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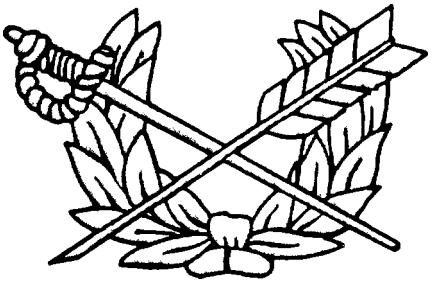

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MILITARY LAW REVIEW

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USE OF FORCE AND INTERNATIONAL COMMUNITY

by Brigadier General Josk-Luis Fernhdez-Flores

General Fernhndez-Flores is the Commandant of the Spanish Army Judge Advocate General's School. He is also the Director of the Center for Studies of Humanitarian International Law of the Spanish Red Cross and a member of the Instituto de Diritto Humanitario (Institute of Human Rights), San Remo, Italy. He serves as a member of the Center for National Defense Studies, which submits studies on defense matters to the Spanish government. His academic positions include: Professor of Public and Private International Law, University of Spain; Assistant Dean of the International Studies Society; Member of the Aeronautic, Space and Commercial Aviation Law Institute; Member of the International Law Association; Member of the International Law Institute of the Salvador University (Argentina); and Member of the Argentine Association of International Law. He is the author of seven texts on international law and more than twenty articles on public and private international law issues in various legal publications.

Following is the text of an address given by General Fernhdez-Flores to members of the U.S. Army Reserve International Law Teams, at The Judge Advocate General's School on 26 June 1985, as part of their Judge Advocate Triennial Training.

My heart is filled with everlasting gratitude. To be in this School is a delight for my spirit and an honor for me and my Army. I thank the Armed Forces of the United States for this opportunity.

I shall present my own thoughts about the relationship between the use of force and the international community.

I. INTRODUCTION

In order to explore the use of force in international relations and the way in which force is used in those relations, one must chiefly consider the international order, particularly the state of the international community at each given time of history.

The state of the international community during each period has led to a different notion of war and of the use of force in general. Almost until present times, was and the permissibility of war, although with various restrictions, has been the consequence of the existence of an inorganic international community in which the subjects of the international order—the states—had to resort to force in certain cases in their relations with others. There was a lack of an organized international corn-

munity with central bodies carrying with them a system of collective security. The lack of this system of collective security meant the existence of a system of individual security, so to speak. Each state had to resort to war as its only means of defense in extreme cases. Thus the individual recourse to war was the result of the lack of a system of collective security.

In our time, however, that setup has been somewhat reversed, at least in theory. The international community has been organizing itself, and the formation of central bodies, though with very relative power, has had two consequences. The first is that the individual recourse to war or to the use of force has tended to be abolished as being inconsistent with the new international order, and the second is that this mechanism was replaced for obvious reasons by a system of collective security. In abstract terms, we could say that the states no longer find it necessary to resort to war individually because there is a system of collective security which enables them to attain the same goals—honest, open goals, of course—which each state individually sets for itself.

There are two large epochs in the history of international law insofar as our subject is concerned. The first epoch includes the entire period preceding our own time in which an inorganic international community had a system of individual security and consequently the international subjects—the states—could individually make use of force. The fact that this individual use of force was more or less restricted in no way affects this general statement. The second epoch covers present times and is one in which a relatively organized international community has a system of collective security and, consequently, the individual use of force by the international subjects is prohibited as a general rule.

In other words, we could say that an inorganic international community is consistent with the permissibility of war and with the individual use of force, while an organized international community must begin by prohibiting the individual recourse to force and replacing it by a system of collective security. In the first case, the security of each state depends upon its own individual force, and in the second case, the security of each state depends upon the efficiency of the system of collective security.

II. HISTORY—FIRST EPOCH

The idea of prohibiting or restricting war or the use of force is a relatively modern one in its present-day formulation. But the placing of certain restrictions on war is something that dates as far back as the advent of Christianity.

Among the Oriental peoples, the Jews, the Greeks, and the Romans, the notion of war does not appear to be subject to any restrictions whatsoever. **A** certain concept of "holy war" made its appearance among the Jews in Deuteronomy, and that concept was later adopted by Islam; but such references are unimportant for our purposes. Neither did Greek philosophy mention the matter directly. The Greeks never raised the question of justice or lawfulness or war in itself. The Romans did not deal with this question either. The farthest they got was to use juridical-religious formulas to begin a war, but, nevertheless, a war could be ***bellum justum*** at *pium* (a just and pious war).

Let those references suffice as a note and let us conclude that those peoples did not raise anything remotely like the juridical, philosophical, or moral question of war.

If we go back to our correlation between the use of force and the international community, the above can be easily explained. The international community, as we understand it today, was then in an embryonic stage. That is why war was the last recourse of peoples for their defense and why the question of justice or morality of war was never raised.

The second period of this very long epoch began with the advent of Christianity. From then on the question of the just war was raised. But it is also from then on that the foundations of what we could today call an international community, more coherent than the previous one, were laid. The use of force and the international community are two concepts which are related.

This second period was to last with variations until about the end of the sixteenth century. Throughout this period the question of war was usually dealt with from a moral viewpoint. One author called this period the "theological" or "war-sin" period.

During the first centuries of Christianity, the question of war ***per se*** was not raised, but a certain controversy did take place in the third and fourth centuries in relation with the military service.

On the one hand, authors like Tertulian and Lactantius declared themselves in favor of absolute non-violence and accordingly stated that all wars were unjust. The former also maintained that the existence of armed forces was inconsistent with the Christian faith, and he was accused of heresy.

On the other hand, no authoritative text rejected outright the possibility of Christians taking part in a war. In fact, many Christians served in the Roman legions and were nevertheless still considered saints. Saint Ambrose and Origen maintained that Christians could take part in a war, and they even praised military values.

Let us state our idea in concrete terms: the international community then bore the seeds of what was later to become medieval Christianity, at least from a doctrinal viewpoint. The result is obvious: there orig inated with Saint Ambrose the conception of the Roman Empire as the basis of the just peace, and the first signs of the justice of war. It stems from this that there are unjust, that is, forbidden, wars as well.

The just-war theory as transmitted to theologians and experts in canon law in the Middle Ages originated specifically with Saint Augustine at the outset of the fifth century. We shall not dwell upon this but merely point out that a clear-cut distinction was then made by that author between just and unjust wars, and that it follows from this that there were unjust wars, which were therefore forbidden.

The doctrine of Saint Augustine basically shaped all of the medieval doctrines, to include those of Saint Isidore, Gratian, and Saint Thomas. So the general idea which predominated throughout this very long period was that there were just and unjust wars; that unjust wars were forbidden; and that consequently there were restrictions on the *ius belli* (right of war).

So as not to lose sight of our fundamental line of argument, let us emphasize once again the correlation between the international community and use of force. Although sociological conditions did not remain unaltered throughout the Middle Ages, it can be said that there existed a community of Christian peoples which faced an outside pagan world. In general terms, this Christian community, which can easily be identified with the international community of that time, can be said to have been fairly homogeneous, because all the peoples comprising that community shared the same principles, had common values, and were relatively organized in a hierarchy, though more theoretical than real. The consequence of this community was the placing of heavy restrictions on the individual recourse to war, as some wars—the unjust wars at least—were forbidden. It would appear too daring for us to affirm that the system of canonical and other types of punishments used by the Church, as well as other essentially feudal types of penalties, were a system of collective security, though merely embryonic in form.

This correlation between the use of force and the international community was later to be expounded in the works of the Spanish classics on international law.

We have now come to the sixteenth and the beginning of the seventeenth centuries, which are rich in the doctrines of Spanish theologians-jurists. Vitoria, Molina and Suarez, chiefly, reworked the scholastic principles of a just war and developed them in detailed, precise terms.

Vitoria lived in an age where the community of Christian peoples had devolved to pure anarchy. Let us not forget this fact. In Vitoria's time, medieval Christianity had disappeared and the new international situation *prima facie* seemed to be anarchy. This apparently shattered international order, as it was not only inorganic but also almost non-community, and resulted in the indiscriminate recourse to war.

Against the clearly narrow framework of medieval Christianity, Vitoria expounded the theory of a far more extensive international community. It was a community which included the pagans as well, a worldwide community. And, in consequence, he detheologized the notion of just war by shifting the main argument from the justice or injustice of war to the damage caused and its reparation. We can say that Vitoria went beyond the limits of the theological and moral notion of war and dealt with the question from a new juridical-secular viewpoint: that of the lawfulness or unlawfulness of war. This idea was to act as a model for later developments.

To Menchaca, only a war attempting to seek reparations for damages suffered was lawful, and a war waged against infidels was unlawful for that reason only. To Ayala, the question was entirely juridical because his main point, the legality-lawfulness of war, centered on the authority of the prince: to be lawful, a war had to be declared by the authority and mandate of a sovereign prince. At the beginning of the seventeenth century, Suarez followed the same line of thought and conceived a universal international community of which all nations could be members. We have now a theory of just war as a true "juridical theory."

From this exposition of the Spanish classics, which has been insufficient in itself but perhaps too long for this lecture, one can deduce a certain secularization of international law and, simultaneously, an awareness of the notion of international community and of the question of the right to wage war; and a shift from moral to juridical considerations, although there was not that much difference between one and the other in medieval times. The Spanish classics worked on the basis of a very vast but heterogeneous and weakened universal community which made it possible for restrictions to be placed on wars waged individually by the states, but which had no way of replacing the individual recourse of war.

So, one can see through this link established by the Spanish classics the beginning of a third phase in this correlation, between the concept of international community and use of force.

It was then that Hugo Grotius, the compiler of international law, was born. He followed the line of Ayala but restated the question. According to him, the state was not subordinate to anything; the prince was the ab-

solute sovereign and, in short, the law. Only he could declare war and his only consideration in doing so was the state's need in light of national interest. Thus there was no reason why his subjects should think about the justice or injustice of war. Although there was then an allusion to what is today termed "conscientious objection," the truth is that here some sort of transfer was made from the subject's conscience to the prince's. Thus war was turned into a juridical institution in conformity with natural law but devoid of moral considerations. War was then seen from a purely utilitarian viewpoint. In short., there were no restrictions at all on war.

So, the decadence of the medieval international order, of the Christian community, and later of the community of all the peoples, carried with it the notion of just war, and war then became lawful and, finally, arbitrary.

This situation continued throughout the seventeenth century and the two centuries that followed. Throughout this epoch there existed a very weak inorganic international community, which had a clearly defined system of individual security and which permitted war as a last recourse for its defense. This clearly shows the significance of a given international order and of a specific system of security for this order. The weakness of the international community made it possible as a general rule to resort in war. It could not be otherwise, because the essence of all juridical orders—and the international order is a juridical order—is that the security of its subject lies in the achievement of justice, and if the juridical order cannot achieve justice, then the subjects themselves must see that it is achieved.

In summary, we can say that **(1)**during the first period, in ancient times, the question of war was not raised and war was considered to be an indiscriminate recourse as a result of the weak international order then in existence; (2)if during the second period, the medieval Christian period, war was subject to restrictions, it was because a relatively homogeneous international community with a certain moral order and a certain hierarchy of powers existed; and **(3)**if in the third period, the three centuries preceding our time, war became a recourse to which the states could almost arbitrarily resort, it was the result of a universal community which existed more in theory than in practice, and in which the absence of all common authority and of community bodies led each of the subjects of the international order to provide for its own defense.

III. Present-Second Epoch

And now let us go on to the present century. At the beginning of the twentieth century, the first attempt was made to rationalize the use of

force at international level. This led to the creation of the League of Nations, the first experiment in organizing an international community.

If we say that this was the first attempt, we must also say that the roots of this attempt go farther back in time, as we have observed, because there are signs of this rationalization in the just-war theory itself. What happened is that the decadence of the international order led to the general rule of lawfulness of war as a political instrument in the centuries preceding our own. Let us now examine the most prominent landmarks on the road leading to our century.

The League of Nations was the first step in an attempt to transform the international order into an organic order and consequently to convert the system of individual security into one of collective security, although somewhat relatively. The system was established as follows:

(1) The starting point of the system was the existence of an international community, because the Preamble to the Covenant cannot be interpreted in any other way.

(2) The right to wage war was restricted. This was also based on the principle set forth in the Preamble that the High Contracting Parties agreed to "certain commitments not to resort to war." Under the terms of the Covenant, some wars were prohibited while others were permitted. All wars that could be termed wars of conquest were absolutely prohibited, and all other wars were relatively prohibited if certain requirements were not met first. Consequently, the following wars were permitted: any wars between a member state and a non-member state; wars between nonmember states; and any wars started after the stipulated periods or generally after compliance with the conditions imposed by the Covenant proper. Thus it cannot be said that the Covenant of the League of Nations outlawed war.

(3) With war restricted but not outlawed, the immediate correlative necessary consequence was the establishment of a system of collective security. In the case of a war of conquest, all the members agreed to "preserve" the state in question against external aggression. In the case of war not complying with the conditions set forth, such a war was termed an act of war against all other members of the League and these members "agreed" to sever all their commercial and financial ties with the aggressor state. Furthermore, the states could resort to the use of armed forces.

The prohibition of war, as we have seen, bore a relation to the weak system of collective security established and both were perfectly consistent with the international community of that time, which, though organized, was somewhat insecure, as later events were to show. The men-

talities were not then mature enough for more. This system was, nevertheless, a decisive step.

In the years that followed, the defects of the Covenant gave rise to several attempts and acts to improve it. Let us omit those minor steps just as we omitted those leading to the formation of the League of Nations.

We shall now stop to deal very briefly with a decisive step, the Briand-Kellogg Pack of 27 August 1928. The Pack, which related chiefly to the prohibition of the war, contained two fundamental articles. Article I stated that the High Contracting Parties condemned, on behalf of their respective peoples, recourse to war for the solution of international controversies and renounced it as an instrument of national policy in their relations with one another. Article II stated that the High Contracting Parties agreed that the settlement or solution of all disputes and conflicts should never be sought except by pacific means, regardless of the origin or nature of such disputes and conflicts.

It clearly follows from a strict interpretation of these Articles that all wars were in principle prohibited, but, nevertheless, some were permitted: any wars waged in self-defense; any wars constituting collective action to enforce compliance with the international obligations; any wars waged between parties and non-parties to the Pact; and any wars between non-parties which still retained their indiscriminate *ius ad bellum* (right to go to war).

The main defect of the Pact was not its failure to prohibit all wars, but its failure to set up a system of collective security. It stated—but only in the Preamble—that any power violating the Pact and resorting to war would be denied the benefits furnished by the Treaty. The prohibition to resort to war is far more definite in this Pact, but nevertheless it makes no provision whatever for any sort of system of collective security. Thus the international community was still not very organized, and consequently, the states still had to resort individually to war in order to defend themselves in certain cases.

Now we come to the present. The Charter of the United Nations is the last universal step taken for the organization of the international community, and accordingly, for the regulation of the individual use of force and its replacement by a system of collective security. In theory we now have the most perfect international community of all times. It is a very elaborate international community: an international community almost completely organized as a society; and an organized international community with several bodies in which the states are more interdependent. It is, in short, an international community in which the states are unable to act alone for reasons of necessity.

In this community-society, the prohibition of war has become possible in new terms under the fundamental provision of the Charter, Article 2, paragraph 4. The formula is very broad but also very vague.

It follows that all wars are prohibited in principle, but there are exceptions: the permissibility of wars waged by states acting in individual or collective self-defense (Article 51); wars constituting coercive measures waged by regional agencies under the authority of the Security Council (Article **53);** wars made by the Security Council as the common action which it may take for the purpose of maintaining or restoring international peace (Article 42); wars waged against an "enemy state" which can justly be considered obsolete (Article 106); wars which are within the domestic jurisdiction of a state (in many opinions); and, according to some authors, wars if the Security Council fails to take the necessary action to ensure enforcement of an award of the International Court of Justice (Article 94).

The abolition of the system of individual security has necessarily led to the establishment of a system of collective security to replace it, because the subjects of the international order cannot be left defenseless. The general principle is stated in two parts: a purpose of the United Nations is to take effective collective measures for the suppression of acts of aggression or other breaches of the peace; and the members of the Organization shall give the United Nations every assistance in any action it takes in accordance with the Charter.

Very briefly, the system works as follows. Peaceful means must first be sought for the settlement of international disputes, as provided in Chapter VI of the Charter. If such means fail to settle the disputes, then the system of collective security goes into action, in accordance with the Chapter VII of the Charter, by the action of the Security Council or the action of the General Assembly.

In conclusion, we can say that today war is prohibited in very broad terms, and consequently, there is a system of collective security that is relatively strong, historically speaking. And this is true although the system does not work as well in practice as would be desired. It is a collective system which replaces the system of individual security and carries out the functions which the latter formerly fulfilled.

If it is possible to prohibit war, it is due to the existence of a relatively organized international community which is, in short, the basis of the entire structure. If the system is not now effective, it is because the international community is not effective enough.

IV. Conclusion

There exists a close relation or correlation between the international community and the use of force, as we have briefly seen above. This same correlation had its origin in the different internal orders, though in the past, of course. And the fact remains that everything in the international order lags behind the internal order.

The international juridical order, like all juridical orders, must insure the security of its subjects. If this order is so weak that it is incapable of carrying out its special functions, then the subjects must protect themselves individually. If the international order acquires sufficient strength to be able to carry out its functions of protection and security, then the subjects will be able to renounce the use of their own force and the international order will be responsible for their security. This is the correlation which we have been pointing out.

LEGAL ASPECTS OF THE STRATEGIC DEFENSE INITIATIVE

by Captain Michael G. Gallagher, USAR*

I. INTRODUCTION

My predecessors in the Oval Office have appeared before you on other occasions to describe the threat posed by the Soviet power and have proposed steps to address that threat. But since the advent of nuclear weapons, those steps have been increasingly directed toward deterrence of aggression through the promise of retaliation.

. . . I've become more and more deeply convinced that the human spirit must be capable of rising above dealing with other nations and human beings by threatening their existence. Feeling this way, I believe we must thoroughly examine every opportunity for reducing tensions and for introducing greater stability into the strategic calculus on both sides.

. . . After careful consideration with my advisors, including the Joint Chiefs of Staff, I believe there is a way. Let me share with you a vision of the future which offers hope. It is that we embark on a program to counter the awesome Soviet missile thrust with measures that are defensive.

. . . What if free people could live secure in the knowledge that their security did not rest upon the threat of instant U.S. retaliation to deter a Soviet attack, that we could intercept and destroy strategic ballistic missiles before they reached our own soil or that of our allies?

. . . Tonight, consistent with our obligations of the ABM Treaty and recognizing the need for closer consultation with our allies, I'm taking an important first step. I am directing a

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> comprehensive and intensive effort to define a long-term research and development program to begin to achieve our ultimate goal of eliminating the threat posed by strategic nuclear missiles. . . . Our only purpose—one all people share—is to search for ways to reduce the danger of nuclear war.'

In his televised address of March 23, 1983, President Reagan outlined a bold proposal to create a Strategic Defense Initiative (SDI). Because the address proposed positioning laser and particle beam weapons in space to shoot down Soviet intercontinental ballistic missiles (ICBM), critics of the plan have dubbed the proposal "Star Wars."[2] Regardless of the policy implications of the President's proposal, the SDI concept poses substantial legal issues.

The purpose of this article is to identify and discuss those legal issues. The article will avoid policy opinions to the extent possible; however, the resolution of certain legal issues may be impossible without discussing the policy aspects of SDI. This article will first present the SDI proposal in summary form and then address the history of international control of air and space, the Nuclear Test Ban Treaty,[3] the Anti-ballistic Missile Treaty,[4] the Interim Strategic Arms Limitation Treaty (SALT I),[5] and the Outer Space Treaty.[6]

II. CONCEPT OF SDI

As he declared in his 1983 speech, President Reagan has undertaken significant steps to create an extensive research and development program on SDI. First, President Reagan assigned responsibility for creation and management of SDI to Secretary of Defense Caspar W. Weinberger. On April 24, 1984, Secretary Weinberger officially created the SDI Program to manage all research and development activities of the

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[1]Televised address of President Ronald Reagan, March 23 1983, reprinted in 19 Weekly Comp. Pres. Doc. 442 (Mar. 15, 1983).

[2]*Hearings on the Department of Defense Appropriations for Fiscal Year 1985 Before the Subcommittee on the Department of Defense of the House Committee on Appropriations*, 98th Cong., 2d Sess., Part 5 at 665 (1984) (Statement of Rep. Joseph P. Addabbo (D.N.Y.)) (hereinafter cited as DOD Hearings).

