equivalent of a pretrial directed verdict for the Government in some mixed cases.

Matsushita: Factual Implausibility and the Requirement for More Persuasive Evidence: The first case in which the Supreme Court began its reshaping of summary judgment practice was decided in March of 1986. In Matsushita,

American manufacturers of television sets brought an antitrust suit against Japanese manufacturers in which it was alleged that the Japanese had conspired to force the Americans out of the U.S. market. The plaintiffs contended that the Japanese had fixed and maintained artificially high prices in their homeland while at the same time fixing and maintaining artificially low prices for the television sets exported to and sold in the United States. The federal district court granted summary judgment in favor of the Japanese defendants finding, inter alia, that an inference of attempted monopolizing and predatory pricing was unreasonable, and that even if the pretrial evidence did show a conspiracy, there was no showing it could have harmed the American manufacturers because they had continued to maintain their market share. Thus, the district court determined that the defendants' conduct did not affect U.S. markets nor was it cognizable under the Sherman Act. The Third Circuit, finding direct and circumstantial evidence that could support an inference of a conspiracy which could tend to injure the plaintiffs, reversed the district court. [103]

The Supreme Court reversed, remanded, and ordered the summary judgment be reinstated unless the Third Circuit could glean other evidence from the record tending to show there was a genuine issue for trial. [104] Although its analysis of antitrust law is beyond the scope of this article, the Court stated the plaintiffs were required to establish a genuine issue of material fact that the Japanese manufacturers had entered into a conspiracy causing a cognizable injury to the American manufacturers. [105] The Court, while ostensibly agreeing with the Third Circuit's evidentiary rulings, found summary judgment appropriate because the plaintiffs' theory of the case was not "plausible." [106] Justice Powell, writing for a 5-4 majority, found it implausible as a matter of economic and business logic that the Japanese would sell products below cost for two decades when these practices had failed to drive their American competitors from the market. [107] Since there was no evidence of any rational motive for the defendants to conspire, the Court found the plaintiffs' evidence regarding the Japanese manufacturers' pricing practices, conduct in their home market, and agreements on distribution and pricing in the American market insufficient to create a "genuine issue for trial." [108]

The Court's elucidation of the appropriate standards for analyzing grants of summary judgment, as well as the nature of the shifting burdens imposed on the litigants, was significant for a number of reasons. First, the Court emphasized the need for summary judgments as a mechanism to weed out weak factual claims, not just facts that lack materiality. [109] Thus, the Court explained:

When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." [110]

The standard for judging whether there is a "genuine issue for trial" was defined as " [w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." [111]

Again, the Supreme Court was making it clear that summary judgment operates in the same fashion in pretrial litigation as does the trial motion for a directed verdict. [112] Furthermore, by clarifying that rationality is the test to be applied, the Court imposed a higher threshold on nonmovants. As a result, in order to survive a motion for summary judgment, the non-movant must do more than raise an inference that there is an issue to be resolved at trial; the plaintiff must show there is sufficient evidence in the pretrial record to either survive a motion for directed verdict or allow the plaintiff to win at trial on these facts. [113]

More important for agency counsel, however, was the Supreme Court's endorsement of a qualitative assessment of the pretrial evidence. [114] The Court stated: "It follows from these settled principles that if the factual context renders respondents' claim implausible--if the claim is one that simply makes no economic sense--respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." [115] Thus, the trial judge considering a motion for summary judgment was given a mandate to evaluate both the plausibility of a plaintiff's claim, as well as the persuasiveness of the evidence available before trial. [116] A district judge is required to weigh the inferences that can be drawn from the pretrial record to determine if they are reasonable or persuasive enough to permit a rational jury to find for the plaintiff. [117] As stated by one commentator: "Although usually the overall burden of advancing a summary judgment motion remains with the movant, [Matsushita] makes clear that nonmovants have their own intermediate burden (one which seems especially strong now, particularly if there is implausibility)." [118]

Anderson: Substantive Standard of Proof at Trial Applies to Summary Judgment: In Anderson, decided the same day as Celotex, the Supreme Court again emphasized the symmetry between summary judgment and directed verdict analyses. [119] The case involved a libel action brought against a magazine and its publisher. Following discovery, the defendant moved for summary judgment on the grounds that since they were public figures, the plaintiffs had to prove actual malice

under the New York Times [120] standards. The defendants asserted they were entitled to judgment as a matter of law in view of an affidavit by the author of the articles in question stating they had been thoroughly researched and facts obtained from many sources. [121] The district court granted defendants' motion, finding that the author's thorough investigation and reliance on numerous sources precluded a finding of actual malice as a matter of law. [122] On appeal, the District of Columbia Circuit reversed, finding that the clear and convincing evidentiary standard applicable at the trial level was irrelevant within the summary judgment context. [123]

Before the Supreme Court, the issue presented was whether in ruling on a motion for summary judgment the trial court must consider the substantive standard of proof from trial on the issue. [124] Finding that the substantive standard of proof applicable in summary judgment proceedings "mirrors" that which applies to directed verdicts, the Court vacated the Court of Appeals ruling. [125] The Court also discussed summary judgment procedure outside of the libel law context in sweeping and favorable terms. [126]

In language that holds new significance in light of the enactment of the Civil Rights Act of 1991, [127] the Court explained that genuine disputes are those where there is sufficient evidence to allow a reasonable jury to return a verdict for the plaintiff:

[I]n ruling on a motion for summary judgment, the judge must view the evidence through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. The question is whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant. [128]

Thus, summary judgment turns on whether an appropriate jury question is presented and the trial judge must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." [129]

While reiterating that the trial judge's role is not to weigh the evidence and make credibility determinations, the Court explained that if the pretrial evidence "is merely colorable" or "not significantly probative," summary judgment should be granted. [130] Moreover, the district court judge "must bear in mind the actual quantum and quality of proof necessary to support liability." [131] Nothing in the Court's opinion indicates that this qualitative review is limited to libel cases or litigation where a higher evidentiary burden applies. [132]

As applied to mixed cases, it is clear agency counsel should argue that since the plaintiff bears the ultimate burden of persuasion on all issues, the plaintiff should be required to present more and better evidence to survive a dispositive government motion. Stated thusly:

[I]t appears that Anderson will have it [sic] greatest meaning in emphasizing that who has the burden at trial must be considered in applying summary judgment law, and that the nonmovant, though entitled to reasonable inferences, cannot rest on a scintilla of evidence or even less evidence than would be proper to have the case submitted to a jury at trial. [133]

As will be discussed more fully below, the trial judge must be educated that the MSPB affirmance of the agency's personnel action -- coupled with the substantive burdens shouldered by the mixed case plaintiff -- will often require the district court to grant summary judgment in favor of the agency.

Celotex: Summary Judgment is not Disfavored, Defendants also Have Rights: Three months after Matsushita, and on the same day it handed down the Anderson opinion, the Supreme Court decided Celotex. [134] Here, the Court approved a grant of summary judgment for an asbestos manufacturer in a wrongful death action. The wife of the decedent had alleged that her husband's death resulted from his exposure to asbestos products manufactured or distributed by the Celotex Corporation. The district court granted summary judgment because despite discovery, the plaintiff had produced no evidence that her husband was exposed to defendant's asbestos products. In reversing the lower court, the District of Columbia Circuit held the summary judgment movant was required to demonstrate that the decedent had not been exposed to defendant's asbestos. The Supreme Court reversed, declaring there is no requirement in Rule 56 that the party moving for summary judgment support its motion with evidence "negating" the nonmovant's claim. [135] Writing for the Court, Justice Rehnquist observed that a party moving for summary judgment may discharge its burden by "showing" or "pointing out" to the trial court that there is an absence of evidence to support the nonmovant's claim. [136]

As in Matsushita and Anderson, the Court approved the trial court's review of the evidence under a sufficiency standard

and found that just as with the directed verdict inquiry, the principal purpose of summary judgment is to dispose of factually unsupported claims. [137] Indeed, the Court stated that summary judgment was mandatory in those instances where the plaintiff's proof failed on an essential element of the claim:

In our view the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. [138]

A complete failure of proof on an essential element of the plaintiff's case, said the Court, rendered all other facts immaterial. [139]

Finally, the Supreme Court made clear that to prevent the unwarranted expenditure of judicial and private resources, it favored the granting of summary judgment: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" [140] Moreover, with the shift to notice pleading, the Court commented that the motion for summary judgment has become the principal tool by which factually insufficient claims or defenses could be eliminated short of trial. The Court concluded its opinion with a discussion of the competing interests to be balanced in the summary judgment context:

Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis. [141]

Thus, the Court emphasized that summary judgment is designed to do more than protect plaintiffs with real claims, it also allows defendants to dispose of unsupported claims short of trial. [142]

While reserving more detailed discussion for later, a brief comment is appropriate now because the above language crystallizes the major points of a suggested approach for the agency's argument for summary judgment in a mixed case. First, regardless of whether the parties have conducted additional discovery as part of the judicial proceedings, agency counsel should argue that there has been "adequate time for discovery" based on the administrative proceedings conducted before the MSPB. If there has been additional discovery conducted under the Federal Rules and, assuming the plaintiff has failed to discover evidence supporting her discrimination claim, the Government's position is further bolstered.

Second, not surprisingly, the proposed "essential element" that should be the focal point of the agency argument is that of pretext. Even if it is assumed the plaintiff has met her burden to establish a prima facie case, the district court's affirmance of the "personnel side" of the case -- whether as the initial prong of a bifurcated single motion or as the first of two separate motions for summary judgment -- presents twin hurdles for the nonmovant. It removes any inference of discrimination that existed prior to the agency's articulation of its legitimate nondiscriminatory reason for acting against the plaintiff. As stated above, the legally mandatory inference of discrimination "drops from the case" once the defendant has satisfied its burden of production. [143] And, by virtue of the court finding adequate support for the agency's personnel action, it should have the practical effect of raising the threshold of evidence the plaintiff must produce in order to establish a genuine issue concerning pretext.

Third, the Government should argue the "sufficient" showing that must be made on the element of pretext is substantial. This is because the plaintiff bears the burden to show pretext at trial. Agency counsel can insist that the import of the Court's affirmance of the "personnel side" of the lawsuit is that, as a matter of the law of the case, the quality and quantity of evidence the mixed case plaintiff must present in order to defeat the agency's motion for summary judgment is greater than would ordinarily be required.

V. MIXED CASE LITIGATION IN PRACTICE AND A PROPOSAL

A. Judicial Treatment of Motions for Summary Judgment

With this framework established, several litigated mixed cases will be analyzed. Both trial and appellate decisions will be examined in order to address the varying analytical approaches used by the courts. Beginning with district court decisions and then proceeding to circuit opinions, the focus will be on the theories advanced by agency counsel and the courts'

responses to them in order to distill and describe the most effective tactics in propounding a dispositive mixed case motion for summary judgment.

District Court Decisions: The plaintiff in Blanco v. Frank [144] was a postal employee at the Miami General Mail Facility. Because there had been recurring problems of fighting among the workers at the facility, management announced a policy that fighting would be dealt with severely and considered to be misconduct warranting removal. After this announcement was posted, Blanco got into a fight with another employee which lasted approximately ten minutes. Following an internal investigation, both men were removed. The other worker appealed his removal through the negotiated grievance procedure and was subsequently reinstated without backpay. Blanco, however, appealed his removal through MSPB procedures and also to the EEOC. [145]

Before the district court, the plaintiff claimed that his removal was based on his sex (male) and national origin (Cuban), and in reprisal for previous equal employment opportunity activities. Blanco also challenged the MSPB decision on unspecified grounds. The district court had previously granted the agency's motion for summary judgment on the personnel side and was considering whether to grant summary judgment on the remaining Title VII issues. [146]

In its motion on the discrimination claims, the agency argued that the MSPB decision was conclusive as to the legitimacy of its stated reason for discharging the plaintiff. According to the defendant, the court was bound to find the plaintiff "was removed for just cause." [147] Disagreeing, the court determined that the " [MSPB Decision] may be persuasive, but not binding." [148] Nevertheless, the court "independently" found the agency's removal action legitimate and that the plaintiff had failed to present evidence which would support a finding of pretext. The court reached this finding despite affidavits submitted by the plaintiff which contained references, although vague, to plaintiff's protected activities and management's stated desire to remove plaintiff for his advocacy efforts. [149]

There are several practice points that can be gleaned from Blanco. In granting summary judgment on the personnel side of the case months before passing on the discrimination issues, the court showed that it was comfortable with the bifurcated review inherent in all mixed cases and, significantly, that it would rule on the MSPB decision before reaching the Title VII claims. Second, counsel for the defendant missed the mark in arguing that the court should give preclusive effect to the MSPB's affirmance of the underlying personnel action. Government counsel must exercise great care in articulating the dual bases for upholding the prior administrative findings. First, using Alexander for authority, agency counsel should stress that full consideration was given to the plaintiff's Title VII rights at the MSPB hearing. [150] Thus, based on the identity of parties and facts and issues litigated below, the court should be urged to afford the MSPB decision "great weight." [151] Next, the defendant should refer the trial judge to her finding that the agency action was supported by substantial evidence and then argue that this judicial determination of legitimacy raises the evidentiary threshold defendant must cross in order to establish a triable issue on pretext.

Implicit in this approach is the supposition that a federal judge is more likely to agree with her previous ruling as the law of the case than with the findings of an unknown AJ. Finally, in finding that affidavits it characterized as "not specific," "inconclusive," and containing only "bare allegations," were "not direct evidence" and, thus, could not defeat the Government's well-grounded motion for summary judgment, this court displayed its willingness to hold a mixed case plaintiff to the same standards as other civil litigants in proving there is a legitimate need for trial. [152]

Agency counsel came closer to the target in Belfoire v. MSPB. [153] There, the plaintiff challenged his demotion from the position of Supervisory Contract Specialist, GS-14, to a GS-13 nonsupervisory position. The agency asserted Belfoire's demotion was based on unsatisfactory performance. Belfoire alleged that the demotion was arbitrary and capricious and that the defendant discriminated against him on the basis of his sex. After the agency had successfully moved for summary judgment on the nondiscrimination claims, it then urged the court to grant summary judgment on the discrimination claim. This motion was denied. [154] The precise contours of the Government's argument cannot be discerned from the text of the opinion. [155] Apparently, however, defendant urged the court to find that its earlier ruling affirming the MSPB decision on the propriety of plaintiff's demotion precluded a finding of discrimination: " [d]efendants contend that this court's finding regarding the nondiscrimination claims means that plaintiff cannot show discrimination." [156] In rejecting this argument the court stated:

Defendants misconstrue the relationship between this court's review of the administrative record on the nondiscrimination claims and this court's de novo review of the discrimination claims. . . . By finding that the process was not arbitrary, the court did not find that defendants engaged in legitimate, nondiscriminatory action. Nor did it find that such action was not a pretext for discrimination. Any inquiry into the validity of plaintiff's discrimination claim in a mixed case such as this

must grant the employee the right to have the facts subject to trial de novo by the reviewing court. [157]

In arguing an issue preclusion theory, the Government simply tried to push the court too far. [158] The better approach would have been to emphasize the implausibility of plaintiff's claim when viewed within the factual context of the demotion. The sequence of pertinent events impugns plaintiff's discrimination theory; his demotion was preceded by unsatisfactory job performance and his allegations of discrimination were not raised until after he was notified of the performance-based action against him. Then the defendant could have shifted the court's focus to plaintiff's duty to come forward with more persuasive evidence than ordinarily is required in order to meet his burden to defeat the standard for a directed verdict. This allows the court to hold the mixed case plaintiff to the higher evidentiary standards warranted by the previous administrative litigation without appearing to undercut his statutory entitlement to a de novo hearing. Here, agency counsel was overly aggressive in arguing that the court's favorable ruling on the personnel side of the case barred even the possibility of a finding of discrimination.

Opinions of the Courts of Appeals: In Morales v. Merit Systems Protection Bd., [159] the Ninth Circuit considered the lower court's grant of summary judgment in an Air Force case. The plaintiff had been removed for misconduct. He defended on the ground that his removal was in retaliation for an earlier threat to file an EEO lawsuit. After unsuccessfully litigating his case before the MSPB, Morales filed his civil complaint in district court. The agency successfully moved for summary judgment on the entire complaint. After discussing the twin standards of review applicable to mixed cases, the Court of Appeals affirmed the grant on the MSPB portion of the matter but reversed and remanded on the plaintiff's Title VII claim. [160]

The Ninth Circuit's resolution of Morales is both significant and instructive. It is instructive because it discusses the interrelationship between the two standards of review and analysis applicable to mixed cases. Morales is significant in that it clearly illustrates the tightrope that trial judges and agency counsel must walk in order to properly adjudicate mixed case summary judgment motions. Both points will be addressed below.

Alfredo Morales was a civilian employee of the United States Air Force, at Travis AFB, California. Morales had over twenty-eight years of service at the time of his removal for misconduct. His job in 1986 was that of work leader of a crew of jet engine mechanics. As leader of the crew, it was Morales' duty to instruct the new members in various jet engine maintenance procedures and to inspect the quality of their work. [161]

Morales' difficulties began in May of 1986. He complained to his superior, Sergeant Fitzgerald, that he was being treated unfairly. Morales alleged that others with less education and experience were being promoted, that he was not provided with "writing opportunities," and that he was not being given the temporary duty assignments he deserved. [162] Morales then told Fitzgerald he would file an "EEO lawsuit" to correct these perceived injustices. [163]

Six weeks after this discussion with Fitzgerald, Morales went on leave. While Morales' was gone, his crew was assigned to a mopping and cleaning detail. When he returned, plaintiff claimed that this action was in retaliation for his threat to bring an EEO lawsuit. Morales raised this complaint and requested a meeting with his superiors. Subsequently, he was suspended for fourteen days for misconduct. [164]

The proposed suspension led to a series of events which ultimately ended with Morales' removal for misconduct. First, the plaintiff scheduled a hospital appointment to escape service of the notice of the suspension. Second, upon completion of the suspension, Morales had a conversation with a new crew member which the agency charged was an attempt by the plaintiff to interfere with an enlisted member's right to elevate a complaint up the chain of command. Morales claimed otherwise. Third, two days after the second incident, Morales engaged in "a verbal and physical tussle with his assistant crew chief that [plaintiff] says was a joke and the Board found to be demeaning to the crew member." [165] Fourth, the next day, Morales got into a verbal altercation with his civilian superior, Lukens. Morales claimed that Lukens had "verbally mistreated" him. [166] The MSPB found that Morales had verbally threatened Lukens. [167]

In its review of the district court's grant of summary judgment, the Ninth Circuit took no issue with the trial judge's ruling on the personnel side of the case. The court found that letters written by members of Morales' crew, coupled with the sworn testimony of those same crew members and plaintiff's superiors, provided substantial, credible evidence to uphold all four of the misconduct charges. Additionally, the court agreed the district judge had correctly reviewed the administrative record under the standards of 5 U.S.C. Sec. 7703(c). Thus, the Court of Appeals affirmed the grant of summary judgment on the nondiscrimination portion of the case. [168]

On the discrimination side of the matter, the Ninth Circuit found the trial court had erred. In its decision, the appellate court quoted extensively from the lower court's opinion. The district court had determined that Morales established a prima facie case, but the four instances of misconduct upheld by the MSPB established legitimate nonretaliatory reasons for his discharge. Indeed, the district court found that based on the evidence of his misconduct, Morales' claim of retaliation had become "implausible" and, citing Matsushita, required him to come forward "with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." [169] Continuing to quote extensively from the lower court's decision, the Ninth Circuit homed in on what it perceived to be the fatal error:

[T]he district court said that it was "required to, in a sense, weigh the evidence to determine whether a reasonable finder of fact could bring in a decision in favor of the non-moving party. . . ." The district court was right in all but its view that in granting summary judgment it could 'weigh the evidence' and resolve a disputed factual issue, when the resolution of that issue depended upon a determination of the credibility of the witnesses. [170]

The court then went on to conclude that Morales' story -- that his superiors had "staged" all four incidents in order to retaliate against him for his threat of an EEO lawsuit -- could be believed by a jury. Thus, said the court, it was improper for the district court to pass judgment on the "credibility" of Morales. Since a jury could believe him, "a triable issue remained." The court affirmed summary judgment on the personnel matter and reversed and remanded on the discrimination issue. [171]

The plaintiff in Williams v. Rice [172] was a sheet metal mechanic at Tinker AFB in Oklahoma. Following an altercation with two supervisors in which Williams shouted obscenities and physically threatened one of them, plaintiff was removed from federal service. Williams contended that his removal was in retaliation for previous complaints of discrimination. [173] At the MSPB hearing, the AJ found no evidence of retaliation for engaging in protected activity. [174]

The District Court for the Western District of Oklahoma granted the defendant's motion for summary judgment. [175] First, the court agreed that the Air Force had indeed followed its regulations governing plaintiff's discharge. Second, the court determined that Williams had failed to establish a prima facie case of retaliation because he had not shown a "causal connection" between his removal and his previous EEO complaints. [176] It based this conclusion on Williams' failure to show that the supervisor who made the decision to remove him had knowledge of his previous EEO complaints or whether Williams had indeed made the complaints. The Tenth Circuit affirmed the district court's grant of summary judgment in all respects. [177]

Williams presents an interesting contrast to the approach of the Ninth Circuit in Morales. The Tenth Circuit did not even address the issue of Williams' credibility. Rather, the court found that Williams had failed to provide evidence of his complaints or that his supervisor knew about them. This finding was made despite Williams' testimony on the matter at a fully litigated two-day MSPB hearing. [178] It could fairly be argued that if Williams had presented a credible version of events as to the circumstances surrounding his alleged EEO complaints, the district court would have denied summary judgment. Similarly, the court could have reasoned that the supervisor's denial of knowledge of the complaints presented a triable issue for the jury. According to the Morales court, since a jury was free to believe, or not, plaintiff's version of events, summary judgment was inappropriate. [179] If that same reasoning were applied in Williams, Williams should have had his day in court.

These two cases are, however, reconcilable. First, it appears that what led to reversal in Morales was not the result reached by the district court, but the unfortunate use of some key words by the trial court in its decision granting summary judgment. The language relied on by the Ninth Circuit in overturning the grant was the lower court's statement that it must "weigh the evidence." [180] According to the appellate court, it agreed with the district court in all other respects. [181] Although the Ninth Circuit seems to be elevating the form of the district court's opinion over the substance of the parties' motion evidence, there is ample support for the ruling with its narrow focus on the lower court's "weigh the evidence" language. [182]

Second, it seems as if the Ninth Circuit simply was not comfortable with the equities in the case. In the second sentence of its opinion, the court refers to the fact that Morales had "worked for the federal government for over twenty-eight years." [183] Moreover, in its concluding dicta the court opines that if a jury did find Morales credible, it could reasonably conclude that his superiors had conspired to get rid of him "after twenty-eight years of faithful service." [184] It does not stretch credulity too far to suggest that the court felt under the circumstances of this case that the penalty of removal was overly severe.

The lessons here for agency counsel are manifest. The language employed in the memorandum in support of the motion for summary judgment must be precise. The district court will usually incorporate the defendant's findings of fact and conclusions of law into its grant of the defendant's motion for summary judgment. Moreover, these same findings and conclusions must be able to withstand appellate review. Agency counsel must emphasize the implausibility of the plaintiff's claim in light of the overwhelming evidence presented by the government at the MSPB hearing. Additionally, Government counsel should stress that the district court itself has determined that the stated reason for taking action against the plaintiff was valid. Conversely, practitioners must avoid suggesting to the court that it should weigh the evidence or find plaintiff's story incredible. [185] Rather, counsel should articulate the heavy burden that must be carried by the plaintiff in order to defeat summary judgment or to present a triable issue for the jury.

B. A Paradigm for the Agency Argument

With the above foundation in place, a proposed method for advancing the agency motion for summary judgment will be outlined. It should be noted at the outset of this proposal, that the timing of filing the motion for summary judgment will necessarily vary with the facts of the case. Ordinarily, agency counsel should file the motion after discovery has closed. This timing advances two objectives. Assuming the plaintiff has not uncovered new evidence in support of his discrimination claim, the agency's position that all facts and issues were thoroughly developed at the MSPB is strengthened. Thus, the argument for affording major consideration to the MSPB decision and record is further enhanced. Filing the motion after discovery has ended also blocks the plaintiff from producing evidentiary matters, previously undisclosed, in response to the Government's potentially dispositive motion. If the motion for summary judgment is filed prior to the end of discovery, the opportunities for the plaintiff to produce an affidavit, or some other matter in response to purported deficiencies in his proof, are increased.

In the memorandum in support of the motion for summary judgment, agency counsel should guide the court through the applicability of each of the Matsushita trilogy of cases, simultaneously emphasizing the import of the MSPB decision, the administrative record, and the court's earlier affirmance of that holding. This suggested approach should also ease agency counsel's burden in educating the court.

As the initial prong of argument, Anderson should be used for two reasons. First, it apprises the court that the substantive standard of proof at trial applies to motions for summary judgment. Thus, the plaintiff's heavy McDonnell Douglas-Burdine burden of persuasion to establish the agency's stated reason for its action is pretextual is incorporated into the pretrial litigation. Moreover, by arguing Anderson initially, government counsel emphasizes to the trial judge the considerable procedural and substantive gauntlet the plaintiff must overcome to survive the defendant's motion. Second, Anderson gives agency counsel an excellent opening to use the previous MSPB findings in order to require the plaintiff to produce more and better evidence, since this case endorses a sufficiency review of the evidence then before the court. [186] Obviously, from the agency's side, the evidence is the MSPB decision and the accompanying administrative record. Agency counsel should stress that since the MSPB AJ addressed all the facts and issues now before the trial court, the weight afforded the MSPB findings should be substantial. [187] Second, the district court's own review of the administrative findings pertinent to the personnel side of the case affirmed the regularity of the process. Accordingly, before "a fair-minded jury could return a verdict for the plaintiff on the evidence presented," plaintiff must present significant evidence indeed to defeat the defendant's overwhelming proof. [188]

Celotex should be addressed next. Again, two essential points can be used. First, regardless of whether additional discovery was conducted under the aegis of the court, the plaintiff has, as a result of the prior MSPB process, had ample opportunity to uncover facts in support of his discrimination claim. The point may then be made that a trial of the mixed case will produce nothing new, that all facts have been uncovered and that the state of the evidence will remain unchanged. That is, the plaintiff has not, and cannot, produce evidence of sufficient quantity and quality to raise a genuine issue of pretext. Next, agency counsel can argue that based on the full evidentiary record already before the trial court, further litigation is unnecessary. Here, counsel may use the policy argument from Celotex which favors summary judgment to promote the inexpensive resolution of lawsuits where possible. Counsel should not hesitate to argue that needless litigation, like prohibited discrimination, is contrary to the public interest.

The final prong of argument is based on Matsushita, and its mandate for raising the evidentiary threshold for nonmovants with implausible claims. Now, the trial judge may legitimately consider and weigh the inferences to be drawn from "the record taken as a whole." [189] Thus, Matsushita brings together all the previous facets of the argument for summary disposition. It allows the agency lawyer to direct the judge's attention to the underlying facts of the case, i.e., the adverse action was precipitated by misconduct or unsatisfactory performance by the plaintiff, thereby undercutting the likelihood

of improper agency motives for its action. Matsushita also validates the analysis of those underlying facts by the court -- both the record review of the personnel side of the case and the de novo review of the discrimination issues. Under Matsushita, the trial judge is required to evaluate the plausibility of plaintiff's claim within the factual context of the case. [190] Moreover, if the court, based on its review of the entire body of evidence then before it, finds the discrimination complaint implausible, it must also require the plaintiff to "come forward with more persuasive evidence . . . than would otherwise be necessary." [191] Based on the prior MSPB adjudication, concomitant discovery, and the trial court's previous affirmance of the personnel questions in the case, agency counsel can insist the plaintiff has not, and cannot, sustain this burden.

VI. CONCLUSION

Although certainly difficult, it is practicable for agency counsel to successfully move for summary judgment in appropriate mixed cases. The principal task that must be executed is to insure that the court understands and applies the appropriate substantive and procedural analysis to this complex type of litigation. It is paramount that agency counsel impress upon the trial judge that the previous MSPB adjudication of the complaint was conducted in a manner that fully protected the statutory rights of the plaintiff. Using this decision as foundation, the court can then be persuaded that its own examination and approval of the regularity of the agency's action legitimately heightens the pretrial scrutiny of plaintiff's judicial complaint. In this manner, the agency trial lawyer can best represent her client by holding the mixed case plaintiff to the same standards of civil litigation that apply to other claimants against the Federal Government.

Footnotes

*Major Rippey (B.S., Tennessee Technical University; M.P.A., University of Tennessee; J.D., St. Mary's School of Law; LL.M., The Georgetown University National Law Center) is Labor Counsel at the Air Force Central Labor Law Office in Rosslyn, Virginia. He is a member of the Texas and District of Columbia Bars.

1. A mixed case involves an adverse personnel action normally appealable to the Merit Systems Protection Board combined with an allegation that a basis for the action was prohibited discrimination. See 5 U.S.C. Sec. 7702(a) (1991); Romain v. Shear, 799 F.2d 1416, 1419 (9th Cir. 1986), cert. denied, 481 U.S. 1050 *[cited at]* (1987).

2. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 *[cited at]* , 802-05 (1973).

3. 475 U.S. 574 *[cited at]* (1986).

4. Fed. R. Civ. P. 1 requires, inter alia, that any motion filed be "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."

5. As with adverse and performance based actions which do not contain allegations of discrimination, actions which do contain allegations of discrimination may, at the election of a bargaining unit employee, be adjudicated by the Merit Systems Protection Board or processed through the negotiated grievance procedure. See 5 U.S.C. Sec. 7121(d) (1991). This category is eliminated since a premise of this article is that it is the trial-type nature of the MSPB hearing that bolsters the Government's efforts to have significant weight afforded to the prior hearing and record.

6. Title VII of the Civil Rights Act of 1964, codified as amended at 42 U.S.C. Secs. 2000e to 2000e-17 (1991).

7. See infra note 12.

8. Chandler v. Roudebush, 425 U.S. 840 *[cited at]* (1986).

9. 5 U.S.C. Sec. 7702(a)(1)(A) (1991). The MSPB has jurisdiction only over appeals from agency actions specifically designated by law, rule, or regulation. 5 U.S.C. Sec. 7701(a). These appealable actions include: (1) a removal; (2) a suspension for more than 14 days; (3) a reduction in grade; (4) a reduction in pay; and, (5) a furlough of 30 days or less. 5 U.S.C. Sec. 7512.

10. 5 U.S.C. Sec. 7702(a)(1)(B). The bases of prohibited discrimination are proscribed by: (1) Sec. 717 of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-16; (2) Sec. 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. Sec. 206(d); (3)

Sec. 501 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 791; and, (4) Secs. 12 and 15 of the Age Discrimination in Employment Act of 1967, 29 U.S.C. Secs. 631, 633(a).

11. 5 U.S.C. Sec. 7703(b)(2) and (c) (1991); Romain v. Shear, 799 F.2d 1416 (9th Cir. 1986), cert. denied, 481 U.S. 1050 *[cited at]* (1987).

12. A complete description of the myriad administrative procedures available to the mixed case complainant is beyond the scope of this article. An exhaustive discussion of mixed case processing at the administrative level, complete with helpful flow diagrams, is found in William V. Luneberg, The Federal Personnel Complaint, Appeal, and Grievance Systems: A Structural Overview and Proposed Revisions, 78 Ky. L.J. 1, 44-55 (1989-90). As previously stated, the scenario upon which this article is premised assumes the complainant is not part of a bargaining unit for which there is a negotiated grievance procedure, and further assumes the complainant has elected to file an appeal with the MSPB. Regardless of the administrative forum elected by the complainant, the analysis at the district court will be the same, assuming, of course, that the complainant has not bypassed the MSPB by pursuing the complaint through the agency EEO process, and then filed an appeal of the agency decision directly with the district court. 5 U.S.C. Sec. 7702(a)(2). Left for another day is the judicial conundrum that such a direct appeal of a mixed case could create.

13. 5 U.S.C. Sec. 7702(a)(1).

14. Id. Sec. 7702(a)(2).

15. Id. Sec. 7121(d).

16. Id.

17. Id. Sec. 7702.

18. Id. Sec. 7702(a)(2).

19. Id.

20. Id. Sec. 7702(a)(1).

21. Id. Sec. 7702(b)(1), (2), (3).

22. Id. Sec. 7702(a)(3).

23. Id. Sec. 7702(b)(2) and (4).

24. Id. Sec. 7702(b)(2).

25. Id. Sec. 7702(b)(3).

26. Id. Sec. 7702(b)(3)(B).

27. Id. Sec. 7702(c).

28. Id. Sec. 7702(d)(1).

29. Id. Sec. 7702(d)(6).

30. Id.Sec. 7702(d)(2)(A). In all, there are eight different times when the mixed case complainant may have the right to bring suit in federal district court: (1) 120 days after filing a complaint with the employing agency even if the agency has not issued a final decision by that time; (2) 30 days after the employing agency's final decision; (3) 120 days after filing a petition with the MSPB if the MSPB has not yet made a decision; (4) 30 days after an MSPB decision. If the employee petitions EEOC to review the matter and EEOC denies the petition, the 30 day period in this case runs from the denial of

such a petition by EEOC; (5) 30 days after the EEOC decision if EEOC agrees with the MSPB; (6) 30 days after MSPB reconsideration if MSPB agrees with the EEOC; (7) 30 days after the special panel makes a decision. Civil Service Reform Act of 1978, Report of the Committee on Post Office and Civil Service, H.R. Rep. No. 1717, 95th Cong., 2d Sess. 141 (1978), reprinted in 1978 U.S.C.C.A.N. 2875.

31. 425 U.S. 840 *[cited at]* (1986).