[3]Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 (effective Oct. 10, 1963).

[4]Treaty With the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, 23 U.S.T. 3435, T.I.A.S. No. 7503 (effective Oct. 3, 1972).

[5]Interim Agreement With the Union of Soviet Socialist Republics on Certain Measures With Respect to the Limitation of Strategic Offensive Arms with Protocol, May 26, 1972, 23 U.S.T. 3462, T.I.A.S. No. 7504 (effective Oct. 3, 1972).

[6]Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (effective Oct. 10, 1962).

SDI.' Secretary Weinberger selected Air Force Lieutenant General James A. Abrahamson, then the Associate Administrator for the Space Transportation System of NASA, to manage the SDI Program.[8]

Following the creation of the SDI Program, President Reagan requested $1.78 billion for the SDI Program as part of the Fiscal Year 1985 budget for the Department of Defense.[9] This request was intended to be a start-up program for a project estimated to cost $25 billion over the next five years.[10] On May 9, 1984, Administration witnesses appeared before the Subcommittee on the Department of Defense of the House Committee on Appropriations.'' These witnesses summarized the technical and strategic plan envisioned by the President.

According to these witnesses, the President foresees implementing the program in four phases: The Research Phase; Systems Development Phase; Transition Phase; and the Final Phase.[12] The Research Phase is the current phase of the President's program in which research and development is being conducted to determine whether the SDI is technically feasible. It is different than the Systems Development Phase, in which prototypes will be researched and developed, tested, and built. The Transition Phase is the period of incremental, sequential deployment of the defensive systems which will result from the Systems Development Phase. The Final Phase will be reached only after all defensive systems are deployed and ballistic missile force levels have reached their negotiated nadir.

Conceptually, the most important phase from both a legal and policy perspective is the current Research Phase because this phase will determine which defensive systems are feasible. The three later phases will merely implement the goals established during this phase. In a practical sense, this Research Phase has not created new research, but, rather, has consolidated under one umbrella, *i.e.*, the SDI Program, existing research into directed and kinetic energy and particle beam weaponry. In fact, the relevant technologies all have been funded in past years, but not all have been specifically related to defending against ballistic missile~.~~

'Secretary of Defense Memorandum, Management of the Strategic Defense Initiative (Apr. 24, 1984), *reprinted in* DOD Hearings, *supra* note 2, at 696.

[8]DOD Hearings, *supra* note 2, at 669 (biographic statement of LTG Abrahamson).

[9]DOD Hearings, *supra* note 2, at 665.

[10]*Id.*

[11]*Id.*

[12]*Id.* at 674.

[13]*Id.* at 675.

Although the Administration has made it clear that the SDI is designed to destroy all offensive missiles before they strike the U.S. and its allies, the principal target of SDI is the ballistic missile.[14] The concept of SDI is to explore technologies that will destroy an ICBM in any one of its four phases: the boost phase in which the propulsion engines are burning; the post-boost phase during which the warhead separates from the engines and multiple warheads are deployed; the mid-course phase in which the warheads travel on ballistic trajectories through space; and the terminal phase in which the warheads reenter the earth's atmosphere on the way to the target.[15]

To achieve this anti-ballistic missile capability, the Administration foresees the need to develop new technologies: surveillance, acquisition, and tracking; directed energy weapons in space; and ground-launched kinetic energy weapons.[16] The surveillance technology will include new tracking and identification systems, such as enhanced satellite observation. The kinetic energy weapons will include interceptor missiles and hyper-velocity gun systems. Although these certainly are new technologies, these systems are conceptually the progeny of conventional anti-aircraft ground-based tactics.

The final proposed SDI technology, directed energy weapons positioned in space, is the most progressive and provocative of the SDI proposals. It envisions the development and deployment of space-based lasers, ground-based lasers, space-based particle beams, and nuclear-powered directed energy weapons.[17] The basic technological thrusts include beam generators (lasers and particle accelerators), beam control, large optics, and acquisition, tracking, and guidance.[18] Currently, the Administration projects that these technologies will be able to destroy ballistic missiles through explosion or implosion of the rockets by fusion of equipment, disruption of the materials, or deterioration of the rocket's physical integrity. Although these technologies will use radiated or nuclear materials, the destruction of the incoming missiles will *not* result from any nuclear detonation.[19]

As described by the Administration witnesses, the proposed SDI envisions a layering of defensive systems. Although earth will provide its customary base for ground-launched missile interception and particle beam weapons, outer space has now been designated by the United

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[14] *Id.* at 676.
[15] *Id.*
[16] *Id.* at 676-78
[17] *Id.* at 677.
[18] *Id.*
[19] *Id.*

States as a fertile area for the placement of weapons. Space-based weapons will utilize state-of-the-art equipment to detect and track missiles heading for the U.S. and its allies. That same extraterrestrial environment will include state-of-the-art laser and particle beam weapons to destroy low-flying ballistic missiles. Thus, the SDI calls for the placement of weapons in space. Even though it is described as defensive systems, the SDI radically changes the customary use of space. Prior to the advent of SDI and anti-satellite weapons, the military use of space had been relatively passive, primarily for surveillance and tracking.[20] This change in the military use of space is not without legal consequences.

III. HISTORY OF INTERNATIONAL CONTROL OF AIR AND SPACE

International control of air and space can be traced to recognition of the principle of territorial sovereignty.[21] This concept of sovereignty directly flowed from the international desire to protect the security and military interests of states. Thus, national sovereignty has been universally acknowledged as the fundamental ordering principle of international relations.[22]

National policy declarations of state control of airspace originated in the early Roman days.[23] Due to the inability to militarily utilize the airspace, however, most international lawyers argued that territorial sovereignty should not extend to control over airspace.[24] This "free use of airspace" theory was quickly discredited with the militarization of airspace.

The first documented military use of airspace can be traced to the Franco-German War of **1870,** in which German balloons drifted into French territory.[25] Following this experience, the First Hague Conference in **1899** recognized the military use of airspace and prohibited the discharge of projectiles from balloons or other similar new methods.[26] Although the Hague Conference prohibited certain uses of airspace, it did not extend sovereignty into the air. In fact, the International Conference of **1910** on Air Navigation expressly permitted the peaceful overflight of aircraft over the territorial boundaries of other s t a t e ~ . ~ ~

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[20] S. Lay & H. Taubenfeld, The Law Relating to Activities of Man in Space **25 (1970)** (hereinafter cited as Lay & Taubenfeld).

[21] Note, *Sovereignty of Outer Space,* **74** Harv. L. Rev. **1154, 1167 (1961)** (hereinafter cited as Harvard Note).

[22] *Id.* at **1159.**

[23] Lay & Taubenfeld, *supra* note 20, at **36.**

[24] *Id.* at **37.**

[25] *See* Menter, *Peaceful Uses of Outer Space and National Security,* 18 Int'l Lawyer 581, 682 (hereinafter cited as Menter).

[26] Lay & Taubenfeld, *supra* note **20,** at **37.**

[27] *Id.*; **see** *also* Goedhuis, *Civil Aviation After the War,* **36** Am. **J.** Int'l L. **596 (1942).**

The final demise of the "freedom of the air" theory occurred during World War I when the belligerents made considerable offensive and defensive use of airspace. Following these experiences, nations unilaterally extended their territorial sovereignty into the airspace by drawing a boundary line perpendicular to the territorial ground boundary.[28] This practice was universally adopted by all states and recognized in the Paris Treaty of 1919.[29]

Although neither the U.S. nor the U.S.S.R. was a party to the agreement, the Paris Treaty was a significant step in the development of air law because it recognized the complete and exclusive sovereignty over the airspace above national territory. Further, the Treaty recognized the right of the subjacent state to exclude foreign aircraft from its territory and to exercise juridical control over all persons and property permitted to enjoy the airspace.

As written and practiced, the Paris Treaty marked a milestone in the granting of rights and powers flowing from territorial sovereignty. The Treaty permitted a nation to close its airspace and to deny unauthorized peaceful commercial overflight. Thus, the Treaty differed substantially from the international law doctrine that permits peaceful vessels to enter the waters of coastal states during peacetime.[30] One author has suggested that the rigorous provisions of air sovereignty contained in the Paris Treaty flowed from several factors: the view that airspace permitted unchecked military opportunities; the under-utilization of airspace for commercial purposes; the inherent danger to persons and property of the subjacent state from aircraft overflight; and diminished threat to world order caused by exclusive air sovereignty as opposed to exclusive control over maritime areas.[31] The Paris Treaty of 1919 thereby manifested international recognition of military capabilities without any foresight on the future growth of air commerce.

Following the Paris Treaty, the concept of national sovereignty over airspace was declared in the Ibero-American Convention of 1926[32] and the Pan American Convention of 1928.[33] The Pan American Convention yielded the first treaty to which the United States was a party that declared sovereignty over airspace. This Convention is noteworthy for sev-

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[28] Harvard Note, *supra* note 21, at 1163.

[29] Convention Relating to the Regulation of Aerial Navigation, 11 L.N.T.S. 173-180 (1922).

[30] Harvard Note, *supra* note 21, at 1164.

[31] *Id.*

[32] Ibero-American Convention of 1926, *reprinted in* 3 Hudson, International Legislation 2019 (1931)(French and Spanish Text only): *see also* Lay & Taubenfeld, *supra* note 20. at 37.

[33] 47 Stat. 1901, T.S. No. 840 (1933).

eral reasons. First, in Article 1, the Convention declared that "the high contracting parties recognize that every state has complete and exclusive sovereignty over the airspace above its territory and territorial waters." It is doubtful that a clearer declaration of sovereignty could be drafted.

Although the Convention applies only to private civilian aircraft, state concern for national security was manifested. For example, Article 15 prohibited those aircraft from transporting explosives, arms, and munitions for war. Further, Article 16 permitted the subjacent states to prohibit the carriage or use of photographic apparatus on private aircraft.

The next significant agreement on the regulation of airspace was the 1947 Chicago Convention on International Civil Aviation.[34] This Convention, opened for signature at Chicago on December 7, 1944, was ratified by the U.S. Senate on July 25, 1946, was proclaimed by the President of the U.S. on March 17, 1947, and entered into force on April 4, 1947.[35]

This Convention substantially mirrored the contents of the Pan American Convention and the Paris Treaty. In Article 1 of the Convention, the parties recognized that "every State has complete and exclusive sovereignty over the airspace above its territory." Although the Convention was expressly limited to private commercial aircraft, Article 3 declared that "no state (military, customs, or police) aircraft of a contracting state shall fly over the territory of another state or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof." In language identical to the earlier treaties, Articles 34 and 35 prohibited carrying munitions or photographic equipment.

As this convention was concluded during World War 11, its provisions manifested the security and commercial concerns of the party states. The security concerns resulted from the immense military power of air forces, as demonstrated by the extensive use of bombers and fighters during the war by all the participating states. Unlike the earlier treaties, however, the Convention also recognized the enormous commerical potential of airspace. Thus, the Convention struck a balance between the known military dangers and the unknown commercial prospects of airspace.

Shortly after the Convention took effect, events occurred that invalidated the security presumptions that had served as a foundation for the

[34] 61 Stat.(2) 1180, T.I.A.S. No. 1591 (1947).
[35] *Id.*

Convention: the successful development of rockets. Although rockets had been used during World War II, the use of outer space had been the sole province of science fiction writers. The successful Soviet launch of Sputnik in 1957, however, introduced the reality of outer space travel to all nations.[36]

The first successful orbiting of a manufactured satellite had significant legal and national security consequences. Due to the military attributes of space-based weaponry, the legal significance of outer space could not be divorced from its national security consequences. Thus, the initial debate on the status of outer space under international law was centered upon issues regarding the peaceful uses of outer space and the extension of national sovereignty into outer space.

On December 13, 1958, the United Nations General Assembly passed Resolution 1348, in which the Assembly emphasized the common interest of all nations in the exploration of outer space and the desire that it should be used only for peaceful purposes for the benefit of all humankind.[37] Further, the Resolution recognized that outer space activities could increase knowledge and improve the quality of life. In that same year, then-Senator Lyndon Johnson emphasized the need for limiting outer space exploration to peaceful purposes by declaring: "Today outer space is free; no nation holds a concession there; and it must remain that way."[38] This effort to limit space exploration to peaceful purposes was illustrated in the U.S. Congress' creation of the National Aeronautics and Space Administration (NASA), a civilian agency, on July 29, 1958.[39] In section 102(a) of the Act, Congress declared that "it is the policy of the United States that activities in space should be devoted to peaceful purposes for the benefit of all mankind." Mindful of the security and military aspects of outer space exploration, the Congress divided national space activities between civilian projects and activities which are primarily military and allocated responsibilities for the former to NASA and the latter to the Department of Defense.[40]

On December 12, 1959, the U.N. General Assembly adopted Resolution **1472,** which created the U.N. Committee on the Peaceful Uses of Outer Space.[41] This committee was chartered to explore means and

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[36] Bridge, *International Law and Military Activities in Outer* **Space,** 13 Akron L. Rev. 649 (1980) (hereinafter cited as Bridge).

[37] G.A. Res. 1348, 13 U.N. GAOR Supp. (No. 18) at 5, U.N. Doc. A/4090 (1958).

[38] Lay & Taubenfeld, *supra* note 20, at 40.

[39] National Aeronautics and Space Act of 1958, Pub. L. No. *85-568, 72* Stat. *426* (1938).

[40] *Id.* § 102(b).

[41] G.A. Res. 1472, 14 U.N. GAOR Supp. (No. 16) at 5, U.N. Doc. A/4354 (1959).

methods by which the exploration of outer space would be used solely for the betterment of the human race, the development of science, and the improvement of the well-being of peoples.[42]

On September 22, 1960, President Dwight Eisenhower addressed the General Assembly and extolled the virtues of peaceful exploration of outer space: better weather forecasting, improved worldwide communications, and other cooperative beneficial efforts.[43] Similarly, on September 21, 1961, President John Kennedy addressed the General Assembly and urged that the rule of law be extended to outer space so as to avoid the militarization of space.[44]

Following these presidential addresses in time, if not in spirit, the U.N. General Assembly adopted Resolution 1721 of December 20, 1961. Although the Resolution specifically dealt with the beneficial uses of space by telecommunications satellites, the preambular language of the Resolution reiterated the theme that "the common interest of mankind is furthered by the peaceful uses of outer space . . . and that exploration and use of outer space should be only for the betterment of mankind. . . ."[45] Following this resolution, the General Assembly adopted Resolution 1884 on October 17, 1967,[46] which ratified Resolution 1721 and further requested all states, pursuant to its determination to take steps to prevent the spread of the arms race to outer space, "to refrain from placing in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, installing such weapons on celestial bodies, or stationing such weapons in outer space in any other manner."

On December 13, 1963, the General Assembly adopted Resolutions 1962[47] and 1963,[48] which emphasized the current international theme that outer space exploration and use should be for peaceful purposes. Although these resolutions, in concert with Resolution 1721, gave some definition to the term "peaceful purposes" by prohibiting the installation of nuclear weapons and other devices of mass destruction in outer space, no concensus has been reached on the precise meaning of "peaceful purposes." Nevertheless, the General Assembly adopted Resolution 2222 which recommended the ratification of the Outer Space Treaty.[49] Al-

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"Galloway, *Direct Broadcast Satellites and Space Law*, 3 J. Space L. 3 (1975) (hereinafter cited as Galloway).

[43]Dwight D. Eisenhower 1959, 1960 Pub. Papers 707, 715 (1960).

"45 Dep't State Bull. 622 (1961).

[45]G.A. Res. 1721, 16 U.N. GAOR Supp. (No. 17) at 6.7. U.N. Doc. A15100 (1961).

[46]G.A. Res. 1884, 18 U.N. GAOR Supp. (No. 15) at 13, U.N. Doc. A15515 (1963).

[47]G.A. Res. 1962, 18 U.N. GAOR Supp. (No. 15) at 15, U.N. Doc. A15515 (1963).

[48]G.A. Res. 1963, 18 U.N. GAOR Supp. (No, 15) at 16, U.N. Doc. A15515 (1963).

[49]G.A. Res. 2222, 21 U.N. GAOR Supp. (No. 16) at 13-15, U.N. Doc. A16316 (1966).

though this treaty will be explored in greater detail below, it is noteworthy at this point as a manifestation of the international community's belief that outer space is to be used for peaceful purposes and that no weapons of mass destruction shall be installed therein. Thus, the Treaty attempts to fashion a legal order with due consideration for national security.[50]

The second consequence of Sputnik was an alteration of the concept of national sovereignty over a state's superadjacent airspace. Prior to Sputnik, states had asserted national sovereignty over their airspace without vertical limitation.[51] As Sputnik and successor satellites orbited terrain without objection by the underlying states, however, it became clear that customary international law did not extend claims of sovereignty into outer space.[52] Thus, there is an undefined area which demarcates the extent of claims of national sovereignty from areas of free travel. Unlike the customary law of the sea, which limited the extent of coastal states' claims of sovereignty over territorial waters by Cornelius Van Bynkershock's **1645** "cannon shot rule" of one sea league or three geographical miles,[53] there is no clear demarcation between airspace and outer space. Due to the significant legal consequences of a breach of national sovereignty, the failure to clearly distinguish airspace from outer space is a glaring international irresponsibility.[54] In an effort to affix this demarcation, commentators have offered many solutions.

Although some commentators have asserted arbitrary ceilings on airspace,[55] most commentators have based their ceilings upon some basic scientific data: the aeropause; the upper extremity of lift; and the end of the atmosphere.[56] The one theory that has been cited more than any other is the "von Karman line," which is described as the median measurement of the distance from the earth where an aeronautical vehicle no longer may perform and when molecular oxygen dissociates and airspace no longer exists (at approximately 275,000 feet above the earth's surface).[57] Due to the quantity of divergent views on the definition of airspace and the failure of the international community to clearly define the termination point for national sovereignty over its superadjacent airspace, most commentators have narrowed the demarcation line to an

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[50]M. McDougal, H. Lasswell & I. Viasic, Law and Public Order in Space 17 (1963).

[51]Lay & Taubenfeld, *supra* note 20, at 39.

[52]Harvard Note, *supra* note 21, at 1168; Lay & Taubenfeld, *supra* note 20, at 39; Provost, *Law of Outer Space—Summarized,* 19 Clev. State L. Rev. 595, 599 (1970).

[53]H. Grotius, The Law of War and Peace (1625), *cited in* Menter, *supra* note 25, at 581.

[54]Bridge, *supra* note **36,** at 650.

[55]*Id.*

[56]Harvard Note, *supra* note 21, at 1171.

[57]Haley, Space Law and Government 78 (1963); Bridge, *supra* note 36. at 651; Lay & Taubenfeld, *supra* note 20, at 43.

area between twenty-five miles, the height which can be reached by vehicles which depend on reaction of the air to maintain flight, and eighty miles, presently the closest distance which orbiting vehicles can come to the earth's surface and still maintain orbital speeds.[58]

Although customary international law has clearly adopted the principle of free travel in outer space, the failure to clearly delineate where airspace ends and outer space begins has had one other unchecked consequence. On December 3, 1976, eight equitorial states adopted the Bogata Declaration, in which each state claimed national sovereignty over the geosynchronous orbit, a geostationary circular orbit above the equitorial plane, some 35,871 kilometers above the earth's surface.[59] The declaration was based upon an extension of the territorial boundaries of each state coupled with a declaration that the particular geostationary orbit was a limited precious resource. Commentators have attacked this declaration with varying degrees of villification. Professor Goedhuis of Leyden University factually disputed the claim of sovereignty by declaring that, although the limits of airspace have not been clearly defined, the geostationary plane is clearly outside of it and well within outer space.[60] Thus, the customary international law which terminates sovereignty at the upper limits of airspace cannot be circumvented by the unilateral action of states.

The preceding discussion presented the international community's general attitude toward the militarization of airspace and outer space. The overall attitude demonstrates both an abhorrence of war as well as a respect for national security. As these two interests conflict, the international community has attempted to balance them so as to minimize militarization without provoking aggression through unilateral disarmament.[61] In keeping with this general international attitude on disarmament, the United States has ratified several treaties which, according to most commentators, directly affect the Administration's Strategic Defense Initiative: the Nuclear Test Ban Treaty, the Anti-Ballistic Missile (ABM) Treaty, the Strategic Arms Limitation Treaty (SALT I), and the Outer Space Treaty.[62]

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[58] Bridge, *supra* note 52, at 652.

"Reprinted in 6 J. Space L. 193 (1978).

[60] Goedhius, *influence of the Conquest of Outer Space on National Sovereignty: Some Observations*, 6 J. Space L. 37 (1978).

[61] Chayes, *An Inquiry Into the Workings of Arms Control Agreements*, 85 Harv. L. **Rev.** 905 (1972).

[62] *See, e.g.*, Bridge, *supra* note **36,** at ***653.***

IV. THE NUCLEAR TEST BAN TREATY

In 1963, the governments of the United States, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics concluded a multilateral Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Under Water, commonly referred to as the Nuclear Test Ban Treaty.[63] As a treaty, the document only binds the contracting parties.[64] As this treaty does not codify existing customary international law, the obligations of the parties may be altered or terminated in accordance with the terms of the Treaty.[65]

The international desire to eliminate nuclear weapons resulted from the Hiroshima and Nagasaki atomic bombings of 1945 and was manifested in the United Nations as early as January 1946.[66] Notwithstanding this early beginning, there was no substantive nuclear arms control progress until 1963. Although the Eighteen Nations Committee on Disarmament met from 1958 to 1963 to negotiate nuclear arms control, no agreement was reached due to a US.-Soviet impasse over on-site verification proposals.[67]

A breakthrough in negotiations occurred when President Kennedy delivered a commencement address at American University, which included an impassioned plea for better understanding of the Soviets with the aim being meaningful arms control.[68] Accepting the American plea, the Soviets concluded the Nuclear Test Ban Treaty in August 1963 after only thirty-four days of bargaining.[69]

In transmitting the Treaty to the Senate, President Kennedy noted that it promoted three objectives: minimizing environmental damage caused by radioactive fallout; limiting the spread of nuclear weapons; and diminishing the spiraling nuclear arms race.[70] These limited objectives flowed from the limited scope of the Treaty. Instead of being a comprehensive prohibition on nuclear weapons testing, the Treaty only

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[63] 14 U.S.T. 1313, T.I.A.S. No. 5433, 48 U.N.T.S. 43 (effective Oct. 10, 1963).

[64] I. Hackworth, Digest of International Law 17 (1940).

[65] *Id.* *see* Bridge, *supra* note 36, at 653.

[66] U.N. Dep't of Political & Security Council Affairs, The United Nations and Disarmament 1945-1970, U.N. Sales No. 70.1X.1,1 (1970) (hereinafter cited as United Nations and Disarmament).

[67] *Id.* at 230.

[68] Speech reprinted at John F. Kennedy 1963 Pub. Papers 459-464 (June 10, 1963). *See* Bechhoefer, *The Nuclear Test Ban Treaty in Retrospect.* 5 Case W. Res. J. Int'l L. 125, 126 (1973) (hereinafter cited as Bechhoefer); E. Schwelb, *The Nuclear Test Ban Treaty and International Law*, 58 Am. J. Int'l L. 642, 644 (1964).

[69] United Nations and Disarmament, *supra* note 66, at 231, 232.

[70] 49 Dep't State Bull. 316 (1963).

prohibited nuclear testing in three environments: the atmosphere, outer space, and underwater. Thus, the Treaty is sometimes referred to as the Limited Test Ban Treaty.[71]

The Treaty is extraordinarily brief. The heart of the Treaty is contained in Article I, section 1(a), which states, "Each of the parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control: in the atmosphere; beyond its limits, including outer space; or underwater, including territorial waters or high seas. . . ."

The Treaty's impact on the SDI flows from this prohibition. One may argue that this prohibition includes, or should extend to, the deployment of weapons systems which utilize nuclear energy for the source of their armaments or destructive power, such as lasers or particle beams. Although such an extension would promote the disarmament policy which underlies the Treaty, it is not expressly encompassed within the legal framework of the Treaty.

The Treaty specifically prohibited only nuclear "explosions" in outer space.[72] As President Kennedy stated, a principal objective of the Treaty was to preserve the environment through the elimination of radioactive fallout.[73] The parties made it clear that the Treaty did not affect weapons deployment, testing, or research, except for the actual detonation of a nuclear device in one of the three specified environments.[74] Clearly, the Treaty was never intended to halt the production of or to reduce the existing stockpiles of weapons, or to curb the expansion and improvement of nuclear capabilities.[75] Furthermore, the Secretary of State advised the Senate that the Treaty did not affect the nation's ability to defend itself, by declaring that Article I, section 1, "does not prohibit the use of nuclear weapons in the event of war nor restrict the exercise of the right of self-defense recognized in Article 51 of the Charter of the United Nations."[76]

In light of the explicit language of the Treaty and the understanding of the parties, the proposed SDI breaches neither the letter nor the spirit of the Treaty. As currently envisioned, the SDI will not utilize a nuclear

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[71]Bechhoefer, *supra* note 68, at 125.
[72]United Nations and Disarmament, *supra* note 66, at 232.
[73]49 Dep't State Bull. 316 (1963).
[74]Bechhoefer, *supra* note 68, at 153.
[75]*Id.*
[76]Hearings on the Nuclear Test Ban Treaty Before the Committee on Foreign Relations of the Senate, 88th Cong., 1st Sess. 5 (1963).

explosion when deployed in space.[77] Likewise, there does not appear to be any use for a nuclear detonation to further the research and development of SDI. Thus, the SDI does not violate the Nuclear Test Ban Treaty.[78]

V. STRATEGIC ARMS LIMITATION TREATIES

On May 26, 1972, the U.S. and the U.S.S.R. concluded the Interim Agreement on Certain Measures With Respect to the Limitations of Strategic Offensive Arms (SALT I).[79] The agreement was approved by the U.S. Senate and became effective on October 3, 1972,[80] and was to have terminated in five years (October 3, 1979), unless superseded by SALT II.[81] As the five-year termination data approached, the parties recognized that a successive agreement would not be concluded on time. Secretary of State Cyrus Vance issued a Unilateral Policy Declaration on September 23, 1977 that the U.S. would not take any action inconsistent with SALT I,[82] thereby extending the coverage of SALT I indefinitely without Senate approval.

On June 18, 1979, the U.S. and the U.S.S.R. concluded the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms (SALT II).[83] Although the Foreign Relations Committee of the U.S. Senate recommended ratification of SALT II,[84] the Treaty has never been ratified by the Senate[85] due to subsequent military[86] and political[87] concerns.

Notwithstanding the lack of Senate ratification, the United States has pledged to comply with the terms of the agreement. On May 3, 1982, President Reagan stated, "As for existing arms agreements, we will re-

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[77] DOD Hearings, ***supra*** note 2, at 690.

[78] For a discussion on other aspects of ballistic missile defense under the Limited Test Ban Treaty, ***see*** J. McBride, The Test Ban Treaty: Military, Technological, and Political Implications 42-53 (1967).

[79] 23 U.S.T. 3462, T.I.A.S. No. 7504 (May 26, 1972)(hereinafter cited as SALT I).

[80] Pub. L. No. 92-448, 86 Stat. 746 (1972).

[81] SALT I art. VIII, para. 2.

[82] 77 Dep't State Bull. 642 (1977); ***See*** Development, 19 Harv. Int'l Law J. 372 (1978) (hereinafter cited as Development).

[83] Arms Control & Disarmament Agency, Documents on Disarmament, 1979 at 189 (1982).

[84] The SALT II Treaty-Report of the Committee on Foreign Relations of the U.S. Senate, 96th Cong., 1st Sess., Exec. Rept. No. 96-14, 1 (1979).

[85] Dep't of Political & Security Council Affairs, 6 U.N. Disarmament Year Book 1981, U.N. Sales No. E.82.IX.6, 107 (1982).

[86] Noting twelve major findings, the Senate Armed Services Committee recommended rejection of the Treaty. ***See*** Report of the Senate Committee on Armed Services: Military Implications of the SALT II Treaty, 96th Cong., 1st Sess. (1980), ***reprinted in*** Arms Control & Disarmament Agency, Documents on Disarmament, 1980 at 549, 550 (1983).

[87] B. Weston, Toward Nuclear Disarmament and Global Security 94, 95 (1984).

frain from actions which undercut them so long as the Soviet Union shows equal restraint."[88] More recently, on June 10, 1985, President Reagan reaffirmed this pledge by stating, "I have decided that the United States will continue to refrain from undercutting existing strategic arms agreements to the extent that the Soviet Union exercises comparable restraint and provided that the Soviet Union actively pursues arms reduction agreements in the currently on-going nuclear and space talks in Geneva."[89]

It is important to note that neither SALT I nor SALT II is legally binding on the U.S. For example, on September 26,1977, Arms Control and Disarmament Agency Director Paul Warnke declared that Secretary Vance's statement of September 23, 1977 was "a declaration of interest. . . non-binding and non-obligatory."[90] This clarification is of legal importance. The Arms Control and Disarmament Act prohibits any agreement the terms of which obligate the United States to limit its armaments without express congressional authority.[91] Thus, the SALT "understandings" are not obligatory on the U.S. and, therefore, have no legal effect. Nevertheless, because the SALT documents have been suggested by some authors to have some legal impact, the content of the agreements will be discussed.[92]

The SALT agreements have been described as "freezing" instruments on the levels of ballistic missiles.[93] It is beyond question that the scope of SALT is limited to ballistic missiles. Article I of SALT I states: "[The] parties undertake not to start construction of fixed land based intercontinental ballistic missiles (ICBM) launchers after July 1,1972." Articles II and III place the same type of numerical ceilings upon ICBM launcher conversions and submarine-launched ballistic missile (SCBM)launchers.

SALT II has the same focus on offensive weaponry in Article I, which states, "Each party undertakes, in accordance with the provisions of this Treaty, to limit strategic offensive arms quantitatively and qualitatively, to exercise restraint in the development of new types of strategic offensive arms, and to adopt other measures provided for in this Treaty." Further, the definitions in Article II of Salt I1 demonstrated that the Treaty affects only offensive arms: intercontinental ballistic missiles,

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[88] 18 Weekly Comp. Pres. Doc. 730 (1982).
[89] 21 Weekly Comp. Pres. Doc. 771 (1985).
[90] 77 Dep't State Bull. 642 (1977); ***See*** also R. Labrie, SALT Hand Book Key Documents and Issues 1972-1979 at 494 (1979).
[91] 22 U.S.C. § 2573 (1982).
[92] *E.g.*, Bridge, supra note 52, at 654.
[93] Rhinelander, An ***Overview*** of ***SALT I,*** 67 Am. J. Int'l L. Supp. at 33 (1973)(hereinafter cited as Rhineland).

submarine-launched ballistic missiles, heavy bombers, cruise missiles, and air-to-surface ballistic missiles.

Nowhere in the agreement is there any mention of defensive systems. As a ballistic missile possesses a trajectory that takes the vehicle out of the earth's atmosphere for part of its flight,[94] the scope of the agreements do not extend to the lasers and particle beams envisioned by SDI. Thus, even if the declaration of the U S . to follow the SALT agreements was determined to be a legal obligation, as an expression of intention to be bound which in good faith could be relied upon by other states,[95] the SDI does not come within the scope of SALT because the SDI does not employ ballistic missiles.

VI. THE ANTI-BALLISTIC MISSILE TREATY

The U.S. and the U.S.S.R. signed the Treaty on the Limitation of Anti-Ballistic Missile (ABM) Systems on May 26, 1972.[96] The U.S. Senate gave its advice and consent to the ratification of the Treaty on August 3, 1972, President Nixon ratified it on September 30, 1972, and it became effective on October 3, 1972.[97]

The parties' intent in concluding this treaty is clearly declared in the preamble to the Treaty: "[E]ffective measures to limit anti-ballistic missile offensive systems would be a substantial factor in curbing the race in strategic offensive arms and would lead to a decrease in risk of outbreak of war involving nuclear weapons . . . ."[98] As the thrust of the Treaty is to eliminate defenses to incoming ballistic missiles, one commentator has characterized the Treaty as a codification of the MADD theory—mutual assured destruction defense."[99] A decade after the Treaty's signing, most commentators, including former Secretary of Defense Robert McNamara,[100] Arms Control Negotiator Paul Warnke,[101] and Under Secretary of Defense Richard Perle,[102] agree that the ABM Treaty is clearly the most significant and beneficial arms control agreement to have been concluded recently.

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[94]DOD Hearings, *supra* note 2. at 676

[95]Development, *supra* note 82, at 375.

[96]23 U.S.T. **3435.** T.I.A.S. No. 7503 (effective Oct. 3. 1972) (hereinafter cited as ABM Treaty).

[97]23 U.S.T. **3435** (1972).

[98]23 U.S.T. **3437** (1972).

[99]Rhinelander, *supra* note 93, at *32.*

[100]"The Real Star Wars—Defense in Space," NBC News Whitepaper. broadcast on Sept. 8, 1984, transcript at 94 (hereinafter cited as NBC News Broadcast).

[101]Warnke, *Possible Outcomes of SALT II*, 67 Am. J. Int'l L. Supp. at 41 (1973).

[102]Perle, *Mutually Assured Destruction as a Strategic Policy*, *67* Am. J. Int'l L. Supp. at 39, 40 (1973).

The scheme of the Treaty is to prohibit the research, development, testing, and deployment of ABM systems except as provided by the Treaty. To give force and effect to the broad policy goals noted in the preamble, the parties gave a very broad definition to the term ABM system: "[A]n ABM system is a system to counter strategic ballistic missiles in flight trajectory."[103] Recognizing the current state of technology, Article II of the Treaty contains examples of ABM systems specifically covered: ABM interception missiles; ABM launchers; and ABM radars.[104] Although these examples did not otherwise limit the broad definition of ABM systems covered by the Treaty, the specific examples served as the foundation for the Treaty. The functional center of the Treaty is contained in Article III, which limits each party to an ABM deployment of not more than 100 ABM launchers and missiles and a servicing ABM radar site of no more than six radar complexes within a 150-kilometer radius of each nation's capital, and a mathematical cap on launchers, missiles, and radars within a 150-kilometer radius of ICBM launchers.

The comprehensive nature of this treaty is found in section 1 of Article V which states: "Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based." The collective reading of Articles III and V reveals that the parties have agreed to deploy *no* ABM systems except for a small number positioned near the nation's capital and one ICBM field. Furthermore, the parties have agreed not to deploy or take steps to deploy any such systems in space. Thus, the SDI conceptually conflicts with the entire fabric of the Treaty.

Article I prohibits the deployment of any ABM system except for the limited number of launchers, missiles, and radars contained in Article III. The provision in Article III that the ABM system be located within a radius of 150 kilometers of the national capital or ICBM launchers clearly signifies that the parties intended to allow only ground-launched ABM systems. If, however, a party suggests that no such ground-basing was intended, the deployment of SDI weapons platforms would violate the Treaty unless the spacecraft maintained an orbit within 150 kilometers of the capital or ICBM field. This orbital limitation would be very difficult to achieve and maintain. Thus, this functional obstacle bolsters the argument that the Treaty permits only ground-launched ABM system. Thus, deployment of a space-based ABM system would violate the ABM Treaty.

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[103] ABM Treaty art. II, § 1.
[104] *Id.* art. II, § 1(a),(b),(c).
[105] Rhinelander, *supra* note 93, at 32.

In addition to barring deployment of SDI, the Treaty bars the development and testing of space-based ABM systems or components.[106] Although the Administration has acknowledged the impact of this treaty provision, Franklin C. Miller, Director of Strategic Forces Policy for the Secretary of Defense, has testified: "The Treaty does, however, permit research short of the fielding of a prototype system, and that is accepted by both sides . . . the research program can be conducted fully within the ABM Treaty and is designed to do so."[107] Thus, the Administration has concluded that Phase I of the President's SDI, which deals with pre-prototype research, does not violate the Treaty and that the Treaty would be violated only upon full-scale SDI deployment.[108]

The Administration's conclusion appears to be legally sound. Phase I of the SDI is only conceptual research on the system to determine whether development of such ABM systems is possible.[109] As the Treaty bars only development, and not research, Phase I of the SDI does not violate the ABM Treaty."' The subsequent phases of the SDI — development, transition, and final"' — will violate the Treaty prohibition on development, testing, and deployment of space-based ABM systems.[112]

The Treaty's interference with the subsequent development and deployment of SDI has been noted by the Administration. Defense Secretary Weinberger has declared that the U.S. is prepared to renegotiate or

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[106] ABM Treaty art. V, § 1.

[107] DOD Hearings, *supra* note 2, at 690.

[108] *Id.* at 691.

[109] *Id.* at 667.

"' *See* ABM Treaty art. V, § 1.

[111] DOD Hearings, *supra* note 2, at 674.

[112] In a recent analysis for the Department of Defense of the AMB Treaty provisions and the secret treaty records of negotiation, Mr. Philip Kunsberg reportedly opined that SDI development and testing (Phases I and 11) would not violate the ABM Treaty. Oberdorfer, *ABM Reinterpretation: A Quick Study*, Wash. Post, Oct. 22, 1985, at A1. According to Mr. Kunsberg's analysis, during the ABM Treaty negotiations, the Soviet Union never accepted an interpretation of the Treaty that banned "research, testing, [and] development of systems based on other physical principles." Oberdorfer, *White House Revises Interpretation of ABM Treaty*, Wash. Post, Oct. 9, 1985, at A21. "Other physical principles" would include the SDI technology. Therefore, if the Soviets never agreed that these "other physical principles" are covered by the **ABM** Treaty, they are not. But, according to former Ambassador Gerard Smith, the chief U.S. negotiator of the ABM Treaty, Mr. Kunsberg's interpretation is erroneous and "while some of the language was 'not the best,' it was clear to him and other negotiators that the Soviets explicitly agreed to tight limits on 'exotic' AMB systems such as those envisioned in the Strategic Defense Initiative." Oberdorfer, ***ABM*** *Reinterpretation:* ***A Quick*** *Study*, Wash. Post, Oct. 22, 1985, at A10. But, Secretary of State George Shultz announced that "President Reagan had decided to continue to conduct the SDI program 'in accordance with a restrictive interpretation' of the ABM treaty even though the administration believed the new interpretation advanced by the Pentagon was fully justified.' " Oberdorfer, *Shultz Was Key in ABM Policy Switch*, Wash. Post, Oct. 17, 1985, at A4.

repudiate the ABM Treaty if such is necessary to ensure the effective deployment of SDI.[113] Specifically, Secretary Weinberger declared: "Do we want to let that kind of Treaty stand in the way of our ability to develop a thoroughly reliable system of defense which can render their nuclear missiles impotent? And my answer to that would be very simple."[114]

Amendment and withdrawal from the Treaty are permitted by Articles XIV and XV. In particular, Article XV permits withdrawal from the Treaty upon six months notice if a party decides that "extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests . . . ."[115] Secretary of Defense Weinberger has declared that at least two extraordinary events exist that justify repudiation of the Treaty: the Soviets have continued to work very assiduously and effectively in the field of strategic defense; and the Soviets have an unfair advantage in strategic offensive systems.[116]

Although there is no treaty definition of "extraordinary events which would jeopardize supreme national interests," Secretary Weinberger's examples appear to meet the drafters' intent. For example, the United States took the position that it would withdraw from the ABM Treaty if a successor to SALT I was not negotiated within its five-year deadline."[117] Specifically, on May 9, 1972, U.S. Ambassador Gerard C. Smith, the chief negotiator, stated:

> The U.S. Delegation has stressed the importance the U.S. Government attaches to achieving agreement on more complete limitations on strategic offensive arms, following agreement on an ABM Treaty and on an Interim Agreement on certain measures with respect to the limitation of strategic offensive arms. The US. Delegation believes that an objective of the follow-on negotiations should be to constrain and reduce on a long-term basis threats to the survivability of our respective strategic retaliatory forces. The USSR Delegation has also indicated that the objectives of SALT would remain unfulfilled without the achievement of an agreement providing for more complete limitations on strategic offensive arms. Both sides recognize that the initial agreements would be steps toward the achievement of more complete limitations on strategic arms. If an agreement providing for more complete strategic offensive arms limitations were not

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[113] NBC News Broadcast, *supra* note 88, at 91.
[114] *Id.* at 93.
[115] ABM Treaty art. XV, § 2.
[116] NBC News Broadcast, *supra* note 88, at 95.
[117] Rhinelander, *supra* note 93, at 33.