32. Id. at 863, n.39; see also Beech Aircraft v. Rainey, 488 U.S. 153 *[cited at]* (1988). The Ninth Circuit has held that EEOC or federal agency determinations are per se admissible in a trial de novo. Bradshaw v. Zoological Soc. of San Diego, 569 F.2d 1066 (9th Cir. 1978).

33. Beech Aircraft v. Rainey, 488 U.S. 153 *[cited at]* , at 153 (1988).

34. Two types of actions taken against federal employees are "appealable actions" which, when combined with an allegation of discrimination form the bases for a mixed case. "Chapter 43 actions" are based on unacceptable performance. "Chapter 75 actions" are taken to promote the efficiency of the service and typically involve some type of employee off-duty misconduct. 5 U.S.C. Secs. 4303, 7513, 7702(a)(1) (1991). Additionally, the proposed sanction must include: (1) a removal; (2) a suspension for more than 14 days; (3) a reduction in grade; (4) a reduction in pay; or, (5) a furlough of 30 days or less. 5 U.S.C. Sec. 7512.

35. 5 U.S.C. Sec. 7701(a); see also Luneberg, supra note 12, at 106-07.

36. 5 U.S.C. Sec. 7701(a).

37. Federal summary judgment practice and procedure is described in more detail below. For purposes of the present discussion, however, agency counsel should be familiar with the types of evidentiary matters that may be used in support of the motion for summary judgment. Fed. R. Civ. P. 56(c) speaks of "depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." The central requirement of summary judgment proof, however, is that it "shall set forth such facts as would be admissible in evidence."

38. 415 U.S. 36 *[cited at]* (1974).

39. Id. at 60 n.21.

40. The procedural requirements which must be met before an action is taken are outside the boundaries of this article. The basic statutory framework for pre-action procedures is set forth at 5 U.S.C. Secs. 4303 and 7513 (1991). Essentially, the employee is entitled to basic administrative due process, that is: (1) advance notice of the proposed action and the facts upon which it is based, (2) a reasonable amount of time to respond, (3) the right to be represented, and, (4) a written decision stating the specific reasons for the action.

41. 5 U.S.C. Sec. 7701(a).

42. 5 C.F.R. Secs. 1201.21-1201.24 (1992).

43. 5 C.F.R. Secs. 1201.31-1201.33.

44. See generally 5 C.F.R. Secs. 1201.11-1201.113, Subpart B--Procedures for Appellate Cases.

45. 5 C.F.R. Sec. 1201.41.

46. Id.

47. Id.

48. Id.

49. Id. Sec. 1201.53.

50. Id.

51. Id. Secs. 1201.111, 1201.113.

52. Id. Sec. 1201.116.

53. Id.

54. Id. Sec. 1201.119.

55. Id. Sec. 1201.54.

56. Fed. R. Evid. 803(8)(C); see Baldwin v. Rice, 144 F.R.D. 102, 104 n.2 (E.D. Cal. 1992).

57. See supra notes 32 and 33 and accompanying text.

58. See supra note 37.

59. 415 U.S. at 61.

60. Id. at 60 n.21 (emphasis added).

61. Id.; see also Luneberg, supra note 12 at 106-07.

62. Fed. R. Civ. P. 56(c).

63. 5 U.S.C. Sec. 7703(b)(1).

64. Id. Secs. 7703(c)(1)-(3).

65. Id. Sec. 7703(c)-(1); Romain v. Shear, 799 F.2d 1416, 1421 (9th Cir.1986) (citing Hayes v. United States, 684 F.2d 137, 141 (D.C.Cir. 1982)). As previously stated, it is assumed that the MSPB has adjudicated the complaint. See supra note 12.

66. Morales v. Merit Systems Protection Board, 932 F.2d 800, 802 (9th Cir. 1991).

67. 5 U.S.C. Sec. 7703(c); Hayes v. United States, 684 F.2d. 137, 141 ("Hayes may bring his entire mixed case before the district court for review de novo of the discrimination claim, and review on the record of his nondiscrimination claim.").

68. At least one commentator has proposed an amendment to the statutory scheme in order to conserve judicial resources and to give effect to the common law doctrine of issue preclusion:

[W]here an employee has been afforded a full trial-type hearing before the MSPB in a mixed case, he or she should be entitled to the limited judicial review generally applicable to administrative determinations and not the full trial de novo currently permitted. . . . Operation of the common law of preclusion is now foreclosed in part by various provisions of the CSRA and the anti-discrimination statutes as construed by the courts. For clarity's sake, the statutory amendment should indicate expressly that an employee in a mixed case has the right to an MSPB hearing or a judicial trial de novo but not both.

Luneberg, supra note 12, at 106-07.

69. See supra text accompanying notes 63-66.

70. See supra note 64.

71. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 *[cited at]* (1981); McDonnell Douglas Corporation v. Green, 411 U.S. 792 *[cited at]* (1973).

72. Matsushita Elec. Indus. Co. v. Zenith, 475 U.S. 574 *[cited at]* (1986).

73. See Williams v. United States Postal Service, 1992 U.S. Dist. LEXIS 15336 (E.D. Pa. 1986)(transfer of mixed case after Title VII claim dismissed serves interests of justice and promotes consistency in handling federal personnel litigation) (citing Afifi v. U.S. Dept. of Interior, 924 F.2d 61 (4th Cir. 1991)(after discrimination portion of mixed case is dismissed, district court has discretion whether to retain jurisdiction over MSPB aspect or to transfer case to the federal circuit)).

74. 715 F.2d 1485, 1490 (Fed. Cir. 1983).

75. S. Rep. No. 95-969, 95th Cong., 2d Sess. 53 (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2775; see also Williams v. Dep't of Army, 715 F.2d 1485, 1491 (Fed. Cir. 1983).

76. McDonnell Douglas Corp. v. Green, 411 U.S. 792 *[cited at]* , 802-04 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 *[cited at]* , 252-256 (1981).

77. McDonnell Douglas, 411 U.S. at 677-678 n.13.

78. Id.

79. Id.

80. Furnco Const. Co. v. Waters, 438 U.S. 567 *[cited at]* , 577 (1978).

81. See sources cited supra note 77.

82. As the Supreme Court stated in Burdine, more than a mere articulation is required. The defendant must rebut plaintiff's case with admissible evidence: "An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel." Burdine, 450 U.S. at 256 n.9. The thesis of this article, and a corollary of this proposition, is that when the agency meets its burden with a final MSPB decision, affirmed by the district court, that a non-movant plaintiff must offer more persuasive evidence than required to defeat the agency movant's motion for summary judgment.

83. See sources cited supra note 77.

84. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 *[cited at]* , 255, 257 (1981).

85. Id. at 255-56 n.10.

86. See sources cited supra note 77.

87. Fed. R .Civ. P. 56(c) (emphasis added).

88. Id.

89. McDonnell Douglas Corp. v. Green, 411 U.S. 792 *[cited at]* , 804-805 (1973).

90. Id. In Hicks v. St. Mary's Honor Center, 970 F.2d 487 (8th Cir. 1992), cert. granted, 113 S.Ct. 954 *[cited at]* (1993), however, the Supreme Court, in an age discrimination case, has taken up the issue of whether discrimination can indeed be inferred from the defendant's incredible explanation for taking adverse action against the plaintiff.

91. Fed. R. Civ. P. 56(c), (e).

92. Matsushita Elec. Indus. Co. v. Zenith, 475 U.S. 574 *[cited at]* , 587 (1986) (citations omitted).

93. Fed. R. Civ. P. 56(e).

94. First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253 *[cited at]* , 288 (1968).

95. Fed. R. Civ. P. 50(a)(1) states:

If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim , counterclaim, cross-claim, or third party claim that cannot be maintained without a favorable finding on that issue.

96. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 *[cited at]* , 251 (1986).

97. Numerous authors have addressed the import of these 1986 cases in terms of whether the Supreme Court effected substantive changes to summary judgment practice or merely clarified and standardized existing law. An exhaustive treatment of summary judgment practice as impacted by these cases is beyond the reach of this article. These 1986 cases are discussed in sufficient detail, however, to enable the agency counsel in the proverbial trenches to use the rules articulated in Matsushita and its progeny to their best advantage in pretrial litigation involving mixed cases.

98. 475 U.S. 574 *[cited at]* (1986).

99. 477 U.S. 242 *[cited at]* (1986).

100. 477 U.S. 317 *[cited at]* (1986).

101. See S. Childress, A New Era For Summary Judgments: Recent Shifts at the Supreme Court, 116 F.R.D. 183, 184 (1987); see also Melissa L. Nelken, One Step Forward, Two Steps Back: Summary Judgment After Celotex, 40 Hastings L.J. 53 (1988).

102. See Childress, supra note 101 at 194.

103. 723 F.2d 238, 304-05 (3d Cir. 1983).

104. 475 U.S. at 599.

105. Id.

106. Id. at 597 (emphasis added).

107. Id. at 597-98.

108. Id. at 598 (citing Fed. R. Civ .P. 56(e)).

109. See Childress, supra note 102 at 186.

110. 475 U.S. at 587-88 (emphasis in original; footnote and citations omitted).

111. Id. at 588.

112. See Childress, supra note 101 at 186; Fed. R. Civ .P. 50(a).

113. See Childress, supra note 101 at 186.

114. Id.

115. 475 U.S. at 588 (emphasis added).

116. See supra note 101.

117. Id.

118. See Childress, supra note 101 at 187 (emphasis added).

119. 477 U.S. at 251-253.

120. New York Times Co. v. Sullivan, 376 U.S. 254 *[cited at]* , 279-280 (1964).

121. 447 U.S. at 246.

122. Id. at 247; 562 F. Supp. 201, 209 (D.D.C. 1983).

123. 477 U.S. at 248; 746 F.2d 1563, 1571 (D.C.Cir. 1984).

124. 477 U.S. at 245.

125. Id. at 251, 258.

126. See Childress, supra note 102 at 190.

127. Section 102(c) of the Civil Rights Act of 1991 affords "any" party the right to a jury trial. Pub. L. No. 102-166, 105 Stat. 1071.

128. 477 U.S. at 255 (emphasis in original).

129. Id. at 253.

130. Id. at 250-51.

131. Id. at 255.

132. See Childress, supra note 101, at 190.

133. Id.

134. Celotex Corp. v. Catrett, 477 U.S. 317 *[cited at]* (1986).

135. Id. at 324.

136. Id. at 326.

137. Id. at 253-54; See Childress, supra note 101, at 188.

138. 477 U.S. at 323.

139. Id.

140. Id. at 328.

141. Id. (emphasis added).

142. See Childress, supra note 101, at 189.

143. See Burdine, 450 U.S. at 256 n.10.

144. 50 Fair Empl. Prac. Cas. 1873 (S.D. Fla. 1989).

145. One of the issues raised by plaintiff at trial was whether the arbitrator's decision reinstating the other combatant should be judicially noticed. The trial judge allowed that the arbitrator's ruling and findings may be persuasive evidence but were not entitled to judicial notice. Further, the court noted that the arbitrator had followed different procedures than the MSPB and had failed to determine who started the fight. Id. at 1874-75. See also Alexander, 415 U.S. at 60 n.21.

146. 50 Fair Empl. Prac. Cas. at 1874-75.

147. Id. at 1876.

148. Id.

149. Id. at 1875. The court disposed of plaintiff's underlying discrimination claims on the basis that he had failed to establish a prima facie case in not identifying other non-hispanics and females who were treated more favorably than he. Thus, the court did not need to proceed further and address the impact of the MSPB decision on the ability of the plaintiff to establish a genuine fact question relating to the issue of pretext.

150. Alexander, 415 U.S. at 60 n.21.

151. Id.

152. Id. at 1876.

153. 41 Fair Empl. Prac. Cas. 26 (D.D.C. 1986).

154. Id. at 27.

155. Id.

156. Id. (emphasis added).

157. Id.

158. In Hicks v. Frank, 1990 U.S. Dist. LEXIS 7253 (N.D. Ill. 1990), the trial judge took a similarly dim view of the Government's attempt to plead the prior MSPB adjudication as a bar to re-litigating the facts surrounding the occurrences of plaintiff's misconduct:

[I]t would be contrary to the policy underlying the enforcement provisions of Title VII to hamper a plaintiff's presentation of his Title VII claim based on the final resolution of the MSPB proceeding, which will, by the nature of the process, always come first. Moreover, since a Title VII claimant is not precluded by a direct agency determination on the discrimination claims, it would be ironic indeed to preclude him by a collateral judgment.

That said, the court went on to describe the importance of the administrative decision to the ultimate resolution of the case. "Thus it is likely that the determination of the MSPB will play a significant evidentiary role in resolution of the plaintiff's claims, but it is not a basis for summary judgment." Id. at *12. Although not citing to Alexander and Chandler it is clear this court applied their reasoning in this case.

159. 932 F.2d 800 (9th Cir. 1991).

160. Id. at 803.

161. Id.

162. Id. at 801.

163. Id.

164. Id.

165. Id.

166. Id.

167. Id.

168. Id. at 802. The Ninth Circuit also agreed with the lower court's affirmance of the MSPB on the appropriateness of the penalty. See Douglas v. Veterans Admin., 5 M.S.P.R. 280 (1981) (in adverse actions taken pursuant to Chapter 75 of 5 U.S.C., agencies must consider not only whether the penalty proposed is authorized, but also whether it is appropriate under all the facts and circumstances of the case).

169. 932 F.2d at 802 (citations omitted).

170. Id. at 803 (emphasis added).

171. Id.

172. 983 F.2d 177 (10th Cir. 1993).

173. Plaintiff subsequently attempted to raise an additional defense of racial discrimination at the district court level. The court entered summary judgment on this claim on exhaustion grounds as not having been previously raised. The Tenth Circuit affirmed the district court's grant. Id. at 181.

174. Id. at 179.

175. Id. at 177.

176. Id. at 181.

177. Id.

178. MSPB Initial Decision, Docket No. SF07528710094, Feb. 13, 1987.

179. 932 F.2d at 803.

180. Id.

181. Id.

182. See Celotex, 477 U.S. at 250. Of course there was no need for the Ninth Circuit to place such weight on the district court's explanation of its reasoning in granting summary judgment. It conducts de novo review of district court grants of summary judgment. Williams v. Edward Apffels Coffee Co., 792 F.2d 1482, 1484 (9th Cir. 1986); see also Proctor v. Consolidated Freightways Corp., 795 F.2d 1472, 1477 (9th Cir. 1986). If so inclined, the Court of Appeals could have ignored the trial judge's "weighing" comment and determined for itself whether summary judgment on the discrimination issue was appropriate.

183. 932 F.2d at 801.

184. Id. at 803. As a trial lawyer friend of the author would often say "I can name that tune in two notes." It is suggested that most agency practitioners with a modicum of experience could predict the outcome of this case upon reading nothing more than the appeals court's laudatory characterization of the plaintiff's previous federal service.

185. Although it is suggested that agency counsel refrain from arguing credibility issues if possible, two Circuit Courts of Appeal, in affirming summary judgments in private sector employment discrimination lawsuits, have approved the trial courts' evaluation of the plaintiffs' truthfulness to assess whether a factual question was presented on the issue of pretext. In Branson v. Price River Coal Co., 853 F.2d 768, 771 (10th Cir. 1988), the Court of Appeals stated: " [T]he district court was justified in entering summary judgment on the grounds that plaintiffs failed to present any credible evidence on the issue of pretext." Thus, the court found that the plaintiffs had not been discharged as part of a reduction-in-force on account of their age. If the Tenth Circuit had followed the Ninth Circuit's reasoning in Morales, a sufficient jury question would have been raised merely because the jury could have believed plaintiffs' version of the events.

Similarly, in Mitchell v. Toledo Hospital, 964 F.2d 577, 584-85 (6th Cir. 1992), the plaintiff's affidavit submitted in response to defendant's motion for summary judgment was insufficient to create a genuine issue of fact concerning whether she was discharged because she was black or for the employer's stated reason of "misuse of hospital property." There, the court determined that plaintiff's "conclusory allegations and subjective beliefs" were inadequate to sustain a claim of discrimination. Id. at 585. Again, it would seem as if under the Ninth Circuit's standards, if the plaintiff advances even a theory of discrimination that might be believable to a jury, summary judgment is defeated. See Morales, 932 F.2d at 803 (plaintiff's testimony that events forming the basis for his discharge for misconduct had been "staged" by his supervisors in retaliation for his earlier threat to raise a complaint of discrimination would, if believed by a jury, be sufficient to raise a factual question).

186. 477 U.S. at 255.

187. It should be noted that the possibility always exists that the plaintiff may change his theory of discrimination from that previously advanced before the MSPB. To the extent that any newly raised theories are negated by the facts and issues developed in the administrative process agency counsel should, of course, include them within the scope of the motion. It is also suggested, however, that defense counsel move to strike any theories and attendant claims not raised below for failure of the plaintiff to exhaust his administrative remedies. Brown v. GSA, 425 U.S. 820 *[cited at]* (1976).

188. 477 U.S. at 253.

189. 475 U.S. at 587-88 (emphasis added).

190. See Childress, supra note 101, at 186; Fed. R. Civ .P. 50(a).

191. 475 U.S. at 588.

38 AFLR 141, Fighting Fraud Illustrated: The Robins AFB Case

Title of Article

Fighting Fraud Illustrated: The Robins AFB Case

Author

Colonel Jerald D. Stubbs, USAF*

Text of Article

I. INTRODUCTION

In July 1990, two managers of hardware stores close to Robins AFB (located near Warner Robins, Georgia) met, as they often did, to discuss business. They discovered each had been involved in unusual, but similar, encounters with Larry Albert, a government employee at Robins AFB.

The first manager had received three contracts from Robins AFB for hardware items priced at $2435. He delivered what was ordered and was paid. Later, Albert came to his store and returned these items, explaining they were no longer needed. But Albert did not want the Air Force's money back. Instead, Albert wanted a line of credit to use in getting other items he said the Air Force did need. The manager agreed, and for the next year Albert picked up a variety of items, charging $2235 against the line of credit. The practice stopped when the manager asked Albert if Robins AFB really needed salt blocks for deer.

The second manager had received two contracts from Robins AFB priced at $628. Soon after, Albert came to the store and told the manager the Air Force no longer needed these items. Albert asked him to bill the Air Force for the undelivered items and, with the money received, to establish a line of credit for Albert to use in getting other items he said the Air Force did need. Albert explained this procedure saved time and paperwork. The manager agreed, billed the Air Force for the undelivered items, and used the money received from the Air Force to establish a line of credit. Over the next two days, Albert obtained several items, charging $238 against the line of credit.

Comparing their experiences, the two managers decided to report Albert's activities to the Air Force Office of Special Investigation (OSI) at Robins AFB; thus began the unravelling of a major fraud ring operating at Robins AFB. What modestly began as an investigation into fraud involving a few thousand dollars and one Air Force employee, ultimately uncovered a complicated fraud scheme involving $2 million, nine Air Force employees, four vendors, and six vendor employees.

This article describes the investigation, criminal prosecution, and civil and administrative actions taken in the Robins AFB fraud case. The handling of fraud cases in general is reviewed by examining principles derived from the Robins AFB experience. This article confirms what can be done when government agencies cooperate and aggressively pursue criminal, civil, and administrative remedies in parallel.

II. THE ROBINS AFB FRAUD CASE, INVESTIGATION AND REMEDIES A. The First Phase of the Investigation

The OSI and Federal Bureau of Investigation (FBI) already had established a team approach for investigating fraud at Robins AFB when the OSI received the report of Albert's suspicious activities. As a result, the investigation was conducted jointly from the beginning by the OSI and FBI, each contributing an agent.

These two agents interviewed Albert. He admitted that the items he acquired from the hardware stores and charged against the lines of credit were for his personal use. The two agents also interviewed Albert's supervisor, Emmitt Long. The investigators learned that Long had accompanied Albert one time to pick up items charged against a line of credit. After an

initial denial, Long admitted he knew about Albert's irregular practice of using lines of credit created from Air Force payments for items returned or undelivered. But he denied any fraud, asserting that the Air Force received the items charged against the lines of credit.

At this point, the investigators briefed the United States Attorney's office for the Middle District of Georgia and the Robins AFB judge advocate office. About the same time, Albert and Long, at their request, met with the Assistant U.S. Attorney (AUSA) handling the case. Both offered to plead guilty to criminal charges based on the fraud involving the two hardware stores. The AUSA, however, concluded that Albert and Long were too quick with their offer and requested the investigation continue.

The investigation now needed to address the contracting process at Robins AFB and how Albert and Long fit into that process. The investigators interviewed the people involved in the contracting process and reviewed contract files. Their principal source of information, however, was the contract law division in the Robins AFB judge advocate office. The investigation revealed the following facts.

Long was in charge of the material warehouse for the maintenance directorate at Robins AFB. Some years earlier, the decision had been made for the maintenance directorate to handle the base's minor civil engineering work. To do this, maintenance established a material warehouse to order and store items needed for this civil engineering work. Because Long was in charge of the warehouse, he had the authority to order items for the warehouse. In the language of government contracting, Long had authority to certify a government requirement for an item. He did this by signing a purchase request.

In the second step of the contracting process, Long submitted the purchase request to the Robins AFB contracting office for issuance of a contract. Long could, and usually did, recommend a vendor who could supply the item, but he had no authority to contract on behalf of the Government. Only a contracting officer has that type of authority. [1] In issuing contracts for the items Long ordered, the contracting office followed the procedures for small purchase contracting. For contracts under $2500, the contracting office awarded the contract to the source Long recommended, if the price was determined fair and reasonable. For contracts over $2500, but under $25,000, the contracting office was required to solicit bids from at least three sources -- one could be the source Long recommended -- and award the contract to the lowest bidder. [2]

In the third step, the contractor delivered the items ordered on the contract, obtained a certification from an Air Force employee that the items had been delivered, and billed the Robins AFB finance office. Long and Albert had authority to sign delivery certificates, although Albert usually signed. In the fourth and final step of the contracting process, the Robins AFB finance office paid the contractor. The finance office required three documents: a contract, a delivery certificate, and an invoice. [3]

In addition to learning the contracting process and Long's and Albert's role in it, the criminal investigators identified other persons to be interviewed. One was Long's former secretary. She told the investigators that Long often instructed her not to enter certain purchase requests into the maintenance warehouse computer system. When she left Air Force employ, she took copies of these purchase requests with her. During the interview, she gave these to the investigators. Most of the purchase requests, totalling more than $250,000, identified the seller as the C.C. Dickson Co., a nationwide distributor of materials for refrigeration, heating, and air conditioning. C.C. Dickson Co. was the source Long recommended. Many of the purchase requests had Long's signature, but several had been signed by James Garrett, another Air Force employee at Robins AFB.

The investigators next interviewed Garrett. This meeting proved to be a pivotal step in the investigation. Until early 1989 Garrett had worked for Long in the material warehouse. Garrett also had authority to order materials and certify their delivery. Garrett admitted to participating in a scheme with Long, Albert, and an off-base vendor that, from July 1987 to early 1989, defrauded the Air Force of approximately $70,000. The off-base vendor was the C.C. Dickson Co. store in Warner Robins, Georgia. The manager was John Hyams.

The scheme Garrett described worked in this manner. Long or Garrett prepared a purchase request for a fictitious requirement and submitted it to the contracting office. The purchase request identified the C.C. Dickson Co. as the recommended source. A contract was issued to C.C. Dickson Co. Garrett then went to the C.C. Dickson Co. store in Warner Robins and signed a form certifying that the items ordered on the contract had been delivered when in fact they had not. Next, Hyams sent an invoice with the false delivery certificate to the Robins AFB finance office which then paid

the C.C. Dickson Co. Hyams arranged for the C.C. Dickson Co. to keep thirty percent markup for profit and overhead. He shared the balance with Garrett, Long, and Albert. Garrett admitted to receiving from $12,000 to $15,000 as his share.

The next person to interview was clear: John Hyams. This interrogation also proved to be a pivotal step in the investigation. Hyams admitted the fraud scheme basically as Garrett described it. He also admitted that the scheme did not end until October 1990, although Garrett dropped out in early 1989. Hyams identified as fraudulent thirty-five invoices that totaled more than $250,000. Later, Hyams would admit that $200,000 of these charges were fraudulent.

Hyams also described a money laundering feature not previously known to the investigators. This feature was necessary because the Air Force paid C.C. Dickson Co. headquarters in Charlotte, North Carolina -- not the Warner Robins store. Hyams' problem was how to get this money out of Charlotte and into the hands of the participants in the fraud scheme. He solved the problem by setting up a money laundering operation through his friend, James Rentz.

Rentz operated a company called Rentz, Inc. Periodically, as instructed by Hyams, Rentz -- through Rentz, Inc. -- billed the C.C. Dickson Co. in Charlotte for items Rentz supposedly sold to the C.C. Dickson Co. store in Warner Robins. In fact, Rentz delivered nothing. On each occasion, Hyams told Rentz the amount to charge, a price based on seventy percent of C.C. Dickson Co.'s price to the Air Force. In this way, Hyams ensured C.C. Dickson Co. received its thirty percent markup. The check would be received from Charlotte and Rentz deducted his cut, which ranged from ten to twelve percent. Rentz then transferred the balance into a bank account he had established in the name of J & J Salvage, a paper company. Hyams and Rentz used this account to make payments to the participants in the fraud scheme, sometimes by check and sometimes in cash.

B. The First Round of Remedies

At this stage, the investigation stalled. Long and Albert had only admitted fraud involving the two hardware stores. They refused to be questioned about participating with Hyams to defraud the Air Force of $200,000. Hyams obtained an attorney who demanded immunity for Hyams' further cooperation with the investigation. Garrett had told all he knew. Rentz also got a lawyer and refused further cooperation.

The U.S. Attorney's Office for the Middle District of Georgia and the Robins AFB staff judge advocate office decided to initiate criminal prosecution, as well as civil and administrative actions. These offices, with the criminal investigators participating, coordinated a strategy to concurrently pursue the investigation and criminal, civil, and administrative remedies. The principal targets were Long, Albert, Rentz, the C.C. Dickson Co., but particularly Hyams. The Government's objective was to pressure the individual defendants to accept deals to which they would pled guilty to reduced charges in exchange for their cooperation with the Government.

The first step was to indict Albert and Long on nine counts of conspiracy, false claims, theft, false statements, and extortion. [4] The Government had a good case against both. Each had admitted fraud involving the two hardware stores. And, the Government had Garrett's testimony against both for the $200,000 fraud involving C.C. Dickson Co., which was corroborated by Long's secretary and the payoffs through J & J Salvage.

Acting in parallel, Robins AFB indefinitely suspended Long and Albert from their employment without pay because the indictment provided reasonable cause to believe that each had committed a crime punishable by imprisonment. Civil service and Air Force regulations allow indefinite suspension without pay in these circumstances. [5] Both employees were also barred from Robins AFB. [6]

Finally, the U.S. Attorney and Robins AFB legal offices asserted written demands for payment against Long and Albert. Robins AFB asserted a single damage claim of more than $200,000 for repayment of a debt. This action created an allowance for an administrative offset later. Eventually, Robins AFB seized Long's final pay and retirement funds totaling $21,000 to help offset the $200,000 claim. [7] The U.S. Attorney's office asserted a demand for $1.1 million in triple damages and forfeitures under the False Claims Act. [8] In short, the Government presented Long and Albert with the triple threat of prison, unemployment, and bankruptcy.

The pressure worked. Long and Albert agreed to plead guilty to a reduced two-count charge of conspiracy and theft [9] and agreed to cooperate with the continued investigation and to testify in any proceeding. They also agreed to repay the Government what they had received as their share of the proceeds from the fraud scheme, and, for its part, the Government agreed to limit their liability to that amount. No agreement was made concerning their Air Force

employment; the indefinite suspensions became permanent removals. [10]

The Air Force also stepped up the pressure on C.C. Dickson Co. by suspending its Warner Robins store from doing business with the Government. [11] At the same time, the company was advised of its liability under the False Claims Act [12] and the potential for criminal prosecution. [13] In these circumstances, the company began exploring the possibility of settlement and cooperating with the Government's investigation.

The last set of this first round of remedies was taken against Hyams, the principal target. He was suspended from doing business with the Government [14] and barred from Robins AFB. [15] C.C. Dickson Co. identified Hyams as the cause of its own problems and fired him. Finally, the Robins AFB legal office asserted a demand for payment of more than $200,000 in single damages, [16] and the U.S. Attorney's office asserted a demand for $1.1 million under the False Claims Act for triple damages and forfeitures. Hyams was a retired Air Force master sergeant. Using the Robins AFB demand for single damages as the basis, the Air Force administratively offset Hyams' debt against his Air Force retired pay. [17]

The combination of these factors should have forced Hyams to accept a plea agreement similar to that negotiated with Long and Albert. The case against Hyams was excellent. He had confessed and the Government had the admissions of Long, Albert, and Garrett and other corroborating evidence. At the time, Hyams would have been allowed to plead guilty to conspiracy and theft, although he faced the more serious charges of bribery and money laundering. [18] He also could have made a deal on his civil liability. Hyams, however, held out for immunity -- a decision he would regret.

C. The Investigation and Remedies, Phase Two

Even as the first round of remedies was in progress, the criminal investigators had begun the second phase of the criminal investigation. They did so with the addition of a new team member -- the Criminal Investigation Division of the Internal Revenue Service (IRS). Its criminal investigative charter includes money laundering when the underlying conduct would be subject to investigation under the Internal Revenue Code. [19]

The second phase of the investigation started with an Air Force employee suspected of participating in Hyams' fraud scheme. This employee was Larry Benton, an Air Force employee in civil engineering at Robins AFB until he retired in late 1990. The criminal investigators requested an interview. Benton's response, delayed for a few days to consult an attorney, was an offer to cooperate if allowed to plead to reduced charges and to limit his civil liability to $75,000, the amount he personally received from the fraud. The Government agreed. Benton pled guilty to conspiracy and theft. Robins AFB administratively offset Benton's debt against his $33,000 in retirement funds still held by the Government, [20] and, with Benton's consent, also seized an $8000 savings account. Benton signed an agreement to pay the balance of $34,000 over a three-year period.

Having made the agreement with the Government, Benton then told investigators that he and John Hyams had defrauded the Air Force of $260,000 from September 1987 through the Fall of 1990. Benton had authority to certify purchase requests for civil engineering to the contracting office. Benton used this authority more than twenty times to create fictitious purchase requests. The scheme operated in the same manner as the plan Hyams, Long, Garrett, Albert, and Rentz had used. Benton submitted the fictitious purchase request to the contracting office recommending C.C. Dickson Co. as the source. The contracting office awarded the contract to C.C. Dickson Co. Hyams supplied nothing, while Benton falsely certified delivery. Hyams submitted a false invoice with the signed delivery certificate to the Robins AFB finance office. After Robins AFB paid for the undelivered items, Hyams received the money and split the proceeds with Benton. Benton knew Rentz was involved, but was not sure how. Benton admitted receiving $75,000 from the scheme.

Benton identified three other Air Force civilian employees and an Air Force sergeant as participants in Hyams' fraud schemes. One employee was George Underwood, who worked in the Robins AFB contracting office. He handled small purchase requests from civil engineering. Under Federal and Air Force procedures, Underwood was required to solicit at least three sources if the contract amount was over $2500. [21] Underwood, as the regulations permitted, solicited the bids by telephone, making a written record for file. [22]

Underwood was interviewed and told the investigators he had disclosed the bids of C.C. Dickson Co.'s competitors to Hyams. Thus, he could bid just under the bids of the competitors. Underwood admitted to accepting $95,000 in bribes from Hyams starting in 1985 and ending in the fall of 1990. Most of the time Hyams paid him in cash. Several times, however, Hyams gave him a check on J & J Salvage's account signed by Rentz. Underwood agreed to plead guilty to conspiring to launder money. [23] Robins AFB fired him and used the remedy of administrative offset to seize his

retirement pay of $24,500. [24]

Underwood identified two others as participants in the bribery arrangement: Annette Franks, an employee in the Robins AFB contracting office, who accepted bribes from Hyams, and Paul George, a C.C. Dickson Co. employee, who often delivered cash to Underwood. Franks and George were interviewed. Franks admitted accepting $4500 in bribes from Hyams and George in exchange for disclosing the bids of C.C. Dickson Co.'s competitors to Hyams and George, who then submitted a bid that was low enough to receive the contract. George admitted delivering bribes to Franks and Underwood. Franks agreed to plead guilty to accepting gratuities. [25] Robins AFB fired her [26] and administratively seized her final pay, $3250. [27] George agreed to plead guilty to paying gratuities to federal officials, [28] and C.C. Dickson Co. fired him.

The second Air Force employee Benton identified as a participant in the fraud scheme was Charlie Billings, a supervisor in the Robins AFB civil engineering office. He ultimately admitted accepting $27,000 in cash and property from Hyams in exchange for remaining silent about his subordinates' circumvention of required contracting procedures. Billings agreed to plead guilty to conspiracy to commit money laundering. [29] Robins AFB fired him [30] and used administrative offset to seize Billings' retirement and final pay of $20,339. [31]

The third Air Force employee Benton identified was Master Sergeant Loren Driskell. Driskell, until his retirement in 1988, was the noncommissioned officer in charge of the air conditioning and refrigeration shop in the Robins AFB civil engineering office. By this time, the investigators had enough information to obtain a search warrant for Driskell's business records. These records were seized, disclosing that Driskell and Hyams had defrauded the Air Force of almost $900,000 between 1985 and August 1988.