> achieved within five years, U.S. supreme interests could be jeopardized. Should that occur, it would constitute a basis for withdrawal from the ABM Treaty. The U.S does not wish to see such a situation occur, nor do we believe that the USSR does, It is because we wish to prevent such a situation that we emphasize the importance the U.S Government attaches to achievement of more complete limitations on strategic offensive arms. The U.S. Executive will inform the Congress, in connection with Congressional consideration of the ABM Treaty and the Interim Agreement, of this statement of the U.S. position.[118]

Notwithstanding the provision of a specific withdrawal article in the Treaty, it is clear that the extraordinary events described by Secretary Weinberger constitute a lawful basis for withdrawal under principles of international law. The principle *rebus sic stantibus* (in these circumstances) provides that a party to a treaty may withdraw from an agreement when there has been a fundamental change in circumstances of an essential fact that constituted the basis for the agreement. Specifically, Article **44** of the Report of the International Law Commission provides:

> *Fundamental change of circumstances*
>
> **1.** A change in the circumstances existing at the time when the treaty was entered into may only be invoked as ground for terminating or withdrawing from a treaty under the conditions set out in the present article.
>
> 2. Where a fundamental change has occurred with regard to a fact or situation existing at the time when the treaty was entered into, it may be invoked as a ground for terminating or withdrawing from the treaty if:
>
> *(a)* The existence of that fact situation constituted an essential basis of the consent of the parties to the treaty; and
>
> *(b)* The effect of the change is to transform in an essential respect the character of the obligations undertaken in the treaty.
>
> **3.** Paragraph **2** above does not apply:
>
> *(a)* To a treaty fixing a boundary; or

[118]U.S. Congress, Office of Technology Assessment, Ballistic Missile Defense Technologies 279 (OTA-ISC-254 Washington DC: US Gov't Printing Office)(1985).

> *(b)* To changes of circumstances which the parties have foreseen and for the consequences of which they have made provisions in the treaty itself.
>
> **4.** Under the conditions specified in Article 46, if the change of circumstances referred to in paragraph **2** above relates to particular clauses of the treaty, it may be invoked as a ground for terminating those clauses only.[119]

Based upon the statements of Ambassador Smith during the treaty negotiations, the U.S. made clear that the obligations of the Treaty were based upon rough strategic parity and continued progress in overall arms control. As Secretary Weinberger has stated, these basic understandings have been breached: there has been no significant demilitarization; rather, there has been continued Soviet growth in strategic offensive arms. It is clear that these changes in the quantity and quality of opposing strategic weapons are a suitable basis for withdrawal under both the specific terms of the Treaty and international law principles. Thus, the Administration's plan to withdraw from the Treaty, if necessary to develop and deploy space-based ABM systems, is lawful.

VII. THE OUTER SPACE TREATY

In November 1957, only a month after the Sputnik launching, the United Nations seriously began to discuss the impact of outer space exploration and use.[120] Because there was no existing organizational structure then in place to specifically address outer space, these discussions took place within the Disarmament Commission and the Ten Nation Committee on Disarmament.[121] On January 12, 1958, President Eisenhower invited Soviet Prime Minister Bulganin to participate in disarmament efforts regarding outer space.[122] On November 12, 1958, Henry Cabot Lodge, U.S. Representative to the U.N., told Committee I (Political and Security) of the U.N. General Assembly that an "[a]greement to prohibit the use of outer space for military purposes is the goal of the United States."[123] Ambassador Lodge clarified the U.S. proposal by identifying two tasks: "First, in the field of disarmament, we must take effective steps to explore methods whereby we can assure that outer space will be used only for peaceful purposes. Second, in the field of the peaceful uses of outer space, we must prepare for practicable and significant

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[119] Report of the International Law Commission, 18 U.N. GAOR Supp. (No. 9), U.N. Doc. A/5509 (1963), *reprinted in* 58 Am. J. Int'l L. 241, 283 (1964).

[120] L. Jasentulyano, **3** Manual on Space Law xi (hereinafter cited as Space Manual).

[121] *Id.*

[122] 38 Dep't State Bull. 122 **(1957).**

[123] 39 Dep't State Bull. 974 (1958).

international cooperation."[124] In an effort to meet these two tasks, the U.S. proposed the creation of an ad hoc committee on the use of outer space to facilitate discussion and other appropriate action.[125]

This U.S. proposal was a counter to a Soviet proposal to create a U.N. agency for international cooperation in research in cosmic space and to serve as a clearinghouse and coordinator for national research.[126] On December 13, 1958, the General Assembly created the Ad Hoc Committee by adopting Resolution 1368.[127]

The Ad Hoc Committee was composed of eighteen nations and was charged with reporting to the General Assembly on the activities and resources of the United Nations and its agencies in the areas of international cooperation in the peaceful uses of outer space, and the future organizational arrangements and the nature of legal problems which might arise in carrying out programs to explore outer space.[128] Although the U.S.S.R. and four of its allies refused to participate in the committee due to their perception that it fatally favored Western interests, the committee did issue an important report to the General Assembly on July 14, 1959.[129] The committee reported that a customary rule of law had arisen recognizing that outer space is open to peaceful exploration by all states, that certain international treaties and customs (laws of air and sea) exist that could provide useful analogies for creating an international regime on outer space law, and that the factual and legal aspects of outer space are so unique that a specific treaty regarding outer space law was required.

The General Assembly thereafter created the Committee on the Peaceful Uses of Outer Space by a unamimous vote in December 1959.[130] This committee was composed of twenty-four members representing Eastern, Western, and non-aligned nations. The mandate of the committee was nearly identical to that of its predecessor, the Ad Hoc Committee. Like the Ad Hoc Committee, this new committee was beset by political problems. Although the Soviets did participate in this committee, procedural disputes prevented it from meeting until September 1961.[131] This delay, in retrospect, may have been beneficial. The agreed procedures of the

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[124] *Id.* at 975.
[125] U.N. Doc. A/C.I/L 220 (Nov. 12, 1958).
[126] Space Manual, *supra* note 105, at **xi.**
[127] 40 Dep't State Bull. 32 (1969).
[128] Space Manual, *supra* note 105. at **xii.**
[129] U.N. Doc. Ai4141 (1959).
[130] G.A. Res. 1472A. 14 U.N. GAOR Supp. (No. 16) at 5, U.N. Doc. A/4354 (1959).
[131] Space Manual, *supra* note 105, at xiv.

committee required that all decisions be by consensus; thus, the significant work that was achieved by the committee represented the vital interests of all the participants.

Shortly after the committee convened in 1961, President Kennedy addressed the General Assembly and urged greater cooperation on outer space and proposed that outer space be reserved only for peaceful purposes consistent with the U.N. Charter.[132] On December 4, 1961, U.S. Ambassador to the U.N. Adlai Stevenson declared in a speech to the General Assembly that outer space exploration should be unrestricted and for peaceful purposes; that neither outer space nor celestial bodies can be claimed by any nation; that the resources of outer space should be open to all states without regard to the state of their economy; and that freedom of space and celestial bodies, like freedom of the seas, will serve the interest of all nations.[133]

On December 20, 1961 the U.N. General Assembly unanimously adopted Resolution 1721, which declared that the U.N. Charter applies to activities conducted in outer space and that outer space is free for exploration by all states without appropriation by any state. Thus, the Resolution proposed the creation of a legal order for outer space by extending the U.N. Charter to outer space.

The unanimity of Resolution 1721 is also noteworthy as a possible basis for declaring international law for outer space. The U.N. Charter does not grant power to the General Assembly to make international law;[134] rather, the Charter grants that power to the Security Council.[135] The United States has declared, however, that this resolution did create international law by codifying customary international law.[136] Further, this resolution served as a basis for the later adoption of the Outer Space Treaty.

Following this resolution, the U.S., the U.S.S.R., and other states offered different drafts for an outer space law. On June 6, 1962, the U.S.S.R. offered its draft which envisioned that exploration and use of outer space would be for the benefit of all humankind, without appropriation by any state and on an equal basis by all states, that all activities would be conducted in accordance with the U.N. Charter and other ap-

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[132] *Id.* at **xvii.**
[133] 46 Dep't State Bull. 180 (1962).
[134] *See* U. N. Charter ch. IV.
[135] *See id. ch.* V.
[136] Statement of Secretary of State Dean Rusk, *reprinted in* 47 Dep't State Bull. 318 (1962).

plicable law, and that the use of outer space for propogating war, national or racial hatred, or enmity between nations would be prohibited.[137]

The United Arab Republic (Egypt) offered its draft on September 14, 1962. A shorter version than the U.S.S.R. proposal, this draft provided that the activities of member states in outer space should be confined solely to peaceful uses, and that in their policies toward outer space, member states should promote international and peaceful cooperation.[138]

Great Britain offered an even shorter draft on October 12, 1962.[139] In addition to its brevity, this draft is noteworthy for its omission of any "peaceful purposes" limitation regarding exploration and use of outer space. This draft declared that outer space is free for exploration and use by all states without claims of sovereignty, appropriation, or exclusive use by any state, and that the use of outer space is governed by the U.N. Charter and other applicable laws.

The U.S. draft declaration, presented on October **14,** 1962, was similar to the British version in that it omitted any declaration on the peaceful purposes of outer space exploration and use.[140] In all other respects, the U.S. draft mirrored the others regarding free use and exploration of outer space without claims of appropriation, exclusive use, or sovereignty.

Disputes over the proper scope and form of the declaration created an impasse. The U.S.S.R. advocated a comprehensive agreement which would encompass a declaration of basic legal principles governing activities of states in outer space exploration and use, as well as a separate formal international agreement on assistance and return of astronauts. The U.S. position was that General Assembly priority should be given only to the limited task of adopting a nonbinding resolution on the issue of assistance and the return of astronauts.[141]

These proposals were referred by the General Assembly to the Legal Subcommittee for consideration. During this referral, the Soviets offered a draft treaty on April 16, 1963, which resembled the earlier Soviet draft with two important exceptions.[142] First, the draft did not include provisions regarding assistance to astronauts, reflecting the subcommittee's view that such an agreement should be a separate document.[143] Second, the revised Soviet draft declared that all states

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[137]U.N. Doc. A/AC.105/C.2/L.1 (1962).
[138]U.N. Doc. A/AC.105/L.6 (1962).
[139]U.N. Doc. A/C1/879 (1962).
[140]U.N. Doc. A/C1/881 (1962).
[141]Space Manual, *supra* note 105, at xviii
[142]U.N. Doc. A/AC.105/C.2/L.6 (1963).
[143]Space Manual, *supra* note 105, at 3.

could freely use outer space, but that "the use of artificial satellites for the collection of intelligence information in the territory of a foreign state is incompatible with the objectives of mankind in its conquest of outer space."

At this point, the major powers agreed that all states had free use of outer space, that no nation could appropriate any celestial body, and that the U.N. Charter and other applicable laws extended into outer space. But, disputes as to the exact meaning of the "free use of outer space," *e.g.*, the Soviets would ban intelligence gathering, and the proper form into which to put the declared principles prevented the major parties from concluding an agreement. In view of this superpower impasse, the General Assembly unanimously adopted Resolution 1884 on October 17, 1963, calling upon all states to restrain from placing into orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, installing such weapons on celestial bodies, or stationing such weapons in outer space in any other manner.[144]

Resolution 1884 is noteworthy for two reasons. First, it clearly defined the hazard to be avoided in outer space—the proliferation of weapons of mass destruction. Second, the unanimous nature of the Resolution persuaded some states, including the U.S., to conclude that the Resolution created international law by codifying customary international law, as did Resolution 1721.

On December 13, 1963, the General Assembly acted again and adopted Resolution 1962,[145] which one commentator described as

> the first attempt by the international community to make legal principles for outer space and space activities in a formalized manner and gave legal recognition to the practices that had already been involved, and stated the objectives of the international community as they had been developed since the beginning of the space age.[146]

This resolution served as the framework for the Outer Space Treaty. Further, as with Resolutions 1721 and 1884, Resolution 1962 has been treated as a codification of customary international law. In declaring the Resolution an act creating law, U.S. Ambassador to the U.N. Stevenson stated:

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[144] G.A. Res. 1884, 18 U.N. GAOR **Supp.** (No. 15) at 13, U.N. Doc. A/5515 (1963).
[145] G.A. Res. 1962, 18 U.N. GAOR Supp. (No. 15) at 15, U.N. **Doc.** A/5515 (1963).
[146] "Space Manual, ***supra*** note 105, **at xx.**

> In the view of the United States the operative paragraphs of the resolution contain legal principles which the General Assembly, in adopting the resolution, declare should guide states in the exploration and use of outer space. We believe these legal principles reflect international law as it is accepted by the members of the United Nations.[147]

The pertinent provisions of Resolution 1962 recognized that outer space and celestial bodies were free for exploration and use by all states and therefore not subject to national appropriation by claims of sovereignty, by means of use, occupation, or other means, and that the exploration and use of outer space should be carried out only in accordance with international law and the U.N. Charter, for the benefit all humankind, and in the interest of maintaining international peace and security.[148]

As this resolution later served as an important source document for the Outer Space Treaty, the specific language used in the Resolution is important. For purposes of this article, it is noteworthy that Resolution 1962 does not call for the demilitarization of space. Rather, the Resolution charges states to use outer space only for the benefit and the interests of all humankind, consistent with the U.N. Charter and other applicable international laws, and in the interest of maintaining international peace and security. Thus, the Resolution reiterates language from both the preamble and Article I of the U.N. Charter regarding the keen interest of states in maintaining international peace and security.[149] This choice of language is important for the discussion below of the "peaceful purposes''language that became part of the Outer Space Treaty.

On May 7, 1966, President Lyndon Johnson publicly announced his concept for a treaty on the use and exploration of outer space.[150] This proposal contained the substance of the previous General Assembly resolutions regarding freedom of use and exploration of outer space and the prohibitions on the stationing of weapons of mass destruction and military maneuvers. On June 16, 1966, U.S. Ambassador to the U.N. Arthur Goldberg delivered a copy of the draft treaty to the U.N. Secretary General.[151] On June 17, 1966, the U.S.S.R. also presented a copy of its draft treaty.[152] Following diplomatic discussions on these proposed treaties,

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'"49 Dep't State Bull. 1007 (1963).
"'Space Manual, *supra* note 105, at xx.
[149]U.N. Charter preamble and art. 1, sec. 1.
[150]54 Dep't State Bull. 900 (1966).
"'55 Dep't State Bull. 60 (1964).
[152]U.N. Doc. A/AC.105/C.2/L.3 (1962).

the parties agreed that the Outer Space Legal Subcommittee should convene on July 12, 1966 to seek agreement on a treaty.[153]

On his opening speech on July 12, 1966, Ambassador Goldberg characterized the U.S. draft as a natural outgrowth of previous General Assembly resolutions.[154] In particular, he stated:

> In drafting the treaty text we have placed before the Committee, our first and central objective—one that we believe all members share—to insure that outer space and celestial bodies are reserved exclusively for peaceful activities. This goal was the motive force which led to the development of the key resolutions of the General Assembly on outer space, and it should be our basic theme in these negotiations.[155]

Thus, the U.S. was committing itself to freedom of use and exploration of outer space, the banning of claims of sovereignty in outer space, and the prohibiting of weapons of mass destruction upon celestial bodies.

The first substantive issue addressed by the Legal Subcommittee was the intended scope of the treaty. Due to the intense interest in reaching an agreement as quickly as possible, the subcommittee rejected the concept of a time-consuming, detailed treaty and, instead, adopted the concept of a treaty containing general principles.[156]

As to the substance of the treaty, the subcommittee used both the U.S. and the U.S.S.R. draft treaties as starting points. Although they shared many common features, the drafts differed in scope. The Soviet draft extended coverage to both outer space and celestial bodies. The U.S., however, included only celestial bodies.[157] Predictably, many countries supported the draft version of the leader of their political alignments. Several Western nations, however, supported the Soviet view as a result of perceived practical difficulties in enforcing the treaty if it were limited to just celestial bodies. The U.S. noted these Western views and concluded that a consensus had been formed in which the treaty should apply to both outer space and celestial bodies.[158] With the U.S. then committed to

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[153] Dembling & Arons, *The Evolution of the Outer Space Treaty*, 33 J. Air L. & Comm. 419, 427 (1967) (hereinafter cited as Dembling & Arons).

[154] 55 Dep't State Bull. 249 (1964).

[155] *Id.* at 251.

[156] Dembling & Arons, *supra* note 153, at 428.

[157] *Id.* This narrow scope contrasts with earlier U.S. drafts which included *both* outer space and celestial bodies. This shift in focus was intentional. Due to the expansive use of satellites, the U.S. wanted to address the use of outer space in the context of general disarmament talks. *See* Menter, *supra* note 25, at 583, and *supra* text accompanying notes 153-54.

[158] Dembling & Arons, *supra* note 153, at 429.

a broad scope, negotiations proceeded and the final agreement was signed on January 27, 1967.

The preceding information provides important background for a full understanding of the Treaty. As the Treaty captures the substance of earlier resolutions and discussions, knowledge of these earlier activities illuminates the meaning of the present Treaty. Thus, the following article-by-article analysis of the Treaty will refer to those earlier events, as well as the negotiations which took place on the specific article.

A. ARTICLE I

In discussing the legality of military activities in outer space, most commentators have omitted any substantive discussion of Article I.[159] This omission is probably due to the generalized scope of the article. In fact, some have argued that the article is really a preamble and thus of little legal significance.[160] Such a characterization is inaccurate. Article I is substantive and affects the scope of military activities in outer space.

Article I, paragraph 1, provides: "The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind."

A threshold question to be answered regarding the intent of this article and the remaining Treaty is the difference between "use" and "exploration." Professor Dembling has concluded that most states agreed with the French delegate that "use" means exploitation.[161] Thus, Article I, paragraph 1, limits the exploitation and exploration of outer space and celestial bodies to those activities that benefit all nations, irrespective of their state of economic or scientific development.

Because paragraph 1 specifically notes that the benefits shall inure to all states irrespective of their *economic or scientific* development, it appears that the intent of this paragraph is commercial—to ensure that outer space is open in the future to all, regardless of the state's current stage of economic or scientific development. The fact that the developing countries insisted upon this paragraph bolsters the argument asserting its commercial intent.[162]

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[159] *See* Bridge, *supra* note 36, at 655.

[160] M. Markoff, *Disarmament and "Peaceful Purposes" Provisions in the 1967 Outer Space Treaty*, 4 J. Space L. 3, 12 (1976)(citing comment of Ambassador Goldberg) (hereinafter cited as Markoff).

[161] Dembling & Arons, *supra* note 153, at 431.

[162] *Id.* at 430.

Notwithstanding this commercial intent rationale, Professor Markoff has argued that this paragraph is a sweeping and comprehensive ban upon all military activities in outer space and upon celestial bodies.[163] Professor Markoff asserted that

> a new principle implying a fixed obligation to use outer space exclusively for peaceful purposes, without specific reference to the language of "peaceful purposes" has been introduced into the text of the Treaty. This has been accomplished through the provision in the Principle Treaty that the exploration and use of outer space shall be carried out for the benefit and in the interests of all countries. The principle of peaceful purpose has been achieved through a form of circumlocution in which several words are employed rather than the single word "peaceful." This has produced a prescription which is a logical derivation and which undoubtedly excludes all military uses of outer space.[164]

Professor Markoff further explained that the term "for the benefit and in the interest of all countries'' is mutually exclusive with military activities because the mere possession of any military power is necessarily a threat to at least one other country. Therefore, his argument concluded that the use (exploitation) of outer space for military purposes cannot be a use for the benefit and in the interest of all countries.

As the SDI is clearly a military activity in outer space, it would be prohibited by the Treaty under Professor Markoffs view. For him, the fact that the SDI is a defensive weapon is not a difference with a legal distinction. Markoff concluded that the language of Article I, paragraph 1, covers all military activities, offensive and defensive, including surveillance, communication, and reconnaisance.[165]

This conclusion must be examined in light of the subsequent articles of the Treaty. In particular, Article III, which provides that states shall conduct their extraterrestial activities in a manner consistent with the U.N. Charter and other international agreements, supports the argument that Article I does not prohibit defensive weapons in outer space. The U.N. Charter specifically recognizes the right of states to take armed action for their individual and collective self-defense.[166] This right

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[163]Markoff, *supra* note 160, at 11
[164]*Id*
[165]*Id*. at 14.
[166]U.N. Charter art. 51.

is the foundation for all international agreements.[167] Unless there is contrary language in Article III of the Outer Space Treaty, this right of self-defense, embodied in Article 51 of the U.N. Charter, lawfully applies to the activities of states in outer space. There is no such limitation in Article 111; therefore, the right of self-defense in Article 51 applies to outer space. Thus, defensive actions, including stationing defensive weapons, are permissible in outer space.

Next, Professor Markoffs argument for an expansive view of Article I must be viewed in light of the specific language of Article IV regarding military activities in outer space and upon celestial bodies. Article IV, paragraph 1, prohibits placing weapons of mass destruction in orbit. The second paragraph of Article IV prohibits the establishment of military bases on celestial bodies and limits all activities on them to exclusively peaceful purposes. If Professor Markoff is correct that Article I prohibits all military activities in outer space, then the prohibitions and limitations contained in Article IV are superfluous. To determine whether Professor Markoffs argument is correct, one must examine Article IV in detail.

B. ARTICLEIV

This article presents the clearest prohibition on certain military uses of outer space. It was deemed sufficiently prospective that because of it President Johnson declared the Treaty to be the "most important arms control development since the Limited Test Ban Treaty of 1963."[168] Soviet commentators have echoed those remarks by declaring that "the treaty establishes a regime of total neutralization and demilitarization of celestial bodies and partial demilitarization of outer space."[169] The article contains two paragraphs that support President Johnson's and the Soviet's lofty expectations.

Paragraph I provides that the parties "undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner." In essence, this paragraph declares outer space and celestial bodies to be nuclear-free zones.

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[167] *But see* G. Zhukov & Y. Kolsov, International Space Law 60 (1984) in which the Soviet authors contend that the adoption of the western view that Article 51 is coextensive with the Outer Space Treaty "clearly ignores the indisputable fact that the right of every state to defend itself is not unlimited," (hereinafter cited as Zhukov & Kolsov).

[168] 55 Dep't State Bull. 952 (1966).

[169] Zhukov & Kulosov, *supra* note 167, at 55.

The subjects of this paragraph's proscription are orbital weapons of mass destruction. It is clear that weapons of mass destruction are defined as weapons that are intended to have indiscriminate effect upon large population and geographical areas.[170] The definition does not include grenades or conventional artillery munitions, but does include nuclear, chemical, and biological weapons.[171] Therefore, this paragraph is only a limited disarmament provision as it does not proscribe stationing weapons of less than mass destruction.

This narrow focus reflects the concerns of the era in which the Outer Space Treaty was negotiated. During this period, states considered placing nuclear bombs in orbit above other states.[172] This strategy envisioned that, upon the commencement of hostilities, these nuclear bombs would be released upon their intended targets. The language of this paragraph reflects the drafters' intention to preclude only this type of space-based offensive warfare. Thus, the paragraph has a narrow scope in that it only bars the placement of weapons of mass destruction, *i.e.*, nuclear weapons, in outer space. A further demonstration that the drafters only intended the paragraph to ban the orbiting of weapons of mass destruction is the drafters' agreement that the Outer Space Treaty does not proscribe the stationing of land-based ICBMs, even though their flight trajectory takes them through outer space.[173]

Paragraph 1 is clearly an attempt at *partial* demilitarization of outer space; the only activity prohibited is the emplacement of weapons of mass destruction. It is also clear that weapons which fall outside of the definition of "weapons of mass destruction" are outside the ban.[174] Thus, the first paragraph does not affect the deployment of SDI.

Paragraph 2 of Article IV provides that:

> The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful explora-

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[170] W. Mallison, *The Laws of War and the Juridical Control of Weapons of Mass Destruction in General and Limited Wars*, 36 *Geo.* Wash. L. Rev. 308 (1967).

[171] *Id.* at 322.

[172] Lay & Taubenfeld, *supra* note 20, at 27.

[173] Bridge, *supra* note 36, at 655.

[174] Zhukov & Kolsov, *supra* note 169, at 55, 56.

tion of the moon and other celestial bodies shall also not be prohibited.

This paragraph differs from the first paragraph in several noteworthy respects. For example, the language of each sentence specifically refers to the moon and other celestial bodies. Excluded from its language, and, therefore, the scope of the paragraph is outer space. Read in conjunction with the first paragraph, Article IV is a partial demilitarization provision that treats outer space differently than celestial bodies, including the moon.

Having distinguished the proscriptions which apply to outer space and celestial bodies, it would appear that the SDI is unaffected by Article IV. Specifically, because paragraph 1 only bans the orbiting of weapons of mass destruction, the SDI is unaffected because it is not a weapon of mass destruction.[175] Similarly, the SDI is unaffected by the second paragraph's demilitarization provision because the SDI equipment will not be placed upon any celestial body, including the moon. Some commentators, however, strongly disagree.

Professor Markoff believes that the Treaty bans military activity both in outer space and upon celestial bodies.[176] Disregarding the precise language of the Treaty, Professor Markoff reasons that the contracting parties did not intend to distinguish between outer space and the celestial bodies in proscribing military activity.[177] Thus, Professor Markoff believes that outer space is subject to the same prohibitions that apply to celestial bodies. His conclusion flows from a two-step process.

First, Professor Markoff states that Article I of the Treaty is a fixed, all-inclusive, substantive obligation that takes precedence over all other articles of the Treaty.[178] Specifically, he argues that Article IV is merely an illustration of the principles embodied in the peaceful purposes language of Article I.[179] To determine whether specific military activity is prohibited, Professor Markoff examines Article I, not Article IV. In short, this rationale excises Article IV from the Treaty, except to the extent that its illustrative terms are relevant to understand Article I.

Having determined that Article I is the predominant substantive article of the Treaty, Professor Markoff then examines the lawfulness of

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[175] *See* text accompanying note 170.
[176] Markoff, *supra* note 160, at 17.
[177] *Id.* at 19.
[178] *Id.* at 15: "It is Article I(1) and not Article IV, that fixes and determines the fundamental criterion of reference relating to the legal use of outer space."
[179] *Id.* at 17.

specific conduct only in light of Article I; unless, of course, the illustrative values of other articles are relevant. In his analysis, Professor Markoff acknowledges that Article I refers only to exploration and exploitation of outer space and celestial bodies "for the benefit and in the interest of all countries."[180] He argues that this phrase is a term of art that is intended to have the same meaning as "peaceful purposes," which is, in fact, the language used in Article IV.[181] Thus Professor Markoff argues that outer space may be used only for "peaceful purposes."[182]

Professor Markoff argues that "peaceful purposes" excludes *all* military purposes, including both offensive and defensive activities,[183] and he concludes, therefore, that space-based defensive weapons are prohibited because of their purely military and non-peaceful character.[184]

Professor Markoffs view has been repudiated by both Western[185] and Soviet[186] commentators. Most critics have agreed that Professor Markoffs interpretation is faulty because it fails to recognize the political background which led to adoption of the Treaty.[187]

As stated earlier, the first step in Professor Markoffs argument is his conclusion that Article IV is not substantive, but merely illustrative of the predominant provisions in Article I. It is clear, however, that the inclusion of separate articles within the Treaty was deliberate.[188] The deliberate intent of the parties is demonstrated, in part, by the contrasting lengths of time expended by the parties in negotiating Article I as opposed to Article IV. Very little time and debate was required for agreement on Article I.[189] Article IV, however, was debated at great length and in considerable detail.[190] It is inconceivable that the parties would have debated a disarmament article in such great detail over such a long period of time if it was merely illustrative of a disarmament article over which they had only briefly debated.

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[180] *Id.* at 11.
[181] *Id.*
[182] *Id.* at 16.
[183] *Id.* at 10.
[184] *Id.* at 17: "No 'exclusively peaceful' exploration can be conceived under the cover of military 'defensive' arms."
[185] C. Christol, The Modern International Law of Outer Space 25 (1982) (hereinafter cited as Christol).
[186] Zhukov & Kolosov, *supra* note 167, at 57.
[187] Christol, *supra* note 185, at 12; P. Magno, *How to Avoid the Militarization of Outer Space?*, published in International Institute of Space Law of the International Astronautical Federation. Proceedings of the 26th Colloquium in the Law of Outer Space 222 (Oct. 10-15, 1983, Budapest Hungary) (hereinafter cited as 26th Colloquium).
[188] Christol, *supra* note 185, at 25.
[189] Dembling & Aron, *supra* note 153, at 429.
[190] *Id.* at 435.

Next, the conduct of the parties is inconsistent with the interpretation advanced by Professor Markoff. Due to the extensive use of military satellites, both the U.S. and the U.S.S.R. intentionally limited disarmament discussions to the celestial bodies.[191] Limiting disarmament provisions of Article IV to celestial bodies was seen by both the U.S. and the U.S.S.R. as a key to unlocking prospects for success in general disarmament negotiation.[192] This approach reflects the general view that military uses of outer space, in the form of reconnaisance, navigation, and communication satellites, act as a stabilizing factor in international affairs. By insuring advanced warning of attack, satellites also preserve, if not enhance, security.[194] Thus, the logical conclusion is that the parties intentionally omitted any language from the Treaty which would totally demilitarize outer space.

Finally, it is clear that when debating the various proposals, the parties always knowingly distinguished outer space from celestial bodies.[195] In fact, the Soviet representative concurred with the U.S. position that outer space was not demilitarized by the Treaty by stating, "A number of questions would, of course, remain to be dealt with after the adoption of the Treaty, particularly the use of outer space for exclusively peaceful purposes."[196] Recently, Soviet commentators have confirmed this declaration by stating that "in the present absence of language totally demilitarizing outer space, international documents refer to the exploration and use of outer space for 'peaceful purposes exclusively' merely as a goal to be pursued."[197]

It is clear that the parties did not intend Article IV to be only illustrative of the prohibitions contained in Article I. Rather, the parties knowingly and purposely intended that Article IV, and not Article I, embody the substantive limitations on military uses of outer space. Thus, as Article IV does not ban the orbital placement of defensive particle beam and laser weapons, the SDI is unaffected by the Treaty.

Assuming, arguendo, that Professor Markoff's application of Article I does apply to outer space, an examination of Professor Markoffs second step—the definition of peaceful purposes—does not prohibit the SDI. As

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[191] *Id.* at **433.**
[192] Christol, *supra* note 185, at **124.**
[193] *Id.* at 28; *see* Lay & Taubenfeld, *supra* note 20, at 25.
[194] *Id.* at 28; *see* Lay & Taubenfeld, *supra* note 20, at 29.
[195] *Id.* at 20; Magno, *supra* note 187, at 222; Reijnen, *The Term "Peaceful" in Space Law, reprinted in* 26th Colloquium, *supra* note 187, at **147.**
[196] Statement of P. Morozov, Ambassador Extraordinary and Pleniputentiary of the USSR before the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space, U.N. Doc. A/AC.105/C.2/SR.66, at 6 (Oct. 21, 1966).
[197] Zhukov & Kolosov, *supra* note 167, at **57.**

stated earlier, the second step of his argument is that Article I limits outer space exploration and exploitation to "peaceful purposes."[198] Professor Markoff, in concert with many other commentators, has defined "peaceful purposes" as non-military purposes.[199] In particular, the Soviets have argued that this phrase means non-military purposes because military activity could never be peaceful because such activity will always bear a relationship, actually or potentially, to violence.[200]

This argument is supported by analogous provisions of the Antarctica Treaty. Article I of that treaty simply provides that "Antarctica shall be used for peaceful purposes only."[201] The argument concludes that because the Antarctica Treaty was intended to totally demilitarize Antarctica, the use of the same language in the Outer Space Treaty must evidence the same intention, *i.e.*, to totally demilitarize outer space and the celestial bodies,[202]

Unlike the Soviets, the West interprets the term "exclusively for peaceful purposes" to include only aggressive actions, not all military action. This Western view asserts that the "exclusively peaceful" use of celestial bodies mirrors the Outer Space Treaty's reference in Article III to conduct in accordance with the U.N. Charter.[204] As the Charter permits states to take actions in self-defense, the term "peaceful purposes" must permit those actions and bar only aggressive acts that are also barred by the U.N. Charter.[205] Further, this Western view asserts that the drafters' reliance upon the customary international law of the seas is necessarily incorporated into the Treaty through Article III's inclusion of all applicable international laws.[206] In particular, customary international law recognizes the right of armed vessels to patrol international waters to promote the U.N. Charter's commitment to maintaining international peace and security.[207] The Outer Space Treaty's application of the U.N. Charter to outer space and celestial bodies must necessarily cre-

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[198] *See* text accompanying notes 180-84.

[199] *See* Markoff, *supra* note 160, at 7.

[200] *See, e.g.*, Zhukov & Kolosov, *supra* note 167, at 60; Piradov & Maiorsky, On the Question of the Non-Use of Force in Outer Space and From Space Against the Earth, to be published in the *27th Colloquium on the Law of Outerspace* at 2.

[201] Antarctica Treaty, 12 U.S.T. 794, T.I.A.S. 4780, 402 U.N.T.S. 71 (1959).

[202] Markoff, *supra* note 160, at 19.

[203] Almond, *Toward Shared Interpretations of the Critical Policy Dimensions of Space Law*, published in *26th Colloquium*, *supra* note 172, at 271, 276, *Menter*, *supra* note **25,** at 585; L. Lipson & N. Katzenbach, American Bar Association Report to the National Aeronautics and Space Administration on the Law of Outer Space 25 (1961).

[204] Menter, *supra* note 25, at 585.

[205] *Id.*

[206] *Id*

[207] Bridge, *supra* note 36, at 658, 663.

ate that same right in outer space.[208] This argument concludes that outer space and celestial bodies are subject to the same legal regime as terrestrial activities.

Both the negotiating history and the conduct of the parties support the Western interpretation. The United States made clear that its use of the term "peaceful purposes" was coextensive with the Treaty's reference to the U.N. Charter.[209] The well-established rule that peaceful purposes includes the right of a state to self-defense was highlighted by Senator Albert Gore of Tennessee in an address to the U.N. General Assembly in 1962:

> It is the view of the U.S. that outer space should be used only for peaceful — that is nonaggressive and beneficial — purposes. The question of military activities in space cannot be divorced from the question of military activities on earth. To banish these activities in both environments we must continue our efforts for general and complete disarmament with adequate safeguards. Until this is achieved, the test of any space activity must not be whether it is military or non-military, but whether or not it is consistent with the U.N. Charter and other obligations of law.[210]

In addition to the history of the Treaty negotiations, the parties' conduct is inconsistent with interpreting "peaceful purposes" as allowing only non-military uses of outer space. As stated earlier, each party has made extensive use of outer space by orbiting various satellites.[211] If Professor Markoffs view is correct that all military uses of outer space are prohibited, then the parties would have intended to prohibit the orbiting of military satellites. This the parties did not intend.[212] On the contrary, the parties have agreed that defensive uses of outer space, particularly reconnaissance satellites, provide stability and security.

Based upon the foregoing, Professor Markoffs theory is meritless. The parties did not intend to demilitarize outer space. The same language of the Treaty that permits the use of military satellites in outer space also

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[208] Wulf, Outer Space Arms Control: Existing Regime and Future Prospects, to be published at *27th* Colloquium *on* the *Law of Outer Space* 6 (1985).
[209] Christol, supra note 185, at 29.
[210] U.N. Doc. A/C.1/PV. 1289 at 13 (1962).
[211] *See* text acconipanying note 193.
[212] Almond, supra note 203, at 277.

permits the use of particle beam and laser weapons.[213] Thus, the SDI is clearly unaffected by the Outer Space Treaty.

VII. CONCLUSION

As examined above, the international community has undertaken several steps to control the military use of outer space. The success of these steps is illustrated by the current absence of weapons in outer space. Outer space is not demilitarized, however, as many states have launched surveillance and communication satellites into earth orbit. The SDI is the first weapons system to be proposed for deployment in outer space. Although the SDI is arguably a defensive weapon, it marks a significant change in the use of outer space. To the extent that it employs weapons platforms in earth orbit without any supporting structure on any celestial bodies, the proposal violates no international agreement except the ABM Treaty. Even that treaty is not violated by the initial Research Phase of the SDI. The subsequent phases of the SDI will clearly violate unambiguous terms of the ABM Treaty which prohibit space-based ABM systems. This violation may not arise if the U.S. repudiates the ABM Treaty, as is lawfully permitted.

[213] At least one Soviet commentator has asserted that "non-aggressive military activities in outer space have been limited, but not banned. Such activities might include the use of missiles to repel acts of aggression, the use of space objects (communication, navigation, meteorological satellites, *etc.*) as support means for military training, maneuvers and other activities of different branches of force in time of peace when they are not categorized as acts of aggression, as well as the use of space objects for testing weapons not prohibited by intended law." Klossov, *Notions of "Peaceful" and "Military" Space Activities*, published in *26th Colloquium*, *supra* note 187, at 118; ***see*** *also* Lay & Taubenfeld, *supra* note **20,** at 31, **32.**

A COMPREHENSIVE GUIDE TO THE MILITARY PRETRIAL INVESTIGATION

by Major Larry A. Gaydos*

I. INTRODUCTION

No specification or charge may be referred to a general court-martial unless there has been a thorough and impartial pretrial investigation conducted in substantial compliance with Article 32 of the Uniform Code of Military Justice (UCMJ).[1] The UCMJ specifically states that failure to comply with Article 32 is not jurisdictional error;[2] a defective Article 32 investigation, however, may deprive the accused of a substantial pretrial right[3] and warrant appropriate relief at trial.[4]

Commentators and courts frequently compare the Article 32 investigation to the federal preliminary examination and the federal grand

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[1]Uniform Code of Military Justice art. 32(a), 10 U.S.C. § 832(a) (hereinafter cited as UCMJ); Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 405(a) (hereinafter cited as R.C.M.).

[2]UCMJ art. 32(d) provides that "[t]he requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error."

[3]The Court of Military Appeals, following dicta in the case of Humphrey v. Smith, 336 U.S. 695 (1949), has consistently accorded special significance to the pretrial hearing. In United States v. Parker, 6 C.M.A. 75, 19 C.M.R. 201, 207 (1955) the court held that "an impartial pretrial hearing is a substantial right which should be accorded an accused. . . . We frown on attempts to whittle it away. We, therefore, start with the premise that a record discloses error when it shows that a perfunctory and superficial pretrial hearing was accorded an accused."

In United States v. Mickel, 9 C.M.A. 324, 26 C.M.R. 104 (1958), the court expanded the concept of enforcement of pretrial hearing rights: "If an accused is deprived of a substantial pretrial right on timely objection, he is entitled to judicial enforcement of his right, without regard to whether such enforcement will benefit him at the trial."

[4]R.C.M. 405(a) discussion; R.C.M. 906(b)(3).

jury.[5] Although the Article 32 investigation is not exactly equivalent to either federal proceeding, it has elements of both and serves as the soldier's counterpart in guaranteeing that the accused will not be tried on baseless charges.[6]

The Court of Appeals for the District of Columbia Circuit has emphasized the significance of the pretrial investigation.' In *Talbot v. Toth*[8] the accused was charged with murder and was placed in pretrial confinement. He petitioned for a writ of habeas corpus arguing that court-martial procedures denied him due process. He specifically contended that the lack of a grand jury inquiry and indictment constituted a denial of procedural due process. Recognizing that the fifth amendment exempts "cases arising in the land or naval forces" from the requirement of indictment by grand jury, the court of appeals went on to add that:

> These provisions of the Uniform Code [Articles 32 and 34] seem to afford an accused as great protection by way of preliminary inquiry into probable cause as do requirements for grand jury inquiry and indictment. . . . Thus, the basic purpose of a hearing preliminary to trial is being met by a method designed pursuant to constitutional provisions, and the method meets all elements essential to due process.[9]

The purpose of this article is to provide a comprehensive guide to the law applicable to the Article 32 pretrial investigation and the Article 34 pretrial advice.

Bee, e.g., United States v. Nichols, 8 C.M.A. 119, 23 C.M.R. 343 (1957) (Sooner or later the military services must realize that this process is the military counterpart of a civilian preliminary hearing, and it is judicial in nature and scope.); MacDonald v. Hodson, 19 C.M.A. 582, 42 C.M.R. 184 (1970) (The Article 32 investigation partakes of the nature both of a preliminary judicial hearing and of the proceedings of a grand jury.). ***See also*** Murphy, ***The Formal Pretrial Investigation,*** 12 Mil. L. Rev. 9 (1961); Moyer, ***Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant,*** 22 Me. L. Rev. 105(1970).

[6]United States v. Samuels, 10 C.M.A. 206, 27 C.M.R. 280 (1959) (It is apparent that the Article [32 investigation] serves a twofold purpose. It operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges.). ***See generally*** Fed. R. Crim. P. 5.1 (Preliminary Examination); Fed. R. Crim. P. 6 (The Grand Jury).