Faced with this evidence, Driskell, through his attorney, offered to cooperate with the Government if allowed to plead to reduced charges. An agreement was reached allowing Driskell to plead to two counts -- signing a false income tax return and conspiracy to commit money laundering. [32] The Air Force administratively offset its claim against Driskell's military retirement pay. [33] Driskell described how he and Hyams defrauded the Government of $910,000 between 1985 and 1988. In the same manner as the other schemes, Driskell created purchase requests for fictitious requirements and submitted them to the contracting office. That office awarded a contract to C.C. Dickson Co. in Warner Robins. Hyams delivered nothing, but Driskell certified receipt. Hyams used this false certificate to invoice Robins AFB, which paid C.C. Dickson Co. in Charlotte. To receive the money from Charlotte, Driskell and Hyams devised a money laundering operation. While on active duty, Driskell had started a private air conditioning business. Through this business, Driskell submitted invoices to C.C. Dickson Co. falsely representing sale of various items to C.C. Dickson Co. Based on instructions from Hyams, the amount Driskell charged Dickson was set at seventy percent of the amount the Air Force paid Dickson on the fraudulent invoices Hyams had submitted to Robins AFB. After receiving payment from Dickson, Driskell paid half to Hyams.

At this stage, with various defendants cooperating, the Government was ready to proceed beyond demand letters with its civil case. A civil complaint was filed against C.C. Dickson Co. and individual defendants for $4.5 million in treble damages and forfeitures under the False Claims Act. [34] The complaint also cited civil fraud, [35] inducing breach of fiduciary duty, [36] breach of fiduciary duty, [37] and constructive trust [38] as a basis for the Government's recovery of damages.

D. Third Phase, Investigation and Remedies

With the revelations disclosed by Driskell and Benton, Hyams was now in an untenable position. He had confessed to $200,000 in fraud, and now Driskell and Benton had added another $1.3 million. Long, Albert, Garrett, Driskell, Benton, Underwood, and Franks had either pled or agreed to plead guilty to significant charges, each was prepared to testify against Hyams, and substantial evidence was available to corroborate their testimony. Among other things, the Air Force had obtained Rentz's, J & J Salvage's, and Hyams' bank records with administrative subpoenas. [39] Moreover, the IRS's criminal investigator stepped up the pressure with administrative remedies. He seized Hyams' motor home and race car as proceeds of illegal money laundering and made it plain to Hyams that this process would continue, including seizure of Hyams' residence. [40]

Hyams had no choice and accepted the inevitable. He agreed to plead guilty to bribing federal officials and conspiracy to commit money laundering. As part of the agreement, Hyams now described the entire fraud scheme, confirming the statements of the other participants. The bribery was not limited to Underwood and Franks, but included the money paid

to Long, Garrett, Albert, Benton, and Driskell as their share of the fraud scheme. [41] He also identified another participant, Technical Sergeant James Watkins.

Watkins, who had replaced Driskell as the noncommissioned officer in charge of the refrigeration shop in August 1988, had been a suspect for several months, but evidence establishing his guilt was inconclusive. Hyams now showed that Watkins had picked up where Driskell had left off. Hyams supplied direct evidence that he and Watkins had defrauded the Government of $50,000 with false invoices submitted by Hyams to the Robins AFB finance office. Watkins supplied the necessary fictitious purchase requests and false delivery certificates. Rentz, through the J & J Salvage account, provided the means to receive the money from Charlotte. After deducting his eleven percent cut, Rentz disbursed the balance to Hyams, who in turn paid half to Watkins.

Watkins was still on active duty; thus, he was tried by court-martial. He pled guilty to conspiracy to defraud the United States, [42] larceny of $50,000, [43] false official statements, [44] and dereliction of duty. [45] He was sentenced to a dishonorable discharge, confinement for five years, total forfeitures, and a fine of $5,000.

The last defendant was Rentz. By this time, the investigators, especially the criminal investigator from the IRS, had compiled an excellent case proving money laundering and tax evasion. Rentz agreed to pled guilty to conspiracy to commit money laundering and signing a false income tax return. [46]

E. The Civil Cases Conclude

Shortly after Rentz pled guilty, C.C. Dickson Co. agreed to settle the Government's civil claim and paid the Government $2 million. The Government had earlier reached satisfactory repayment arrangements with Benton, Billings, Long, Albert, Garrett, Underwood, and Franks. Through these agreements and administrative offsets, the Government collected another $170,000. This left Hyams, Driskell, Rentz, George, and Watkins liable for $2.1 million, the balance owed on the Government's $4.5 million claim under the False Claims Act. Civil claims against these defendants were pending in 1994.

F. Sentencing of the Civilians Defendants

Because of his early and substantial cooperation in the investigation, Garrett was allowed to plead to one count of conspiracy to commit money laundering. [47] Shortly before his sentencing, Robins AFB fired him. Garrett also settled the civil claim against him and paid the Government $80,000.

Hyams, as the ringleader, drew the heaviest prison sentence and fine. Most of the prison terms imposed on the civilian defendants must actually be served. Good time of fifty-four days per year is subtracted for sentences of more than one year, but parole in the federal system has been abolished. [48] The table below sets out the prison sentence and fine for each defendant.

Punishment Received DEFENDANT SENTENCE FINE Garrett 8 months $4000 Franks 5 years probation i with 6 months in a half-way house None George 1 year $3000 Benton 15 months None Long 22 months $5000 Albert 2 1/2 years $2500 Rentz 2 1/2 years $7500 Underwood 4 years None Billings 4 1/3 years None Driskell 5 years $12,500 Hyams 8 3/4 years $150,000

III. PRINCIPLES FOR HANDLING FRAUD CASES

The Robins AFB experience taught or confirmed several principles about how to investigate and pursue remedies in fraud cases. This section examines seven principles.

A. Principle No. 1: Never Accept a Defendant's Statement as Completely True [49]

Few criminals willingly admit wrongdoing. Even when they admit guilt, they limit their admissions to what they believe investigators already know. In short, defendants lie. Billings, Underwood, Franks, and Rentz denied any wrongdoing when first questioned. Only when confronted with evidence did they confess. Watkins maintained his innocence until two days before trial even though confronted with overwhelming evidence. He did not accept reality until the evidence amassed against him became irrefutable.

Albert, Long, and Hyams are the classic cases illustrating this principle. Albert and Long from the beginning admitted they defrauded the Government of a few thousand dollars involving the two hardware stores. They admitted this amount of fraud because they believed that was all the Government knew -- and they were right. Hyams, when first questioned, was willing to admit to defrauding the Government of $200,000 in a conspiracy with Long, Garrett, and Albert. Again, he believed that was all the Government knew, and at the time, he also was right.

One of the turning points in the investigation occurred when the AUSA handling the criminal prosecution refused to accept an offer from Long and Albert to plead guilty to defrauding the Government of several thousand dollars. She rightly sensed that the offer came too easily. Applying the principle that most criminals will admit only what they believe the Government already knows, she directed the criminal investigation to continue.

By the time the investigation reached Hyams, everyone on the Government's team was convinced of the validity of the principle that defendants lie. No one believed Hyams' fraud was limited to $200,000, and no question existed about continuing the investigation. The principle of lying defendants has a corollary: there are no small cases. Every fraud case should be treated as having the potential of involving major fraud.

The conclusion is not to stop investigating just because a defendant admits some wrongdoing. An investigation should be pushed to its logical limits. Only when all reasonably available leads have been examined should the investigation stop.

B. Principle No. 2: Do not Treat White-Collar Criminals as Criminals When Interviewing Them [50]

Even more than other criminals, white-collar criminals do not want to believe they are criminals. Of course they are criminals, but that does not change how they view themselves. At best, they may acknowledge their fraudulent acts are criminal, but they will still see themselves as good people who sometimes do bad things. Consequently, white-collar criminals are offended if their conduct is bluntly labeled criminal or if the interviewers are hostile or threatening.

Investigators and lawyers who interview white-collar criminals need to understand how white-collar criminals perceive themselves and their fraudulent acts. Individuals are more likely to disclose their criminal conduct in interviews conducted in a friendly manner and the fraudulent acts are discussed in neutral terms. Avoid emotion-laden terms such as steal, fraud, or bribery. Be friendly, and at least in the beginning, do not use any threats.

To achieve a friendly interview where criminal conduct is discussed in neutral terms, avoid giving a rights advisement. That is no problem if the white-collar criminal is a civilian who is not in custody during the interview and has not been arraigned or indicted. The rights advisement required by Miranda v. Arizona [51] applies only when the subject is in custody. [52] The Sixth Amendment right to counsel applies if the subject has been arraigned or indicted. [53]

But if the white-collar criminal is a military member whose interview is part of a military criminal investigation, the rights advisement required by Article 31 must be given. This requirement applies even though the subject is not in custody and has not been charged. [54] If the ultimate aim is a court-martial, do not try to avoid the Article 31 requirement by having someone, such as an FBI agent who is handling the civilian part of the criminal investigation, conduct the interview. An Article 31 rights advisement is required when military and civilian investigators conduct a joint investigation or when the civilian investigator acts as part of the military investigation. [55] Even when a rights advisements is required, investigators and lawyers should nevertheless strive to keep interviews friendly using neutral terms to discuss a defendant's criminal conduct.

The investigators in the Robins AFB fraud case repeatedly demonstrated the success of this approach. When Garrett was first questioned, the available evidence established only a few thousand dollars of fraud involving the two hardware stores. Yet Garrett admitted the entire fraud scheme in maintenance. From the beginning, Hyams also admitted the entire fraud scheme in maintenance although he did conceal the scheme as it applied to civil engineering. Benton admitted his participation in the civil engineering fraud, concealing nothing.

This is not to suggest that Garrett, Hyams, and Benton confessed simply because they liked the investigators who questioned them. In each case, the investigators had evidence of the defendants' criminal conduct. They had enough information to discuss the defendants' criminal conduct so that the subjects could not be sure just how much the investigators actually knew. Moreover, although the interviews were friendly and criminal conduct was discussed in neutral terms, the defendants understood they were in trouble because the matter under discussion was their criminal conduct. They knew the full range of criminal, civil, and administrative penalties they faced. They also understood their

cooperation, or lack of it, would be reported to the government lawyers who would decide what action to take against them. Incriminating statements obtained from defendants after advice along these lines are voluntary and admissible in evidence. [56] The results were three confessions. These three defendants confessed to more than the Government was able to prove at the time.

This approach does not work in every case. Long, Albert, and Watkins never admitted anything until they were sure the Government could prove their guilt. After he got a lawyer, Hyams adopted the same posture. Four defendants initially denied guilt when the investigators had little evidence against them. But later, when confronted with some evidence, they admitted to participating in the fraud scheme.

On balance, the investigators' friendly approach to the white-collar criminals in the Robins AFB fraud scheme was an outstanding success. Seven participants confessed all or a significant part in the fraud scheme when confronted with some evidence and three individuals confessed at the first interview. Not only did they admit their complicity, they provided important evidence against other participants in the scheme.

The effectiveness of a friendly approach to interviewing white collar criminals applies to lawyers. Of course, by the time the lawyers are interviewing white collar criminals, usually investigators already have obtained the basic admissions. Even so, lawyers need certain additional details to perfect criminal, civil, and administrative cases. They are more likely to obtain those details from defendants who regard the lawyer as a reasonably civil individual rather than a hostile adversary. Even if the setting is a trial and the interview is the cross-examination of a white-collar criminal, a nonhostile approach usually obtains better results. [57]

C. Principle No. 3: Pursue Criminal, Civil, and Administrative Remedies Concurrently

Most people agree that criminal, civil, and administrative remedies should be taken eventually. Those who defraud the United States should be prosecuted, forced to pay restitution, separated from federal service if an officer or employee, and barred from doing business with the Government if a contractor. These remedies should be pursued concurrently. Unfortunately, all too often the practice is to take them sequentially, if at all. The result is that many actions fall short of their goal, or worse, are never taken.

Unquestionably, criminal remedies have priority over civil remedies which, in turn, have priority over administrative remedies. But this priority should not mean sequential pursuit of remedies, i.e., civil claims begin at the end of the criminal prosecution and administrative remedies start only when the civil claims are complete.

Three things happen when remedies are taken sequentially, all of them unsatisfactory. First, remedies delayed become lost during the period of delay. If C.C. Dickson Co. and Hyams had not been suspended from contracting with the Government, they would have continued to receive and benefit from government business. If Long, Albert, Billings, Underwood, and Franks had not been fired or suspended without pay, they would have continued to draw government salaries.

Some remedies when delayed are lost forever. Benton, for example, had retired from federal service a few months before his participation in the fraud scheme could be proved. He was about to receive $17,300 as the first installment on his lump sum retirement. Prompt administrative offset prevented him from receiving that money. Otherwise, the recovery of the $17,300 would have been lost because Benton was insolvent. Both Hyams and Driskell were retired military members when their fraud was discovered. Until administrative offsets were taken, each continued to receive his full military retirement pay. A classic way to lose a remedy forever is to delay a civil claim beyond the statute of limitations. [58] No statute of limitations applies to administrative actions under a government contract, [59] and the limitation period for administrative offsets under 31 U.S.C. Sec. 3716 is ten years. [60] But the Government may be similarly barred by the doctrine of laches or waiver if it fails to exercise due diligence in taking such actions and this failure prejudices the other party. [61]

Government delay in filing a lawsuit under the False Claims Act also increases the risk that an individual qui tam relator will file first entitling the relator to a significant part of any eventual recovery. [62] This procrastination occurred at Robins AFB when the Department of Justice delayed filing a claim under the False Claims Act long after the criminal case had concluded. In the interim, a relator filed a lawsuit and, as a result, collected $75,000 of a $600,000 settlement.

Pursuing remedies in sequence has a second disadvantage. The resulting delay leads to stale evidence and loss of interest

in the case. Memories of witnesses fade, and records are lost or destroyed. Interest in pursuing remedies diminishes as federal officials move to new jobs and take on new assignments.

Fraud cases, especially the more complex, consume huge quantities of time even when pursued diligently. The Robins case took more than two years and was not completely finished. But at least all remedies were initiated and pursued concurrently. If remedies had been taken sequentially, initiating civil remedies would have been delayed a year, and the administrative remedies would have not yet begun within a two year period.

Another case at Robins AFB illustrates these problems. The Justice Department insisted on finishing the criminal case before the civil or administrative remedies could begin. The criminal case took three years. As a result, the civil case under the False Claims Act was barely filed before the statute of limitations expired, and the administrative remedies remain unstarted. Meanwhile, the contracting officials, inspectors, auditors, and lawyers who originally worked the fraud case for the Government were reassigned to new jobs or started new projects. Witnesses needed to prove the fraud, whether they worked for the contractor or the Government, need to recall events that occurred four or more years prior. A more ineffective way to pursue fraud remedies is hard to imagine.

The third disadvantage of taking remedies sequentially is the loss of pressure on defendants to cooperate with the Government. When remedies are pursued in parallel, however, the Government confronts those who defraud the Government with a triple threat: imprisonment, impoverishment, and unemployment.

The False Claims Act, with its penalties of triple damages and forfeitures between $5000 to $10,000 per false claim, is a formidable weapon. [63] It applies to individuals and to corporations that are liable for the acts of their employees acting within the scope of their employment and for the benefit of the corporation. [64] The Act is especially useful in a fraud case involving a corporation which, although criminally liable for its employees acting within the scope of their employment and for the benefit of the corporation, [65] cannot be imprisoned. Moreover, the Act applies not only to the obvious fraudulent billing for goods and services not delivered, [66] but also to fraudulent overcharging and mischarging, [67] product substitution, [68] and collusive bidding. [69]

Other remedies pursued with claims under the False Claims Act [70] are useful because they apply in ways the False Claims Act does not. A constructive trust claim allows the Government not only to trace fraud proceeds to the defendant, but also to third parties who have not given value. [71] A common law claim for civil fraud, unlike a claim under the False Claims Act, permits the Government to recover consequential damages. [72] In bribery and illegal gratuities cases, claims for breach of fiduciary duty and inducing breach of fiduciary duty permit the Government to recover the amount of the bribe or illegal gratuity. [73]

The Government also may cancel a contract when the formation or performance is tainted by fraud, bribery, conflicts of interest, collusive bidding, subcontractor kickbacks, or false claims. [74] Monetarily, this remedy more severely affects a defendant when the Government's damages under the False Claims Act or common law are small or nonexistent.

Other important civil remedies are claims for breach of contract and payment by mistake. [75] Although recovery is limited to single damages, the Government does not have to prove fraud. Moreover, these two remedies may be used to support an administrative offset. This remedy is particularly useful when the amount available for offset is less than single damages.

Using the triple threat of criminal, civil, and administrative actions, the Government is often able to bargain for a defendant's cooperation by agreeing to accept less than what the Government might receive if it pursued all remedies in full. Some remedies are not properly the subject of bargaining. A security clearance is one example. The continued employment in federal service by an employee who defrauds the United States cannot be bargained. On the other hand, some remedies are suitable for bargaining. Justice seldom requires that a defendant be charged with every crime committed. Nor is it necessary to have full civil damages. In the Robins case, the Government was willing to accept pleas to reduced charges that nevertheless reflected the defendants' criminal activity and furnished the basis for adequate sentences. The Government also was willing to accept less than full civil damages from individual defendants as long as these defendants agreed to return at least as much money as they had personally received from the fraud scheme.

What the Government received in exchange was the discovery of the civil engineering fraud. The key bargains were those struck with Long, Albert, and Benton. Before that, the Government had reasonably good cases against Long and Albert for their part in the maintenance fraud based on evidence from Garrett and Long's secretary. The Government had an

excellent case against Hyams and Garrett for their part in the maintenance fraud as each had confessed. But the Government had little information concerning the civil engineering fraud, and that knowledge was limited to Benton. Benton's cooperation opened up the civil engineering fraud, and, combined with Long's and Albert's cooperation, made the case against Hyams irrefutable, thereby forcing him at last to make his own deal. Hyams' cooperation then led to the rest of the case in civil engineering: Driskell and Watkins, and the identification of two employees in contracting, another C.C. Dickson Co. employee, and Rentz's full involvement in the fraud scheme.

The concurrent pursuit of fraud remedies and the willingness of defendants to cut deals also led to the $2 million settlement with C.C. Dickson Co. The defendants who had made bargains with the Government were the source of the evidence against C.C. Dickson Co. In addition, C.C. Dickson Co.'s Warner Robins office was suspended from doing business with the Government. The Air Force made it plain to C.C. Dickson Co. that ending the suspension depended, in part, on the company's willingness to cooperate in the Government's investigation and to make restitution. Cooperation is a legitimate factor in debarment and suspension decisions. [76]

Once a defendant is cooperating, further pressure is unnecessary and may be counterproductive. For example, Garrett cooperated from the beginning and not until the end was he fired and compelled to pay partial civil damages. Similarly, no action to offset Driskell's military retired pay was taken while he was cooperating in the Government's investigation.

In summary, pursuing remedies in parallel works to the Government's advantage. Remedies are not lost and actions can be taken while evidence and interest are fresh. Because of the triple pressure of taking remedies concurrently, defendants are more likely to cooperate with the Government, thereby revealing the full extent of the fraud and supplying evidence against others.

D. Principle No. 4: Use the Team Approach

In a team approach, Government investigators and lawyers join together to investigate fraud and pursue remedies. The team approach first requires assembling the right team members. These members are the investigators who will investigate the fraud and the lawyers who will handle the criminal, civil, and administrative proceedings. One of the three military criminal investigative agencies, such as the OSI, furnishes agency investigators. The FBI provides investigators if criminal prosecutions or civil claims are involved. [77] The Department of Justice (DOJ) is represented by the attorneys who will conduct the prosecution of the criminal cases and pursue civil claims. Agency attorneys complete the team. They include military prosecutors, if court-martial proceedings are contemplated, and attorneys who will handle administrative actions.

Investigators and attorneys from the agency and from DOJ are the core team members, but others may be added depending on the nature of the investigation. In fraudulent defective pricing cases, for example, someone from the Defense Contract Audit Agency (DCAA) should be part of the team. In the Robins AFB fraud case, representatives from the IRS's Criminal Investigative Division were part of the team because remedies pursued included forfeitures under money laundering statutes.

The team approach also requires that team members participate throughout the investigative and remedy phases of the cases. Attorneys responsible for the criminal, civil, and administrative cases participate from the start of the investigation, and investigators continue their participation through conclusion of the criminal, civil, and administrative cases. This does not mean every team member participates equally in all phases of a fraud case. In the investigative phase, investigators supply most of the effort. Attorneys serve to advise the investigators on what is needed to support criminal, civil, and administrative remedies. As the case shifts to the remedy phase, more work is undertaken by attorneys, but investigators remain involved as sources of information and for further investigation as needed. But regardless of the phase, continuous communication is required among team members from the start of the investigation to the conclusion of the remedy phase.

Two reasons exist for using a team approach to pursue fraud remedies. First, it prevents interference among remedies. Having criminal, civil, and administrative remedies available in a fraud case carries with it the potential for interference among remedies. One issue is whether remedies will be pursued in sequence or in parallel, even though pursuing remedies in parallel increases the potential for interference.

A common instance of interference occurs when, in pursuing criminal, civil, and administrative remedies, Government officials take conflicting positions. These officials can use different legal theories, assert different facts, or claim different amounts. Interference among remedies can occur in other ways as well and is discussed in the next three sections.

A team approach prevents this interference because team members communicate with each other. Before adopting positions on legal theories, facts, or amounts, team members check with each other. This ensures consistent positions regardless of the remedy pursued. Similarly, before an action is taken in investigating a fraud case or pursuing a remedy, team members evaluate what effect that action will have on the investigation and on other remedies. At best, this avoids interference altogether. At a minimum, it allows advantages and disadvantages of a contemplated action to be weighed and a conscious decision made on the best course to take. When team members are fully involved and informed, they can advise other team members if some action might interfere with the investigation or with the pursuit of a remedy.

The second reason for a team approach is to bring to the case those who make fraud remedies work. At one level, this means bringing to the case those who are responsible for the remedy involved. The DOJ attorneys, supported by FBI agents, enforce criminal statutes, other than the Uniform Code of Military Justice (UCMJ), and pursue civil claims. Agency attorneys, supported by agency investigators, conduct criminal prosecutions under the UCMJ and handle administrative actions. Simply put, pursuing criminal, civil, and administrative remedies requires participation on the team by those who will take these remedies.

But DOJ and agency officials using a team approach do more than make their own remedies work. They help make all remedies work. The evidence gathered in a criminal investigation, with some exceptions involving grand jury secrecy, is available to support civil and administrative actions. A criminal conviction, under the doctrine of collateral estoppel, establishes as proved in a later civil case those facts necessary to the criminal conviction. [78] And, as discussed below, a criminal conviction can be used to support several different administrative actions. [79] The DOJ attorneys and investigators also have experience in investigating and proving fraud that helps in prosecutions under the UCMJ and administrative actions taken by agencies.

Agency investigators and attorneys better understand agency procedures. This knowledge is important to criminal prosecutions and civil actions, especially if the fraud involves the complexities of agency contracting, as it often does. In the Robins fraud case, agency contract lawyers, early in the case, set out for investigators and DOJ attorneys how the small purchase contracting process was supposed to work. Understanding this process was essential to investigating the case and pursuing fraud remedies. After all, before the fraud scheme could be understood, the process the defendants subverted had to be known.

Finally, agency investigators and attorneys have experience in investigating and proving fraud that also helps in criminal prosecutions and civil actions. The role of IRS criminal investigators in the Robins AFB fraud case again shows how specialists in one area help make all remedies work. At the same time criminal, civil, and other administrative remedies were being pursued, IRS investigators took those administrative remedies for which they were responsible -- forfeitures under money laundering statutes. Moreover, evidence they developed while investigating money laundering helped prove large parts of the fraud scheme. Analyzing thousands of financial records, they traced the fraud scheme and its proceeds from start to finish with straightforward summaries of complex fraudulent transactions. This evidence was used, not only to support forfeitures under money laundering statutes, but also to support the criminal prosecutions, civil cases, and other administrative actions.

In the Robins AFB fraud case, the agency and DOJ lawyers were involved at the beginning of the investigation, and the criminal investigators participated to the end of the last remedy. Communication among team members was continuous and usually daily. It is no overstatement that the team approach and resulting coordinated strategy was the key to the Government's success in the Robins AFB fraud case.

E. Principle No. 5: Pursue Civil and Administrative Remedies to Avoid Conflict with the Criminal Case

As a legal matter, the Government may generally pursue criminal, civil, and administrative remedies in parallel. The Government's right to pursue these remedies in any order it chooses has been repeatedly upheld. [80] Some exceptions exist. A court may stay civil or administrative proceedings or impose protective orders when justice so requires. [81] Contracting officers are prohibited from issuing final decisions in a case involving fraud. [82]

In a rare case, the Double Jeopardy Clause [83] prohibits the Government from criminally prosecuting a defendant and also imposing civil forfeitures bearing no rational relation to the amount of the Government's loss. [84] This rule should cause no problem as it applies only to actually imposing, not just suing for, statutory forfeitures. In some cases, circumstances may require the a civil claim for statutory forfeitures to be filed while the criminal case is pending or before it begins. But the consequences of this Double Jeopardy rule can be avoided by waiting for the criminal case to conclude

before proceeding to a judgment in the civil case.

Legally, the Government may pursue civil and administrative remedies in parallel with criminal proceedings. As a matter of policy, however, criminal proceedings have priority. One way to interfere with the criminal case is to take positions in civil and administrative proceedings that are inconsistent with the Government's positions in the criminal case. For this reason, in taking civil and administrative actions concurrently with criminal proceedings, actions that would interfere with the criminal case must be avoided. As previously discussed, however, the team approach prevents this problem.

The other principal cause of interference is to prematurely disclose the Government's criminal case to a defendant. This problem, too, can be prevented. As a first rule, no remedy is initiated until the prosecutor is willing to disclose to a defendant that an investigation even exists. This disclosure usually happens when a defendant is indicted or interviewed as a subject. Disclosure can occur in other ways. The timing of remedies to avoid prematurely disclosing an investigation varies from case to case. The Robins AFB case, for example, was complicated by the presence of many defendants. The decision was made to proceed against those defendants who had been interviewed as subjects even though the investigation had not reached that stage with other defendants. The reasoning was that interviewing some defendants as subjects alerted the remaining defendants to the investigation.

Interviewing a defendant as a subject of a criminal investigation and indicting a defendant disclose the existence of a criminal investigation. These actions, however, do not reveal the Government's evidence. This leads to the second rule: in pursuing civil and administrative remedies, team members should not prematurely disclose evidence supporting the criminal case.

Pursuing civil and administrative remedies can disclose evidence supporting the Government's criminal case in two ways. First, the Government may have to present some evidence to support its request for a civil or administrative remedy. Second, by initiating certain civil or administrative remedies, the Government's case may be subject to discovery. The rules vary depending on the remedy. Through coordination, however, civil and administrative remedies can be pursued without prematurely disclosing evidence supporting the Government's criminal case. This problem requires a three-part analysis.

First, the attorneys handling the civil and administrative remedies decide what evidence is needed to support civil and administrative remedies. They also will know what evidence will be available to the defendant through discovery. In some instances, nothing more than an indictment is required. Federal employees may be indefinitely suspended without pay from their government jobs when reasonable cause exists to believe an employee has committed a crime punishable by imprisonment. An indictment for such a crime is reasonable cause. [85] Similarly, people and companies may be suspended from doing business with the Government based on adequate evidence of fraud. Again, an indictment is adequate evidence. [86] Other remedies, however, require something other than an indictment.

Second, the prosecutor decides what evidence can be revealed and in what form. In some instances, evidence may be disclosed without adverse effect because it is already known to the defense. In other instances, the prosecutor is willing to disclosed it because disclosure will not adversely affect the criminal case. Even though prosecutors may be willing to disclose evidence, they may be unwilling to allow witnesses, other than criminal investigators, to testify under oath in civil or administrative proceedings before the criminal case is tried. This situation existed in the Robins AFB fraud case.

To answer this problem, the technique of the criminal investigator's affidavit was developed. This affidavit is a sworn statement by an investigator providing enough evidence for the remedy in question. This device is particularly effective if the defendant has admitted fraud. It also works well when nontestimonial evidence is available to establish a defendant's fraudulent activity. For example, stolen government property may have been recovered from the defendant's possession.

In the Robins fraud case, an investigator's affidavit provided the evidence needed to suspend C.C. Dickson Co. and its employee, Hyams, from doing business with the Government. The affidavit supplied adequate evidence of fraud, the standard of proof required by regulation. [87] That affidavit needed to do no more than recite Hyams' confession to the maintenance fraud, including Rentz's money laundering role, and the corroborating bank records Hyams had obtained from Rentz and given to investigators. It was unnecessary for the affidavit to say anything about evidence unknown at the time to Hyams, i.e., Garrett's corroborating statement and the documents Long's secretary supplied.

In contractor suspension cases, the Government may prevent further disclosure of its evidence beyond the affidavit it chooses to submit. By regulation, further proceedings to determine disputed facts are prohibited if DOJ advises that

substantial interests of the Government in other legal proceedings would be prejudiced. [88]

A criminal investigator's affidavit may also be used to support administrative offset against the pay of civilian employees and military members. By statute and implementing regulations, federal agencies may administratively offset debts of their employees and military members against pay otherwise due. [89] This offset requires an administrative record sufficient to establish the debt. The debtor has the right to review this record and submit evidence in response, but has no right to an oral hearing unless the validity of the debt turns on the credibility of witnesses. [90] If no oral hearing is held, the debtor is entitled to an administrative review on the written record. [91] An investigator's affidavit satisfies this standard when the validity of a disputed debt does not turn on the credibility of witnesses. In the Robins case, this method was used to take the administrative offset against the retired pay of several civilian defendants and the retired pay of two military defendants.

An affidavit is useful as long as proof of some part of the fraud does not turn on credibility of witnesses. Some administrative offset is better than none. The affidavit need only establish a debt based on fraud that equals the amount available for offset. For example, the $250,000 debt owed by Hyams based on the maintenance fraud was more than enough to offset the value of Hyams' retirement pay, although later investigation established Hyams' fraud at $1.5 million.

The second way pursuing civil and administrative remedies can prematurely disclose the Government's criminal case is through discovery. For this reason, filing a civil lawsuit before the criminal case is tried is generally inadvisable. A civil lawsuit, however, should be filed when the statute of limitations is about to expire or if the defendant is dissipating significant assets.

Availability of discovery to a defendant in administrative cases varies depending on the administrative remedy involved. Discovery is not available in suspensions from employment based on an indictment, administrative offsets against employees or military members, or suspensions from doing business with the Government. As previously discussed, the agency may choose how much evidence to use, and its form, to support these remedies. Availability of discovery in other administrative actions is not an issue. In these actions, the Government will almost always have to present more evidence than an investigator's affidavit. Administrative action should be delayed until after the criminal case is over, absent other compelling considerations.

After conviction, civil and remaining administrative actions ordinarily may be initiated without adversely affecting a criminal case. Further delay until sentencing is unnecessary unless the conviction has left the amount of fraud unresolved and the defendant will dispute this matter at a hearing on sentencing. In this situation, disadvantages of further delaying civil and administrative actions must be balanced against any adverse effect on the criminal case. Often, a pre-sentencing report will disclose evidence of the amount of fraud to a defendant. At this point the further delay of civil or administrative actions is not necessary.

F. Principle No. 6: Pursue Administrative Remedies to Avoid Conflict with the Civil Case

Pursuing administrative remedies in parallel with civil remedies can create conflict in three ways. The first is to take a position in the administrative action inconsistent with the Government's position in the civil case. Inconsistencies can be factual or legal. In an extreme case, the Government may be held to have elected between two inconsistent remedies. This happened in Baldredge v. Hadley. [92] The agency had proceeded administratively to cancel several contracts for fraud and to recover what it had paid the defendants under the contracts. The court barred a civil action under the False Claims Act, holding such a claim inconsistent with the agency's earlier action cancelling the contract.

This questionable decision involving cancellation of a contract for fraud is not inconsistent with a claim under the False Claims Act. Fortunately, it has limited scope. Administrative and civil remedies are generally consistent and no election is required. [93] In United States v. Thomas, [94] for example, the agency, in an administrative proceeding, had recovered from the defendant subsidy payments obtained by fraud. Afterwards, the Government brought an action under the False Claims Act for the same fraud. The court found the two remedies consistent and sustained the False Claims Act action. [95] In determining how much the defendant owed under the False Claims Act, however, the defendant was entitled to a credit for amounts recovered by the agency. [96] The credit is applied after tripling the amount of the Government's single damages, not before. [97]

Although pursuing a consistent administrative action does not bar a later civil claim for fraud, collateral estoppel may apply in certain cases to preclude relitigation of issues. The doctrine of collateral estoppel precludes relitigating issues of

fact or law actually litigated and determined in a prior lawsuit. The causes of action from one lawsuit to the second need not be the same. [98] The effect of collateral estoppel attaches not only to judicial proceedings, but also to administrative proceedings if certain conditions are met. The administrative proceeding must meet judicial standards of due process, and the administrative findings must be on material issues supported by substantial evidence on the administrative record as a whole. [99] Proceedings before agency boards of contract appeals, for example, meet the test for applying collateral estoppel. [100] The effect of collateral estoppel cuts both ways. If the Government prevails in the administrative action, the defendant will be barred from relitigating issues in a later civil case. If the defendant prevails, the Government will be barred.

Avoiding inconsistent positions, factual or legal, requires coordination among government officials who take administrative and civil actions. As previously described, preventing inconsistent positions is a principal reason for using a team approach in fraud cases.

The second way that parallel civil and administrative actions can cause conflict is to disclose that a civil case may be pursued prematurely, but this is an issue only in narrow circumstances. It is not an issue after the civil lawsuit is filed. At this point, the Government's civil case is subject to disclosure through discovery. It is not an issue if the administrative remedy is based on an indictment or conviction. An indictment, as previously seen, allows suspension of government employees from employment and suspension of contractors from doing business with the Government. A conviction for fraud, by itself, furnishes the basis for permanently removing an employee from government service [101] and permanently barring a defense contractor from doing business with the Government. [102] If the credibility of witnesses was an issue in an administrative offset against the pay of military members or government employees, it is no longer an issue after a conviction. A conviction alone supports these administrative offsets. In sentencing a defendant for fraud, the court must determine the amount of the Government's loss in order to apply the federal sentencing guidelines. [103]

A criminal case, however, might not be prosecuted or could result in an acquittal. It may result in a conviction for a crime that is insufficient to support an administrative remedy. Yet the Government still may intend to pursue a civil action for fraud and administrative remedies. Without an indictment or conviction, taking administrative remedies before the civil lawsuit is filed could risk prematurely disclosing the civil case.

For two administrative remedies, however, this problem can be avoided by using an investigator's affidavit. As previously described, this technique may be used for taking administrative offsets against the pay of government workers, if credibility of witnesses is not an issue, and for suspending defense contractors. An investigator's affidavit allows the Government to control what evidence is used to support the administrative remedy and the form of that evidence. Neither an oral hearing nor discovery is involved. Coordinating the affidavit with the attorney handling civil remedies insures consistency with the Government's position in civil litigation and avoids premature disclosure of the civil case.

Those administrative remedies involving an oral hearing or discovery should ordinarily wait for the filing of the civil lawsuit. An exception, however, should be considered when delay will cause loss of a substantial administrative offset.

The third area of conflict in concurrently pursuing civil and administrative remedies involves government contract claims that, absent fraud, would be processed under the Contract Disputes Act of 1978. [104] This Act establishes a dispute resolution process for claims involving a government contract. Among other things, it requires all claims against a contractor relating to a government contract to be the subject of a final decision of the contracting officer. [105] The contractor can appeal the final decision to an agency board of contract appeals or to the Court of Federal Claims. [106]

The Act also prohibits agencies from settling, compromising, paying, or otherwise adjusting any claim involving fraud. [107] Citing this provision, the DOJ has taken the position in litigation that the dispute resolution process under the Contract Disputes Act does not apply to government claims against contractors if any part of the transaction involves fraud. For the most part DOJ has been successful. [108] If a transaction gives rise to fraud allegations, the Contract Disputes Act does not apply. The Government may bring an action in Federal District Court alleging not only fraud, but also breach of contract, unjust enrichment, and payment under mistake of fact. Absent fraud allegations, these claims would be subject to dispute resolution under the Contract Disputes Act. [109]

The DOJ's position, in effect, prevents an agency from pursuing a government claim under the Contract Disputes Act concurrently with a civil fraud case. The Department's position has the advantage of consolidating all theories of recovery in one case, eliminating duplication of effort, and assuring consistent results. However, two potential problems are created.

First, the DOJ may drop the civil case. If the civil suit is not pursued, the agency will have to bring a claim under the Contract Disputes Act with the attendant disadvantages caused by lengthy delay as previously described. [110] This problem can be avoided if DOJ includes contract claims not requiring proof of fraud in its civil case and pursues those claims even if the fraud claims are later dropped. Whether the courts will permit this course of action is unclear. The courts that have allowed contract claims to be consolidated with fraud claims in a civil case have not addressed what will happen if the fraud claims are dropped.

The second potential problem is the loss of administrative offsets. This loss stems from DOJ's position coupled with provisions of the Federal Acquisition Regulation (FAR) addressing contract debts owed by contractors to the Government. The FAR distinguishes between determining the amount of any debt and demanding its payment. Contracting officers determine the amount of any debt, fairly considering government and contractor claims. But the debt determination is neither a settlement of these claims nor a contracting officer's final decision under the Contract Disputes Act. [111] A demand for payment of the debt, however, requires a final decision by the contracting officer. [112] The demand for payment, not the debt determination, provides the basis for administrative offset. [113] The demand for payment also starts the interest period if no contract provision provides for an earlier date. [114] In a fraud case, the contracting officer can make a debt determination, but cannot issue a final decision because, as interpreted by the DOJ, the Contract Disputes Act does not apply to fraud cases. Without a final decision, the FAR prohibits administrative offsets. For the same reason, the interest period will not begin to run unless a contract clause separately provides for interest.

One solution is to change the FAR to allow administrative offsets without a contracting officer's final decision. Another is to take administrative offsets under the Debt Collection Act. The Contract Disputes Act poses no obstacle because it does not apply to government claims arising from fraud transactions. Unlike the Contract Disputes Act, the Debt Collection Act does permit agencies to attempt to collect government claims -- even those involving fraud. [115] If fraud is involved, however, an agency may not compromise or end collection action. [116] After the required coordination with DOJ, [117] the contracting officer or other responsible official should assert a demand for payment and use that as a basis for administrative offset. As in any debt collection case, the contractor is entitled to inspect and copy what the Government relies on to establish the debt and to an oral hearing if credibility of witnesses is an issue. [118]

The process for taking administrative offsets under the Debt Collection Act is less favorable to the Government than the process under the FAR. The Debt Collection Act requires due process before taking administrative offsets. The FAR calls for due process after administrative offsets are made. Contractors know this. In the past, they have argued for applying the Debt Collection Act to administrative offsets for contract claims, but without success. [119] Consequently, the preferred solution is to amend the FAR to allow administrative offsets without a contracting officer's final decision.

G. Principle No. 7: Pursue the Criminal Case to Avoid Conflict withCivil and Administrative Remedies

This principle has two parts. First, a grand jury should be used to obtain evidence only as a last resort. Under Rule 6(e) of the Federal Rules of Criminal Procedure, "matters occurring before the grand jury" may be disclosed, with limited exceptions, only to enforce federal criminal law. Only one of these limited exceptions is relevant here. Grand jury materials may be disclosed for purposes of civil litigation, but only if disclosure is by a court order finding that disclosure of specific materials is needed to prevent injustice and outweighs the need for continued grand jury secrecy. [120] This limited exception applies only to judicial proceedings; it does not apply to administrative proceedings. [121] Legally and practically, evidence obtained by a grand jury will be unavailable to support civil and administrative remedies when needed, if at all. To obtain this evidence from the grand jury, a court order is required.

Matters occurring before the grand jury include the names of the witnesses who testified before the grand jury and what they said. [122] It does not include, however, what these witnesses have said outside the grand jury, such as statements obtained by government investigators. [123] Matters occurring before the grand jury also include the documents presented to the grand jury and documents prepared for the grand jury. [124] Not included are documents obtained from sources independent of the grand jury proceeding, such as a prior government investigation. [125] The rule of secrecy only prohibits disclosing these matters in a way that would reveal grand jury proceedings. [126] It does not apply to witnesses or documents merely because they have been presented to the grand jury. [127]

Avoiding problems caused by grand jury secrecy is straightforward. Statements from individuals and documents should be obtained independently of grand jury proceedings whenever possible. Obtaining statements from individuals requires little elaboration because it simply means interviewing them apart from grand jury proceedings. These witnesses may also testify before the grand jury. Regardless, statements obtained apart from the grand jury proceedings may be used to

support civil and administrative remedies without violating the rule of grand jury secrecy. This holds true even if the investigator who obtained the statement also knew the witness testified before the grand jury and had access to the testimony.

Similarly, documents should be obtained outside grand jury proceedings, that is, without using a grand jury subpoena. The preferred method is through consent of whoever has possession of the document. Absent consent, the other two alternatives are either a search warrant or an administrative subpoena issued by the DOD's Inspector General. The advantage of a search warrant is that the defendant is not alerted in advance of the Government's interest. Advance notice allows a defendant who is so inclined to destroy or conceal evidence. After all, a defendant willing to defraud the Government is ordinarily willing to conceal proof of that fraud.

The advantage of an Inspector General subpoena is that, unlike a search warrant, a showing of probable cause is unnecessary. The Inspector General Act of 1978 [128] assigns to agency Inspector Generals the duty, among other things, to investigate and audit programs and operations of their agencies. [129] They also are to carry out activities to detect fraud in agency programs and operations. [130] The Act gives Inspector Generals the authority to subpoena evidence necessary for them to perform their statutory functions. [131] An administrative subpoena may be issued if it furthers a purpose within the statutory authority of an agency's Inspector General. [132] The pendency of a parallel criminal proceeding is immaterial. [133] Moreover, materials obtained by an Inspector General subpoena may be provided to the Department of Justice to be used in pursuing criminal and civil remedies. [134]

The disadvantage of an administrative subpoena is the cumbersome process necessary to obtain one. In the DOD, the Inspector General or the deputy must personally approve the subpoena. [135] The Inspector General requires substantial documentation to accompany a request for a subpoena, especially if the subpoena is for financial records. [136] Consequently, if probable cause exists, a search warrant is more easily obtained.

Documents obtained through consent, search, or administrative subpoena are available to support civil, administrative, and criminal remedies. These documents include grand jury proceedings, although knowledge about which documents are provided to the grand jury must be limited to prosecutors and criminal investigators. In order that documents can be used in civil and administrative actions, copies, not the originals, should be provided to the grand jury.

The second part of pursuing the criminal case to avoid conflict with civil and administrative remedies focuses on the proper administration of criminal justice. Pursuing criminal, civil, and administrative remedies in parallel requires a cooperative effort. Among other advantages, this approach provides the Government greater leverage in bargaining with defendants over the terms of plea agreements and settlements in civil and administrative cases. Prosecutors, who have a great deal of discretion in deciding which crimes to charge, can offer reduced criminal charges to influence a defendant to settle civil and administrative cases on terms favorable to the Government. Similarly, attorneys handling civil and administrative cases can agree to take less than the full remedy to influence a defendant to accept a plea agreement and plead guilty.

Apart from leverage, prosecutors also can use their discretion to support the Government's position in civil and administrative cases. As discussed several times in this article, results in a criminal case may be used to support civil and administrative remedies. But usefulness for this purpose depends upon the crimes charged, language in the indictment, findings in the sentencing proceeding, and contents of any plea agreement. For example, for filing a $1 million false claim against the Government, the conviction and sentence of an individual or corporation provides stronger support for civil and administrative remedies than a conviction and sentence for the same crime based on filing a false income tax return.

The Government's authority to use criminal, civil, and administrative remedies to affect overall outcome does have limits. Ethically, a prosecutor may pursue only those criminal charges supported by probable cause and sufficient evidence for a conviction. [137] Prosecutors also must bargain with similarly situated defendants on similar terms. [138] Finally, a defendant's plea of guilty must be voluntary. [139]

Within these limits, the concurrent pursuit of fraud remedies in a manner to influence the overall outcome of various remedies is legitimate. A plea agreement may properly provide for restitution as part of the sentence. [140] Restitution, moreover, when part of a plea agreement, is not limited to the specific crimes charged. [141] A prosecutor, in plea negotiations, may bargain for a defendant's agreement to pay restitution, not only for crimes charged, but also for crimes the prosecutor agrees to drop. [142] These rules apply when the victim is the Government. [143]

Global settlements between the Government and defendants that resolve criminal, civil, and administrative aspects of a fraud case are an accepted practice. Extending beyond restitution as part of the sentence, these settlements address a defendant's civil and administrative liability. In United States v. Carrigan, [144] for example, a proposed global settlement provided for the defendant corporation to plead guilty and settle civil and contract claims in exchange for the Government's agreement to dismiss criminal charges against individual defendants and take no action to bar the corporation from doing business with the Government. [145] A prosecutor also may agree to immunity from criminal prosecution in exchange for forfeitures and civil penalties. [146]

Global settlements have advantages for defendants who can reduce their civil/administrative liability. [147] Defendants often want and can use plea agreements to limit or even eliminate civil forfeitures in exchange for a guilty plea. [148] Consequently, voluntariness of a guilty plea should not be an issue. After all, if prosecutors can offer reduced charges or a reduced sentence in exchange for a guilty plea, [149] they should be able to make the same offer in exchange for a defendant's accepting certain civil and administrative liabilities. Just as criminal charges must be supported by probable cause and sufficient evidence for a conviction, threatened civil and administrative remedies must be supported in law and fact. [150]

This is not to suggest the Government should insist on global settlements. The Government and a defendant may be able to reach agreement on some, but not all, aspects of a fraud case. If that occurs, the parts where there is agreement are resolved, and the balance is litigated. A defendant, for example, may be willing to plead guilty to fraud, but unwilling to settle the civil case because agreement on the amount of the fraud cannot be reached. If the plea agreement is one the Government would ordinarily accept, the Government should accept the plea agreement without insisting on a global settlement. [151]

IV. CONCLUSION

Handling fraud cases can be a challenging, even a frustrating, experience for judge advocates. Lacking direct control of any fraud remedy, they must pursue remedies by influencing those who do have direct control. The judge advocate's influence is highest for administrative remedies that are handled within the military service concerned. Initiation is controlled by a staff office reporting to the same chain of command as the judge advocate. These staff offices are generally receptive to judge advocate recommendations to initiate an administrative remedy. Even here, however, pursuing an administrative remedy can be blocked by the DOJ. The judge advocate, therefore, must convince DOJ attorneys that administrative remedies can be pursued in a way that avoids interference with criminal and civil actions. A judge advocate's influence diminishes when the DOJ controls the remedy for civil and criminal actions. In this case, the judge advocate's role is to support DOJ. How vigorously these remedies are pursued depends upon the interest of DOJ attorneys in a case and the amount of influence the judge advocate has with DOJ. Moreover, lack of direct control is only part of the challenge. In many instances, a "field" judge advocate does not speak for the Air Force in dealing with DOJ attorneys. Instead, that role is usually reserved to the Secretariat's General Counsel office. Part of the solution to this situation is to enlarge a field judge advocate's authority. Service regulations should designate a field judge advocate as the staff officer principally responsible for handling fraud remedies. A field judge advocate should have authority, in the name of the commander, to direct initiation of demands for payment, administrative setoffs, and suspension and debarment actions. Moreover, he or she should be provided the authority to represent the Air Force to DOJ on all matters involving those fraud cases assigned to them. Higher headquarters, including the General Counsel's office, will continue to oversee actions taken in fraud cases based on field reports. The responsibility for execution, however, belongs in the field. Even if these changes are made, a field judge advocate must still work with others in and out of his or her command in order for fraud remedies to work. The seven principles discussed in this article are a starting point.

Footnotes

*Colonel Stubbs (A.B., University of Georgia; J.D., Harvard Law School) is the Deputy Staff Judge Advocate, Air Force Materiel Command, Wright-Patterson AFB, Ohio. He is a member of the State Bar of Georgia.

1. Federal Acquisition Regulations System (FARS), 48 C.F.R. Sec. 1.601 (1992).

2. Id. at Secs. 13.101, 13.106(a), and (b) (1992).

3. Air Force Regulation (AFR) 177-102, para. 12-2, Commercial Transactions at Base Level, (15 Nov. 1987 and 15 Apr. 1989).

4. 18 U.S.C. Secs. 287 (false, fictitious or fraudulent claims), 371 (conspiracy to defraud), 641 (theft), 1001 (fraud and false statements), 1951 (interference with commerce by threats or violence) (1988).

5. Implementing 5 U.S.C. Secs. 7511-14 (1988 & Supp. II 1990), Civil Service Regulations, 5 C.F.R. Secs. 752.402(e), 752.404(b)(3)(iii) & (d)(1) (1992); AFR 40-750, para. 16e(1), and atch. 5, para. 10(b), Discipline and Adverse Actions (23 July 1982 and 22 Dec. 1989). See, e.g., Martin v. United States Customs Service, 12 M.S.P.R. 12, 10 M.S.P.B. 568 (1982).

6. 18 U.S.C. Sec. 1382 (1988) makes it a crime to reenter a military installation after having been removed or ordered not to enter.

7. 31 U.S.C. Secs. 3711, 3716 (1988 & Supp. II 1990); 4 C.F.R. Secs. 101.1-102.4 (1992); 32 C.F.R. Sec. 90.6, encl. 1, para. F.1.-3 (1992). See, e.g., 64 Comp. Gen. 907 *[cited at]* (1985).

8. 31 U.S.C. Secs. 3729-33 (1988 & Supp. II 1990).

9. 18 U.S.C. Secs. 371 and 641 (1988).

10. 5 U.S.C. Secs. 7512(1), 7513(a) (1988); 5 C.F.R. Sec. 752.402 (1992); AFR 40-750, supra note 5, at para. 16b and atch. 3, para. 15.

11. FARS, 48 C.F.R. Secs. 9.406-5(a), 9.407-2(a), & 9.407-5 (1992) (suspension of a company may be based on adequate evidence of fraud committed by an employee acting for the company).

12. See infra note 64 and accompanying text.

13. See infra note 65 and accompanying text.

14. FARS, 48 C.F.R. Sec. 9.407-2(a) (1992).

15. 18 U.S.C. Sec. 1382.

16. See infra note 70 and accompanying text.

17. 37 U.S.C. Sec. 1007(c) (1988); 32 C.F.R. Sec. 90.6, encl. 1, para. C. (1992).

18. 18 U.S.C. Secs. 371 (conspiracy), 641 (theft), 201 (bribery) and 1956 (money laundering) (1988).

19. Treasury Delegation Order 15-42, 56 Fed. Reg. 21400 (1991).

20. 31 U.S.C. Secs. 3711, 3716; 5 C.F.R. Secs. 752.402(e), 752.404(b)(3)(iii), & (d)(1); AFR 40-750, para. 16e(1) and atch. 5, para. 10(b).

21. FARS, Secs. 13.101, 13.106(a) & (b).

22. 48 C.F.R. Sec. 3.106(c) (1992).

23. 18 U.S.C. Sec. 371 (1988).

24. 31 U.S.C. Secs. 3711, 3716; 4 C.F.R. Secs. 101.1-102.4; 32 C.F.R. Sec. 90.6, encl. 1, para F.1.-3.

25. 18 U.S.C. Sec. 201(c)(1)(B) (1988).

26. 5 U.S.C. Secs. 7512(1), 7513(a); 5 C.F.R. Sec. 752.402; AFR 40-750, para. 16b and atch. 3, para. 15.

27. 31 U.S.C. Secs. 3711, 3716; 4 C.F.R. Secs. 101.1-102.4; 32 C.F.R. Sec. 90.6, encl. 1, para. F.1.-3.

28. 18 U.S.C. Sec. 201(c)(1)(A) (1988).

29. 18 U.S.C. Sec. 371 (1988).

30. 5 U.S.C. Secs. 7512(1), 7513(A); 5 C.F.R. Sec. 752.402; AFR 40-7750, para 16b and atch 3, para. 15.

31. 31 U.S.C. Secs. 3711, 3716; 4 C.F.R. Secs. 101.1-102.4; 32 C.F.R. Sec. 90.6, encl. 1, para. F.1.-3.

32. 18 U.S.C. Sec. 371 (1988) and 26 U.S.C. Sec. 7206(1) (1988).

33. 37 U.S.C. Sec. 1007(C); 32 C.F.R. Sec. 90.6, encl. 1, para. C.

34. 31 U.S.C. Secs. 3729-33 (1988 & Supp. II 1990).

35. See infra notes 70, 73.

36. See infra note 73.

37. See infra note 73.

38. See infra note 71.

39. See infra notes 128-134 and accompanying text.

40. 18 U.S.C. Sec. 981 (1988, Supp. I 1989, & Supp. II 1990).

41. Id. at Sec. 201(b)(1)(B) (1988).

42. 10 U.S.C. Sec. 934 (1988).

43. Id. at Sec. 921 (1988).

44. Id. at Sec. 907 (1988).

45. Id. at Sec. 892 (1988).

46. 18 U.S.C. Secs. 371 (1988); 26 U.S.C. Sec. 7206 (1988).

47. 18 U.S.C. Sec. 371 (1988).

48. Id. at Sec. 3624(b); 18 U.S.C. Secs. 3551, 3553; Sentencing Reform Act (part of the Comprehensive Crime Control Act) of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2027 Sec. 218(a)(b).

49. This principle and the following discussion are based on the thought and practice of Miriam Duke and Linda Phillips. Ms. Duke is the chief criminal prosecutor in the U.S. Attorney's Office for the Middle District of Georgia. Ms. Phillips, at the time, was an OSI special agent.

50. This principle is based on the thought and practice of Linda Phillips, then an OSI special agent, and Fred Stofer, an FBI special agent, assigned to the FBI office in Macon, Georgia.

51. 384 U.S. 436 *[cited at]* (1966).

52. California v. Beheler, 463 U.S. 1121 *[cited at]* (1983).

53. United States v. Henry, 447 U.S. 264 *[cited at]* (1980); Brewer v. Williams, 430 U.S. 387 *[cited at]* (1977); Massiah v. United States, 377 U.S. 201 *[cited at]* (1964).

54. 10 U.S.C. Sec. 831 (1988).

55. United States v. Penn, 39 C.M.R. 194 (C.M.A. 1969); United States v. Kellam, 2 M.J. 338 *[cited at]* , 341-42 (A.F.C.M.R. 1976). See also United States v. Baird, 851 F.2d 376, 383 (D.C.Cir. 1988).

56. United States v. Willard, 919 F.2d 606, 608 (9th Cir. 1990), cert. denied, 112 S.Ct. 208 *[cited at]* (1991) (defendants's cooperation would be made known to the government prosecutor); United States v. Nash, 910 F.2d 749, 752-53 (11th Cir. 1990) (defendant's cooperation would be made known to prosecutor; cooperating defendants generally fared better); United States v. Robinson, 698 F.2d 448, 455 (D.C. Cir. 1983) (defendant's cooperation would be made known to prosecutor); United States v. Ballard, 586 F.2d 1060, 1063 (5th Cir. 1978) (defendant told in uncoercive manner of realistically expected penalties and encouraged to tell the truth); United States v. Pomares, 499 F.2d 1220, 1221-23 (en banc) (2d Cir. 1974), cert. denied, 419 U.S. 1032 *[cited at]* (1974) (defendant faced heavy penalties; cooperation wisest course rather than remaining silent).

57. Fred Lane, Lane's Goldstein Trial Technique, Secs. 19.12, 19.82, (3d ed. 1968).

58. The limitation period under the False Claims Act is six years from the fraud or three years from the date facts material to the right of action are known or reasonably should have been known by a federal official responsible to act, whichever is longer, but not to exceed ten years from the fraud. 31 U.S.C. Sec. 3731(b) (1988). For civil fines, penalties, or forfeitures, the period is five years. 28 U.S.C. Sec. 2462 (1988). For common law torts, such as fraud, bribery, and conflict of interest, the period is three years from the date the cause of action accrues. 28 U.S.C. Sec. 2415(b) (1988). For contract actions, the period is six years from the date the cause of action accrues. 28 U.S.C. Sec. 2415(a) (1988). The running of a limitation period under Sec. 2415 is suspended for any period facts material to the right of action are not known and reasonably could not have been known by a federal official responsible for acting. 28 U.S.C. Sec. 2416 (1988). The limitation period for Anti-Kickback claims is six years from when the Government knew or should have known of the prohibited conduct. 41 U.S.C. Sec. 55 (1988).

59. Jobs for Progress, Inc. v. United States, 759 F.2d 1, 5-9 (Fed. Cir. 1985); World Wide Tankers, Inc., ASBCA No. 20903, 77-1 B.C.A. Para. 12,302 (1977), proceedings reinstituted, 79-1 B.C.A. Para. 13,619 (1978).

60. 31 U.S.C. Sec. 3716, by its own terms, "does not apply--(1) to a claim . . . that has been outstanding for more than 10 years." Id. at Sec. 3716(c)(1) (1988). Under the implementing federal rule, however, the limitation period is ten years from the date facts material to the right of action are known or reasonably should be known by a responsible official. 5 C.F.R. Sec. 102.3(b)(3) (1992). This apparent regulatory extension of the statutory limitation period is questionable.

61. Jobs for Progress, Inc., 759 F.2d at 5-9; Lane v. United States, 639 F.2d 758 (Ct. Cl. 1981); Roberts v. U.S. Great Am. Ins. Co., 357 F.2d 938, 946 (Ct. Cl. 1966).

62. 31 U.S.C. Sec. 3730(b),(d), and (e) (1988 & Supp. II 1990).

63. 31 U.S.C. Sec. 2729 (1988).

64. Grand Union Co. v. United States, 696 F.2d 888, 891 (11th Cir. 1983). Not all circuits require proof that the employee acted to benefit the corporation. United States v. O'Connell, 890 F.2d 563 (1st Cir. 1989). The general rule is that a corporation is liable for the wrongful acts of its employees acting within the scope of their employment. United States v. United States Cartridge Co., 198 F.2d 456, 464 (8th Cir. 1952) (stating the general rule in a False Claims Act case, but declining to follow it because of special facts), cert. denied, 345 U.S. 910 *[cited at]* (1953).

65. See, e.g., United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989), cert. denied, 493 U.S. 1021 *[cited at]* (1990) (anti-trust case); United States v. Automated Medical Lab., Inc., 770 F.2d 399, 406-08, n.5 (4th Cir. 1985).

66. United States ex rel. Weinberger v. Equifax, Inc., 557 F.2d 456 (5th Cir. 1977), cert. denied, 434 U.S. 1035 *[cited at]* (1978). (False Claims Act primarily directed against contractors who bill for nonexistent or worthless goods or who charge exorbitant prices for delivered goods).

67. United States v. Neifert-White Co., 390 U.S. 228 *[cited at]* (1968); United States v. Ueber, 303 F.2d 462 (6th Cir.

1962). Cf. Equifax, 557 F.2d 456 at 460.

68. United States v. Aerodex, 469 F.2d 1003, 1007-08 (5th Cir. 1973).

69. Brown v. United States, 524 F.2d 693, 704-05 (Ct. Cl. 1976); United States v. Cripps, 460 F. Supp. 969, 975 (E.D. Mich. 1978).

70. United States v. Mead, 426 F.2d 118 (9th Cir. 1970); United States v. Borin, 209 F.2d 145, 147-48, cert. denied, 348 U.S. 821 *[cited at]* (1954). See also United States v. Silliman, 167 F.2d 607, 611 (3d Cir.), cert. denied, 335 U.S. 825 *[cited at]* (1948) (False Claims Act is not the Government's exclusive remedy for fraud, and the Government may also pursue a claim under the common law for fraud); Continental Mgmt, Inc. v. United States, 527 F.2d 613, 620 (Ct. Cl. 1975) (statutory penalties for bribery and fraud do not preclude government civil remedies under the common law).

71. United States v. Carter, 217 U.S. 286 *[cited at]* (1910); Zions First National Bank v. United Health Club, Inc., 704 F.2d 120, 124 (3d Cir. 1983). See also United States v. Kearns, 595 F.2d 729 (D.C. Cir. 1978) (constructive trust imposed on proceeds held by person responsible for the fraud).

72. United States v. Aerodex, 469 F.2d 1003, 1011-12 (5th Cir. 1973).

73. United States v. Carter, 217 U.S. 286 *[cited at]* (1910); Continental Mgt, Inc. v. United States, 527 F.2d 613, 615-19 (Ct. Cl. 1975); United States v. Shaw, 725 F. Supp. 896, 898-900 (S.D. Miss. 1989).

74. United States v. Mississippi Valley Generating Co., 364 U.S. 520 *[cited at]* , 563-66 (1961); Joseph Morton Co., Inc. v. United States, 757 F.2d 1273, 1277-79 (Fed. Cir. 1985); K & R Eng'g Co., Inc. v. United States, 616 F.2d 469, 472-76 (1980); and United States v. Brown, 524 F.2d 693, 699-700 (Ct. Cl. 1976).

75. United States v. Mead, 426 F.2d 118, 124-25 (9th Cir. 1970); United States v. Syston-Donner Corp., 486 F.2d 259 (9th Cir. 1973); United States v. Rockwell Int'l Corp., 795 F. Supp. 1131 (N.D. Ga. 1992). See United States v. Wurts, 303 U.S. 414 *[cited at]* , 415 (1938) (the United States may recover funds that its agents have wrongfully, erroneously, or illegally paid independent of any statute).

76. FARS, 48 C.F.R. Secs. 9.406-1(a)(4) and (5), 9.407-1(b)(2) (1992).

77. The 1984 Memorandum of Understanding (MOU) between the Departments of Justice and Defense gives the FBI primary investigative jurisdiction in significant bribery and conflict of interest cases involving DOD personnel. This MOU also requires notice to the Department of Justice in fraud and theft cases when federal prosecution is warranted. DOJ decides, in consultation with DOD, which agency will handle the case. Department of Defense Directive 5525.7, encl. 1 (Jan. 22, 1985).

78. See, e.g., United States v. Killough, 848 F.2d 1523, 1528 (11th Cir. 1988).

79. See infra notes 101-103.

80. See, e.g., Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 *[cited at]* , 52 (1912); Securities & Exchange Comm'n v. Dresser Indus., 628 F.2d 1368, 1374-76 (D.C. Cir. 1980) (en banc), cert. denied, 449 U.S. 993 *[cited at]* (1980). DOD policy is to take timely civil and administrative actions and, following required coordination, to take appropriate administrative actions before civil and criminal cases are reached. DOD Instruction 7050.5, para. D3 (June 7, 1985).

81. Dresser, 628 F.2d at 1375-76.

82. See infra notes 107-113 and accompanying text.

83. U.S. Const. amend. V.

84. Halper v. United States, 490 U.S. 435 *[cited at]* (1989).

85. Implementing 5 U.S.C. Secs. 7511-14 (1988 & Supp. II 1990), Civil Service Regulations, 5 C.F.R. Secs. 752.402(e), 752.404(b)(3)(iii) and (d) (1992); AFR 40-750, para. 16e(1) and atch. 5, para. 10(b), Discipline and Adverse Actions (23 July 1982 and 22 Dec. 1989). See, e.g., Martin v. United States Customs Service, 12 M.S.P.R. 12, 10 M.S.P.B. 568 (1982).

86. FARS, 48 C.F.R. Secs. 9.406-5(a) and 9.407-2(a), 9.407-5 (1992).

87. Id. at Sec. 9.407-2(a) (1992).

88. Id. at Sec. 9.407-3(c)6) and (d) (1992). See ATL, Inc. v. United States, 736 F.2d 677, 684-86 (Fed. Cir. 1984); Horne Bros., Inc. v. Laird, 463 F.2d 1268 (D.C. Cir. 1972).

89. Final and retired pay of civilian employees and final pay of military members, 31 U.S.C. Secs. 3711, 3716 (1988 & Supp. II 1990); 4 C.F.R. Secs. 101.1-102.4 (1992); 32 C.F.R. Sec. 90.6, Encl. 1, para. F. 1.-3. (1992); see, e.g., 64 Comp. Gen. 907 *[cited at]* (1985). Current and retired pay of military members, 37 U.S.C. Sec. 1007(c) (1988); 32 C.F.R. Sec. 90.6, encl. 1, para. C. (1992). Current pay of civilian employees, 5 U.S.C. Sec. 5514(a)(1) (1988); 32 C.F.R. Sec. 90.6, encl. 1, para. D. (1992).

90. Final and retired pay of civilian employees and final pay of military members, 31 U.S.C. Sec. 3716(a) (1988); 4 C.F.R. Sec. 102.3(c) (1992); 32 C.F.R. Sec. 90.6, encl. 1, para. F.6. (1992). Current and retired pay of military members, 64 Comp. Gen. 142 *[cited at]* (1984); Air Force Reg. 170-30, para. 3-5 (change 2, 30 June 1990). Current pay of civilian employees, 5 U.S.C. Sec. 5514(a)(2) (1988); 32 C.F.R. Sec. 90.6, encl. 1, para. E.7.a(2) (1992); AFR 170-30, paras. 3-19, 3-20, Debt Collection, (30 Apr. 1987).

91. Final and retired pay of civilian employees and final pay of military members, 31 U.S.C. Sec. 3716(a) (1992); 4 C.F.R. Sec. 102.3(c) (1992); 32 C.F.R. Sec. 90.6, encl. 1, para. F.6. (1992). Current and retired pay of military members, 64 Comp. Gen. 142 *[cited at]* (1984); 32 C.F.R. Sec. 90.6, encl. 1, para. C. 3. (1992). Current pay of civilian employees, 5 U.S.C. Sec. 5514(a)(2) (1988); 32 C.F.R. Sec. 90.6, encl. 1, para. E.7.a(2) (1992).

92. 491 F.2d 859 (10th Cir.), cert. denied, 417 U.S. 910 *[cited at]* (1974).

93. United States v. TDC Management Corp., 1992 WL 212418 (D.D.C. Aug. 17, 1992); Peterson v. Weinberger, 508 F.2d 45, 49-50 (5th Cir.), cert. denied, 423 U.S. 830 *[cited at]* (1975); Hillburn v. Butz, 463 F.2d 1207, 1209 (5th Cir. 1972), cert. denied, 410 U.S. 942 *[cited at]* (1973); United States v. Williams, 162 F. Supp. 903 (M.D. Ala. 1957).

94. 709 F.2d 968 (5th Cir. 1983).

95. Id. at 971.

96. Id. at 973.

97. United States v. Borstein, 423 U.S. 303 *[cited at]* (1976).

98. Lawlor v. National Screen Serv. Corp., 349 U.S. 322 *[cited at]* (1955); United States v. Thomas, 709 F.2d 968 at 971-72 (5th Cir. 1983).

99. Paramount Transp. Sys. v. Chauffeurs, Teamsters and Helpers, 436 F.2d 1064 (9th Cir. 1971).

100. United States v. TDC Management Corp., 1992 WL 212418 (D.D.C. Aug. 17, 1992); Ingalls Shipbuilding, Inc. v. United States, 21 Cl. Ct. 117, 122-25 (1990).

101. See, e.g., Otherson v. Dep't of Justice, I.N.S., 711 F.2d 267 (D.C. Cir. 1983).

102. FARS, 48 C.F.R. Sec. 9.406-3(d) (1992).

103. United States v. Scarano, 975 F.2d 580, 583 (9th Cir. 1992).

104. 41 U.S.C. Secs. 601-613 (1988 & Supp III 1991).