'Talbot v. Toth, 215 F.2d 22 (D.C. Cir. 1954).

[8]*Id.*

[9]*Id.* at 28.

PART ONE—THE ARTICLE 32 PRETRIAL INVESTIGATION

II. THE PURPOSE OF THE INVESTIGATION

A. STATUTORY

The three statutorily recognized purposes of the Article 32 pretrial investigation are to (1) inquire into the truth of the matters set forth in the charges; (2) consider the form of the charges; and (3) obtain an impartial recommendation as to the disposition that should be made of the case.[10] Although the recommendations of the investigating officer are only advisory,[11] the investigation provides the convening authority with a screening device to identify and dismiss specifications which are not supported by available evidence or which are otherwise legally deficient. The convening authority is specifically precluded from referring a Specification to a general court-martial if the staff judge advocate concludes in the pretrial advice that the specification is not warranted by the evidence indicated in the Article 32 report of investigation.[12]

B. DISCOVERY

Although the Article 32 investigation was not originally designed to be a defense discovery procedure,[13] the broad rights afforded the accused

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[10] UCMJ art. 32(a); R.C.M. 405(a) discussion.

[11] R.C.M. 405(a) discussion. See also Green v. Widdecke, 19 C.M.A. 576, 42 C.M.R. 178 (1970) (investigating officer's recommendation that the accused be prosecuted for voluntary manslaughter did not preclude referral of an unpremeditated murder charge).

[12] UCMJ art. 34(a)(2).

[13] There is some disagreement whether the Article 32 investigation was originally intended to be a defense discovery device. There is some support in the legislative history for both sides of the issue, Proponents of the position that the Article 32 investigation was intended to be a defense discovery device point to the following testimony given by Mr. Larkin before the House Committee on Armed Services:

> [The Article 32 investigation] goes further than you usually find in a proceeding in a civil court in that not only does it enable the investigating officer to determine whether there is probable cause . . . but it is partially in the nature of a discovery for the accused in that he is able to find out a good deal of the facts and circumstances which are alleged to have been committed which by and large is more than an accused in a civil case is entitled to.

Hearings on *H.R.* 2498 Before a Subcomm. *of* the House Comm. on Armed Services, 81st Cong., 1st Sess. 997 (1949).

Opponents of the defense discovery position point to the fact that the hearings taken as a whole demonstrate an intent to create a mechanism for determining the existence of probable cause. Any utility the investigation may have as a discovery tool is viewed as a purely coincidental by-product of this probable cause determination. See generally United States v. Connor, 19 M.J. 631 (N.M.C.M.R.1984), *petition* granted, 20 M.J. 363 (C.M.A. 1985). Because the defense discovery purpose is not mentioned anywhere else in the legislative history, or in Article 32 itself, the better view is probably that defense discovery was intended only to be a collateral consequence of the investigation.

to have reasonably available witnesses" and evidence[15] produced at the investigation make it a useful discovery tool. Appellate courts have generally recognized that the Article 32 investigation does fulfill a legitimate defense discovery purpose.[16] This discovery purpose has also been recognized by the drafters of Military Rule of Evidence (Rule) 804[17] and Rule for Courts-Martial (R.C.M.) 405.[18]

C. PRESERVATION OF TESTIMONY AS A COLLATERAL PURPOSE

In addition to its express statutory purposes and recognized discovery purpose, the Article 32 investigation also serves a collateral purpose related to the preservation of testimony. The Article 32 investigating officer is charged with identifying whether potential witnesses will be available for trial" and evidentiary rules allow for some Article 32 testimony to be used at trial.[20]

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[14] R.C.M. 405(g)(1)(A). **See generally infra** section IV.

[15] R.C.M. 405(g)(1)(B). **See generally infra** section IV.

[16] *See, e.g.*, United States v. Roberts, 10 M.J. **308, 311** (C.M.A. **1981)** (There is no doubt that a military accused has important pretrial discovery rights at an Article **32** investigation. Nevertheless, such pretrial discovery is not the sole purpose of the investigation nor is it unrestricted in view of its statutory origin.); United States v. Payne, **3** M.J. **354, 357** n.14 (C.M.A. **1977)** (One of Congress' intentions in creating the Article **32** investigation was to establish a method of discovery.); United States v. Samuels, **10** C.M.A. 206, 212, 27 C.M.R. **280, 286 (1959)** (It is apparent that the Article **[32** investigation] serves a twofold purpose. It operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges.); United States v. Tomaszewski, **8** C.M.A. **266, 24** C.M.R. **76 (1957)** (The Article **32** investigation "operates as a discovery proceeding."). *But* **see** United States v. Eggers, **3** C.M.A. **191, 194, 11** C.M.R. **191, 194 (1953)** (Discovery is not a prime object of the pretrial investigation. At most it is a circumstantial by-product—and a right unguaranteed to defense counsel.); United States v. Connor, **19** M.J. **631** (N.M.C.M.R. 1984), *petition granted*, **20** M.J. **363** (C.M.A. **1985).**

[17] In discussing whether testimony at the Article **32** investigation should fall with the federal "former testimony" exception to the hearsay rule, the drafters of Rule **804** specifically addressed the discovery role of the Article **32** investigation.

> Because Article **32** hearings represent a unique hybrid of preliminary hearings and grand juries with features dissimilar to both, it was particularly difficult for the Committee to determine exactly how. . . the Federal Rule would apply *to* Article **32** hearings, The specific difficulty stems from the fact that Article **32** hearings were intended by Congress to function as discovery devices for the defense as well as to recommend an appropriate disposition of charges to the convening authority.

Mil. R. Evid. 804(b) analysis **(1980)** (the Military Rules of Evidence will be cited as Rule in the text and Mil. R. Evid. in the footnotes).

[18] After outlining the primary (statutorily recognized) purposes of the Article **32** investigation, the drafters of R.C.M. **405** state that "[t]he investigation also serves as a means of discovery." R.C.M. 405(a) discussion.

"R.C.M. 405(h)(1)(A) discussion; Dep't of Army, Pamphlet No. **27-17,** Procedural Guide For Article 32(b) Investigating Officer, para. 3-3*a* (Mar. **1985)** (hereinafter cited as **DA** Pam **27-17);see** *also* **DD Form 457,** Investigating Officer's Report, block **16** (Aug. **1984).**

[20] Mil. R. Evid. **613** (impeachment with prior inconsistent statements); Mil. R. Evid. 801(d)(1) (prior statements of witnesses admissible as substantive evidence); Mil. R. Evid. 804(b)(1) (former testimony of unavailable witnesses admissible as substantive evidence).

1. Prior statements under Rule 801(d)(1).

Under Rule 801(d)(1) prior statements of a witness are admissible at trial as substantive evidence if the witness testifies at trial and the prior statement fits within one of three categories: (1) prior consistent statements offered to rebut an express or implied charge that the witness' in-court testimony was recently fabricated; (2) statements of identification of a person made after perceiving the person; or (3) prior inconsistent statements given under oath subject to the penalty for perjury at a trial, hearing, or other proceeding.

While all three categories of prior statements can have important applications at trial, the last category, prior inconsistent statements, is the one that is potentially the most useful for counsel. It is not uncommon for witnesses to change the substance of their testimony between the time of the Article 32 hearing and the time of trial. Because all testimony at the Article 32 hearing must be given under oath,[21] except unsworn statements by the accused,[22] and false testimony at the Article 32 hearing can be punished as perjury,[23] Article 32 testimony can be ad-

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[21] R.C.M. 405(h)(1)(A).

[22] R.C.M. 405(f)(12) and 405(h)(1)(A).

[23] Military witnesses are subject to court-martial for perjury under Article 131. UCMJ art. 131 defines the crime of perjury as follows:

> Any person subject to . . . [the Code] who in a judicial proceeding or in a course of justice willfully and corruptly—
>
> (1) upon a lawful oath or in any form allowed by law to be substituted for an oath, gives any false testimony material to the issue or matter of inquiry. . . .
>
> . . . .
>
> is guilty of perjury and shall be punished as a court-martial may direct.

The phrase "in a course of justice" includes an investigation conducted under Article 32. MCM, 1984, Part IV, para. 57c(1). *See also* United States v. Crooks, 12 C.M.A. 677, 680, 31 C.M.R. 263, 266 (1962) ("That the Article 32 investigation is a 'judicial proceeding or in a course of justice' within the meaning of Article 131 is not open to question."); United States v. Poole, 15 M.J. 883 (A.C.M.R. 1983) (Accused convicted of committing perjury while testifying at an Article 32 investigation.).

Civilian witnesses and military witnesses who testify falsely at an Article 32 hearing could be tried in federal court for perjury in violation of 18 U.S.C. § 1621 (1982). 18 U.S.C. § 1621 provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury. . . . This section is applicable whether the statement or subscription is made within or without the United States.

mitted as a prior inconsistent statement. The prior testimony serves not only to impeach the witness' in-court testimony,[24] it also can be considered on the merits as substantive evidence to establish an element of the offense or to raise a defense.[25]

2. Former testimony under Rule 804(b)(1).

Under Rule 804(b)(1) testimony given at an Article 32 hearing is admissible at a subsequent trial if there is a verbatim transcript of the Article 32 testimony, the witness is unavailable to testify at the trial, and the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony at the Article 32 hearing.[26]

The report of the Article 32 investigation must include the substance of the witness testimony taken on both sides.[27] The investigating officer ordinarily will summarize the testimony and, when practical, will have the witness swear to the truth of the summary.[28] Although the accused has no right to have a verbatim transcript of the Article 32 hearing prepared,[29] the appointing authority can direct that a verbatim transcript be taken.[30] When a verbatim transcript is not ordered originally, but audio recordings of the testimony are made to assist the investigating officer in producing a summarized transcript, those tape recordings may later constitute a verbatim record of testimony under Rule 804(b)(1).[31]

Witness unavailability for the purpose of admitting Article 32 testimony as an exception to the hearsay rule is generally defined in Rule

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A more difficult, and unanswered, question exists regarding the admissibility under Mil. R. Evid. 810(d)(1) of prior Article 32 testimony given by a foreign national who is not amenable to a perjury prosecution before a U.S. tribunal. Arguably the prior inconsistent statement would be admissible if the false Article 32 testimony would be punishable as perjury under the laws of the nation where the testimony occurred or under the laws of the nation where the witness held citizenship. Alternatively, counsel could attempt to have the statement admitted under the general hearsay exception in Mil. R. Evid. 804(b)(5).

[24] *See* Mil. R. Evid. 613.

[25] Mil. R. Evid. 801(d)(1) analysis (1980).

[26] Mil. R. Evid. 804(b)(1).

[27] R.C.M. 405(j)(2)(B).

[28] R.C.M. 405(h)(1)(A) discussion.

[29] United States v. Allen, 5 C.M.A. 626, 18 C.M.R. 250 (1955); United States v. Matthews, 13 M.J. 501 (A.C.M.R. 1982)(The lack of a verbatim Article 32 transcript in a capital case did not deprive the accused of the sixth amendment right to effective representation by counsel.);United States v. Fredrick, 7 M.J. 791 (N.C.M.R.1979).

[30] R.C.M. 405(c) gives the appointing authority the power to establish procedures for conducting the investigation so long as the procedures established are not inconsistent with the Rules for Courts-Martial.

[31] The requirement that a verbatim record of the testimony be produced was added to Fed. R. Evid. 804(b)(1) to ensure accuracy of the former statement. The actual tape recordings of the testimony would be the most accurate record of the testimony available. Mil. R. Evid. 804(b)(1) analysis (1980).

804(a).[32] When the former Article 32 testimony is to be introduced by the government, the accused's right to confront witnesses against him or her also impacts upon the government's obligation to demonstrate unavailability. The confrontation clause requires the government to demonstrate a good faith effort to obtain the witness' presence at trial.[33] The Supreme Court defined this "good faith" requirement in *Ohio v. Roberts*:[34]

> [I]f no possibility of procuring a witness exists . . . "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation. "*The* lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness."[35]

The greatest stumbling block to the admissibility of Article 32 testimony pursuant to Rule 804(b)(1) is the requirement that opposing counsel had an opportunity and similar motive to develop the Article 32 testimony through direct, cross, or redirect examination.[36] The proponent of the evidence bears the burden of establishing this "opportunity and similar motive."[37]

There are two typical situations where counsel opposing the admission of former testimony may argue the lack of opportunity to develop the testimony at the Article 32. First, counsel opposing the evidence at trial may argue that they were not personally present at the Article 32. The

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[32] Mil. R. Evid. 804(a) provides that a declarant is unavailable when the declarant—

> **(1)** is exempted by ruling of the military judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> **(2)** persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or
>
> (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> **(5)** is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance . . . by process or other reasonable means; or
>
> **(6)** is unavailable within the meaning of Article 49(d)(2).

[33] Barber v. Page, 390 U.S. 719 **(1968).**
[34] 448 U.S. 56 (1980).
[35] *Id.* at 74.
[36] Mil. R. Evid. 804(b)(1).
[37] *Id.* analysis (1980).

defense counsel representing the accused at trial may not have been hired until after the Article 32 hearing or may have allowed detailed military counsel to handle the pretrial investigation.[38] Government counsel also may decide not to attend the Article 32 hearing, even though entitled to attend as the government's representative,[39] and instead allow the investigating officer to conduct the examination.

Second, counsel may argue that they had no opportunity to inquire into certain areas of cross-examination because of limited investigation and preparation time, or because important evidence concerning the case was not discovered until after the investigation.[40]

Although military case law does not yet address all of these specific issues, federal courts do not take such a restrictive view of the opportunity requirement." Common law required an identity of parties and an identity of issues between the trial and the pretrial hearing,[42] but these requirements may be somewhat relaxed when admissibility is analyzed in terms of opportunity and similar motive.[43]

There is little doubt that in any given case a defense counsel's motive to develop a government witness' testimony at the Article 32 hearing may be different than the motive the defense counsel would have at trial. The defense counsel may treat the Article 32 hearing as a discovery device to conduct an "initial interview'' of the witness, as a practice opportunity to try a new advocacy technique, or as a pro forma proceeding where little or no defense counsel participation is necessary. Because the recommendations of the investigating officer are purely advisory[44] it may not be to the accused's benefit to discredit the government witness at the Article 32 hearing. If the defense counsel believes the charges inevitably will be referred to trial by general court-martial, the prudent de-

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[38] At the Article 32 hearing the accused has the right to be represented by detailed military counsel, to request available individual military counsel, or to hire a civilian counsel. R.C.M. 405(d)(2).

[39] R.C.M. 405(d)(3).

"The investigating officer is charged with conducting a timely investigation. R.C.M. 405(j)(1). If the accused is in pretrial confinement, the report of investigation should be forwarded to the general court-martial convening authority within eight days of the imposition of the confinement. UCMJ art. 33.

[41] *See generally* M. Graham, Handbook on Federal Evidence 903 (1981). *See also* United States v. Zurosky, 614 F.2d 779, 791 (1st Cir. 1979)("[Fed. R. Evid. 804(b)(1)] doesn't focus on practical realities facing defense counsel but rather upon the scope and nature of the opportunity for cross-examination permitted by the court."). A change in counsel after the pretrial hearing will not, standing alone, defeat the admissibility of former testimony under Mil. R. Evid. 804(b)(1). United States v. Kelly, 15 M.J. 1024 (A.C.M.R. 1983). *Accord* Ohio v. Roberts, 448 U.S. 56 (1980).

[42] M. Graham, Handbook on Federal Evidence 903 (1981).

[43] *Id. See also* United States v. Hubbard, 18 M.J. 678, 683 n.1 (A.C.M.R. 1984).

[44] R.C.M. 405(a) discussion.

fense counsel will seek to conceal the defense strategy and will save effective areas of cross-examination and impeachment for trial where the element of surprise can be used to the best tactical advantage.

Notwithstanding that the defense counsel's motives may be dissimilar *in fact,* the courts vary in how they assess the presence or absence of this "similar motive" as a matter of law.

The drafters' analysis to Rule 804(b)(1) suggests that a defense counsel who uses the Article 32 hearing for discovery rather than impeachment would not have a "similar motive" within the intended meaning of Rule 804(b)(1).[45] The drafters go on to suggest that although the defense counsel's assertion of his or her motive is not binding on the military judge, the prosecution has the burden of establishing admissibility and that burden "may be impossible to meet should the defense counsel adequately raise the issue."[46]

Military courts have not found it as difficult to find "similar motive" as the drafters suggested in their analysis. In *United States v. Hubbard"* the Army Court of Military Review noted with approval the broad interpretation that federal courts have given the term "similar motive" used in Federal Rule of Evidence (Federal Rule) 804(b)(1).[48] Instead of accepting the defense counsel's assertion as to motive, the court determined the issue by an objective examination of counsel's conduct at the Article 32 hearing.[49] In *Hubbard* the defense counsel conducted a thorough, lengthy, and vigorous cross-examination that covered all obvious areas of possible attack;[50] and thus objectively demonstrated a similar motive.

The Navy-Marine Court of Military Review went further and held the drafters' analysis of Rule 804(b)(1) to be of "little persuasive value."[51] In *United States v. Connor* the court interpreted the legislative history of Article 32 as refuting any specific discovery purpose behind the investigation. Instead they viewed the investigation strictly as a probable cause determination which coincidentally provided an opportunity for some defense discovery.[52] Accordingly, the "similar motive" requirement con-

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"Mil. R. Evid. 804(b)(1) analysis (1980).

[46] *Id.*

"18 M.J. 678 (A.C.M.R. 1984).

[48] *Id.* at 683 n.1.

[49] *Id.* at 682. Accord S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 376-77 (1981).

[50] *Hubbard*, 18 M.J. at 683 (The court specifically noted that the defense counsel attempted to discredit the government witness with prior inconsistent statements and by showing past criminal activity of the witness.).

"United States v. Connor, 19 M.J. 631 (N.M.C.M.R. 1984), *petition* grunted, 20 M.J. 363 (C.M.A. 1985).

[52] *Id.* at 636.

tained in Rule 804(b)(1) was interpreted to require nothing more than an "opportunity" to cross-examine the witness at a proceeding where there is identity of parties and identity of issues.[53]

The Army Court of Military Review approach outlined in *Hubbard* represents the better view. In *Connor* the Navy-Marine court failed to recognize that the "similar motive" requirement is more than a suggestion by the drafters of the Military Rules of Evidence. It is a foundational element specifically contained in both Federal Rule 804(b)(1) and Rule 804(b)(1), and actually *replaced* the old requirements of identity of parties and identity of issues.[54] Additionally, the court in *Connor* failed to recognize the role "similar motive" plays in satisfying the confrontation clause by ensuring that the former testimony has the requisite indicia of reliability.[55]

An unresolved issue is the extent to which one party can impose a "similar motive" on opposing counsel by announcing beforehand that he or she intends to use the witness' Article 32 testimony as "former testimony" should the witness become unavailable for trial.

III. PARTICIPANTS

A. APPOINTING AUTHORITY

Unless prohibited by service regulations, any court-martial convening authority can appoint an Article 32 investigating officer and direct that

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[53] *Id.* at 638. In reaching this conclusion the Navy-Marine Court of Military Review relied primarily on the fact that the legislative history to Article 32 did not expressly provide for a discovery role and an analysis of the old "reported testimony" hearsay exception contained in MCM, 1951, para. 145b.

[54] M. Graham, Handbook on Federal Evidence 903 (1981). The Navy-Marine Court of Military Review relied on United States v. Eggers, 3 C.M.A. 191, 11 C.M.R. 191 (1953) and United States v. Burrow, 16 C.M.A. 94, 36 C.M.R. 250 (1966). Both cases pre-dated Mil. R. Evid. 804(b)(1). In *Eggers* and *Burrow* the Court of Military Appeals declined the opportunity to read a "similar motive" requirement into the reported testimony hearsay exception. The court did not address the issue of what "similar motive" would mean were it an actual part of the evidentiary rule contained in the Manual for Courts-Martial. *Cf.* United States v. Feldman, 761 F.2d 380 (7th Cir. 1985), where the court held that the "similar motive" requirement of Fed. R. Evid. 804(b)(1) required more than a mere "naked opportunity" to cross-examine, In assessing the party's motive to develop testimony, the court said the judge should consider the type of proceeding in which the testimony is given, counsel's trial strategy, potential penalties or financial stakes, and the number of issues and parties. *Id.* at 385.