105. Id. at Sec. 606(a).

106. Id. at Secs. 607, 610(a).

107. Id. at Sec. 606(a).

108. United States v. Rockwell Int'l Corp., 795 F. Supp. 1131 (N.D. Ga. 1992); United States v. General Dynamics Land Sys., Inc., Civ. No. 90-70340, (E.D. Mich. Aug. 7, 1990); United States v. The Meredith Corp., Civ. , 1990 WL 375611 (S.D. Iowa, June 15, 1990); United States v. JT Construction Co., Inc., 668 F. Supp. 592, 593-94 (W.D. Tx. 1987); BMY Combat Sys. Div. of Harsco Corp. v. United States, 26 Cl. Ct. 846, 849 (1992). Contra United States v. Hughes Aircraft Co., 1991 WL 133569 (C.D. Cal. Apr. 5, 1991); United States ex rel. John P. Perron, Jr. v. Hughes Aircraft Co., 1991 WL 352416 (C.D. Cal. Apr. 29, 1991).

109. United States v. TDC Mgmt Corp., 1992 WL 212418 (D.D.C. Aug. 17, 1992); Rockwell Int'l, 795 F. Supp. at 1133-34.

110. See supra text accompanying notes 58-76.

111. 48 C.F.R. Sec. 32.606(a) and (b) (1992).

112. Id. at Sec. 32.609(c).

113. Id. at Secs. 32.611 and 32.612.

114. Id. at Sec. 32.610.

115. 31 U.S.C. Sec. 3711(a) (1988).

116. 31 U.S.C. Sec. 3711(c)(1) (1988, Supp. II 1990, & Supp. III 1991).

117. 4 C.F.R. Sec. 101.3(a) (1992).

118. See supra text accompanying notes 90-91.

119. Allied Signal, Inc. v. United States, 941 F.2d 1194, 1196-98 (Fed. Cir. 1991); Avco Corp. v. United States, 10 Cl. Ct. 665 (1986).

120. United States v. Sells Eng'g, Inc., 463 U.S. 418 *[cited at]* , 425-46 (1983); Matter of Federal Grand Jury Proceedings, 760 F.2d 436, 438-39 (2d Cir. 1985).

121. United States v. Baggott, 463 U.S. 476 *[cited at]* (1983); In Re Grand Jury 89-4-72, 932 F.2d 481 (6th Cir. 1991), cert. denied, 112 S.Ct. 418 *[cited at]* (1991).

122. In re Subpoena to Testify Before Grand Jury, 864 F.2d 1559, 1564 (11th Cir. 1989); In re Grand Jury Investigation, 610 F.2d 202, 216-217 (5th Cir. 1980); Matter of Grand Jury Investigation (90-3-2), 748 F. Supp. 1188, 1207 (E.D. Mich. 1990).

123. Anaya v. United States, 815 F.2d 1373, 1376, 1378-80 (10th Cir. 1987); Security & Exchange Comm'n v. Dresser Indus., 628 F.2d 1368, 1382 (D.C. Cir.) (en banc), cert. denied, 449 U.S. 993 *[cited at]* (1980); In Re Grand Jury Investigation, 610 F.2d at 217.

124. In re Subpoena to Testify Before Grand Jury, 864 F.2d 1559, 1564 (11th Cir. 1989).

125. Id. at 1564; Dresser, 628 F.2d at 1382-83; In re Grand Jury Investigation, 610 F.2d at 217; Matter of Grand Jury

Investigation (90-3-2), 748 F. Supp. at 1208; United States v. Premises Known as 25 Coligni Ave., 120 F.R.D. 465 (S.D.N.Y. 1988); McArthur v. Robinson, 98 F.R.D. 672 (D.C. Ark. 1983).

126. Anaya, 815 F.2d at 1378-80; Matter of Grand Jury Investigation (90-3-2), 748 F. Supp. at 1207; In re Grand Jury Investigation of Ven-Fuel, 441 F. Supp. 1299 (D.C. Fla. 1977).

127. Anaya, 815 F.2d at 1378-80; see supra note 125.

128. 5 U.S.C. app. 3 Secs. 1-12 (1988, Supp. II 1990, & Supp. III 1991).

129. Id. at Sec. 4(a)(1).

130. Id. at Sec. 4(a)(2).

131. Id. at Sec. 6(a)(4).

132. United States v. Aero Mayflower Transit Co., Inc., 831 F.2d 1142, 1144-46 (D.C. Cir. 1987); United States v. Westinghouse Corp., 788 F.2d 164 (3d Cir. 1986).

133. United States v. Art Metal-U.S.A., Inc., 484 F. Supp. 884, 886-87 (D.N.J. 1980).

134. United States v. Educational Dev. Network Corp., 884 F.2d 737, 738-40, 741-43 (3d Cir. 1989), cert. denied, 494 U.S. 1078 *[cited at]* (1990); Aero Mayflower, 831 F.2d at 1144-46.

135. United States v. Custodian of Records, Southwestern Fertility Center, 743 F. Supp. 783, 786-87 (W.D. Okla. 1990) (authority delegable to Deputy Inspector General).

136. 12 U.S.C. Sec. 3405 (1988) sets out statutory requirements for administrative subpoena of financial records. These statutory requirements are partly implemented in 32 C.F.R. Sec. 294.9(a)(1) (1992) (DOD Directive 5400.12) and Air Force Office Special Investigations Regulation 124-49, Chap. 3, Obtaining Financial Data Information (23 Feb. 1984).

137. Bordenkircher v. Hayes, 434 U.S. 357 *[cited at]* , 364 (1978); Office of The Judge Advocate General Letter No. 92-26, Air Force Standards for the Administration Criminal Justice 3-3.9(a) (22 Oct. 1992) [hereinafter AF Standards]. See also Commonwealth ex rel. Ward v. Harrington, 266 Ky. 41, 98 S.W. 2d 53 (1936).

138. AF Standards, supra note 137 at 14-3.1(c). See Borkenkircher, 434 U.S. at 364; In re Rook, 276 Or. 695, 556 P.2d 1351 (1976) (improper for a prosecutor to refuse to plea bargain because defendant was represented by a particular lawyer). Cf. United States v. Jones, 26 M.J. 650 *[cited at]* , 651 (A.C.M.R.), (in exercising its broad discretion to accept or reject a plea agreement, Government must be fair), pet. for review denied, 27 M.J. 650 *[cited at]* (C.M.R. 1988).

139. Brady v. United States, 397 U.S. 742 *[cited at]* (1970); Fed. R. Crim. P. 11.

140. 18 U.S.C. Sec. 3663(a)(1) (1988).

141. 18 U.S.C. Sec. 3663(a)(3) (Supp. II 1990); United States v. Olson, 25 M.J. 293 *[cited at]* , 295-96 (C.M.A. 1987).

142. United States v. Soderling, 970 F.2d 529, 532-34, n.9 (9th Cir. 1992), cert. denied, 113 S.Ct. 2446 *[cited at]* (1993).

143. United States v. Helmsley, 941 F.2d 71 (2d Cir. 1991), cert. denied, 112 S.Ct. 1162 *[cited at]* (1992); Olson, 25 M.J. at 294-96.

144. 778 F.2d 1454, 1456-57 (10th Cir. 1985).

145. Carrigan, 778 F. 2d at 1456-57. The agreement failed when the court refused to accept the plea agreement because it dismissed criminal charges against individual defendants. Id. at 1456-60. Cf. United States v. Mischler, 787 F. 2d 240, 244, n.5 (7th Cir. 1986) (court interpreted plea agreement as not addressing restitution because, in part, parties negotiated,

but failed to reach agreement on restitution).

146. United States v. Boltz, 663 F. Supp. 956, 960-61 (D. Ak. 1987).

147. In re Arnett, 804 F.2d 1200 (11th Cir. 1986) (Government agreed not to seek forfeitures beyond cash seized from defendant at time of arrest); United States v. Trott, 779 F.2d 912, 916 (3d Cir. 1985) (Government agreed not to seek forfeitures); United States v. Hall, 730 F. Supp. 646, 647, 650-53 (M.D. Pa.) (plea agreement barred civil penalty). Cf. Shades Ridge Holding Co., Inc. v. United States, 888 F.2d 725, 730 (11th Cir. 1989), cert. denied, 494 U.S. 1027 *[cited at]* (1990) (plea agreement interpreted as not releasing defendant from civil tax liability).

148. Arnett, 804 F.2d at 1202, 1204 (where plea agreement barred forfeitures beyond certain amount, Government must dismiss forfeiture action or court would vacate guilty plea); Trott, 779 F.2d at 916; United States v. Runck, 601 F.2d 968 (8th Cir. 1979) (plea agreement's failure to address restitution barred court from ordering restitution as part of the sentence); Hall, 730 F. Supp. at 646, 650-53.

149. Bordenkircher v. Hayes, 434 U.S. 357 *[cited at]* , 363-64 (1978); Ford v. United States, 418 F.2d 855, 858-59 (8th Cir. 1969) (promise not to prosecute under habitual offender state law).

150. Cf. Ford, 418 F.2d at 859 (to invalidate a guilty plea, defendant must show prosecutor threatened or promised illegitimate action).

151. Cf. United States v. Jones, 26 M.J. 650 *[cited at]* , 651 (A.C.M.R. 1988) (after Government involuntarily recouped its losses from defendant, improper for Government to reject a plea agreement because it did not provide for restitution).

Title of Article

Post-Trial Contact with Court Members: A Critical Analysis

Author

Major Holly M. Stone, USAF*

Text of Article

I. INTRODUCTION

Air Force people sometimes talk about the need to "lead turn" an adversary -- to point your jet where an adversary will be, not where he is. [1] Similarly, legal scholars should aim ahead of the current state of the law in an effort to show where it ought to go. The purpose of this article is to examine post-trial contact between court members and attorneys and "lead turn" proposed changes designed to eliminate current uncertainty and confusion in this area. More specifically, this article suggests that the military adopt strict limitations on all post-trial communication concerning a case and recommends that counsel obtain leave of court prior to engaging in any discussions about a case with court members.

The law generally disfavors post-trial lawyer contact with jurors. [2] This reluctance is a matter of self-interest on the part of the justice system [3] and often comes at the expense of trial litigants. The reason for this reluctance is a desire to protect the secrecy of deliberations, promote stable verdicts, and prevent juror harassment and annoyance. [4]

Procedural, evidentiary, and ethical rules further these policy objectives by striking a balance between the tribunal's interests and those of the individual litigants. [5] Federal, state, and military courts take divergent approaches, reflecting the difficulty in balancing these interests. Some jurisdictions strictly regulate post-trial contacts, while others -- including the military -- take a permissive approach to post-trial contacts with members.

Post-trial contacts with court members arise in three basic contexts. First, counsel may contact court members for the purpose of gathering information to impeach the findings or sentence. Second, attorneys may seek a critique of their performance at the conclusion of the trial. Third, defense counsel may contact court members in order to obtain a post-trial clemency recommendation.

Most, although not all, court cases concerning post-trial contacts arise in the context of Military Rule of Evidence (MRE) 606(b), [6] which addresses the competency of a court member to testify as a witness to impeach the verdict. Being a rule of exclusion, it places limits on the use of a court member's testimony. The rule does not regulate how or when that information is collected, nor does it address the propriety of post-trial critiques or requests for clemency recommendations. For that, we must look to ethical and procedural rules -- both statutory and case made. These ethical and procedural rules address issues other than impeachment of a verdict. For example, ethical rules address post-trial critiques [7] and procedural rules govern requests for clemency recommendations. [8]

Military law in the area of post-trial contacts is confusing and contradictory, [9] suggesting that stricter supervision is in order. The confusion is attributable, in part, to two factors. First, the courts and the drafters of our ethical and procedural rules seldom analyze the interdependence between Rule 606(b) (the use of court member testimony in post-trial proceedings) [10] and the ethical and procedural rules (the collection of that information). The courts often determine whether or not the court member's testimony is admissible, but fail to comment on the propriety of counsel obtaining this information to begin with. Second, the courts and drafters of the procedural and ethical rules generally fail to recognize that the substantial policy goals behind the testimonial rules also apply to the collection of that information to begin with.

The focus of this article is on the collection process itself and whether the military should supervise post-trial

communications more closely. [11] To analyze the collection process properly, however, some discussion of MRE 606(b) is necessary, particularly the various public policy rationales military courts advance in support of it. This article then surveys federal and state law to give readers an understanding of how other jurisdictions handle post-verdict communications with jurors. It is followed by a review of the various military ethical rules. The remainder of this article then examines the rules found in the Uniform Code of Military Justice (UCMJ), [12] the 1984 Manual for Courts-Martial (MCM), [13] and military case law. This article concludes with a proposal to change current military practice.

II. RULE 606(B) AND ITS RATIONALE

MRE 606(b) embodies a general prohibition against a court member's testimony followed by three exceptions. [14] The rule works in conjunction with Rules for Courts-Martial (R.C.M.) 923 and 1008, [15] which prohibit the impeachment of a finding or sentence otherwise regular on its face. Together, these rules permit impeachment only when "extraneous prejudicial information . . . , outside influence. . . , or unlawful command influence was brought to bear upon any member." [16]

The first military decision to articulate the public policy concerns behind the nonimpeachability rule is United States v. Bishop. [17] The Court of Military Appeals recognized three general policy rationales in its support: (1) freedom of deliberation; (2) the stability and finality of verdicts; and (3) the prevention of annoyance and embarrassment of court members. [18]

The underlying, and perhaps overriding, concern of the courts is in "the orderly administration of the justice system." [19] As a matter of policy, MRE 606(b) provides a "balance between accurately resolving criminal trials in accordance with rules of law and the desirability of promoting finality in litigation and the protection of members from harassment and second-guessing." [20] If the law authorized testimony about all types of court member impropriety, it would create an incentive for parties and attorneys to pressure court members into testifying contrary to the verdict and an endless drain on judicial resources. Thus, even if court members' deliberations involved " [u]nsound reasoning, misconception of the evidence, or misapplication of the law," they may not testify as to those matters in a challenge to the findings or sentence. [21] Similarly, the rules operate to preclude the use of evidence "concerning whether [court members] followed instructions or were emotionally influenced by some event at trial." [22]

It is important to note that even when a court member is permitted to testify under one of the exceptions, the inquiry is narrowly focused on the facts and not on how the extraneous information, outside influence, or unlawful command influence affected the impressions, emotional feelings, or mental processes of the member [23] -- what is generically referred to as the "deliberative process." Disclosure of matters within a court member's consciousness is considered off-limits under the rule. For example, a member may testify that the panel failed to use secret written ballots, but a court may not elicit how this affected the member's thought processes. [24]

III. FEDERAL AND STATE PRACTICE

Many jurisdictions strictly limit post-verdict contacts with jurors. This is especially true of the federal district courts, [25] but some states strictly regulate this area as well. [26] These restrictions are established through case law, [27] rules of court, [28] or ethical standards. [29] Even within the federal courts, the rules are not uniform. Some require attorneys to file a petition before interviewing a juror. [30] Many require attorneys to have a "reasonable belief" or "good cause to believe" that a challenge exists under that jurisdiction's equivalent to MRE 606(b). [31] Very often these rules permit ex parte application to the judge, but sometimes they require notice to the opposing party. [32] Some rules limit contacts only between attorneys and jurors, while others extend the prohibition to parties, investigators, or other representatives. [33]

These various regulatory schemes often come under attack. Attorneys and commentators offer a number of arguments against strict regulation of post-trial interviews. They suggest that limiting their opportunity to talk to jurors denies them the opportunity to sharpen their trial techniques and strategies. [34] In the criminal context, defendants argue that their inability to talk to jurors prevents them from determining if there was a violation of their Fifth Amendment right to a fair trial or their Sixth Amendment right to an impartial jury. [35]

Courts are generally unpersuaded by these arguments. The Fifth Circuit Court of Appeals is perhaps the most outspoken critic of post-verdict communications. Judge Alvin B. Rubin wrote in United States v. Haeberle: "We have repeatedly refused to denigrate jury trials by afterwards ransacking the jurors minds in search of some new ground, not previously supported by evidence, for a new trial." [36] The litigants in this civil case challenged the local district court rule

prohibiting post-verdict interviews except upon leave of court with good cause shown. [37] Because the verdict in the case was "so contrary" to the litigant's expectations, the losing party wished to interview the jurors so that "some lesson for both counsel and plaintiffs could be learned." [38] In addition, the attorneys and parties to the case argued they had a First Amendment right to speak to the jurors that was unduly hampered by court restrictions. [39] Judge Rubin wrote:

The first-amendment interests of both the disgruntled litigant and its counsel in interviewing jurors in order to satisfy their curiosity and improve their advocacy are limited. We agree with the district court's implicit conclusion that those interests are not merely balanced but plainly outweighed by the jurors' interest in privacy and the public's interest in well-administered justice. [40]

Courts frequently express concern for the individual juror's right to privacy and protection from embarrassment and annoyance. In Arnez v. Helbig, [41] the Minnesota Court of Appeals expressed its strong policy of protecting jurors from harassment once they were discharged. The Minnesota court ruled in this civil case that attorneys may "never" contact a juror for the purpose of gathering evidence. [42] The court used a balancing analysis, concluding that the "remote" possibility of detecting juror misconduct was more than offset by the importance of shielding jurors from harassment. [43]

Similarly, in United States v. Kepreos, the First Circuit Court of Appeals established a rule limiting post-trial interviews of jurors except for "extraordinary circumstances." [44] In that case, the defendant's first prosecution for mail fraud and violations of the Commodity Exchange Act ended in a mistrial. Afterwards, the prosecutor contacted at least one of the jurors and learned why they failed to convict the defendant. The court held that this did not affect the fundamental fairness of the defendant's subsequent trial, but nonetheless condemned the prosecutor's conduct. [45] The court offered a number of reasons for its new rule, including a "diminished confidence in jury verdicts" when attorneys explore the thought processes of jurors. [46]

IV. ETHICAL RESTRICTIONS

Ethical rules play a key role in the military's regulation of post-verdict interviews. Any discussion of our ethical rules must begin with the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules). [47] The Army, Air Force, and Navy have adopted rules which are virtually identical to the ABA Model Rules except for minor modifications to reflect variances in terminology. [48] Rule 3.5(b) governs impartiality and decorum of the tribunal and prohibits ex parte communications with a judge, court, or board member, prospective court or board member, or other official "except as permitted by law." [49] On first reading, Model Rule 3.5 does not appear to address post-trial contacts with trial participants. The annotations to the Model Rules, however, indicate that the drafters intended to regulate post-verdict communications. The annotations also reflect a desire for the Model Rules to be more restrictive than their predecessor, [50] the ABA Model Code of Professional Responsibility (Model Code). [51]

Model Rule 3.5 is a general prohibition, excepting only those communications permitted by law. [52] Consequently, the best practice for military attorneys is to assume that post-trial contacts with court members are not permitted unless one can point to a rule or case that otherwise permits it. It is helpful to compare Model Rule 3.5 with its predecessor under the Model Code. While Model Rule 3.5 is simply a general prohibition, the Model Code was a narrower and more specific prohibition. The Model Code's Disciplinary Rule 7-108(D) prohibited post-trial interviews that were "calculated merely to harass or embarrass the juror or to influence his action in future jury service." [53] Attorneys were otherwise permitted to make inquiries of court members. Ethical Consideration 7-29 made it clear that post-verdict contacts were permitted in order to "ascertain if the verdict might be subject to legal challenge." [54] These Model Code provisions echoed the concerns found in ABA Formal Opinion 319. [55] Written in 1967, the opinion overturned earlier ABA advice that strictly prohibited attorney/juror contact. The 1967 opinion relaxed this general prohibition by recognizing that an attorney must have the "tools for ascertaining whether or not grounds for a new trial exist." [56] In addition, the ABA opinion authorized communication with jurors for the purpose of "self-education." [57] The opinion stated that attorneys could ask for a critique of their trial performance as long as the juror was willing and it was not construed as "fawning" or "flattery." [58] Taken together, Disciplinary Rule 7-108(D), Ethical Consideration 7-29, and ABA Formal Opinion 319 permitted an attorney broad ethical authority to engage in post-trial contacts for the purpose of a critique or to discover grounds for impeaching the verdict. [59] The subsequent adoption of the more restrictive Model Rule 3.5 reflects a desire to shift the regulation of post-trial communications from the ethical arena to other rule-making bodies.

As stated previously, Model Rule 3.5 prohibits ex parte post-trial contacts unless otherwise authorized by law. The ABA Standards for Criminal Justice (ABA Standards) provide military practitioners some additional guidance and authority in this regard. [60] The military services are not uniform in their adoption of the ABA Standards. The Navy has not officially

adopted the ABA Standards, whereas the Army adopted them without modification. [61] The Air Force adopted its own version of the ABA Standards (Air Force Standards) with modifications to reflect differences in substance and terminology. [62] The Air Force Standards also include a disclaimer stating that the UCMJ, MCM, regulations, case law, or the Model Rules prevail in the event of an inconsistency with the Air Force Standards. [63] The Army has a similar disclaimer for the ABA Standards. [64]

The pertinent provisions are Standards 3-5.4(c) (for the prosecution) and 4-7.3(c) (for the defense). Air Force Standard 3-5.4(c) is virtually identical to the ABA Standard. It reads as follows: "After discharge of the members from further consideration of a case, it is unprofessional conduct for the trial counsel to intentionally ask questions of a court member for the purpose of harassing or embarrassing the member in any way which will tend to influence judgment in future cases." [65] Readers should note the similarity between this provision and old Disciplinary Rule 7-108(D). [66] Both the Air Force and the ABA Standard 3-5.4 attach a mens rea element to post-verdict contacts in that the questioning of the court member must be "intentionally . . . for the purpose of harassing or embarrassing the member [and] which will tend to influence judgment in future cases," [67] in order to be prohibited.

Air Force Standard 4-7.3(c) applies to defense counsel and is identical to the prosecution standard, but adds: "If the defense counsel believes that the findings or sentence may be subject to legal challenge, counsel may properly communicate with court members to determine whether such challenge may be available." [68] The use of the phrase "if the defense counsel believes" that there may be a challenge implies that the defense counsel is ethically precluded from engaging in a fishing expedition. Based upon the lack of any qualifiers to this provision, however, the defense counsel's belief would not necessarily have to be "reasonable." The trial counsel is not permitted a similar right to interview court members because of concerns about unlawful command influence. [69]

The discussion to the Air Force Standards makes it clear that both the prosecution and defense may seek a critique of their performance. [70] Neither side may solicit a court member's vote, but for some reason the discussion fails to address whether counsel may inquire into the court member's deliberative process. Because the MCM prohibits an inquiry into the deliberative process, this omission is of no consequence. [71] The discussion to the defense standard permits defense counsel to request a clemency recommendation and references MRE 606(b), R.C.M. 923, and Model Rule 3.5 without further comment. [72] The discussion goes on to conclude that " [w]hat is prohibited are 'improper' communications which may be further defined by circuit rules of court practices." [73]

V. MILITARY LAW ON POST-TRIAL CONTACTS

Because the ABA and Air Force Standards provide the most specific advice, practitioners concerned about the proper limits on court member interviews will find them useful. For Air Force and Army lawyers, they provide the specific authority to engage in post-verdict contacts -- as envisioned by Model Rule 3.5. The inquiry should not stop there, however, because the Standards are applicable only to the extent they are consistent with the UCMJ, the MCM, and case law. [74]

A good starting point for additional analysis is R.C.M. 922(e), [75] which prohibits polling of court members on findings and R.C.M. 1007(c), [76] which prohibits a polling on the sentence. These rules are based on the requirements of Article 51(a), [77] which mandates secret written ballots, and Article 39(b), [78] which calls for closed deliberations. [79] Both rules state that " [e]xcept as provided in Mil. R. Evid. 606, members may not otherwise be questioned about their deliberations and voting." [80] Air Force Standards 3-5.4 and 4-7.3 fail to prohibit the solicitation of a court member's opinion. Given this omission, one must read "deliberation" into the Air Force Standard. [81] The MCM, UCMJ, and MRE 606(b) reflect a strong policy of protecting the deliberative process from scrutiny.

Article 37 of the UCMJ prohibits unlawful command influence. It is perhaps the most critical provision relating to post-trial contacts, as well as the least understood. As we have already seen, MRE 606(b) permits an inquiry of court members to determine if unlawful command influence was brought to bear during the course of the proceedings. The question we address now, however, is how a trial counsel may violate Article 37 through post-trial interviews.

The appellant in United States v. Baker raised this issue, but the court declined to address it. [82] The case nonetheless bears some study. In Baker, a court member contacted the trial counsel after trial to "discuss" the case. The opinion is not clear about the nature of the discussion except to say that during the course of the conversation, the trial counsel asked why the panel did not adjudge a discharge. [83] Apparently the panel did vote for a dishonorable discharge but failed to announce it or reflect it on the sentencing worksheet. The Air Force Court of Military Appeals held that the sentence could

not be adjusted to reflect the discharge, but did so without deciding a key concern -- whether trial counsel's questioning of the court member about the discharge was a violation of Article 37. [84] Chief Judge Sullivan in his concurrence nonetheless offers a hint. He noted that "trial counsel's routine practice of post-trial consultation with court members should not be encouraged where these panel members, still detailed to court-martial duty, may hear additional cases." [85] The unstated assumption underlying his concern is that post-trial inquiries give counsel an opportunity to assess the performance of a particular court member. This information can then be used in subsequent proceedings to challenge the court member peremptorily.

Chief Judge Sullivan's remarks leave many unanswered questions. Are counsel to avoid discussions about a prior case if the court member is detailed to the jury pool to serve sometime in the future, or should counsel avoid only those court members on orders for court-martial duty? Why restrict discussions to only those court members on orders or detailed to the pool? At many military installations, court members expect to serve regularly, and the same danger exists with them even though they may not be currently detailed or on orders.

As the above discussion on unlawful command influence illustrates, military courts are reluctant to analyze the public policy concerns behind their decisions. For example, in Baker, Judge Cox recognized the need to protect the deliberative process during the post-trial Article 39(a) session, and wrote approvingly that the members were not asked about their "views or impressions." [86] Unfortunately, he has no comment on the propriety of the trial counsel's invasion of the deliberative process. Trial counsel's inquiry into "why" no punitive discharge was imposed was an attempt to inquire into the deliberative process, and the court's failure to raise this issue sends the wrong message to trial practitioners. In addition, the decision does not recognize the public policy of minimizing the use of judicial resources. In this case, trial counsel's improper inquiry led to an unnecessary post-trial Article 39(a) proceeding as well as the appellate case itself.

United States v. Rios, [87] an Air Force Court of Military Review decision, causes even greater concern. In Rios, the trial court held a post-trial Article 39(a) session to inquire into the matter of an inattentive court member and an "allegation that the members were exposed to improper information." [88] While testifying on the issue of falling asleep, a court member disclosed that he talked with trial counsel prior to the Article 39(a) session. In response to the military judge's questioning, the assistant trial counsel disclosed that he asked all the members if they knew anything about the appellant failing a polygraph. The assistant trial counsel also showed one member the affidavits alleging he was asleep. The court ultimately held that the post-trial contacts did not prejudice the appellant, [89] but the court's analysis in this case is problematic for a number of reasons.

First, the court stated that "because the trial was concluded, assistant trial counsel was not specifically prohibited" from contacting court members. [90] Under Model Rule 3.5, however, the proper inquiry is not whether the post-trial contact was specifically precluded, but whether it is specifically authorized by law. [91] Second, the court mistakenly cited Baker for the proposition that the prosecution is not prohibited from contacting court members after trial, [92] when the Baker court took great pains to avoid that issue. [93] Finally, the Rios opinion noted that the assistant trial counsel did not "intend" to influence what the court member would say, [94] but fails to address the possibility that the appearance of unlawful command influence should be avoided as well. The appearance in this case is that the assistant trial counsel coached the court members on their testimony.

Nonetheless, finding this situation "troubling," Judge Snyder fashioned a rule requiring the Government to give the defense notice any time it believes it "necessary to query the court members outside the courtroom regarding the performance of their substantive duty as court members." [95] In a footnote he states, "Obviously, we exclude contacts of an administrative nature." [96]

His use of the term "substantive," without further explanation, is unfortunate. It is clear he intended "substantive" inquiries to include an inquiry for the purposes of MRE 606(b). But was it also his intent to require the Government to give notice if it intends to engage in post-trial critiques? The key policy concern at stake in Rios was unlawful command influence. A request for a post-trial critique may result in at least the appearance of improper command influence where there is a pending case to which the court member is detailed. In failing to clearly articulate the policy goals the court was attempting to further by such a procedural rule, we are left with little help on its application.

Issues raised in United States v. Heimer [97] suggest that restraints also should be placed on defense counsel. The issue in Heimer was whether to allow the defense counsel to impeach the verdict with a court member questionnaire he submitted to the members after trial. The appellant attempted to show that court members failed to follow instructions and that they expected the appellant to testify -- matters outside the scope of MRE 606(b). In both instances, the Air Force Court of

Military Review disagreed with this use of the questionnaires but never addressed the issue of whether collection of this information was proper to begin with, [98] again sending mixed signals to trial practitioners. The court recognized the need to avoid "harassment of court-members with attempts to secure evidence that might impeach a verdict," [99] but neglected to comment on the defense counsel's conduct in gathering the information initially.

Two other decisions are helpful in this area. In United States v. Boland, [100] a member of the Army Trial Defense Services (TDS) approached court members after trial and learned they possibly sentenced the defendant for a crime he was acquitted of. The court chastised the TDS attorney, who was not an actual trial participant. [101] The Army Court of Military Review noted that the attorney was "playing the gadfly" and cautioned counsel from invading the "sanctity" of the deliberation room by questioning court members in such a way that they "revealed the deliberative process." [102] The court expressed concern about post-trial critiques by suggesting that counsel seek a "safer, and perhaps more meaningful, critique from the military judge" rather than court members. [103]

It is interesting to compare this case with another decided by the Air Force Court of Military Appeals at about the same time. In United States v. McClain, [104] the court noted that a staff judge advocate has a "legitimate interest" in knowing what factors influenced a court-martial in order to make "improvements." [105] The court specifically gave the nod to inquiries as to whether the trial counsel adequately presented the evidence and argued the case. [106] The court was cautious, however, and noted that these discussion must be "reasonably designed to accomplish such improvements." [107] The court further expressed doubts about the "appropriateness of commanders or staff judge advocates discussing their findings or sentences for such discussions run the risk of transgressing Article 37." [108] The court concluded that " [i]n light of Article 51 [governing secret written ballots] we are sure that in military justice 'silence is golden,' insofar as discussions between court members and staff judge advocates are concerned." [109]

VI. A PROPOSAL

Military trial practitioners need meaningful guidance on post-verdict contact with court members. This guidance can come from a number of sources, including rules of court or even an instruction from the judge to the trial participants. In order to promote uniformity and consistency, however, service-wide ethical rules, or perhaps an amendment to the MCM, are more appropriate. Any new rule should provide sufficient flexibility to accommodate the interests of both the military and the individual trial participants. The proposal best suited to these concerns is one that requires leave of court and notice to the opposing side prior to initiating an interview. With the exception of a request to solicit a clemency recommendation, it is wise to impose a requirement of good cause, forcing the attorney to begin with at least an articulable suspicion of misconduct, rather than engage in a fishing expedition. [110] This proposal grants the military judge discretion to regulate the subject and manner of post-trial interviews.

The value of such a proposal is apparent from the previous survey of state and federal practice, as well as the military experience in this area. The sheer number of federal circuits following a strict method of regulation is also a good argument for the military's adoption of a similar rule. [111] Although military attorneys are perhaps less likely to engage in abusive practices than their civilian counterparts, the military has an additional interest to guard against -- unlawful command influence or the appearance of unlawful command influence. [112] This is especially true in the context of a court member who is detailed, or likely to be detailed, to a pending court.

More importantly, military rules reflect a strong interest in protecting the deliberative process. MRE 606(b) and R.C.M. 922, 923, 1007, and 1008 were enacted to further the purposes of Article 39(b) (closed deliberations) and Article 51(a) (secret voting). Current ethical rules fail to protect the deliberative process adequately because there is truly no method to supervise or enforce the rules consistently. Greater judicial involvement will diminish concerns about unlawful command influence and the possibility of abuse.

This proposal provides clear, consistent, and enforceable standards to trial practitioners and gives military judges broad discretion in supervising interviews. Perhaps its greatest benefit is its flexibility. The judge determines first whether questioning is appropriate and then regulates the manner and scope of that questioning. For example, the trial judge may grant a request to solicit a clemency recommendation prior to adjournment. After trial, a defense counsel may forward a request to the military judge with notice to the trial counsel. If a significant issue arises, the judge may order a post-trial Article 39(a) session. [113]

In deciding whether to grant a request or not, the judge's analysis must balance the needs of the court system against those of the individual parties. Judges should ordinarily deny requests for post-trial critiques for a number of reasons. First of

all, the deliberative process of the court member is too easily invaded. [114] It is also difficult for a court member to discuss a case with a trial participant without unintentionally revealing something the other court members are entitled to have protected. Furthermore, post-trial critiques are all too often motivated out of simple curiosity rather than a desire to improve advocacy skills. [115] The result may be an appearance of favoritism when the court members spend more time with one counsel or make inappropriate remarks. When the court members are likely to serve on future court cases, post-trial critiques create at least the appearance of unlawful command influence. [116] Finally, to the extent counsel have a legitimate interest in improving their trial skills, they should turn to the military judge as a more meaningful source. [117] Given the risk of unlawful command influence and embarrassment or annoyance to the members, requests for a post-trial critique ordinarily should be denied.

The more difficult task for the military judge to decide is a request to question court members for the purpose of challenging the findings or sentence. The military judge must balance the need to avoid jury harassment and waste of judicial resources with the possibility defense counsel may find an impeachable matter during the trial interview. The proposed rule requiring good cause best serves these competing interests. If the judge concludes that questioning is appropriate, he or she may limit the manner and scope of the inquiry to minimize court member harassment or inquiry into unimpeachable areas.

VII. CONCLUSION

The present scheme of regulating post-trial contacts with court members is inadequate. The ethical rules are confusing and case law fails to address the substantial policy concerns at stake. Military practitioners need firm guidance to avoid a possible ethical violation. Furthermore, until we establish enforceable standards, the military is likely to see greater appellate activity on post-trial issues. The rule proposed by this article would strictly limit post-trial contacts with court members except upon leave of court with good cause shown and notice to the opposing side. This rule comports with the prevailing federal practice and would promote uniformity, certainty, and a fair accommodation to the varying policy concerns.

Footnotes

*Major Stone (B.A., J.D., University of Kentucky; LL.M., The Judge Advocate General School, U.S. Army) is an Instructor, The Air Force Judge Advocate General School, Maxwell AFB, Alabama. She is a member of the Kentucky State Bar.

1. Donald P. Rice, Check Twelve, A.F. Mag. (Mar. 1993) at 22.

2. United States v. Heimer, 34 M.J. 541 *[cited at]* , 545 (A.F.C.M.R. 1991). See generally Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 387 (1985) [hereinafter Hazard & Hodes]; 19 A.L.R. 4th 1209 (1983)

3. See Hazard & Hodes, supra note 2, at 387.

4. See discussion infra parts II and III.

5. See discussion infra parts II, III, IV, and V.

6. Manual for Courts-Martial, United States (1984), [hereinafter MCM].Mil. R. Evid. 606(b)

7. Office of The Judge Advocate General Letter No. 92-26, Air Force Standards for the Administration of Criminal Justice (22 Oct. 1992) [hereinafter Air Force Standards], Air Force Standards 3-5.3 discussion and 4-7.3 discussion.

8. MCM, supra note 6, Rules for Court-Martial (R.C.M.) 1105.

9. See discussion infra part V.

10. See generally Susan Crump, Jury Misconduct, Jury Interviews and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified? 66 N.C. L. Rev. 509, 532-33 (1988) (proposing a redrafting of Fed. R.

Evid. 606(b) and local federal court rules regulating jury interviews in order to promote a "single effort to achieve the policy goals of each").

11. A discussion of the scope of Rule 606(b) is beyond the scope of the article. For an overview of the rule, see Stephen A. Saltzburg et al, Military Rules of Evidence Manual 633 (3d ed. 1991).

12. UCMJ arts. 1-146, codified at 10 U.S.C. Secs. 801-946 (1988).

13. MCM, supra note 6.

14. MCM, supra note 6, Mil. R. Evid. 606(b). The roots of Mil. R. Evid. 606(b) are traced to Lord Mansfield, the judge in the English case of Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785). Prior to Vaise, jurors routinely attempted to impeach their verdict by providing evidence of their own misconduct. Lord Mansfield ruled this evidence incompetent, reasoning that persons who engaged in jury misconduct would be unreliable and their testimony untrustworthy. Crump, supra note 10, at 513-14. Note also that the military rule is substantially similar to Fed. R. Evid. 606(b). The military rule adds an exception for unlawful command influence and extends the rule to reflect the court members' role in sentencing.

15. MCM, supra note 6, R.C.M. 923 and 1008.

16. Id. Accord United States v. Motsinger, 34 M.J. 255 *[cited at]* (C.M.A. 1992); United States v. West, 48 C.M.R. 548 (C.M.A. 1974); United States v. Huber, 30 C.M.R. 208 (C.M.A. 1961); United States v. Boland, 22 M.J. 886 *[cited at]* (A.C.M.R. 1986).

17. 11 M.J. 7 *[cited at]* (C.M.A. 1981).

18. Id. at 9. Accord United States v. Heimer, 34 M.J. 541 *[cited at]* (A.F.C.M.R. 1991). "There is an understandable judicial reluctance to permit inquiry into the state of mind of a court member after a court-martial has adjourned. This is to avoid harassment of court-members with attempts to secure evidence that might impeach a verdict." Id. at 545. Cf. Rushen v. Spain, 464 U.S. 114 *[cited at]* (1983) (per curiam) (a juror generally cannot testify about the mental process by which the verdict was reached).

19. United States v. Boland, 22 M.J. at 890.

20. Id.; Saltzburg, supra note 11, at 633.

21. MCM, supra note 6, R.C.M. 923 discussion.

22. United States v. Boland, 22 M.J. at 890.

23. MCM, supra note 6, Mil. R. Evid. 606(b).

24. United States v. Martinez, 17 M.J. 916 *[cited at]* (N.M.C.M.R. 1984). When the evidence establishes a proper ground for impeachment, a presumption of prejudice arises and the Government must look to other competent evidence to rebut that presumption. Id. at 921.

25. See Crump, supra note 10, at 526-29 for a comprehensive overview of federal practice.

26. See, e.g., Florida Bar Rules of Professional Conduct 4-3.5(c)(4) (Impartiality and decorum of the tribunal); Massachusetts Code of Professional Responsibility Rule 3:07; State v. Socolofsky, 666 P.2d 725 (Kan. 1983); McQueen v. Commonwealth, 721 S.W.2d 694 (Ky. 1986), cert. denied, 481 U.S. 1059 *[cited at]* (1987).

27. United States v. Kepreos, 759 F.2d 961, 967 (1st Cir.), cert. denied, 474 U.S. 901 *[cited at]* (1985); United States v. Moten, 582 F.2d 654, 668 (2d Cir. 1978) (per curiam); United States v. Franks, 511 F.2d 25, 37 (6th Cir.), cert. denied, 422 U.S. 1048 *[cited at]* (1976); Northern Pac. Ry. v. Mely, 219 F.2d 199, 202 (9th Cir. 1954); Rakes v. United States, 169 F.2d 239 (4th Cir. 1948).

28. See McQueen v. Commonwealth, 721 S.W.2d at 700; Crump, supra note 10, at 526-28 (surveying more than 20 district level rules of court).

29. See sources cited supra note 26.

30. See Crump, supra note 10, at 527 (citing U.S. Dist. Ct. S.D. Ala. R. 12; U.S. Dist. Ct. Kan. R. 23A).

31. Id. at 528 (citing U.S. Dist. Ct. Kan. R. 23A; U.S. Dist. Ct. N.J. R. 19(B); U.S. Dist. Ct. S.D. Ohio R. 5.6).

32. Id. at 527.

33. Id.

34. See, e.g., Haeberle v. Texas Int'l Airlines, 739 F.2d 1019, 1020 (5th Cir. 1984).

35. See United States v. Franks, 511 F.2d 25, 37 (6th Cir.), cert. denied, 422 U.S. 1048 *[cited at]* (1976); McQueen v. Commonwealth, 721 S.W.2d 694, 697, cert. denied, 481 U.S. 1059 *[cited at]* (1987). See also, Michael A. Jeter, Note, Criminal Law -- The Right to an Impartial Jury is Protected by an Opportunity to Prove that Juror Bias or Prosecutorial Misconduct Affected the Outcome of the Trial, 26 How. L.J. 799, 802 (1983). Cf. ABA Comm. on Professional Ethics and Professional Responsibility, Formal Op. 319 (1967).

36. 739 F.2d at 1021 (citing United States v. Riley, 544 F.2d 237, 242 (5th Cir. 1976), cert. denied, 430 U.S. 932 *[cited at]* (1977)).

37. Federal and state rules on post-trial contacts make no distinction between civil and criminal cases. It appears likely, however, that courts would allow a more liberal interpretation of the rules in criminal cases. Although this article only addresses criminal proceedings, Air Force Standards, supra note 7, encompass post-trial contacts with members of administrative boards.

38. Haeberle, 739 F.2d at 1020.

39. Id.

40. Id. at 1022.

41. 383 N.W.2d 4 (Minn. Ct. App. 1986).

42. Id. at 6.

43. Id.

44. 759 F.2d 961, 967 (1st Cir.), cert. denied, 474 U.S. 901 *[cited at]* (1985).

45. Id.

46. Id.

47. ABA Model Rules of Professional Conduct (1983) [hereinafter Model Rules]. In August 1983, the ABA adopted the Model Rules to replace the ABA Model Code of Professional Responsibility (1980) [hereinafter Model Code] as the official code of ethics for the ABA.

48. Army Regulation 27-26, Rules of Professional Conduct for Lawyers (1 May 1992); Navy Judge Advocate General Instruction 5803.1A, Professional Conduct of Attorneys Practicing Under the Supervision of the Judge Advocate General; Office of the Judge Advocate General Letter No. 92-26, Air Force Rules of Professional Responsibility (22 Oct. 1992). These rules are promulgated pursuant to R.C.M. 109, which authorizes each Judge Advocate General to prescribe rules not inconsistent with the MCM to govern the professional supervision and discipline of military attorneys and other

attorneys practicing in proceedings governed by the UCMJ and the MCM. MCM, supra note 6, R.C.M. 109(a).

49. The Army and Navy rules do not refer to board members. Rather, they include "member [s] of a tribunal" in the group subject to restricted ex parte contacts.

50. American Bar Association, Annotated Model Rules of Professional Conduct 372 (2d ed. 1992) [hereinafter Annotated Model Rules]. "Post-trial contacts were permitted under . . . the predecessor Model Code as long as they were not calculated merely to harass or embarrass the juror or to influence his actions in future jury service. . . . Rule 3.5, however, permits only those contacts otherwise permitted by law." Id. (emphasis added).

51. Model Code, supra note 47.

52. Annotated Model Rules, supra note 50, at 366.

53. Model Code, supra note 47, at DR 7-108.

54. Id. at EC 7-29.

55. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 319 (1967).

56. Id.

57. Id.

58. Id.

59. The Model Rules, supra note 47, indicate, however, that "even under the more permissive Code provision . . . courts generally found post-trial communications with jurors improper, whether the lawyer was trying to improve his or her trial skills, or trying to impeach the jury's verdict." Annotated Model Rules, supra note 50, at 372.

60. ABA Standards for Criminal Justice (1980) [hereinafter ABA Standards].

61. Army Regulation 27-10, Military Justice, Para. 5-8 (22 Dec. 1989) [hereinafter AR 27-10].

62. Air Force Standards, supra note 7, Standard 4-7.3.

63. Id.

64. AR 27-10, supra note 61, at Para. 5-8.

65. Air Force Standards, supra note 7, Standard 4-7.3.

66. See supra text accompanying note 53.

67. It is interesting to note that the Air Force drafters omitted the phrase "or makes comments" in the prosecution standard but includes it in the defense standard.

68. Air Force Standards, supra note 7, Standard 4-7.3.

69. See United States v. Rios, 32 M.J. 501 *[cited at]* (A.F.C.M.R. 1992).

70. Air Force Standards, supra note 7, Standards 3-5.4 and 4-7.3 discussion.

71. See discussion infra part V.

72. Air Force Standards, supra note 7, Standard 4-7.3 discussion.

73. Id.

74. See supra text accompanying notes 63-64.

75. MCM, supra note 6, R.C.M. 922 (Announcement of findings).

76. MCM, supra note 6, R.C.M. 1007 (Announcement of sentence).

77. UCMJ art. 51, 10 U.S.C. Sec. 851 (1988).

78. UCMJ art. 39, 10 U.S.C Sec. 839 (1988).

79. MCM, supra note 6, R.C.M. 922 analysis, app. 21, at A21-61.

80. MCM, supra note 6, R.C.M. 922 and R.C.M. 1007 (emphasis added).

81. See supra text accompanying notes 63-64.

82. 32 M.J. 290 *[cited at]* (C.M.A. 1991).

83. Id. at 291.

84. Id. at 290.

85. Id. at 293 (Sullivan, C.J., concurring).

86. Id. at 291 n.2.

87. 32 M.J. 501 *[cited at]* (A.F.C.M.R. 1992).

88. Id. at 502.

89. Id. at 505.

90. Id. at 503.

91. See supra text accompanying note 49.

92. 32 M.J. at 507.

93. 32 M.J. at 290.

94. Cf. Annotated Model Rules, supra note 50 (Rule 3.5(b) bars ex parte communications even "if it is not clear that the lawyer intended" to influence a trial participant).

95. 32 M.J. at 507.

96. Id. at 507 n.3.

97. 34 M.J. 541 *[cited at]* (A.F.C.M.R 1991).

98. The court wrote, "panel surveys should not be used to support allegations that members ignored instructions or that they were swayed emotionally." Id. at 545 (emphasis added). The court later wrote, "we disagree with appellant's use and appraisal of the court member responses." Id. at 547 (emphasis added). Although the courts are not responsible for enforcement of our ethical rules (see supra discussion at note 48), the court's failure to mention that an ethical problem exists may create the appearance it is condoned by the court.

99. Id. at 545.

100. 22 M.J. 886 *[cited at]* (A.C.M.R. 1986).

101. Id. at 884 n.2.

102. Id.

103. Id.

104. 22 M.J. 124 *[cited at]* (C.M.A. 1986).

105. Id. at 132.

106. Id. at 132 n.6.

107. Id. at 132.

108. Id. at 131.

109. Id. at 132.

110. The suggested proposal would read as follows:

After the discharge of the court members, no attorney shall at any time or in any manner communicate with a court member regarding the findings or sentence. Provided, however, that if any attorney has a good faith belief that the findings or sentence may be subject to legal challenge, such attorney may apply to the military judge, with notice to the opposing party, for permission to interview one or more of the members regarding any fact or circumstance claimed to support such legal challenge. If satisfied that good cause exists, the military judge may grant permission to make the requested communication and shall prescribe the terms and conditions under which the same may be conducted. Provided further, that if a defense counsel seeks to request a clemency recommendation from a court member, such attorney shall apply to the military judge for permission to request a recommendation. The military judge shall grant permission to solicit clemency recommendations and may prescribe the terms and conditions under which the same shall be conducted.

In order to ensure the greatest applicability and consistency, an amendment to the MCM is best suited for this proposal, particularly given the public policy embodied in the MCM concerning secret deliberations.

111. See sources cited supra notes 26-29. Cf. Stephen A. Lamb, The Court-Martial Panel Selection Process: A Critical Analysis, 137 Mil. L. Rev. 106 (1992). Major Lamb writes, "the public's acceptance of the military justice system would appear to be substantially related to the military's obligation to make its criminal justice provisions comport as closely as possible to corresponding federal provisions." Id. at 158.

112. UCMJ art. 37, 10 U.S.C. Sec. 837 (1988).

113. A great deal of confusion currently exists as to what procedures to follow when information arises concerning a proper Mil. R. Evid. 606(b) matter. One possibility is found in the discussion to R.C.M. 923, which states that "when a showing of a ground for impeaching the verdict has been made, members may be questioned about such a ground. The military judge determines, as an interlocutory matter, whether such an inquiry will be conducted and whether a finding has been impeached." MCM, supra note 6, R.C.M. 923 discussion. The discussion is based upon United States v. Witherspoon, 16 M.J. 252 *[cited at]* (C.M.A. 1983); United States v. Bishop, 11 M.J. 7 *[cited at]* (C.M.A. 1981); and United States v. West, 48 C.M.R. 548 (C.M.A. 1974). More recent decisions, however, imply that post-verdict inquiries may be handled through affidavits. United States v. Rios, 32. M.J. 501 (A.F.C.M.R. 1992); United States v. Norment, 34 M.J. 224 *[cited at]* (C.M.A. 1992). See also David D. Jividen, Will the Dike Burst? Plugging the Unconstitutional Hole in Article 66(c), UCMJ, 38 A.F. L. Rev. (1994); Randy L. Woolf, The Post-Trial Authority of the Military Judge, The Army Lawyer (Jan. 1991).

114. For example, some of the questions found in the defense counsel's questionnaire in United States v. Heimer, 34 M.J. 541 *[cited at]* (A.F.C.M.R. 1991) included: "What concerned you most (if anything) about [the victim's] testimony?" "Rate the impact of [certain evidence] on the overall substance of the evidence." Id. at 545. It is also interesting to note that the defense counsel had a disclaimer at the bottom of the questionnaire stating, "DO NOT REVEAL YOUR VOTE OR THE VOTE OF ANY OTHER MEMBER." Id. The disclaimer, unfortunately, neglects to warn the members that they were not required to discuss or reveal the deliberative process.

115. See United States v. Driscoll, 276 F. Supp. 333 (S.D.N.Y. 1966).

116. United States v. Baker, 32 M.J. 290 *[cited at]* , 293 (Sullivan, C.J., concurring). See also State v. Socolofsky, 666 P.2d 725 (Kan. 1983) (communicating with a member of a jury is improper even following the conclusion of the particular case if the jurors to whom such communications are directed are likely to sit on other jury panels before the end of the court's term).

117. See United States v. McClain, 22 M.J. 124 *[cited at]* , 132 (C.M.A. 1986). But even post-trial critiques with the military judge carry some risk. In United States v. Copening, 34 M.J. 28 *[cited at]* (C.M.A. 1992), the Court of Military Appeals "strongly recommended" that military judges not conduct post-trial critiques with counsel when there is "any possibility of future action in a case. We also recommend that both counsel be present during these sessions." Id. at 29 n.*.

Title of Article

Birmingham's Employment Discrimination War : A Clarion Call for Strict Meritocracy in Government Employment

Author

Lieutenant Colonel R. Philip Deavel, USAF*

Text of Article

Contrary to the allegations of some opponents of this Title, there is nothing in it that will give any power to any Commission or to any court to require hiring, firing or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion and national origin are not to be used as a basis for hiring and firing. [1] - Senator Hubert H. Humphrey

I. INTRODUCTION

This article reviews a long series of federal court cases dealing with allegations of discrimination by the city of Birmingham, Alabama, between 1974 and the present. The cases culminate in two decisions issued by separate panels of the United States Court of Appeals for the Eleventh Circuit in 1994 -- In Re Birmingham Reverse Discrimination Employment Litigation, [2] and Ensley Branch, N.A.A.C.P. v. Seibels. [3] The decisions jointly take the city of Birmingham to task for having used two civil rights consent decrees entered into in 1981 as the justification for a personnel system whose overriding objective was racial balancing of the work force through the use of precisely defined quotas. The use of racial balancing and the quotas that enforced the system were found to have created a pattern and practice of discrimination against Caucasians. As will be dealt with in more detail below, the city of Birmingham has been ordered to implement a system of nondiscriminatory, race and gender blind civil service tests, and then hire and promote employees based upon merit. While the Birmingham employment discrimination litigation is legally significant in and of itself, this article uses that litigation to analyze a larger debate in America. This debate involves the long running philosophical struggle between two schools of thought as to what constitutes discrimination and how civil rights should be defined. The first school is composed of the advocates of what is defined as the "quota ideal." As will be discussed more fully later, the advocates of this concept assert that it is appropriate, indeed desirable as a matter of social justice, for governments to use various preferences to mold the racial, ethnic, religious and gender composition of the work force. The objective of the quota ideal concept is to create a work force that in its racial, ethnic, religious and gender composition mirrors the percentages of those groups as they exist in American society. The second school of thought is built around the concept of "meritocracy," a belief that rights under the Constitution and civil rights statutes vest in individuals not groups. Going hand in glove with this position is the belief that it is possible to establish objective criteria that define merit for employment actions, and such criteria should be used as the defining force in employment actions. The position of this article is that the city of Birmingham's long-running use of quotas to racially balance its work force is deeply flawed both legally and as social policy. It is, in fact, a formula for injustice and the exacerbation of racial tension in the city's work force. The city's use of quotas offers a classic study of the marked difference between how the quota ideal works in theory, and how it operates in reality.

II. THE HISTORY OF THE CIVIL RIGHTS ACT OF 1964

After a long and bitter struggle, the Eighty-Eighth Congress passed the most comprehensive civil rights legislation in the nation's history, the Civil Rights Act of 1964. [4] Title VII of this Act prohibits discrimination in employment based upon race, color, religion, sex, or national origin. However, the principal engine which successfully pulled the Civil Rights Act of 1964 through a hail storm of opposition was not concern over employment opportunities (important as that was), but a growing revulsion with the rigid segregation practiced in the Southern states and the increasingly brutal tactics needed to enforce that segregation in the face of ever more organized opposition by the African-American population. Then Vice

President Lyndon Johnson articulated the emotional essence of support for the Civil Rights Act when he stated: "It's just not right for a man to risk his life in Vietnam or somewhere and then find he can't buy a cup of coffee in a roadside restaurant. Nobody can deny that, in the South or elsewhere, and the President ought to say it." [5] The Civil Rights Act of 1964 has, in fact, been almost universally successful in ending discrimination in public accommodations. Segregated train and bus stations have all faded into history along with whites only restaurant and hotel signs. As emotional as it was at the time, the desegregation of public accommodations has proven to be the least complex, most easily obtainable goal on the road to making America into a truly integrated society. The principal reason is the absence of legitimate competing interests. The owners of segregated restaurants may have resented serving blacks, just as the owners of previously restricted resorts may have chafed at having to accept Jewish guests, but integration did not require them to give up any economic privileges or diminish their future opportunities. If anything, integration should have brought them additional income from the previously excluded class of customers. Far more than the issue of equal access to public accommodations, the decisions made in the field of equal employment opportunity (who shall be hired, trained, promoted, or laid off), create very real winners and losers. Since the passage of the 1964 Civil Rights Act, the two diametrically opposed philosophical schools -- meritocracy and the quota ideal -- have consistently clashed over what core objectives federal civil rights laws should have in the employment arena. The meritocratic model holds that hiring and promotions should be conducted strictly on the basis of individual merit, as defined by objective criteria. Because of its focus on individual worth and achievement, it views any effort to manipulate outcomes based upon race, religion, gender, or ethnicity as contrary to a just society. The proponents of the 1964 Civil Rights Act represented their legislation as the ideal embodiment of meritocratic principle during the debates on Title VII. The quote by Senator Humphrey from the Congressional Record at the beginning of this article was typical of those made to beat back allegations that the 1964 Civil Rights Act could create massive racial and ethnic balancing in the American work-place. [6] The other competing model is the "quota ideal," named by David Brion Davis, the Sterling Professor of History at Yale University. [7] This school holds that as a matter of fundamental justice each ethnic group in society should be represented in the work force -- especially in privileged or desirable positions -- in roughly the percentage which they comprise in the population at large. However, by the 1980s the very term "quota" had fallen into disrepute with the general public. The advocates of the quota ideal came to defend both the justice and efficacy of this concept under the general rubric of affirmative action or diversity in the work place. [8] However, whether one defines these programs as the quota ideal, goals, fair share, or work place diversity, they all share a common ideological thread: The belief that mirror imaging between the composition of the work force and the general population in all career fields is a desirable social goal and the use of various forms of affirmative action to help mold the complexion of the work force is a legitimate use of governmental power. It is useful, for the purposes of this article, to describe the concept of affirmative action. Affirmative action is normally divided into two separate categories. The first is voluntary affirmative action, usually conducted in the name of diversity, the second is court-ordered affirmative action directed as remedial relief for specific acts of prior discrimination. There is also a hybrid between the two -- affirmative action conducted pursuant to a judicially- approved consent decree "voluntarily" entered into by an employer as the quid pro quo for the settlement of a lawsuit. It is this hybrid form, consent decrees, and the legal standards by which they should be judged, especially for their impact on third parties, that forms the basis of Birmingham's twenty years of litigation over its personnel system. As will be developed further on in this commentary, the federal courts have elected to judge affirmative action programs initiated pursuant to a consent decree for an unlawful impact on the individuals not given preferential consideration (reverse discrimination) by the same basic legal standards and tests which have been developed to review voluntary affirmative action programs. However, the issues involved are far from settled in either the legal or political arena, and the radically different philosophical orientation of the proponents of the quota ideal and meritocracy have made this a passionately litigated field of American law. In the years between the passage of the 1964 Civil Rights Act and the Supreme Court's 1989 decision in City of Richmond v. J.A. Croson Co., [9] it was difficult to decipher accurately which school was even in the legal ascendancy. During this period, a majority of the Supreme Court attempted to balance two often diametrically opposed ideals: a desire to overcome the nation's history of discrimination by upholding various racial preferences to minorities, while pursing the long-term goal of making race or ethnicity a prohibited factor in employment decisions. The resulting case law was neither clear nor consistent. [10] However, with the decision in Croson, a majority of the Court came down clearly on the side of meritocracy. In this case, the Court struck down a set aside program that required nonminority prime contractors [11] to subcontract at least thirty percent of the dollar value of each contract to approved minority business enterprises. The Court struck down this remedial program for violating the Equal Protection clause of the Fourteenth Amendment. The city failed to establish there had been acts of discrimination against black businesses seeking contracts with Richmond which would justify effectively fencing off thirty percent of the value of the city's contracts from white subcontractors. A majority of the Court appeared to reach the conclusion this set-aside program had little to do with "remediating" specific acts of discrimination and everything to do with what could be termed classic "Chicago style" ward politics. [12] A majority of the Court definitively rejected the proposition that discrimination which is applied against members of the majority (i.e., Caucasian) community should be given a lower standard of review than discrimination against minorities. [13] Croson made clear that

race-based voluntary affirmative action plans are subject to strict scrutiny. The Croson Court acknowledged that affirmative action plans are themselves a form of discrimination. As such, they cannot stand merely on the constitutionally infirm foundation of seeking diversity in the work force or generalized allegations of societal discrimination. To be lawful, post-Croson affirmative action plans must be narrowly tailored and designed to compensate for specific acts of prior unlawful discrimination. Croson thus established the constitutional framework which the Eleventh Circuit has now used to deal with some of the most historically convoluted litigation and the attendant issues related to civil rights consent decrees.

III. BIRMINGHAM FROM 1963 TO 1993 Perhaps no other American city has played such a pivotal role in defining individual civil rights in America as Birmingham, Alabama, even if that role has been unintentional and undesired by a succession of city administrations both white and black. [14] By the early 1960s, Birmingham was Alabama's largest city -- one of the most comprehensively segregated in the South. [15] In the summer of 1963, the city gained international notoriety when Public Safety Commissioner (Chief of Police) Bull Connor unleashed high pressure fire hoses and police dogs against peaceful demonstrators on Birmingham's streets. This was followed by what surely was one of the most wretched and heartless attacks on the civil rights movement when on September 15, 1963, Robert Edward Chambliss dynamited Birmingham's 16th Street Baptist Church, killing four African-American children preparing for services. [16] However, the very senselessness of the bombing and the widespread revulsion it engendered marked the beginning of the end for Birmingham's old social structure. Within one year of the bombing white voters had rejected Bull Connor's bid to become Mayor. [17] In 1965, the city adopted multi-faceted changes in the personnel system designed to bring blacks into government and in particular the police department. [18] Starting in 1974, the city changed the scoring system used for hiring new police officers to increase its validity for black applicants. At the same time the examination fees were waived, the overall passing score was reduced, and other changes were made in who was eligible to take the tests -- all to encourage black applicants. [19] These changes in the personnel system were supported by Mayor David Vann, a white Democrat who supported integration and had previously served as a clerk for Supreme Court Justice Hugo Black. [20] Mayor Vann served from 1975 to 1979. In 1979 Richard Arrington, a black city councilman, was elected mayor with the support of twenty percent of the city's white electorate. Mr. Arrington has remained Birmingham's mayor for the ensuing fifteen years and is the current incumbent. The demographics of the city have changed since Mr. Arrington's first election and Birmingham now has a majority black electorate.

IV. THE BIRMINGHAM EMPLOYMENT DISCRIMINATION SUITS: PHASE ONE, THE EARLY YEARS

Since 1975, the city of Birmingham has remained in constant litigation in the federal courts with first black and then white employees. Both groups alleged -- with some degree of success -- that the system for hiring and promoting city employees, particularly firefighters and police officers, violates both Title VII's prohibition against racial discrimination in employment and the Constitution. This litigation has to date produced six published federal circuit court decisions (one of which was withdrawn four months after its publication) and one Supreme Court decision. [21] Beginning in 1945, the city of Birmingham (the city) made hiring and promotion decisions using a merit system operated by the Jefferson County Personnel Board (Personnel Board or Board), an independent civil service agency. [22] The core of the system was a series of written exams tailored to the occupations and/or promotion being applied for. Seniority also was recognized and factored into the final ranking of applicants. For example, firefighters seeking promotion to the supervisory ranks took written tests which measured knowledge of fire-fighting and management techniques. One point was added to the test score for every year of seniority the applicant possessed. [23] Following nonpartisan civil service principles, the city consistently filled vacancies by hiring candidates off the resulting merit listing in order of the applicants' final scores. In 1974, four separate federal suits were filed alleging that the city's employment practices discriminated against blacks. These four cases were consolidated and trial was held on the issue of whether the tests used to rank applicants for police and firefighter positions discriminated against blacks. The district court found that the tests were not intended to discriminate against any group, were used in good faith, and did not violate the Constitution. Nevertheless, the court also found that the tests did have a disparate impact on blacks (e.g., blacks, as a group, consistently scored lower on the tests than did whites) and had never been properly validated (e.g., professionally established to be statistically relevant to the occupations being applied for). Their use was thus found to have violated Title VII. [24] Given the prevailing case law, the district court's decision was not unsupported. Under the standard that had been established by the Supreme Court in Albemarle Paper Co. v. Moody, [25] a prima facie Title VII case is established against any written employment test that is shown to have a disparate racial impact. Under Albemarle, the burden then shifts to the employer to prove that the criterion and content of the test can successfully measure likely future job performance in a statistically significant manner and that alternative screening methods would not be effective. In January 1977, the district court found that the Personnel Board had failed to carry this burden and entered a final judgment holding that the test violated Title VII. Nevertheless, the Board continued to defend its occupational tests as valid under Title VII and immediately appealed. The Fifth Circuit

subsequently upheld the district court's decision in Ensley Branch NAACP v. Seibels [26] (Ensley I). During this early stage of the discrimination litigation, the Personnel Board was clearly driving the strategy, while the city of Birmingham largely played the role of interested bystander. This was soon to change. With Mayor Arrington's election in 1979, the plaintiffs gained a defendant far more sympathetic to their position. In fairness to the new mayor, however, the city opened settlement negotiations from a less than ideal position. The heart and soul of its civil service system, the Personnel Board's battery of nonpartisan occupation specific tests and the subsequent ranking of candidates, had been declared in violation of Title VII. To the uninitiated in Title VII litigation the solution might appear simple: contract with a professional testing service to draft new tests that can be validated. In reality, validation under the standards of the late 1970s and early 1980s was often a Sisyphusian task. First, it is extremely expensive to design occupation specific tests and establish that the results of the tests will accurately predict job performance with the painstaking statistical significance required by the Equal Employment Opportunity Commission guidelines. [27] It is not legally sufficient that the tests are facially neutral, designed in good faith, and used consistently for all applicants. Validation requires that the tests also be shown to predict job performance to a degree that is statistically significant -- a requirement that is often of daunting complexity and expense, especially for a small corporation or governmental entity of limited resources. [28] Finally, the fact that the employer has negotiated the maze of professional validation creates no immunity from Title VII suits by any protected class of test takers who can show that the test has had a disparate impact on their selection rate. Plaintiffs are sure to have their own experts to challenge the methodology as "flawed," all of which will then be heard by a federal judiciary that until recent years cast a jaundiced eye toward merit systems that did not produce racial/ethnic proportionality in hiring rates. Regardless of who was at the helm of authority, the Personnel Board's reluctance to embrace validation as the road out of its employment discrimination litigation fifteen years ago was regrettable, but very understandable. [29] The city also had a second objective in entering settlement negotiations. This was to whittle down the economic liability hanging over the city budget. Because the civil service tests used by the city had been found to violate Title VII, each of the unsuccessful black applicants would have a right to seek the equitable relief then authorized by the 1964 Civil Rights Act -- retroactive promotions, back pay, and attorney fees. After the district court's decision on the legality of the tests, the city's outside counsel estimated their total exposure at over $5 million dollars. [30] The final element in the consent decree solution was, however, the election of a liberal mayor who was ideologically comfortable with creating a system of goals for increasing black employment that was in reality a racial quota system for employment. [31] The end result was a sweeping settlement, memorialized in two separate consent decrees, that effectively disposed of the colorblind merit selection system that had been in place since the mid 1960s. The settlement embraced the quota ideal -- that the city's work force should be a mirror image of the county's ethnic makeup. The settlement thus established a goal that the city's work force in all departments be twenty-eight percent black. To ensure this goal would be met the settlement established a strict racial quota for personnel actions: fifty percent of all entry level hires as firefighters and police and fifty percent of all promotions to fire lieutenant and police sergeant would be reserved for blacks until the goal (quota) of twenty-eight percent representation had been achieved. [32] The plaintiffs settled for a modest backpay award of $300,000. In return, they gained what amounted to a racial protection system that strongly discriminated in favor of blacks, and exempted them from competing against white candidates. The individuals to be given preferential treatment were not required to establish they had ever been the victim of discrimination by the city. [33] With the stroke of a pen the new administration transferred the burden of compensating the victims of previous discrimination from the people of Birmingham at large (through the use of tax monies to pay backpay awards) to a relatively small pool of white, working-class firefighters and police officers, none of whom were shown to have ever engaged in discrimination themselves. The adverse impact of the consent decree on the career aspirations of the city's nonblack work force was substantial. At the time the decree was entered into, ten percent of the fire and police departments employees were black. By establishing a goal (in actual effect and implementation a quota) that fifty percent of the promotions be given to blacks, it meant that blacks would be promoted at nine times the rate for white applicants. [34] Stuart Taylor Jr., a senior writer with the American Lawyer magazine, analyzed the promotions made in the fire department for a one-year period as follows:

In 1983 for example 95 white and 18 black Birmingham fire fighters took the lieutenant's test; 89 whites and nine blacks passed. Two of the whites and three of the blacks were promoted to lieutenant. In making the promotions, the city chose the whites who ranked first and second in combined scores (test scores plus seniority points), then passed over 76 other whites to promote the blacks who ranked eightieth, eighty-third, and eighty-fifth. If seniority points had not been added, the highest-ranking black would have been sixty-third. [35]