[55] Ohio v. Roberts, 448 U.S. 56 (1980). ***See*** *also* United States v. Thornton, 16 M.J. 1011 (A.C.M.R. 1983). In *Thornton* the government introduced a sworn statement of the victim under the residual hearsay exception, Mil. R. Evid. 804(b)(5), arguing in part that defense cross-examination of the victim at the Article 32 investigation provided the "indicia of reliability" required by the confrontation clause. The Army Court of Military Review rejected that argument saying "it is more than a possibility that the defense counsel used the Article 32 hearing for discovery purposes alone." *Thornton*, 16 M.J. at 1014.

an investigation be conducted.[56] There is no requirement that the appointing authority be neutral and detached. In fact, by definition, the appointing authority will order an Article 32 investigation only after making the determination that the charged offenses possibly merit trial by general court-martial.[57] Although all convening authorities have the general authority to order an Article 32 investigation, that perogative can be curtailed or circumscribed by a superior convening authority.[58]

B. INVESTIGATING OFFICER

The appointing authority who directs an Article 32 investigation also appoints an investigating officer to conduct the investigation.[59] The investigating officer must be mature[60] and impartial,[61] and must conduct the investigation as a quasi-judicial proceeding.[62]

1. Maturity.

The investigating officer must be a commissioned officer.[63] The Manual for Courts-Martial goes on to define "maturity" in terms of a preference for a field grade officer or an officer with legal training.[64] Although there is no requirement that a lawyer serve as investigating officer, many jurisdictions do make lawyers available to serve as investigating officers—particularly in complex or serious cases.[65]

2. Impartiality.

Article 32 entitles the accused to a "thorough and *impartial* investigation,"[66] but neither the UCMJ nor the Manual goes on to further define

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[56] R.C.M. 405(c).

"United States v. Wojciechowski, 19 M.J. 577 (N.M.C.M.R. 1984) (No error occurred where special court-martial convening authority told the accused he was going to send the case to a general court-martial, even though the special court-martial convening authority had not yet received the report of the Article 32 investigation.).

"United States v. Turner, 17 M.J. 997 (A.C.M.R. 1984) (The general court-martial convening authority can require subordinate convening authorities to appoint one of two designated officers to perform any investigation conducted pursuant to Article 32, UCMJ.). ***See generally*** United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983.).

[59] R.C.M. 405(d)(1).

[60] R.C.M. 405(d)(1) discussion.

[61] R.C.M. 405(a).

[62] R.C.M. 405(d)(1) discussion; United States v. Payne, 3 M.J. 354 (C.M.A. 1977).

[63] R.C.M. 405(d)(1).

[64] R.C.M. 405(d)(1) discussion. Although the MCM, 1984, does not discuss these qualifications as indicative of "maturity" they are carried over from MCM, 1969, Para. 34*a*, which did discuss them in that context.

[65] ***See, e.g.***, United States v. Durr, 47 C.M.R. 622 (A.F.C.M.R. 1973). ***See also*** United States v. Davis, 20 M.J. 61 (C.M.A. 1985) (The court encouraged the use of lawyers as investigating officers noting that "the use of legally trained persons to perform the judicial duties involved avoids some of the complaints lodged against lay judges.").

[66] UCMJ art. 32(a).

when an investigating officer should be disqualified because of lack of impartiality. The only specific prohibition in the Manual is that the accuser is disqualified from serving as investigating officer."

Case law provides some guidance as to when a person should be disqualified from serving as an investigating officer. Prior knowledge about a case, standing alone, does not disqualify an officer from serving as an Article 32 investigating officer.[68] By the same token, participation in a related case, as an investigating officer[69] or military judge,[70] is not a disqualification. *An* officer is disqualified from serving as an investigating officer if he or she has had a prior role in perfecting the case against the accused[71] or has previously formed or expressed an opinion concerning the accused's guilt.[72]

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[67]United States v. Cunningham, 12 C.M.A. 402, 30 C.M.R. 402 (1961)(Appointment of an accuser as the pretrial investigating officer is inconsistent with the codal requirement of a thorough and impartial investigation of the charges.);R.C.M. 405(d)(1).

[68]United States v. Schreiber, 16 C.M.R. 639 (A.F.B.R. 1954). The investigating officer detailed to investigate Schreiber's case had previously been the Article 32 investigating officer in a related case. The board of review held that mere familarity with the facts and details of a case was not a disqualification.

[69]United States v. Collins, *6* M.J. 256 (C.M.A. 1979). During the course of Airman Collins' Article 32 hearing, the investigating officer discovered that Collins had threatened potential witnesses in the investigation. After the investigating officer passed this information to the appointing authority, the appointing authority directed the same investigating officer to include the allegations of communicating a threat in the ongoing Article 32 investigation. The court held that the investigating officer's actions did not make him an accuser and did not manifest a lack of impartiality.

[70]United States v. Jones, 20 M.J. 919 (N.M.C.M.R. 1985); United States v. Wager, 10 M.J. 546 (N.C.M.R. 1980)(A military judge who presides over a companion case is not automatically disqualified from later serving as the Article 32 investigating officer in a co-accused's case.).

"United States v. Parker, 6 C.M.A. 75, 19 C.M.R. 201 (1955). In ***Parker*** a "serious incident investigator" was assigned the task of assisting CID in the investigation of a series of offenses. This investigator accompanied the accused to CID headquarters and assisted in the interrogation, eventually getting the accused to confess. This same serious incident investigator was then appointed the Article 32 investigating officer. As the Article 32 investigating officer his "hearing" consisted of no more than a consideration of his own prior investigative file. Calling this scenario "not even token compliance with Article 32," the Court of Military Appeals held that the investigating officer's prior role in "solving these mysteries and insuring an ironclad conviction of the wrongdoer" deprived him of impartiality. ***See*** *also* United States v. Lopez, 20 C.M.A. 76, 42 C.M.R. 268 (1970).

[72]United States v. Natalello, 10 M.J. 594 (A.F.C.M.R. 1980). In ***Natalello*** an investigating officer of a related case determined from his investigation that Natalello was also involved in the offenses he was investigating. Charges were brought against Natalello and the same investigating officer was detailed to conduct the Article 32 investigation. The court held that he should have been disqualified because of "his prior conclusions drawn and expressed about the accused's culpability."

As a general proposition an investigating officer should be disqualified anytime his or her impartiality reasonably might be questioned.[73]

3. Quasi-judicial character

It is well established in case law that the Article 32 investigation is a judicial (or quasi-judicial) proceeding[74] and that the investigating officer performs a quasi-judicial function.[75] Accordingly, courts require the investigating officer to comply with applicable provisions of the ABA Code of Judicial Conduct and the ABA Standards for Criminal Justice.[76] Although there are a number of ethical standards which have been applied to the Article 32 investigating officer,[77] the most significant provisions involve the prohibition against *ex parte* communications.[78]

"United States v. Castleman, 11 M.J. 562 (A.F.C.M.R. 1981). The Article 32 investigating officer in *Castleman* was a good friend of the accuser-main government witness in the case. In holding that the investigating officer should have disqualified himself, the court relied on the ABA Standards for Criminal Justice, The Function of the Trial Judge, Standard 1.7 (1972) which states, 'The trial judge should recuse himself whenever he has any doubt as to his ability to preside impartiality in a criminal case *or whenever he believes his impartiality can reasonably be questioned"* (emphasis supplied). *Compare* United States v. Reynolds, 19 M.J. 529 (A.C.M.R. 1984) (where the court declined the opportunity to decide whether a judge advocate was disqualified from being the Article 32 investigating officer in a case where the trial counsel, assistant trial counsel, and government witnesses were all co-workers assigned to other branches of the same staff judge advocate office), *petition granted,* 20 M.J. 363 (C.M.A. 1985) *with* United States v. Davis, 20 M.J. 61 (C.M.A. 1985) (investigating officer should have recused himself where his supervisory relationship with defense counsel could impair defense counsel's effectiveness in representing the accused).

"See, e.g., United States v. Samuels, 10 C.M.A. 206, 212, 27 C.M.R. 280, 286 (1959) ("It is judicial in nature."); United States v. Nichols, 8 C.M.A. 119, 124, 23 C.M.R. 343, 348 (1957) ("Its judicial character is made manifest by the fact that testimony taken at the hearing can be used at the trial if the witness becomes unavailable.").

[75] United States v. Payne, 3 M.J. 354, 355 n.5 (C.M.A. 1977) ("[T]he investigating officer must be viewed as a judicial officer, and functio accordingly."); United States v. Collins, 6 M.J. 256, 258 (C.M.A. 1970) (The Article 32 investigating officer is referred to as "the Article 32 judicial officer.").

[76] *United States v. Payne, United States v. Collins;* United States v. Grimm, 6 M.J. 890 (A.C.M.R. 1979).

[77] *See, e.g., Collins,* 6 M.J. at 259:

> The Standards Relating to the Administration of Criminal Justice, as compiled by the American Bar Association regarding the Function of the Trial Judge, provide proper guidelines for any person acting in a judicial capacity or quasi-judicial capacity. Without fully reiterating all the General Standards relating to the judicial person's obligations, we regard the duty to protect the witness [ABA Standards, The Function of Trial Judge § 5.4 (1972)] and the duty to maintain order [ABA Standards, The Function of Trial Judge § 6.3 (1972)] as pertinent to the facts of this case.

[78] Code of Judicial Conduct Canon 3A(4) provides:

> A judge should . . . neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

The general rule is that the Article 32 investigating officer must receive *all* legal advice from a *neutral* judge advocate *and* no advice concerning *substantive* matters can be given *ex parte*.[79] While the rule itself is easily stated, the courts have struggled in defining the parameters of the specific prohibitions.

When the Article 32 investigating officer is not legally trained, it is usually desirable to have a legally trained "advisor" available to assist the investigating officer in conducting a legally sufficient investigation and to address the myriad of legal questions which arise during the course of a typical investigation.

The investigating officer must get *all* his or her legal advice from a neutral legal advisor.[80] Communications with non-neutral personnel are permissible only if they involve patently trivial administrative matters, *e.g.*, when to take a lunch break.[81] The trial counsel appointed to attend the Article 32 hearings as the government representative is clearly not neutral.[82] Generally, anyone performing a "prosecutorial function" is disqualified from serving as legal advisor to the Article 32 investigating of-

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> *Commentary*: The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

Standards for Criminal Justice, Special Functions of the Trial Judge § 6-2.1 (1980) provide, "The trial judge should insist that neither the prosecutor nor the defense counsel nor any other person discuss a pending case with the judge ex parte, except after adequate notice to all other parties and when authorized by law or in accordance with approved practice."

[79] *United States* v. *Payne*. The court in *United States v. Grimm* interpreted *Payne* as follows:

> We read *Payne* as forging two tests for error. First, does the individual furnishing *any* advice to an I.O. serve in a prosecutorial function? If so, there is error. Second, did the I.O. obtain advice from a non-prosecutor advisor on a *substantive* question without prior notice to all other parties? If so, again there is error.

6 M.J. at 893.

[80] *United States v. Payne* (To do otherwise would constitute an abandonment of the required impartiality and would result in a derogation of the judicial functions inherent in that office.).

[81] *Grimm*, 6 M.J. at 893 n.8 (We believe that reason mandates that the "advice" *Payne* condemns does not include patently trivial matters, *e.g.*, scheduling of a hearing room or arranging for a legal clerk or court reporter to assist the I.O. Notwithstanding, the better practice would be to minimize I.O. and prosecution contacts on even administrative matters.).

[82] *Payne*, 3 M.J. at 355 ("However laudable . . . [the investigative officer's] . . . desires to confer with someone more 'familiar' with the case may have been, we find that these ex parte discussions with the prosecuting attorney were violative of his role as a judicial officer.").

ficer.[83] Although the determination of whether a chief of military justice or a trial counsel for another jurisdiction is performing a "prosecution function" depends on the specific facts in the case,[84] the better practice is to appoint a judge advocate having no criminal law related responsibilities as the legal advisor for the Article 32 investigation.[85]

Even when the Article 32 investigating officer does go to a neutral legal advisor for advice, if the advice involves substantive matters, it cannot be given *ex parte.*[86] In theory, advice concerning purely procedural matters can be given *ex parte;* however, the distinction between substance and procedure is too illdefined to be of practical use.[87] The safest approach is to treat all advice as a matter of substance.

Unfortunately, it is unclear just what makes a communication *"ex parte."* When must the parties be given notice of the substantive advice sought and what forum must be utilized in providing the parties an opportunity to respond to the advice received?

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[83] *United States v. Payne; United States v. Grimm.*

[84] *United States v. Grimm.* In *Grimm* the court discussed whether the chief of criminal law at Ft. Ord performed a "prosecutorial function" within the meaning of *Puyne.* Holding that regular duty titles are not dispositive of the issue, the court went on to look at the actual duty functions of the chief of criminal law. The court concluded that *this* chief of criminal law did not perform a prosecutorial function where his duties were primarily administrative in nature, consisting of monitoring pretrial and post-trial processing, making recommendations to the SJA regarding disposition of a case, assigning trial counsel to cases, and rating trial counsel on efficiency reports. The chief of criminal law did not appear in court as a trial counsel, did not direct the trial tactics or strategy of trial counsel, and did not routinely advise law enforcement personnel.

[85] For example, legal assistance officers, claims judge advocates, or administrative law specialists.

[86] *United States v. Grimm.*

[87] In *Payne*, 3 M.J. at 355 n.4, the court cited "questions of the applicable burden of proof, evidentiary standards, and most critically, the legality of the search which produced the incriminating evidence" as examples of substantive rather than procedural matters. In *Grimm,* 6 M.J. at 894, government counsel at trial and on appeal conceded that substantive advice was given "regarding the role a weapon would have to play to support an aggravated assault charge." In United States v. Saunders, 11 M.J. 912 (A.C.M.R. 1981), the Article 32 investigating officer had an *ex parte* conversation with the accused's battalion commander regarding the accused's mental capacity and mental responsibility. The court treated this as an impermissible *ex parte* communication. *But see* Judge Lewis' dissent:

> I cannot believe that Congress intended that the full panoply of the American Bar Association Canons of Judicial Ethics be applicable to investigating officers. Few could find fault with the notion that an investigating officer loses his required neutrality and detachment where he is receiving *en parte* substantive advice from the person who will later prosecute the case as occurred in *Payne.* Here the communication was with a non-prosecutor and conveyed the same information that later came before the investigating officer properly.

Id. at 916.

The ABA Code of Judicial Conduct seems to sanction after-the-fact notice to the parties,[88] while the ABA Standards for Criminal Justice and case law require prior notice to the parties.[89] Although no authority requires that the legal advice be given in the context of a full adversarial proceeding,[90] none of the cases discusses the minimum acceptable procedures.

As a practical matter the government's interests are protected best by using procedures which fully document the context of all investigating officer-legal advisor communications. Once the defense fairly raises the issues of substantive *ex parte* advice, the government bears the burden of showing by clear and convincing evidence that substantive matters were not discussed or that the accused was not prejudiced.[91]

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[88]Code of Judicial Conduct Canon 3A(4) provides that a judge "may obtain the advice of a disinterested expert on the law . . . if he gives notice to the parties of the person consulted and the substance of the advice. . . ."

[89]Standards for Criminal Justice, Special Functions of the Trial Judge § 6-2.1 (1980) provides that no person may "discuss a pending case with the judge ex parte, except after adequate notice to all other parties. . . ." In *Grimm*, 6 M.J. at 894, the court, after finding that the neutral legal advisor had discussed a substantive matter with the investigating officer, went on to conclude that "[i]nasmuch as counsel for the accused and the prosecution were not given prior notice, we find a violation of *Payne*. . . ."

[90]In two concurring opinions Judge Jones distinguished the Article 32 hearing from a trial and suggested that

> The Article 32 investigating officer should be required to list in his report the names of all persons from whom he obtained legal advice on substantive questions, but he should not be required to obtain the advice in an adversary proceeding. This would convert the investigation into a "mini-trial" and only cause delay without adding a concurrent benefit to the accused or the Government.

Grimm, 6 M.J. at 896 (Jones, J., concurring); United States v. Crumb, 10 M.J. 520, 528 n.3 (A.C.M.R.1980) (Jones, J., concurring).

[91]*Payne*, 3 M.J. at 357.

> Although we determine that the Article 32 investigating officer was acting in violation of the applicable standards of conduct for the judicial office he served, it is nonetheless incumbent upon us to examine the record for a determination of whether this impropriety prejudiced the appellant. We are not unmindful of the inherent difficulty presented by requiring a defendant to demonstrate the prejudice resulting from improper actions by a judicial officer, the full extent or text of which he may be unaware in part or whole. We conclude that this is a mutter requiring a presumption of prejudice. Absent clear and convincing evidence to the contrary, we will be obliged to reverse the case.

Id. (emphasis added). In Puyne the government was able to meet the burden because of the extensive testimony of the Article 32 investigating officer and because the officer who rendered the advice prepared extensive notes outlining the matters discussed. The court concluded its decision, however, by warning that in "future cases when testing for prejudice, we will resolve doubts against the judicial officer who participates in such a practice." *Id*, at 358.

Once an officer has served as an Article 32 investigating officer in a case he or she is disqualified from subsequently serving as trial counsel,[92] military judge,[93] court member,[94] or staff judge advocate [5] with respect to that case. The investigating officer subsequently can serve as defense counsel only if requested by the accused.[96]

C. COUNSEL

1. Government counsel.

The appointing authority who directed the Article 32 investigation may detail, or request an appropriate authority to detail, counsel to represent the government at the investigation.[97] Counsel representing

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The problems inherent in this area were well illustrated in United States v. Brunson, 15 M.J. 898 (C.G.C.M.R. 1982). In Brunson the Article 32 investigating officer conducted numerous *ex* parte discussions concerning substantive and procedural matters with non-neutral officers. Because the parties involved did not build a complete record of the substance of all *ex* parte discussions, the court held that the government had failed to overcome the presumption of prejudice by clear and convincing evidence. Id. at 901. The General Counsel, Department of Transportation filed a certificate for review asking the Court of Military Appeals to require the accused to show actual prejudice rather than apply a presumption of prejudice under Puyne. United States v. Brunson, 15 M.J. 72 (C.M.A. 1982). The Court of Military Appeals responded by summarily affirming the presumption of prejudice test, citing *Puyne* as controlling authority. United States v. Brunson, 17 M.J. 181 (C.M.A. 1983).

[92] UCMJ art. 27(a)(2).

[93] UCMJ art. 26(d).

[94] UCMJ art. 25(d)(2).

[95] UCMJ art. 6(c) (investigating officer is disqualified from serving as staff judge advocate to any reviewing authority upon the same case); UCMJ art. 64(a) (investigating officer is disqualified from preparing the post-trial review); accord United States v. Jollif, 22 C.M.A. 95, 46 C.M.R. 95 (1973) (The Article 32 investigating officer is disqualified from later drafting the post-trial review for the staff judge advocate.). *See* also R.C.M. 405(d)(1) ('The investigating officer is disqualified to act later in the same case in any other capacity."). But *see* United States v. Beard, 15 M.J. 768 (A.F.C.M.R. 1983) (The Article 32 investigating officer, who was subsequently made the SJA to the accused's special court-martial convening authority, was not "acting as a staff judge advocate" where the only function he performed relating to the accused's case was the ministerial act of recommending changes in court-martial panel membership.).

[96] UCMJ art. 27(a)(2).

[97] R.C.M. 405(d)(3)(A). UCMJ art. 32 is silent regarding the presence of government counsel at the investigation. Originally the Article 32 hearing was treated as an *ex* parte proceeding in that the government was not formally represented as a party. United States v. Samuels, 10 C.M.A. 206, 212, 27 C.M.R. 280, 286 (1959). In United States v. Young, 13 C.M.A. 134, 32 C.M.R. 134 (1962), the legal advisor to the Article 32 investigating officer attended the hearing and assisted the investigating officer by examining witnesses and advising on legal rulings. The same legal advisor was subsequently detailed trial counsel and prosecuted the case. The court sanctioned this practice, holding that it did not violate Article 27(a) because the legal advisor had not become the *de facto* investigating officer and that the participation of the legal advisor or even a member of the prosecution is permissible so long as it does not displace or encroach upon the impartiality of the investigating officer.