The operation of the consent decree on promotions to captain produced similar results: "In the same year, 29 white and three black Birmingham fire lieutenants took the captain's test; 27 whites and one black passed. The city promoted the top ranking whites and passed over the next 24 other whites to promote the black. He had the lowest passing score." [36]

V. MARTIN V. WILKS: DEFINING WHO GETS TO COMPETE ON THE CONSENT DECREE PLAYING FIELD

AND WHO SITS ON THE BENCH

On August 18, 1981, following a fairness hearing, the district court approved the consent decrees negotiated by the city. On August 4, 1981, the union representing the firefighters, the Birmingham Firefighters Association (BFA), which had previously submitted an amicus curiae brief opposing the settlement, had attempted to intervene in the suit as a party. The BFA, representing two white firefighters, objected to the promotion goals. The essence of their position was that white firefighters would be severely and unjustly penalized for future promotions because of their race. However, the district court, at the city's urging, ruled that the BFA's objections were untimely and that the organization thus would not be permitted to intervene. After the city began to implement the quotas, a separate suit was filed by seven white firefighters against the city alleging that unlawful reverse discrimination would result if the consent decree's goals were enforced. [37] The plaintiffs sought a preliminary injunction to prevent the city's implementation of the promotion goals until their case could be heard on the merits. The district court refused to order an injunction on the grounds that the plaintiffs had failed to establish that enforcement would result in any irreparable injury. This was based upon the fact that as Title VII is universal and covers all races, the new white plaintiffs would have all the equitable remedies then authorized for the original black plaintiffs if it was ultimately determined that the consent decree had resulted in new unlawful discrimination. The plaintiffs could thus not establish they would suffer any irreparable injury if the consent decrees were allowed to go into operation. The seven firefighters promptly appealed this ruling. The decision of the district court not to grant an injunction was subsequently upheld by the Eleventh Circuit in the third appellate decision concerning this litigation -- United States v. Jefferson County. [38] In the meantime, the three additional suits alleging that the consent decree's terms would produce unlawful reverse discrimination were consolidated as the Birmingham Reverse Discrimination Employment Litigation. [39] The shifting legal positions of the litigants and their legal representatives for this action bears mentioning. With the exception of the white firefighters, the philosophical positions of the other parties as to what constitutes a just promotion system had markedly changed over the years. The city government under Mayor Arrington was now unequivocally aligned with the original plaintiffs. These original black plaintiffs, now the beneficiaries of the racial preference given black employees and applicants, intervened in defense of the consent decree and the city. (hereinafter the Martin intervenors). The Department of Justice (DOJ), which had supported the original black plaintiffs and signed the consent decree as a party, switched sides. [40] Just as the election of a new administration in the city of Birmingham had brought about a fundamental shift in the city's position on the appropriateness and justice of using racial quotas for promotion, so a change in national leadership had brought a fundamental shift in the Department of Justice's position on these same issues. In 1981, President Reagan named William Bradford Reynolds Assistant Attorney General to head the DOJ's Civil Rights Division. Reynolds came to the position with a firm conviction that affirmative action had been corrupted from an honest attempt to recruit the best employees from all sections of society, to a cynical racial spoils system that violated both the spirit and letter of American civil rights laws. [41] Both the positions Mr. Reynolds took and the unapologetic fire with which he delivered them ultimately cost him Senate approval of his nomination to become an associate Attorney General. [42] Even though the Carter administration's Justice Department had signed the consent decree as a party, it clearly represented the type of nonvictim specific, sweeping, judicially-sanctioned reverse racial discrimination that Reynolds found so repugnant. The United States thus brought an action within the context of the BRDEL line of cases against the city alleging that it was engaging in a pattern and practice of unlawful racial discrimination against whites in violation of both Title VII and the Equal Protection Clause of the Fourteenth Amendment. In its answer to the plaintiffs, the city acknowledged that it had made numerous promotion and hiring decisions predicated upon race, but defended on the grounds they were made in accordance with the terms of the consent decree and were thus immunized from legal challenge. [43] In numerous pretrial conferences, the plaintiffs requested guidance from the district court as to what standard of proof would be required to establish unlawful discrimination when the employment actions were admittedly being taken pursuant to a duly approved consent decree which purports only to be compensating for past discrimination. [44] This question goes to the core of all the employment litigation by the city concerning the consent decree. The district court treated the white plaintiffs as if they were lawfully bound by the terms of the consent decree every bit as much as the city. The court thus elected to narrowly define the reverse discrimination suit as an assertion that the city had violated paragraph 2 of the consent decree. This paragraph stated that the city would not be required to hire or promote the unqualified:

Nothing herein shall be interpreted as requiring the city to hire unnecessary personnel, or to hire, transfer or promote a person who is not qualified, or to hire, transfer, or promote a less qualified person, in preference to a person who is demonstrably better qualified based upon the results of a job related selection procedure. [45]

The district court treated the plaintiffs' far more fundamental challenge, whether the consent decree itself was lawful, as a matter already resolved in the initial fairness hearing and thus res judicata and immunized from collateral attack. Even though the firefighters were not permitted to intervene in 1981, the district court effectively bound them to the terms of the

decrees and thus converted an action based upon Title VII and the 14th Amendment, into a breech of contract suit, with the added novelty that the plaintiffs had never been parties to the contract in question -- the consent decree. The district court subsequently found that the city had not violated paragraph 2 of the consent decree. Indeed, using a circular logic reminiscent of the surreal justice dispensed by governments in the novels of Kafka, the court reasoned that as the city had abandoned the use of any job related selection criteria it would thus be impossible for the plaintiffs to show that selection criteria were being used in a discriminatory manner. As the Eleventh Circuit noted when reversing this decision: "Since the city did not use a job related selection criteria, the court apparently reasoned, paragraph 2 imposed no obligations on it." [46] In the fourth appellate decision to be issued concerning Birmingham's employment practices, In re Birmingham Reverse Discrimination Employment Litigation [47] (BRDEL I), the district court's decision was thus set aside. The Eleventh Circuit noted that the district court's decision violated the strong public policy of including all affected parties in settlement negotiations to prevent precisely the type of retrograde litigation that had arisen in this case. The court also made short work of the city's argument that it had fairly represented the interests of all the employees of the city when negotiating the consent decree:

Indeed, the city's interests were antagonistic in that it had every reason to avoid a determination of liability and little reason to object to the promotion aspect of the settlement. The settlement did not require the city to make any additional promotions, only to reallocate the promotions it would have made in any event. In real terms, the relief contemplated by the decrees was not to come from the city, but from the hands of the employees who would have otherwise received the promotions. [48]

The Eleventh Circuit remanded the case to the district court with instructions to hear the plaintiffs' allegations of unlawful discrimination on the merits. The court further instructed that the consent decree should be judged for validity using the same analysis and standard of review which would be appropriate for a voluntary affirmative action plan. The court declined to embrace the city's position that a consent decree, as a judicially approved document disposing of discrimination claims, should receive greater deference than voluntary affirmative action plans. In rejecting this contention the court noted:

We perceive no reason for treating a consent decree entered pursuant to a voluntary settlement differently from a voluntary affirmative action plan. In both instances the employer has embarked on a voluntary undertaking; we reject any notion that the memorialization of that voluntary undertaking in the form of a consent decree somehow provides the employer with extra protection against charges of illegal discrimination. [49]

In a warning that has come back to haunt the city in later litigation, the court expressed grave concern that the consent decree permitted the city to make race conscious promotions free of any professional, job-related selection criteria and further advised that this aspect of the decree alone required the district court to review the document with "heightened scrutiny." [50] Finally, the court ruled that because the United States had signed the consent decree as a party, it was not free to now switch sides and collaterally attack the legitimacy of the decree. However, the court left the United States with wide latitude to separate its position from that of the city by holding that the DOJ could request modification of the decrees based upon changed circumstances or case law. [51]

Consistent with the winner-take-all attitudes and strong personal enmity the key parties now felt for each other, [52] the city sought and was granted certiorari. What was at stake was not merely the handful of promotions currently being contested. If the reverse discrimination complaints were heard on the merits, then the city could anticipate a string of similar suits by unsuccessful white employees alleging that but for the disadvantageous treatment they received because of their race they clearly would have been promoted. For even if the city prevailed on the current suits by establishing that the race conscious promotions were lawful, compensatory actions for past discrimination, this would not authorize the city to run what could be called a perpetual compensatory racial spoils system unless the consent decree was given absolute protection from collateral attack by the nonblack employees negatively affected by that decree. Furthermore, the decision of the Eleventh Circuit was directly contrary to the holding in the majority of federal circuits. [53] When the Supreme Court subsequently issued its decision in Martin v. Wilks, [54] the majority, led by Chief Justice Rehnquist, unequivocally embraced the position of the Eleventh Circuit. In its arguments before the Supreme Court, the city had again raised its impermissible collateral attack theory, arguing that the strong congressional policy favoring settlement of civil rights suits, and the importance (at least for the first group of plaintiffs), of achieving finality in the settlement, dictated that consent decrees be immunized from challenge once they had been approved by the district court. In rejecting this theory, the Court noted: "A voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly settle voluntarily or otherwise, the conflicting claims of another group of employees who do not join in the agreement." [55] The effect of the Supreme Court's decision was not to invalidate the consent decree. What it did mean

was that fourteen years after the original suit by the black plaintiffs and eight years after the consent decree was signed, the impact of the consent decree on the rights and interests of all the city's employees must be considered in weighing what is appropriate and truly remedial relief for the original plaintiffs. Lastly, and undoubtedly most important to the Wilks class, the Court's decision meant that the nonblack employees would be able to represent their own interests before the district court, rather than rely on any putative representation by the city.

VI. BENNETT V. ARRINGTON: THE DISTRICT COURT REAFFIRMS THE VALIDITY OF THE CONSENT DECREES

After a period for additional discovery, the white employees' reverse discrimination claims returned to the same court (Northern District of Alabama) and same Judge (Chief Judge Pointer) who had first approved the consent decrees, now for a trial on the merits. The trial began on October 21, 1991, a decade after the original approval of the consent decrees. In Bennett v. Arrington [56] the court subsequently reaffirmed its original decision after the fairness hearing and found the consent decree was lawful. Citing the Supreme Court's decision in Croson as authority, the court applied a strict scrutiny standard of review to the city's decision making process. [57] The court analyzed the decree using the two-prong test set forth in Johnson v. Transportation Agency. [58] The first prong of Johnson is to determine whether a race-biased promotion plan was justified by a manifest imbalance in the work force that could be shown to flow from historical segregation. If this first test is met, the second prong is to determine whether the race biased promotion system unnecessarily tramples the rights of white employees or acts as an absolute bar to their advancement. Reviewing the city's historical use of written occupational tests, which the opinion characterized as having a "severe adverse impact on blacks," and the failure of earlier voluntary affirmative action plans to significantly increase the number of blacks employed by the municipal departments in question, the court found that the city was justified in entering into the consent decree. [59] The court went on to find that the decree was narrowly tailored and thus met the second prong of Johnson based upon the following factors: nothing required the city to promote unqualified blacks; [60] the decree only required the hiring of blacks and women in proportion to their percentages in the civilian labor force of Jefferson County; [61] the decree contained a provision authorizing modifications in its terms in accordance with changes in the makeup of the work force. [62] As for the requirement that set aside promotions for one race vastly greater than its percentage of the current employee work force of the city, the court gave its approval by stating: "The promotions within the Fire Department to Captain and battalion Chief were tied to the black representation within the Department, albeit accelerated by the original interim goal to twice the representation of blacks in the Department." [63] Finally, the district court found that the decree did not act as an absolute bar to promotions for any group as nonblack employees could still compete for fifty percent of the promotions. [64] Thus, after ten years of litigation, including one appeal to the Supreme Court on the collateral issue of whether the claims of reverse discrimination should even be heard on the merits, the claims of the white plaintiffs were dismissed by the district court with prejudice. However, the Eleventh Circuit had earlier left the door open for both the United States and the white plaintiffs to seek modifications to the consent decrees based upon changed circumstances. Independent of the Bennett case, the plaintiffs had sought extensive modifications of the consent decrees before the district court.

VII. THE WILKS CLASS AND THE UNITED STATES BOTH SEEK MODIFICATIONS TO THE DECREES

In accordance with the guidance from the Eleventh Circuit in BRDEL I, [65] the United States moved the district court to modify the decrees on May 3, 1990. The court set forth the gist of the modifications sought as follows:

1. To replace the existing long-term goals (which [were]... based on civilian labor force figures) with the long-term goal of developing lawful selection procedures.

2. To replace current interim goals with interim goals based upon applicant flow data, that would terminate upon the implementation of lawful selection criteria.

3. To require the Personnel Board to develop nondiscriminatory selection procedures in a timely manner....

4. To require the city of Birmingham to cooperate with the Board in the Board's development of nondiscriminatory selection procedures and for the city to demonstrate that any selection procedures it has implemented in addition to those of the Personnel Board are lawful; and

5. To strengthen the current recruitment procedures. [66]

In a proposed allied order, the United States also recommended that the city and the Board be given three years to develop and implement valid, race blind selection procedures that would objectively measure the relative merit of applicants and candidates for promotion. [67] The Wilks class (white plaintiffs) also put forth their own recommended modifications, designed to eliminate the goals and bring about the termination of the decree in four years. [68] The city and the Bryant class (original black and female plaintiffs), acknowledged that some modifications were in order, including the eventual creation of valid, nondiscriminatory selection and promotion procedures, but -- in the words of the Eleventh Circuit -- "vehemently opposed" the three-year timetable proposed by the United States as unnecessary. [69] In reviewing the appropriateness of continuing the consent decrees, the court first acknowledged the obvious: A city administration elected by a black majority had over the last decade certainly reduced, if not completely eliminated, any residual discrimination against blacks in government employment. [70] After reviewing the historical employment trends, and noting that the city work force was now forty-five percent black, the district court ordered the following modifications in the decree:

1. The city must stop using annual goals for any promotional position once the long-term goal is met for the position from which the promotional candidates are normally chosen, except that the city should continue to promote blacks and women to high-level police and fire positions in proportion to those groups' representation in the position from which promotions are normally made until the long-term goal is reached with respect to the high-level positions.

2. The city must stop using annual goals for any particular job classification once the Board develops lawful screening procedures for that job.

3. The city should group similar jobs together for the purpose of determining whether a particular goal has been met.

4. The district court will, in 1996, reconsider the appropriateness of continuing the city decree. [71]

The district court made only one modification to the companion decree for the Personnel Board. This modification dictated that until the Board developed lawful (i.e., validated) tests for a given occupation, it must certify black and female candidates for the occupation or position in question in proportion to their representation among the applicants, even if the long-term goals for the position had already been met. [72] The intention of the court was to forbid the Board from providing the city lists of candidates based upon discriminatory (i.e., invalidated) tests. The court's single most important holding in its review of the consent decrees was its refusal to require any time standards for the Personnel Board to develop valid, race and gender blind testing procedures. Undoubtedly cognizant of the historically difficult task of drafting meaningful, objective, written tests that could pass the judicial review typically used in the 1970s and early 1980s for disparate impact, the court stated that setting out specific test development and review (validation) requirements would be "unrealistic, unworkable and unwise." [73] The net effect of the court's decision was to leave intact a personnel system that operated as a precisely defined spoils system, philosophically based upon the quota ideal, with no planned termination date.

VIII. THE ELEVENTH CIRCUIT REVISITS BOTH THE CONSENT DECREE MODIFICATIONS AND THE BENNETT CASE

Consistent with the history of Birmingham's employment discrimination litigation, the losing parties in both the above actions promptly appealed to the Eleventh Circuit. The United States, joined by the nonblack employees of the city (the Wilks class) appealed the district court's decision to leave the fundamental quota aspects of the consent decree intact. In a separate action, fourteen of the original nonblack Fire Department employees and one nonblack city Engineering Department employee brought a separate appeal. This appeal alleged that the district court erred when it ruled the city had not violated their rights under Title VII and the Equal Protection Clause when it made promotions based upon race. In separate opinions by two panels of the Eleventh Circuit, the system used by the city to divide up employment opportunity and the consent decrees which have been used to provide a lawful justification for that system, were found to have been used in an unlawful manner. While, as will be explained below, the Eleventh Circuit has given the city a "reasonable" period of time to create a new personnel system -- to be based upon merit principles -- the current system has been scuttled by two separate panels of the Eleventh Circuit.

IX. BRDEL II : CONFRONTING THE NEW SEGREGATION

The district court previously found the consent decrees did not produce unlawful reverse discrimination. [74] On May 4, 1994, the Eleventh Circuit issued the BRDEL II decision reversing the district court's findings of fact and analysis of law. [75] In BRDEL II, the court began its analysis of the district court's decision by recognizing the struggle that lower courts

faced in extracting meaningful guidance from the Supreme Court's multi-opinioned decisions on government affirmative action plans prior to the Croson decision. [76] However, after that first conciliatory note the court went on to dissect the district court's analysis. The first error assigned was the decision to analyze the claims of reverse discrimination under Title VII alone, rather than under both Title VII and the Equal Protection Clause of the Fourteenth Amendment. [77] Before turning to the relevant case law the court defined the degree of racial segregation used for managing promotions under the consent decree:

For example, if the Board supplies the names of four blacks and four non--blacks for promotional openings, the black list contains the four highest-ranked blacks and the non-black list contains the four highest-ranked non-blacks on the eligible register, regardless of how high or low they actually rank on the register relative to each other. [78]

Further on in the same page, the court reiterates the fact that the separation is so complete under the decrees that blacks and non-blacks are never compared or allowed to compete against each other for promotions:

Under this system, then, employees who will eventually fill an opening in the BFRS are pre-selected by race. If four fire lieutenant positions are open two will be filled by blacks and two by non-blacks. No black employee ever competes for the two openings designated in advance to be filled by non-blacks. No non-black employee can compete for the two openings designated for blacks. [79]

The court found that the city had implemented and used the consent decrees to create a rigid racial quota system for promotions. [80] Under the Croson standard, this would not automatically be fatal if the decree could be shown to be truly a remedial action on behalf of identifiable victims of past discrimination. However, the next aspect of the decree to fail under the court's analysis was the scope of the quota system and its complete lack of a relationship to any identifiable class of victims. Normally, an employer/defendant will vigorously resist settling a class action suit on terms that severely restrict the operation of its personnel system. The reason for this is obvious. The senior leadership of both private sector and governmental organizations place a natural premium on the ability to hire, promote, transfer and fire personnel as the very essence of what it means to effectively manage an organization. Senior managers do not want to be under the thumb of a magistrate or special master who makes personnel decisions based not upon the needs of the organization, but in accordance with a rigid consent decree. It naturally follows, in a "normal" class action where the interests and objectives of the plaintiffs and defendant are opposed, the defendant would agree to a consent decree that blocked her control of fifty percent of the promotions, (with no set time-frame for ever returning control of the promotions to the organization), only if she believed a trial on the merits would produce evidence of such overwhelming discrimination that the judicially imposed remedy would be even more burdensome than the settlement. However, in this litigation it is reasonable to hypothecate that the Arrington administration viewed the consent decree as an extremely useful vehicle for implementing its own agenda. [81] It provided a shield of legality for the operation of a profoundly race conscious personnel system. In BRDEL II, the Eleventh Circuit repeatedly returned to the fact that the fifty percent quota represented a political decision made as part of the settlement process, rather than any mathematically justifiable figure designed to compensate any identifiable class of victims.

By virtue of the rigid manner in which the city has used race to determine promotions under the decree, 42 black firefighters, because of their race, gained an exclusive claim to half of all fire lieutenant promotions made under the plan, but lost any possibility of competing for the other half. On the other hand, the remaining 411 non-black firefighters saw the number of promotions to which they might aspire, absent the consideration of their race, cut from 100% to half of all lieutenant positions. The 50% promotion quota was to continue for the duration of the decree, subject to future modification, without regard to the number of lieutenant openings in any given year, the number of black firefighters eligible to become lieutenants at any particular time, or any factor other than race. As the decree operates, no non-black firefighter can even be considered for a promotional job reserved for blacks unless no blacks remain on the Board's eligible register.

We discern no legitimate basis for the 50% figure ultimately chosen for the annual fire lieutenant promotion quota. The 50% figure selected is completely uninfluenced by the percentage representation of blacks in the firefighter ranks, the feeder job from which promotions are filled. The 50% figure appears entirely arbitrary, set at 50% through the settlement bargaining process. [82]

As noted, the court analyzed the consent decree scheme not only under Title VII, but also under the Equal Protection Clause. Citing Croson, the court made clear it believed the Fourteenth Amendment requires the strictest scrutiny of any use of race by a governmental entity to "smoke out" illegitimate racial classifications. [83] For government-created racial

classifications to survive such scrutiny they must be reasonable and appropriate actions to remediate past discrimination, through a narrowly tailored vehicle. The legal foundation upon which the massive racial quota system in the consent decree rested was the district court's finding of fact in Bennett [84] that alternative, more meritocratic measures to deal with residual discrimination had not and would not be effective. The BRDEL II panel rejected both the district court's analysis of the historical employment data and its opinion of the efficacy of race-neutral vehicles for ending residual discrimination. The court found that the city of Birmingham had made "significant progress" in integrating its work force (without using racial classifications) between 1974 and 1981. [85] Indeed, the degree of integration was found to have increased markedly through the years immediately before the consent decree. Referencing a chart published in BRDEL II showing the growth in the number of black employees between 1974 and 1981, the court stated:

As the chart demonstrates, between 1978 and 1981, the city increased the number of black firefighters from eight to forty-two -- a five fold increase that was achieved in the absence of the race-based affirmative action plan embodied in the decree. We regard this progress as encouraging, not ineffective. [86]

The court found the district court's conclusion that alternatives to quotas would be ineffective was "clearly erroneous." [87] The Eleventh Circuit could have ended its analysis at this point and remanded the case to the district court to modify or eliminate the consent decree consistent with the BRDEL II decision. However, the court went on to comment on the inherent constitutional and practical problems common to ethnic balancing systems that attempt to create a work force that is the mirror image of the society at large. In the real world, the court observed, members of each race, gender, and religious group do not "gravitate with mathematical exactitude" [88] to each occupation. The court commented as follows on the city's effort to use the consent decree to produce the quota ideal in its work-force:

The city's rigid approach, while administratively convenient, is not a narrowly tailored means to remedy prior discrimination. It is instead an approach designed to achieve government-mandated racial balancing-the perpetuation of discrimination by government. We can imagine nothing less conducive to eliminating the vestiges of past discrimination than a government separating its employees into two categories, black and non-black, and allocating a rigid, inflexible number of promotions to each group, year in and year out. [89]

In its conclusion, the BRDEL II court found the affirmative action provisions of the consent decree thus violated both Title VII and the Equal Protection Clause of the Fourteenth Amendment. The case was remanded, once again, to the district court to determine appropriate relief for the victims of Birmingham's new segregation.

X. ENSLEY II: THE ELEVENTH CIRCUIT REJECTS THE ARGUMENT THAT CREATING LAWFUL WRITTEN TESTS IS "MISSION IMPOSSIBLE"

On the same date (May 4, 1994) the Eleventh Circuit released BRDEL II, a second panel of that court released the related case of Ensley Branch, N.A.A.C.P. v. Seibels [90] (hereinafter the withdrawn opinion). The appellants in this action were the United States and the Wilks class of employees, who challenged the district court's modifications of the consent decrees for the city and the Personnel Board. The two appellants were seeking similar but different relief from the Eleventh Circuit. As will be discussed more fully below, the panel found the consent decrees contain fundamental constitutional flaws. The city immediately requested a rehearing, and the court granted the request. By decision dated August 25, 1994, the court withdrew its original opinion and substituted a new decision on the same date, which retained the case style of Ensley Branch, N.A.A.C.P. v. Seibels [91] (hereinafter Ensley II). [92] It is this second substituted opinion which is analyzed below. The positions of the parties in Ensley II are as follows. The United States claimed that the district court's refusal to establish any time frame for the city and Board to develop valid gender and race blind selection criteria was an abuse of discretion. [93] The Wilks class, on the other hand, sought more sweeping relief, arguing there was insufficient evidence of past discrimination to justify any affirmative action plan. [94]

It is also helpful to understand the role the Board played in the operation of the personnel system. The Board acted much like a civil service authority for the city. The Board accepted applications for new hires and promotions, devised and administered occupational examinations to measure knowledge and competence, and certified lists of candidates to the city. In addition to the firefighter examinations referenced in BRDEL II, the original suit against the Board covered written tests for eighteen other positions, as well as challenges to the rules affecting promotion opportunity, the validity of educational requirements, and the validity of height and weight requirements for some positions that had a disparate impact on women. [95] The consent decrees for the Board and the city disposed of both these claims. The Board's consent decree was the philosophical twin of the city's consent decree. They were negotiated as a package deal. The Board's decree also set long and short-term race and gender quotas. [96] Like the city, the Board agreed to use long-term quotas to create

a work force that mirrored the civilian work force in race and gender. The consent decree did not set any time frame for the creation and validation of new race and gender blind occupational tests. [97] This is not surprising if one assumes the actual, if unstated, objective of the decree was to provide a lawful vehicle to engage in long-term racial balancing of the work force. The court announced that it would use the test recently articulated by the Supreme Court in Rufo v. Inmates of Suffolk County Jail, [98] to determine if the consent decree should be modified. [99] Rufo established a two-prong test for determining when to modify an institutional reform consent decree which vindicates constitutional rights. The first prong requires the party seeking modification to prove that a significant change in the facts or law has occurred. If that first hurdle is met, the moving party must establish that the changes sought are in fact "suitably tailored" to the new factual or legal environment. After an extensive review of the case law defining the validity of affirmative action plans for public employers, the Ensley II court turned its analysis to the district court's findings of fact concerning both the initial approval of the consent decree and its rulings on the modification action appealed from. The Eleventh Circuit found that there was in fact sound statistical evidence before the district court of disparate impact on black applicants for the tests used for the fire and police departments -- the occupations which formed the heart of the original litigation. This evidence gave the Board and the city an "adequate basis" for entering into remedial consent decrees. [100] However, because the decrees were entered into before any trial on the merits for the other occupations, the Eleventh Circuit declined to decide if there ever was or is now a valid basis for race conscious remedies for them. [101] During the modification proceedings, the district court refused to permit the parties to delve into this issue, or allow presentation of evidence on the original discrimination (or lack thereof) by the Board and the city. The Ensley II panel found that this decision was an abuse of the district court's discretion and reversed. [102] On remand the appellants must be allowed to raise these core issues and the city and Board will have the burden of establishing that such discrimination existed and continues to be unremediated. The Ensley II panel thus found the appellants had met the first prong of the Rufo test. In addressing the second prong of Rufo (and Croson), that relief be narrowly tailored, the court assumed for its analysis that the city and Board would be able to establish additional evidence of discrimination for the other occupations and departments on remand. [103] Nevertheless, the court found that even if there was evidence of more widespread discrimination to form the legal foundation for some type of remedial action, both the long-term and short-term goals (quotas) set by the Board's consent decree were "fundamentally flawed." [104] The court wrote:

As written, the long term racial goals are fundamentally flawed. The flaw is that they are designed to create parity between the racial composition of the labor pool and the race of the employees in each job position. The constitution does not guarantee racial parity in public employment; instead, it forbids racial discrimination. A public employment consent decree's race conscious provisions are valid only to the extent that they promote the compelling government interest, anchored in the Constitution, of ending discrimination. [105]

In providing guidance to the district court on how modification should be approached, the court "looked behind the veil" of the language of the decrees indicating that the goals are remedial in nature by commenting on the Eleventh Circuit's perception of their real long-term objective:

On remand, the district court must rewrite the decrees to reflect that their true long-term purpose is to remedy past and present discrimination, not to achieve work force parity. The goal of eliminating discrimination may justify some interim use of affirmative action, but affirmative action selection provisions are themselves a form of discrimination that cannot continue forever. An end to racial discrimination demands the development of valid, non-discriminatory selection procedures. We hesitate to label this essential object "long-term," because it should be pursued with a sense of urgency. [106]

If fundamental employment/personnel actions are not to be made based upon racial or gender quotas, then it naturally follows that some type of objective criteria must be used as the measure of individual merit. Indeed, the Ensley II court reserved its sternest and most explicit admonitions for the issue of developing objective tests and evaluations to determine and rank the merit of competing candidates. The court repeatedly expressed its dismay that thirteen years after the consent decree went into effect the Board had yet to design and validate a single written exam. The court also noted that as of 1991 the Board was using thirty-five different written tests, not a single one of which had been validated. It did not escape the court's notice that this situation could provide the Board and city a perverse, bootstrap method of perpetually justifying a personnel system based upon quotas. The court commented on the possibility of a never-ending cycle of discrimination as follows:

Under its present decree, the Board may indefinitely administer racially discriminatory tests and then attempt to cure the resulting injury to blacks with race-conscious affirmative action. Federal courts should not tolerate such institutionalized discrimination. [107]

The Ensley II court concluded that this alternating cycle of using invalidated tests coupled with a quota system for promotions had remediated little but instead created entirely new groups of victims.

One color of discrimination has been painted over another in an effort to mask the peeling remnants of prejudice past, leaving a new and equally offensive discoloration rather than a clean canvas. The time has long passed for the Board and the city to strip away the past and adopt fresh, race-neutral selection procedures. And Court-approved racial preferences must end as soon as possible. [108]

Applying the same analysis as applied to the long-term goals, the court found that they were also unsupported by evidence of discrimination, arbitrarily set at figures unrelated to any rational mediation plan, and lacked the "flexibility that the Constitution requires." [109] However, the court also held that until valid job selection procedures are in place the city could continue to use some level of racial preferences to counteract the effects of the racially discriminatory tests still being used. [110] The consent decrees also created quotas for women. The court reviewed this part of the decrees using the lower, intermediate level of scrutiny set forth as appropriate by the Supreme Court for gender-based classifications in Craig v. Boron [111] and Mississippi University for Women v. Hogan. [112] The Ensley II panel expressly found that the Supreme Court had not meant to overturn this standard of review sub silentio, with its decision in Croson. [113] The court acknowledged that on its face it appears legally "odd" to apply different standards of review to affirmative action programs depending upon which group was the beneficiary of the preferences. [114] However, the court reasoned that the Supreme Court had come to the conclusion in Croson that using favoritism and preferences between racial and ethnic groups by employers was particularly odious and thus required the strictest standard of review. [115] Nevertheless the court found that even applying the lower intermediate standard of review, the operation of the decrees was not "substantially related" to the objective of eliminating gender discrimination in public employment. [116] The court found that it was also an abuse of the district court's discretion not to require the Board to create valid, gender neutral selection tests. [117] Reliance on perpetual quotas rather than valid selection criteria for employing women, the court stated, reinforced condescending stereotypes about female applicants: "Perpetual use of affirmative action may foster the misguided belief that women cannot compete on their own." [118] Given the tone and tenor of the Ensley II court's comments on the importance of developing objective criteria, it comes as no surprise the court also found the district court's refusal to set any time-table for the creation and validation of meritocratic selection procedures for all applicants, black and white, male and female, to have been a "serious flaw" in judicial oversight. [119] In fact, the Eleventh Circuit expressed grave concern at the district court's language that establishing a judicially-imposed timetable for developing valid tests would be "unrealistic, unworkable and unwise." [120] The Ensley II court listed a long series of recent federal decisions upholding the validation procedures used by employers to prove their meritocratic tests were "job-related," even though they had an adverse impact (i.e., a lower pass or selection rate) on one or more groups of employees. [121] Indeed, the court displayed no patience with the argument that existing Title VII case law made the validation of meaningful tests a futile undertaking:

We are loath to impute such a gross error to our nation's elected representatives. Had Congress shared the district court's belief that validation of selection procedures was "unrealistic, unworkable and unwise," then Congress would not have made a specific exception to Title VII for the proper use of professionally designed tests. [122]

In its conclusion, the court remanded the case to the district court to determine if there is specific evidence of discrimination against blacks that would justify continuing race conscious selection procedures. In those occupations where there is insufficient evidence, the race conscious relief is to be dissolved. Even in those occupations where there is sufficient evidence of past discrimination, the race conscious selection procedures must be specifically tailored to remediate the discrimination, not engage in racial balancing. Finally, the district court was required to set reasonably prompt deadlines for the Board and the city to create race-neutral selection procedures. [123] The Ensley II court expressed consternation for both the philosophical use the Board and The city had made of the consent decrees over the last decade, and the laissez faire attitude of the district court toward the development of a meritocratic selection model for the city's work force. The court wrote:

[T]he district court is directed to order the city and the Board to develop race-neutral selection procedures forthwith, not at the casual pace the Board has passed off as progress for thirteen years. The Board's decree is not a security blanket to be clung to, but a badge of shame, a monument to the board's past and present failure to treat all candidates in a fair and non-discriminatory manner. Federal judicial oversight should provide public employers no refuge from their responsibilities. [124]

Twenty years after the issue of discrimination in the city of Birmingham's work force was first put before the District

Court for the Northern District of Alabama, the same basic issues with the same parties are once again before that forum for resolution.

XI. THE QUOTA IDEAL: THE UNIVERSAL OPIATE OF THE SOCIAL PLANNERS

A. Birmingham's Experience

Fifteen years ago Birmingham's new political leadership made a fateful decision to deal with allegations of discrimination, not by compensating the specific victims of that discrimination or by improving the meritocratic selection procedures, but by implementing an all-encompassing system designed to create racial balancing along the lines of the quota ideal. Given the deep historical discrimination against blacks in Birmingham before the passage of 1964 Civil Rights Act, the philosophical bent of the consent decrees is understandable, if regrettable. In addition to the lure of racial balancing, the consent decrees offered a vehicle for a massive "catch-up" in black employment to compensate for years of discrimination. The fact that the African-Americans who were made the beneficiaries of employment based upon race might not themselves have been the victims of racial discrimination was given very little consideration. Nor was there concern for the fact that the individual white city workers who were cast into a very real second class status might never had played a part in that discrimination. The city viewed the decrees as doing justice in the bigger equation of the community at large. The result of the operation of the decrees has not been a more just or harmonious community. The decree has polarized the city's work force into extremely litigious groups broken down along racial lines. Years of energy by the city's leadership and a steady stream of tax dollars that could have been used to design and validate objective civil service tests was instead devoted to defending what ultimately was indefensible. While African-Americans are the short-term beneficiaries of the consent decrees, the Ensley II court recognized the injustice that using invalidated tests in conjunction with quotas do by denigrating the achievements and abilities of the city's African-American employees:

> Use of racial hiring quotas to mask the effects of discriminatory selection procedures places grievous burdens on blacks as well as whites. Whatever they measure, tests that are not job related do not predict future job performance, yet they may convince some persons that those who score lower are less qualified. As Justice Brennan once observed, "even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs." [125]

In addition to its other legal woes, the city is now facing a claim for $2.5 million dollars for attorney fees (authorized for prevailing parties in Title VII actions) from the plaintiffs/appellants who have (now successfully) challenged the consent decrees over the last fourteen years. [126] Finally, the compensation to individuals the district court finds have in fact been victimized by the consent decree, and the attorney fees for those actions may raise the final cost to the city far higher. The city's strategy to resolve its original litigation by focusing on groups rather than individuals was its fundamental flaw. However, when it comes to the implementation of the quota ideal, Birmingham's experience is not unique.

B. The American History of the Quota Ideal: What They Don't Teach In Diversity Training

The debate over quotas tends to be viewed as a uniquely American struggle to define justice between blacks and whites. In truth, the current debate represents only the most recent twist on a long and rocky road. The quota ideal springs forth from the roots of prejudice. It first gained political force in the 1920s as a way for America to deal with its so called "Jewish problem." The "problem" was the phenomenal success of Eastern European Jewish immigrants after the First World War. Whether one attributes this success to the belief in hard work and sacrifice typical of immigrants in general, the respect and support for academic excellence in Jewish culture, or the talmudic tradition of analysis and intellectual rigor, a high percentage of Jewish immigrants and their children strove to join the professions through university training. By 1920, Jews comprised barely four percent of America's population, but they constituted seventy-three percent of the students at the City College of New York, forty percent at Columbia University and twenty percent at Harvard. [127] In 1922, Harvard's President Abbott Lawrence Lowell decided that Jews were changing the cultural complexion of Harvard and introduced the "silent quota" which cut Jewish attendance at Harvard from twenty-two percent to no more than ten percent. [128] Likewise, in a classic justification of the quota ideal, Dean William Rappleye of Columbia's medical college stated, "the racial and religious makeup in medicine ought to be kept fairly parallel with the population makeup" as justification for slashing Jewish enrollment to six percent of medical students. [129]

The effect in both cases was the same. White Christian applicants were exempted from having to compete with Jewish applicants on objective measures of competence and merit. Untold numbers of Jewish students who had made academic

excellence their life's ambition were rejected in the name of ethnic balancing. The intolerance and chauvinism of some of America's oldest academic institutions brought the Jewish quotas into disfavor after the Second World War. This prejudice against excellence is intrinsic to the quota ideal. It has come back to life in the past decade with Asian immigrants. During 1993, San Francisco's elite public high school, the Lowell School, was under pressure to accept no more Asian students, regardless of their test scores. The school operates on a racial quota system that prohibits more than forty percent of the student body to belong to the same ethnic group. [130] Because of the success of Asian students in meeting the race blind, meritocratic standards of Lowell, they have committed the offense (at least under the quota ideal) of succeeding beyond the allotment for their ethnic group: Asian students now comprise 42.9 percent of the student body. [131] Admission to Lowell is based upon a battery of academic tests based upon a sixty-nine point scale. What constitutes a passing score is predicated upon the race or ethnic group of the applicant. The more successful the members of an ethnic group have been on the test, the higher the minimum passing score for acceptance is set. For example, in 1994 the minimum passing score for whites was fifty-eight. However, for those of Chinese heritage the minimum passing score was sixty-two. [132] University professor Andrew R. Heinze articulated the human price that the quota ideal extracts, as applied at Lowell:

The anti-Asian quota of Lowell High School is no less damaging because it was not specifically designed to keep Asians out. The effect is the same. It demoralizes families who have struggled, often against great odds, so that their children could advance and fulfill American ideals of work and achievement. It makes a person's racial or ethnic identity more important than his or her character and performance. It lowers the academic standards of our schools. It punishes the diligent and discourages the talented. [133]

Allegations have repeatedly surfaced that California's state university system discriminates against Asian applicants in pursuit of racial balancing. The University of California at Los Angeles (UCLA), was charged with giving illegal preference to Caucasian applicants over Asian. An internal memo from UCLA's admissions director stating the school would "endeavor to curb the decline of Caucasian students" [134] certainly gave credibility to the suspicion that UCLA was engaged in ethnic balancing at the expense of Asians. In one of the most notorious examples, an Asian-American applicant to the University of California Berkeley's Law School received a letter informing her that she had been placed on the "Asian waiting list." [135] In 1989, Berkeley acknowledged that "it is clear that decisions made in the admissions process indisputably had a disproportionate impact on Asians," [136] to which California Congressman Dana Rohrabacher commented, "That's academic gobbledygook for: we discriminated." [137] Once the quota ideal takes root in a culture, it tends to spread as relentlessly as the Kudzu vine in a denuded Southern field. While the most devoted collectivists embrace the quota ideal as a general principle of justice, this is not the typical justification used to create affirmative action programs. Entry into the spoils system is usually justified on the ability to demonstrate the group you represent has suffered a disadvantage from society at large, or from those in positions of authority. As the concept of group entitlement gains legitimacy, it spreads through the body politic. The degree to which this phenomenon has taken place in the United States during the last twenty years is evidenced by the recent proposal of conservative political columnist Cal Thomas that religious conservatives push the broadcasting and print industries to create an affirmative action program for the evangelical community. [138] Mr. Thomas' syllogism runs as follows: (A) All groups in society should have appropriate representation in the news media; (B) Religious conservatives are a definable group within society composed of millions of individuals; (C) The American mass media is dominated by aggressively secular individuals who maintain their control by hiring new journalists who share their secular agenda; (D) This has resulted in an ideologically narrow mass media that has consistently stereotyped, ridiculed and caricatured religious conservatives in a way that would never be tolerated about any other minority in American society; (E) Therefore, the just solution is for religious conservatives to bring organized pressure on the communications industry to create a remedial affirmative action program to hire religiously committed journalists in appropriate numbers. Mr. Thomas' bottom line justification for this preference is as follows: "Because religion is so intertwined with contemporary politics, newsrooms ought to conduct an affirmative action program to include people on their staffs who believe as millions of Americans do and who can report correctly and fairly on those beliefs in a way that will inform all of us." [139] While Mr. Thomas' proposal is no doubt producing a less than sympathetic -- if not "tight-jawed" -- response from the typical advocates of the quota ideal, his proposal is not outlandish if analyzed with intellectual consistency using the mantras of affirmative action and diversity. However, the constitutional and ethical fault in the proposition is that preferential rights to religious conservatives as a group should occur if discrimination against specific individuals can be shown. This is the classic springboard of the broad-brush "remedial" quota ideal: Viewing individual misconduct (alleged acts of discrimination against religiously inclined journalists) as the justification for sweeping judicially or legislatively imposed structural changes in society. If Mr. Thomas can establish in a court of law that even one applicant at the Washington Post or the CBS News Division has been discriminated against because of religious beliefs, then the full remedial force of the law should be brought to bear to vindicate the rights of those individuals. However, if Mr. Thomas' remedial proposal was implemented, it would mean that religiously inclined applicants for journalism and broadcasting positions, who had themselves never been the victims of unlawful

discrimination, would receive preferential treatment in proportion to those equally innocent souls whose only "misconduct" was to proclaim a secular orientation on their application. Such is the nature of the collective justice of the quota ideal.

C. The International Experience

The quota ideal has not simply been an American illusion of social justice. The list of nations that have adopted the quota ideal in search of justice and social harmony are legion. In many instances, the quota ideal produced instead injustice and civil strife. The terrible carnage produced by the civil war in Rwanda is well known. What is less appreciated is the role that the quota ideal played in exacerbating historic ethnic animosity. The Hutu majority took control of the country from the previously dominant Tutsis in 1959. They subsequently implemented an affirmative action program (read quotas) to compensate for previous discrimination by the Tutsis. Under this system, employment in the civil service and military and admissions to educational institutions were made so that the work force/student body would mirror the ethnic makeup of the country: eighty-five percent Hutu, fifteen percent Tutsi. The now deposed government defended these quotas as "affirmative action steps to correct past inequalities against the Hutu." [140] However benign the Hutu might have seen this quota system, in effect, it meant that Tutsi youth who were themselves blameless, and had not even been born when the previous discrimination occurred, were only able to apply for one out of every ten university and government positions. It made individual achievement and merit a largely irrelevant consideration -- ethnic affiliation was the defining factor of life. It was a system The New Yorker described as "a sort of black-on-black apartheid, with tribal identity cards and an ethnic-quota system that limited Tutsis' access to schools and jobs." [141] Another example of the failure of the quota ideal in the international arena can be found on the island nation of Sri Lanka, where the Tamil Tigers, a guerrilla force of 10,000 or more insurgents, have battled government forces for the last decade. The industrious Tamil community, which constitutes seventeen percent of the island's population, believes that long standing efforts at ethnic balancing have had a pernicious effect on their development. It is thus not surprising when the Tamil Tigers issued their "six conditions for peace" in 1988, one of the six was " [u]niversity entrance only on merit, not by ethnic quotas." [142] At the other end of the Indian sub-continent in Pakistan, ethnic quotas for employment and education were the catalyst for a political movement that has brought the country near to civil war. In the strife and great human migration that took place after India's partition in 1947, more than nine million Muslims fled north to Pakistan. These were the Mohajirs, who lived primarily in urban areas of India, and were better educated as a group than the native born Pakistanis, the Sindis and Punjabis. With their orientation toward the professions and commerce, they settled in Pakistan's cities and began to rebuild their lives and fortunes. However, their success in the civil service and academia created resentment in the native born population. Prime Minister Zulfikar Ali Bhutto made the fateful decision in the 1950s to try to defuse the situation by embracing the quota ideal. He imposed strict quotas for admissions to colleges and government positions, effectively dividing Pakistanis between immigrants and the native born. [143] These distinctions, and the ethnic spoils system he created, carried over to the next generation of Pakistanis. In 1978, a group of Mohajirs, ironically students who could not get admitted to the School of Pharmacy because the quota for Mohajirs was filled, founded a new political party to represent their interests, the MQM. [144] The movement, with its focus on the injustice the quota system has worked on the Mohajirs, rapidly gained adherents. However, with the government rejecting meaningful change in the quota system, the strife between the two groups has consistently escalated. After a street battle between government security forces and MQM supporters left fifty dead on February 7, 1990, Pakistani political columnist Ayaz Amir stated, "Pakistan has never before seen the street power and fire power of this party. The MQM is not an organization. It's a monster." [145] The purpose of this article is not to provide a comprehensive review of the history of the quota ideal. [146] Nevertheless, the above anecdotal cases are useful to highlight the fact that Birmingham's results with racial balancing are not unique. Indeed, governments have consistently reaped a bitter harvest of injustice and social strife when they attempt to sow justice by dividing opportunities for success in employment, education, and government contracts into a spoils system between ethnic groups. Neither is it surprising that since World War II those nations and political movements which have been most enamored with socialism have also been the most fervent supporters of the quota ideal, for the quota ideal represents a classic collectivist notion of social justice. It dovetails nicely with the Marxist concept that human progress is not measured by the accomplishments of individuals, but by the actions of races, nations, and social classes. Under the collectivist mind-set, individual rights must always give way to the greater rights of the community, acting through state authority. Ergo, if confiscating private property without compensation is useful for the majority, or denying educational opportunity to an otherwise clearly deserving Asian student is necessary to support diversity, then the greater morality rests with the authority of the state, not the disadvantaged individuals. However, what the collectivists historically overlooked (usually with disastrous results for the societies they purported to care so deeply about) was that races, nations, and social classes do not attend medical school, invent polio vaccines, create Microsoft Corporations, or fight fires in Birmingham, Alabama -- individuals do. Individuals, in turn, collectively reach their greatest potential when they are secure in the knowledge their government will judge them in all things on their individual merit. A governmental entity,

when it is acting in its capacity as an employer, especially one which presides over a multi-ethnic society, has a special duty to set the example of supporting meritocratic principles. This is important both to maintain the confidence of the governed in their leaders' dedication to justice, and to set a standard of conduct for the private sector. As Justice Brandeis observed: "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." [147]

XII. CONCLUSION

The Birmingham employment discrimination cases are a classic example of what happens when a government abandons the discipline, integrity, and justice of meritocracy for the siren song of the quota ideal. Once again the Birmingham employment discrimination litigation is before the District Court for the Northern District of Alabama. The court is now faced with the doubly vexing job of determining what, if any, discrimination is still taking place against African-Americans and to what degree the unlawful operation of the consent decrees has discriminated against Caucasians.

From the history of the court decisions to date (October 1994), there is certainly reason to believe the operation of the consent decrees will be found to have created a pattern and practice of unlawful discrimination against Caucasians. In addition, the city of Birmingham appears as determined as ever to defend the status quo. After twenty years of litigation, the methods used by the city of Birmingham to hire and promote employees appear no more resolved then they were in 1974. If it is the ultimate adjudication of the federal courts that the consent decrees have been used to create a pattern and practice of discrimination against whites, then the issue of appropriate remediation for this discrimination must ultimately be addressed. It no doubt will be tempting to make this new class of victims whole by sweeping, broad-brush relief that would benefit Caucasians as a class. [148] However, this would be just as unconstitutional a denial of equal protection to African-Americans as the consent decrees are a denial of equal protection to Caucasians. The just solution to Birmingham's employment discrimination litigation is the one that has been consistently ignored to date -- a laser precise focus on making the specific, identifiable victims of discrimination, black or white, whole through appropriate individual relief. This is never a simple task. In class action litigation it is an exhausting, continuous, expensive, and time-consuming endeavor for the court, counsel, and parties. Nevertheless, it is the only just and constitutional road out of this employment discrimination quagmire. Any broad-based, long-running remedial affirmative action (ergo quotas) for Caucasians would inevitably result in many members of that group receiving preferential employment and promotions who were never themselves disadvantaged by the consent decree. Likewise, it would inevitably and needlessly stifle the opportunities of numerous African-American employees who are themselves blameless for the current situation. It would perpetuate the cycle of victimization, ethnic polarization in the city's work force, and ceaseless litigation that have marked the last twenty years.

Footnotes

*Lieutenant Colonel R. Philip Deavel (B.S., Suffolk University; J.D., University of Mississippi; LL.M. (Labor Law), The George Washington University National Law Center) is the Chief, Civil Law Division, United States Air Force Judge Advocate General School, Maxwell AFB, Alabama. He is a member of the Mississippi Bar.

1. 110 Cong. Rec. 6549 (1964).

2. 20 F.3d 1525 (11th Cir. 1994) [hereinafter BRDEL II].

3. 1994 U.S. App. LEXIS 23275 (11th Cir. 1994) [hereinafter Ensley II].

4. 42 U.S.C.A. Secs. 2000e to 2000e-17 (West 1994 Supp).

5. Schlei and Grossman, Employment Discrimination Law xi (2d ed. 1983).

6. When Title VII was debated in Congress, opponents charged that the Act would set off a legal movement toward quotas in hiring, promotions, and lay-offs that would undermine merit principles in society at large. Title VII's impact on seniority systems was also of great concern. Creating and protecting seniority systems have been overriding objectives of the American labor movement. This flows from the belief that those workers who have invested the most years with a specific employer should be given the most security in employment. The supporters of Title VII expended a great deal of energy refuting arguments that the Act would largely place the economic burdens of integration on nonblack working-

class Americans. In responding to these attacks, Senator Clark introduced into the congressional record a memorandum of law from the Department of Justice (DOJ) setting forth the department's interpretation of Title VII's impact on employment practices. The memorandum denied that Title VII could be used for racial balancing or would in any way undermine seniority rights. 110 Cong. Rec. 7207 (1964). Senator Humphrey, responding to the concerns of rank and file workers about the impact of Title VII, stated: "I would not support this fair and reasonable equal employment opportunity provision if it would have any harmful effects on unions." Id. at n.1. Finally Walter P. Reuther, then President of the United Auto Workers (UAW), wrote an open letter supporting Title VII which was read into the congressional record. The letter set forth the UAW's belief that it was not "the letter or intention of the law" that white workers would be discriminated against or have their opportunities diminished in the process of integration. 110 Cong. Rec. 7217 (1964).

7. See David Brion Davis, The Other Zion: American Jews and the Meritocratic Experiment, The New Republic, Apr. 12, 1993, at 29-50.

8. For a rendition of the arguments that affirmative action is necessary for promoting social justice, see Gertrude Ezorsky, Racism and Justice: The Case for Affirmative Action (1991).

9. 109 S. Ct. 706 (1989).

10. For a comprehensive review of the nine Supreme Court decisions on affirmative action before Croson, see Mary C. Daly, Some Runs, Some Hits, Some Errors-Keeping Score in the Affirmative Action Ballpark from Weber to Johnson, 30 B.C. L. Rev 1 (1988). This article categorized the affirmative action cases before Croson as "lengthy, incohesive, contradictory, and ambiguous." Both the article and the language above were referenced by the Eleventh Circuit in one of the Birmingham employment discrimination cases. BRDEL II, 20 F.3d 1525, (11th Cir. 1994).

11. Ironically, minority-owned prime contractors were exempt from this requirement and could hire free of any racial consideration. 109 S.Ct. at 713.

12. The majority opinion in Croson did not accept the city's argument that the burdens the "white majority" elects to place on itself through affirmative action programs should be viewed as most "benign," because whites were in actuality the minority in Richmond:

In this case, blacks comprise approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened scrutiny in this case. Id. at 722.

In the same vein, when the Fourth Circuit reviewed this set aside program and found it constitutionally invalid, the majority commented that "remedial measures" cannot be used as a cover for what in reality is a "political transfer" of governmental benefits. J.A. Croson Co. v. Richmond, 822 F.2d 1355, 1360 (4th Cir. 1987).

13. The importance of Croson in bringing clarity to the reverse discrimination/affirmative action debate cannot be overstated. William Bradford Reynolds, now a distinguished fellow at the National Legal Center for the Public Interest and the former head of the Justice Department's Civil Rights Division during a critical phase of the Birmingham employment discrimination litigation, wrote of this decision:

To be sure, the court has struggled to reach this point, speaking more often than not with multiple voices, and in some instances, even with forked tongue. But a solid and reliable majority has emerged to provide the kind of clarity of thinking and purpose needed to fulfill Dr. Martin Luther King Jr.'s dream of a nation that will one day judge its children 'not by the color of their skin but by the content of their character.'

William Bradford Reynolds, Colorblind at Last! St. L. Post Disp., June 29, 1989, at B3.

14. See Henry Hampton & Steve Fayer, et al, Voices of Freedom, An Oral History of the Civil Rights Movement, from the 1950s Through the 1980s 123-30 (1990).

15. Id.

16. Chambliss, a member of the "Eastview 13 Klavern" of the Ku Klux Klan, was subsequently tried for the bombing and convicted of first degree murder on Nov. 18, 1977.

17. Hampton & Fayer, supra note 14, at 124.

18. Branch v. Seibels, 20 F.3d 1489, at 1494 (11th Cir. 1994).

19. Id.

20. Stuart Taylor Jr., Second-Class Citizens, Am. Lawyer , Sept. 1989, at 42-65.

21. The appellate cases are as follows: Martin v. Wilks, 490 U.S. 755 *[cited at]* (1989); In re Birmingham Reverse Discrimination Employment Litigation (BRDEL II), 20 F.3d 1525 (11th Cir 1994); Ensley Branch, N.A.A.C.P. v. Seibels, 20 F.3d 1489 (11th Cir. 1994) (opinion withdrawn after grant of rehearing); Ensley Branch, N.A.A.C.P. v. Seibels (Ensley II), No. 91-7799, 1994 U.S. App. LEXIS 23275 (11th Cir. 1994) (substituted opinion after rehearing). In re Birmingham Reverse Discrimination Employment Litigation (BRDEL I), 833 F.2d 1492 (1988)(rehearing and rehearing en banc denied; United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983); Ensley Branch, N.A.A.C.P. v. Seibels (Ensley I), 616 F.2d 812 (5th Cir.), cert. denied, 449 U.S. 1061 *[cited at]* (1980). The district court's decision and order finding the civil service tests used for the fire and police departments violated Title VII is reported at 13 Empl. Prac. Dec. 11,504. The district court's subsequent decision reaffirming the validity of the consent decrees is reported as Bennett v. Arrington, 806 F. Supp. 926 (N.D. Ala. 1992).

22. For a detailed review of how the Personnel Board operates, see Taylor, supra note 20, at 46.

23. Id.

24. The district court's order was published at 13 Empl.Prac.Dec. 11,504.

25. 422 U.S. 405 *[cited at]* (1975).

26. 616 F.2d 812 (5th Cir.), cert. denied, 499 U.S. 1061 *[cited at]* (1980).

27. At the time of the settlement negotiations, the EEOC guidelines were set forth at 29 C.F.R. Sec. 1607.5 (c)(2). Under these guidelines, it is not sufficient that the proposed test be relevant and designed in good faith.

28. Municipalities have had difficulty in designing written tests for firefighter and police positions that are meaningful and occupationally relevant, yet do not run afoul of the EEOC's four-fifths rule (a test which produces a selection rate of less than four-fifths of the selection rate for any other group will generally be considered to have an adverse impact). See Doreen Canton, Adverse Impact Analysis of Public Sector Employment Tests: Can a City Devise a Valid Test?, 56 U. Cin. L. Rev. 683 (1987).

29. The Eleventh Circuit's frustration with the city and Personnel Board for failing to validate its selection procedures over the last 20 years is discussed later in this article.

30. Taylor, supra note 20, at 52.

31. Id.

32. Id.

33. Id.

34. Id. at 45.

35. Id. at 46.

36. Id.

37. Civil Action No. 82-P-850-S. (N.D. Ala. 1981)

38. 720 F.2d 1511 (11th Cir. 1983).

39. Civil Actions Nos. 83-P-2116-S, 82-P-1852-S, 84-0903-S. (N.D. Ala. 1981).

40. At the time, the DOJ was severely criticized by both liberals and legal scholars for switching sides. The DOJ already had made numerous appearances in court on behalf of the original black plaintiffs and helped negotiate the consent decrees when Mr. Reynolds moved the position of the Civil Rights Division 180 degrees on the Birmingham litigation. It is interesting to note that Mr. Deval Patrick, the current Chief of the Civil Rights Division in the Clinton administration, has been responsible for the DOJ again switching sides in a civil rights case. The recent case of position switching came in Taxman v. Piscataway Board of Education, No. 94-5112. The plaintiff was Sharon Taxman, a white school teacher at Piscataway High School in New Jersey. The school board made the decision to abolish one of two business education teaching positions. Two incumbent teachers were in peril of losing their jobs, one white and one black. Rather than make the reduction in force (RIF) decision based upon merit principles, the board elected to keep the black teacher and terminate Ms. Taxman in support of its affirmative action program. The DOJ under the Bush Administration brought a civil rights action in federal district court on behalf of Ms. Taxman and prevailed. Ms. Taxman was awarded nearly $134,000 in backpay and damages for having been discriminated against because of her race. The school board appealed this decision. In July 1994, the DOJ surprised both sides by requesting permission from the Court of Appeals for the Third Circuit to file an amicus brief on behalf of the school board. In a news conference on Sept. 8, 1994, Attorney General Janet Reno defended the decision to switch sides because "it is important to make clear that diversity is a factor that employers can consider in developing voluntary affirmative actions plans." Reno Defends Justice Department Switch in New Jersey School System, Daily Labor Rep. (Sept. 9, 1994). Finally, the DOJ has again altered its position on the Birmingham discrimination cases. The DOJ filed an amicus brief in support of the city in the BRDEL II appeal, while continuing to support the white plaintiffs in the Ensley II appeal. All these cases of position switching reflect the deep chasm in America about what constitutes "discrimination." It is reflected in the lack of a bipartisan consensus on what position the DOJ should take in civil rights cases.

41. Reynolds, supra note 13, at 52-55. Mr. Reynolds' views and the clarity with which he articulated them tended to raise passionate responses from both supporters and opponents. The National Review commented that the debate over Mr. Reynolds' nomination for the position of associate attorney general "will be in essence a debate over whether the 1964 Civil Rights Act is finally going to mean what we were told it meant." Nat'l Rev., June 28 1985, at 17. At the other end of the spectrum, Benjamin Hooks of the NAACP labeled him a "right wing ideological fanatic." U.S. News & World Rep., June 17, 1985, at 11.

42. The Senate Judiciary Committee rejected Mr. Reynolds' nomination by a ten to eight vote. A sympathetic Senator Alan Simpson commented that the manner in which Reynolds' nomination was treated by the committee was analogous to "the ritual of being pecked to death by ducks." N. Y. Times, June 28, 1985, at A1.

43. In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492, 1496 (11th Cir. 1987) [hereinafter BRDEL I].

44. Id. at 1496.

45. Id. at 1497.

46. Id.

47. 833 F. 2d at 1502.

48. Id. at 1499.

49. Id. at 1501 (footnotes omitted).

50. Id.

51. Id.

52. For a review of the bitterness and animosity this marathon litigation has created in the parties and their legal counsel, see Taylor, supra note 20, at 53-55.

53. The Court in Martin v. Wilks referenced this split in the circuits and cited cases from the 2d, 5th, 6th, and 9th Circuits to the contrary of the 11th Circuit position. 490 U.S. 755 *[cited at]* , 764 n.3 (1985).

54. Id. at 755.

55. Id. at 768.

56. 806 F. Supp. 926 (N.D. Ala. 1992).

57. Id. at 928.

58. 480 U.S. 616 *[cited at]* (1987).

59. 806 F. Supp. at 929-30.

60. Id. at 930.

61. Id.

62. Id.

63. Id. at 931.

64. Id.

65. While the United States was forbidden to change sides as a party, the totality of the modifications sought effectively placed the DOJ with the Wilks class.

66. Ensley Branch, N.A.A.C.P. v. Seibels, 1994 U.S. App. LEXIS 23275, at *33 (11th Cir. 1994).

67. Id.

68. Id. at *34.

69. Id. at *34, *35.

70. Id. at *36.

71. Id. at *38.

72. Id. at *39.

73. Id. at *40.

74. Bennett v. Arrington, 806 F.Supp. 926 (N.D. Ala. 1992).

75. In re Birmingham Reverse Discrimination Employment Litigation, 20 F.3d 1525 (11th Cir. 1994) [BRDEL II].

76. Id. at 1534.

77. Id.

78. Id.

79. Id.

80. Id. at 1541.

81. According to Stuart Taylor, "Mayor Arrington approved the deal even more heartily. The black plaintiffs had settled for what he called a 'modest amount' of backpay, giving up huge monetary claims to get strong affirmative action preferences over whites. Recalled Arrington in a 1985 deposition: 'I thought it was the best business deal we had ever struck.'" Taylor, supra note 20, at 43.

82. 20 F.3d at 1542.

83. Id. at 1544 (citing Croson, 488 U.S. at 493).

84. 806 F. Supp. 926, 929 (N. D. Ala. 1992).

85. 20 F.3d at 1546.

86. Id.

87. Id.

88. Id. (quoting from Int'l Bd. of Teamsters v. United States, 431 U.S. 324 *[cited at]* , 340 (1977)).

89. Id. at 1548.

90. 20 F.3d 1489 (11th Cir. 1994).

91. No. 91-7799, 1994 U.S.App. LEXIS 23275 (11th Cir. 1994).

92. The Ensley II panel reached the same basic legal conclusions after the rehearing. However, when comparing the two opinions, the withdrawn opinion has a harsher tone. The totality of the first decision sharply conveys the frustration of the court over Birmingham's perpetual inability or unwillingness to base employment actions on lawful, colorblind criteria. The original decision appears to repeatedly invite the district court to appoint a special master to take control of the personnel system and rebuild it on a constitutionally valid foundation. Ensley II, the substituted opinion, has a softer tone, with more advisory language on practical steps the Board and city could take to have their personnel system pass constitutional muster. In particular, the substituted opinion advises that if the city and Board really perceive the creation and validation of written tests to be an impossible undertaking (a position the Ensley II panel does not share) then they should seriously consider making employment actions (hiring and promotions) based upon a time-of-application system or a lottery. Id. at *86. While both systems would be useless in ranking applicants based upon merit, the court noted that at least the city would have a system that was not racially discriminatory. Id.

93. Id. at *40.

94. Id.

95. Id. at *16.

96. Id. at *18, *19.

97. Id.

98. 112 S. Ct. 748 (1992).

99. Ensley II, 1994 U.S. App. LEXIS 23275, at *43.

100. Id. at *57.

101. Id. at *61.

102. Id.

103. Id. at *63.

104. Id.

105. Id. at *64, *65.

106. Id. at *73, *74.

107. Id. at *78.

108. Id. at *80.

109. Id. at *90.

110. Id. at *98.

111. 429 U.S. 190 *[cited at]* (1977).

112. 458 U.S. 718 *[cited at]* (1982).

113. Ensley II, 1994 U.S. App. LEXIS 23275 at *107.

114. Id.

115. Id. at *108.

116. Id. at *114.

117. Id.

118. Id.

119. Id. at *76.

120. Id. at *81.

121. Id. at *81-*84.

122. Id. at *85.

123. Id. at *88.

124. Id. at *99.

125. Ensley Branch, N.A.A.C.P. v. Seibels, No. 91-7799, 1994 U.S. App. LEXIS 23275, at *78 (quoting Justice Brennan in United Jewish Orgs. v. Carey, 430 U.S. 144 *[cited at]* , 97 S. Ct. 996, 51 L. Ed. 2d 299 (1977) (J. Brennan concurring in part)).

126. The Wilks class was prepared to submit a claim of $2 million dollars for attorney fees (if they subsequently prevailed on the merits of their case) after the Supreme Court vindicated their ten-year struggle to gain legal standing to challenge the consent decrees. Taylor, supra note 20, at 52. According to the lead attorney for the Wilks class, Mr. Raymond Fitzpatrick Jr., the city has to date declined to settle attorney fees for any of the issues the plaintiff/intervenors have prevailed on in BRDEL II and Ensley II. He stated the total amount for attorney fees he will seek court ordered payment for is now $2.5 million. Telephone Interview with Raymond Fitzpatrick Jr., 17 Sept. 1994.

127. For a comparison of the impact of academic quotas on Jewish and Asian immigrants, see Andrew R. Heinze, Don't Punish Asians For Good Grades, S. F. Chron., Oct. 13, 1993, at A21.

128. Davis, supra note 7, at 31.

129. Id.

130. Heinze, supra note 127, at a21.

131. Id.

132. See Claire Cooper, School Integration Faces New Challenge in Court; Plaintiffs Urging a Return to Competition Based Upon Individual Merit, S. F. Exam., Aug. 1, 1994, at Al.

133. Heinze, supra note 127, at A21.

134. See Harold Johnson, Model Victims; Discrimination Against Asian Students in California's Public Universities, Nat'l Rev. West, July 20, 1992, at 7.

135. Id.

136. Id.

137. Id.

138. Cal Thomas, Media Gods Finally See The Light, L. A. Times Synd., July 28, 1994.

139. Id.

140. See Charles Onyango-Obbo, Rebellion Adds Momentum To Rwanda Reform, Africa News Serv., April 26, 1993.

141. Comment, New Yorker, July 18, 1994, at 4.

142. Hugh Pain, Sri Lanka's Tamil Tigers Will Fight and Talk, Reuters News Serv. Libr. Rep., Dec. 17, 1988.

143. Sheila Tefft, Karachi's Urban Warfare, Christian Science Monitor, Mar. 6, 1990, at 3.

144. Id.

145. Id.

146. For an analysis of the ever expanding list of groups seeking to convince courts and legislatures to grant them various forms of collective preference over the last twenty years, see Fredrick R. Lynch, Whose Diversity? Whose Consensus? Analysis of American Society, 30 Society 36-40, No. 5, July 1993.

147. Olmstead v. United States, 277 U.S. 438 *[cited at]* , 485 (1928) (Brandeis J., dissenting).

148. According to Mr. Fitzpatrick (the attorney for the Wilks class), his clients will not request broad-brush affirmative action for themselves now that the proverbial "shoe is on the other foot." Mr. Fitzpatrick states he will seek retroactive

promotions and other appropriate relief only for the approximately 40 white employees who can clearly establish that they would have been promoted but for their race. Nevertheless, as the author has attempted to establish in this article, once a group has been granted "victim" status by the courts, and the remediation train gathers steam, the appeal of seeking group-wide, nonspecific preferences (ergo, affirmative action) tends to build momentum on its own. Mr. Fitzpatrick states that the city has made no overtures for settlement, and has in fact petitioned the eleventh Circuit to review BRDEL II en banc. He opines that the city of Birmingham will ultimately seek certiorari on both BRDEL II and Ensley II if its requests for rehearing en banc are unsuccessful. If this prediction proves accurate, the final resolution of this litigation may still be many years in the future. Telephone Interview with Mr. Raymond Fitzpatrick Jr. (Sept. 17, 1994).