In United States v. Weaver, 13 C.M.A. 147, 32 C.M.R. 147 (1962), the court specifically approved the practice of having a government representative participate in the Article 32 investigation:

the government appears as a partisan advocate and cannot function as the legal advisor to the Article 32 investigating officer.[98] As a partisan advocate, the government representative may question witnesses who appear at the Article 32 hearing,[99] may examine any evidence considered by the investigating officer,[100] and may argue for an appropriate disposition of the case.[101]

2. Counsel for the accused.

The Article 32 investigation is a critical stage in the prosecution of a case and, therefore, the accused is entitled to be represented by counsel.[102] The accused's right to counsel at the Article 32 hearing are the same as they are at trial[103] and generally include the right to be represented by a detailed military counsel,[104] the right to be represented by individually requested military counsel if that counsel is reasonably avail-

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> The Article 32 investigation is an important part of court-martial procedure. Manifestly, the Government as well as the accused has an immediate and material interest in the proceedings. Although no provision of the Uniform Code or the Manual requires the Government to be present, its appearance may be desirable and helpful . . . "we can find no fault with the practice, which has the legitimate effect of making the investigation an adversary proceeding, presided over by the investigating officer."

Id. at 149 (citations omitted). Based on *Weaver*, the 1969 Manual for Courts-Martial contained a specific authorization that "if the accused is represented by counsel, the government may be represented by counsel with equivalent qualifications designated by the officer who directed the investigation, at the discretion of the latter." MCM, 1969, para. 34c; Dep't of Army, Pamphlet No. 27-2, Analysis of Contents, Manual for Courts-Martial, United States 1969, Revised Edition, p. 7-4 (July 1970). This provision was later changed to simply provide that "The government may be represented at the investigation by counsel designated by the officer who directed the investigation." MCM, 1969, para. 34c (C6, 1 Sept. 1982).

"United States v. Payne, 3 M.J. 354 (C.M.A. 1977). The court in *Payne* specifically overruled United States v. Young, 13 C.M.A. 134, 32 C.M.R. 134 (1962) and its progeny to the extent they sanctioned this practice. Puyne, 3 M.J. at 357.

[98] DA Pam 27-17, para. 1-2*d*.

[100] R.C.M. 405(h)(1)(B).

[101] DA Pam 27-17, para. 1-2*d*.

[102] UCMJ art. 32(b) ("The accused has the right to be represented at that investigation as provided in . . . Article 38 . . . and in regulations prescribed under that section."); R.C.M. 405(f)(4).

[103] UCMJ art. 32(b). *See also* United States v. Tomaszewski, 8 C.M.A. 266, 24 C.M.R. 76 (1957) where the court rejected the government argument that counsel could include nonlawyer officers:

> [T]he connection between the investigation and the trial itself is so close that we are of the opinion that Congress did not intend to differentiate between the two in regard to the qualifications of counsel appointed for the accused. We conclude, therefore, that the accused is entitled to be represented by the same kind of counsel to which he is entitled at trial, namely, counsel qualified within the meaning of Article 27(b).

Id. at 79.

[104] UCMJ art. 38(b)(3)(A); R.C.M. 405(d)(2)(A).

able,[105] and the right to be represented by civilian counsel at no expense to the United States Government.[106]

The accused must be advised of his or her right to be represented by counsel at the investigation;[107] the accused's elections regarding the rights to counsel should be documented in the report of the investigation.[108] Although the accused has the right to hire civilian counsel, the government is not required to delay the investigation for an unreasonable amount of time to facilitate the retention of civilian counsel.[109]

Counsel for the accused has the right to cross-examine witnesses at the investigation,[110] to compel production of reasonably available witnesses and evidence,"[111] and to argue for an appropriate disposition of the case.[112]

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[105] UCMJ art. 38(b)(3)(B); R.C.M. 405(d)(2)(B). *See also* United States v. Courtier, 20 C.M.A. 278, 279, 43 C.M.R. 118, 119 (1971) ("[t]he right to the assistance of counsel of one's own choice during the pretrial proceedings, when such counsel is reasonably available, is a substantial right entitled to judicial enforcement"). For a discussion of the procedures used in processing a request for individual military counsel and in determining when counsel is "reasonably available" *see* R.C.M. 506 and Dep't of Army, Reg. No. 27-10, Military Justice, para. 5-7 (1 July 1984) (hereinafter cited as AR 27-10).

[106] UCMJ art. 38(b)(2); R.C.M. 405(d)(2)(c). *See also* United States v. Nichols, 8 C.M.A. 119, 23 C.M.R. 343 (1957) (The accused's right to be represented by civilian counsel cannot be curtailed by a service-imposed obligation to obtain a security clearance for access to service classified matter.).

[107] UCMJ art. 32(a).

[108] R.C.M. 405(j)(2)(A). *See also* DA Pam 27-17, para. 2-3; DD Form 457 (Aug. 1984).

[109] R.C.M. 405(d)(2)(c) ("The investigation shall not be unduly delayed for [the purpose of obtaining civilian counsel]."). *See generally* United States v. Bowie, 17 M.J. 821 (A.C.M.R. 1984) (Military judge did not abuse his discretion in denying the accused a continuance to hire a civilian counsel where the accused had already been given more than two months delay, the accused was still unable to name a specific firm or counsel he desired to retain, and the government had gone to the expense of bringing witnesses from a substantial distance.); United States v. Brown, 10 M.J. 635 (A.C.M.R. 1980) (Military judge did not abuse his discretion in denying a continuance for the accused to hire a civilian counsel where the accused had known for some time about his rights to counsel and the date of the scheduled trial; the government had relied on the scheduled date to produce witnesses at great expense and inconvenience and the nature of the delay was to resolve a fee problem.). *But see* United States v. Maness, 23 C.M.A. 41, 46, 48 C.M.R. 512, 517 (1974) ("[O]nly in 'an extremely unusual case' should an accused be 'forced to forego civilian counsel'. . . ." On the facts of the case it was error not to postpone the Article 32 hearing to allow the accused's retained civilian counsel to participate.); United States v. Lewis, 8 M.J. 838 (A.C.M.R. 1980) (The Article 32 investigating officer denied the accused a substantial right in failing to delay the investigation for a reasonable effort to seek out civilian counsel. Although the accused asked for no specific time delay there was no indication that the request was made for an improper motive and there was no indication that a few days delay would have inconvenienced or prejudiced the interests of the government.).

[110] UCMJ art. 32(b); R.C.M. 405(f)(8).

[111] UCMJ art. 32(b); R.C.M. 405(f)(9), (10).

[112] DA Pam 27-17, para. 3-3i.

D. OTHER PERSONNEL

Interpreters and reporters may be detailed, as needed, at the direction of the convening authority who initiated the investigation.[113]

IV. MATTERS CONSIDERED BY THE ARTICLE 32 INVESTIGATING OFFICER

A. SCOPE OF THE INVESTIGATION

Article 32 requires the investigating officer to conduct a "thorough" investigation of all matters set forth in the charges and specifically directs that this include an inquiry as to the truth of the matters set forth in the charges, a consideration of the form of the charges, and a recommendation as to the disposition which should be made of the case.[114]

Article 32 does not provide a general unlimited mandate to investigate criminal activity or criminal suspects, but rather should be limited to an investigation of issues raised by the charges and necessary to a proper disposition of the case.[115] The investigation may properly include an inquiry into the legality of a search, seizure, or confession, even though such an inquiry is not required[116] and the Article 32 investigating officer need not rule on the admissibility of evidence.[117] The investigation is not limited to an examination of witnesses and evidence mentioned in the allied papers accompanying the charges[118] but should include all reasonably available witnesses and evidence relevant to the investigation.[119]

B. EVIDENTIARY CONSIDERATIONS

1. Application of the Military Rules of Evidence.

The Military Rules of Evidence, other than Rules 301, 302, 303, 305, and Section V, do not apply in pretrial investigations.[120] If, during the in-

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[113] R.C.M. 405(d)(3). For a discussion of when a verbatim record is required *see infra* section V.

[114] UCMJ art. 32(a); R.C.M. 405(e).

[115] R.C.M. 405(a) discussion.

[116] R.C.M. 405(e) discussion.

[117] R.C.M. 405(i) discussion (an investigating officer may consider any evidence, even if that evidence would not be admissible at trial); R.C.M. 405(h)(2) (an investigating officer is not required to rule on any objections made by counsel at the Article 32 hearing).

[118] R.C.M. 405(a) discussion.

[119] *See generally* R.C.M. 405(g).

[120] Mil. R. Evid. 1101(d); R.C.M. 405(i). The military "rape shield" protections in Mil. R. Evid. 412 do not apply to the Article 32 investigation, although the investigating officer arguably can afford similar protection to a rape victim by enforcing Mil. R. Evid. 303's prohibition against degrading questions. R.C.M. 405(i) analysis. *See also* United States v. Martel, 19 M.J. 917 (A.C.M.R. 1985)(error for the investigating officer to consider matters covered by the marital privilege, Mil. R. Evid. 504(b)). *Cf.* United States v. Dagenais, 15 M.J. 1018 (A.F.C.M.R. 1983)(Witness at an Article 32 investigation could properly refuse to answer questions concerning alleged homosexuality where the questions were not material to the offenses being investigated and did not impact on the witness' credibility.).

vestigation, the investigating officer suspects a military witness of having committed an offense under the UCMJ, the investigating officer should comply with the warning requirements of Rule 305.[121]

2. *Form of the evidence.*

All testimony at the Article 32 investigation, except the testimony of the accused,[122] must be given under oath.[123] There is a preference for the personal appearance of witnesses and the actual production of relevant

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[121]UCMJ art. 31; Mil. R. Evid. 305; R.C.M. 405(h)(1)(A) discussion. See *also* United States v. Poole, 15 M.J. 883 (A.C.M.R. 1983)(Article 32 investigating officer is required to give rights warnings to a military witness when the investigator actually suspects that the person being questioned has committed an offense or "when the totality of circumstances are such that the questioner reasonably should have harbored that suspicion.")In *Poole* the accused was convicted of committing perjury at the Article 32 investigation of PFC Houck. PFC Houck was charged with being one of four soldiers who committed an assault and robbery near the 1-2-3 Club on post, PFC Houck's alibi was that he had been in PVT Poole's barracks room all evening, The allied documents accompanying the charges against PFC Houck contained several conflicting statements from PVT Poole. Two sergeants who escorted PVT Poole to the MP station for questioning made statements saying that PVT Poole admitted being at the 1-2-3 Club and intervening in a fight involving PFC Houck sometime during the weekend in question. In the sworn statement given to the military police, PVT Poole denied being near the 1-2-3 Club on Saturday night and supported PFC Houck's alibi. The allied papers also contained a second statement given by PVT Poole to the military police maintaining the alibi defense. This second statement was given after the military police advised Poole of his Article 31 rights. The military police suspected Poole of being involved in the assault and attempted robbery along with PFC Houck, and false swearing in his first statement. At PFC Houck's pretrial investigation, PVT Poole again .supported PFC Houck's alibi.

The court held that the totality of the circumstances was not such that the investigating officer should reasonably have suspected PVT Poole of any offense. The "mere existence of some circumstances that would suggest to a suspicious mind that a witness might have been involved" in the offense being investigated is not enough to trigger the rights warning requirement. *Id.* at 887. The courts also indicated that, although the test is an objective standard, it was appropriate to consider that the Article 32 investigating officer was not a trained investigator, had not done an Article 32 investigation before, and did not have a legal advisor present at the hearing.

Cf. United States v. Williams, 9 M.J. 831 (A.C.M.R. 1980). PVT Williams was also convicted of committing perjury as a witness at an Article 32 investigation. Unlike *Poole*, PVT Williams was never implicated as being involved in the offenses being investigated. Instead, PVT Williams was a government confidential informant who had made pre-investigation statements inculpating SP5 Johnson. PVT Williams was then called to testify as a government witness at SP5 Johnson's Article 32 investigation. At the Article 32 investigation PVT Williams had a "memory lapse" and was unable to remember the events being investigated and could not recall making any previous statements.

At Williams' court-martial (for AWOL and perjury) the defense argued that at some point during Williams' Article 32 testimony either the investigating officer or the government representative should have recognized that Williams was lying and should have read Williams his Article 31 rights for perjury. The court held that Article 31 does apply to witnesses at an Article 32 investigation when they are suspected of having committed ***past*** criminal offenses, but that Article 31 does not apply to future offenses and does not require the interruption of testimony at the Article 32 investigation to advise the witness that if they continue they subject themselves to possible perjury charges.

[122]R.C.M. 405(f)(12) (the accused has the right to make a statement in any form).

[123]R.C.M. 405(h)(1)(A). For a suggested form of the oath to be administered see R.C.M. 405(h)(1)(A) discussion.

evidence,[124] but alternative forms of evidence are permissible under some circumstances.[125]

When a witness is not reasonably available to appear personally at the Article 32 investigation,[126] the investigating officer can consider "(i) [s]worn statements; (ii) [s]tatements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is as claimed; (iii) [p]rior testimony under oath; and (iv) [d]epositions of that witness."[127] Arguably these alternative forms of evidence cannot be considered if the defense objects and the witness is reasonably available.[128]

The investigating officer cannot consider unsworn statements,[129] stipulations of fact, stipulations of expected testimony, or offers of proof of expected testimony if the defense objects.[130]

When the actual physical evidence is not reasonably available[131] the investigating officer may consider testimony describing the evidence, or an authenticated copy, photograph, or reproduction of similar accuracy of the evidence.[132] Arguably, these alternatives cannot be considered if the defense objects and the actual physical evidence is reasonably available.[133]

If the defense objects, the investigating officer cannot consider a stipulation of fact or a stipulation of expected testimony concerning the evidence, a stipulation as to the contents of a document, an unsworn statement describing the evidence, or an offer of proof concerning perti-

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[124] R.C.M. 405(g)(2)(B) discussion.

[125] *See generally* R.C.M. 405(g)(4), (5).

[126] For a discussion of reasonable availability *see* R.C.M. 405(g)(2) and *infra* section IV.

[127] R.C.M. 405(g)(4)(B).

[128] The 1969 Manual contained the simple prohibition that, "Upon objection by the accused or his counsel. statements of unavailable witnesses which are not under oath or affirmation will not be considered by the investigating officer." MCM, 1969, para. 34*d*.

The 1984 Manual went further and attempted to address consideration of various alternatives to testimony with more particularity. Although the drafters clearly did not intend these provisions to be more restrictive than the standards contained in the 1969 Manual, a literal reading of R.C.M. 405(g)(4)(B) arguably is more restrictive. The intent of the drafters was probably to acknowledge that if the defense objected and the witness was reasonably available, the witness had to be produced in addition to consideration of the sworn statement or other recognized testimony alternative.

[129] R.C.M. 405(g)(4)(A)(vi). *See also* United States v. Samuels, 10 C.M.A. 206, 213, 27 C.M.R. 280, 287 (1959) (A "statement of a witness may be considered by the investigating officer only if it is supported by oath or affirmation.").

[130] R.C.M. 405(g)(4)(A).

[131] For a discussion of reasonable availability *see* R.C.M. 405(g)(2)(C).

[132] R.C.M. 405(g)(5)(B).

[133] *See supra* note 130.

nent characteristics of the evidence.[134] Arguably, other alternative forms of the evidence, *e.g.,* unauthenticated copies, photographs, or reproductions, can never be considered.[135]

The investigating officer can consider other matters, such as a personal observation of the crime scene, so long as the parties are informed of the other evidence that will be considered and are given an opportunity to examine the evidence.[136]

C. DEFENSE EVIDENCE

At the pretrial investigation the defense has broad rights to have reasonably available witnesses and evidence produced, to cross-examine witnesses, and to present anything it may desire in defense or mitigation.[137]

1. Witnessproduction.

The witness production provisions of Article 32 provide the basis for a statutory confrontation guarantee and make the Article 32 investigation a useful defense discovery tool.[138] The courts recognize that the Article 32 investigation does perform a legitimate, but not unlimited, discovery

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[134] R.C.M. 405(g)(5)(A).

[135] *See supra* note 128. This interpretation has the anomalous effect of creating a more restrictive authentication requirement at the Article 32 hearing than at the actual courtmartial, despite the clear intent that the Military Rules of Evidence should not encumber the pretrial investigation.

[136] R.C.M. 405(h)(1)(B). *See also* United States v. Craig, 22 C.M.R. 466 (A.B.R. 1956)(Error for the Article 32 investigating officer to consider an Inspector General's Report which he then refused to disclose to the defense counsel because of its "confidential" classification.).

[137] UCMJ art. 32(b) provides, "At the investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigation officer shall examine available witnesses requested by the accused."

[138] *See, e.g.*, United States v. Roberts, 10 M.J. 308 (C.M.A. 1981); United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976); United States v. Samuels, 10 C.M.A. 206, 27 C.M.R. 280 (1959). Although courts readily recognized that Article 32 provides for a statutory confrontation right distinguishable from constitutional rights to confrontation, the exact difference has never been defined by the courts. As a general proposition, statutory confrontation under Article 32 has a more liberal definition of unavailability which in turn triggers the admissibility of testimony alternatives which have a lower indicia of reliability than would be required at an actual trial. ***Compare*** United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976) (balancing test for availability . . . sworn statements as testimony substitute) *with* Ohio v. Roberts, 448 U.S. 56 (1980)(good faith effort by government to procure the witness required. . .testimony substitute required to have extra indicia of reliability).

purpose.[139] Defining the limits of the defense right to have witnesses produced at the investigation has provided the courts some difficulty. The general rule is that upon timely request by the accused "any witness whose testimony would be relevant to the investigation and not cumulative, shall be produced if reasonably available."[140]

The determination of when a witness is reasonably available involves a balancing test.[141] "A witness is 'reasonably available' when the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance."[142] This balancing test should be applied to determine the "reasonable availability" of any defense requested witness regardless of whether the witness will be called by the prosecution or the defense at trial.[143] If the requested witness is not one which the prosecution is going to call at trial, the defense has the burden of providing enough information to the investigating officer to demonstrate the significance of the witness' testimony.[144]

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[139]United States v. Roberts, 10 M.J. 308, 311 (C.M.A. 1981) ("There is no doubt that a military accused has important pretrial discovery rights at an Article 32 investigation. Nevertheless, such pretrial discovery is not the sole purpose of the investigation nor is it unrestricted in view of its statutory origin."). **See** *also* United States v. Nichols, 8 C.M.A. 119, 23 C.M.R. 343, 352 (1957):

> There is a distinct advantage in having a dress rehearsal, and Congress has given that privilege to an accused. When it is taken away, among other things, the opportunity to probe for weaknesses in the testimony of witnesses is denied; the probability of developing leads for witnesses who may be of assistance to the defense is decreased.

[140]R.C.M. 405(g)(1)(A).

[141]United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976); R.C.M. 405(g)(1)(A).

[142]R.C.M. 405(g)(1)(A). The Manual test adopts the basic test announced in *United States v. Ledbetter* but goes on to add "delay" and "effect on military operations" as factors to be weighed against the significance of the witness' testimony.

[143]*United States v. Ledbetter*.

[144]United States v. Martinez, 12 M.J. 801 (N.M.C.M.R. 1981) (The defense request that members of a vessel's crew be brought from South America to testify at an Article 32 hearing in Charleston, South Carolina, was properly denied where the government did not plan to call the individuals as witnesses, and the defense wanted to question them regarding the character of the accused and the victim but was unable to do more than speculate as to the significance of their testimony.); United States v. Thomas, 7 M.J. 655 (A.C.M.R. 1979) (The defense request that a confidential informant be brought from the United States to testify at an Article 32 hearing in Germany was properly denied where the government did not intend to call the informant as a witness, and the defense could only speculate that the informant's testimony might support a possible entrapment defense.).

A witness who would be unavailable for trial under Rule 804(a) is *per se* "not reasonably available" for testimony at the Article **32** investigation.[145]

The Article **32** investigating officer makes the initial determination of whether a military witness is reasonably available.[146] Because a military witness is susceptible to the lawful orders of superiors and is usually available for worldwide travel on short notice, distance from the site of trial will generally not be the controlling factor in applying the balancing test.[147] This is especially true when the government transfers the witness shortly before the Article 32 hearing.[148] A military witness who

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[145]R.C.M. 405(g)(1)(A). Mil. R. Evid. 804(a) provides that a witness is unavailable when the witness

> **(1)** is exempted by ruling of the military judge on the ground of privilege from testimony concerning the subject matter of the declarant's statement; or
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> **(2)** persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or
>
> (3) testifies to a lack of memory of the subject matter of the declarant's statement; *or*
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance . . . by process or other reasonable means; or
>
> (6) is unavailable within the meaning of [UCMJ] Article 49(d)(2).

[146]R.C.M. 405(g)(2)(A).

[147]United States v. Cruz, **5** M.J. **286,** 288 n.4 (C.M.A. 1978) ("Availability of the service person is not measured in terms of distance from the trial,"); *Ledbetter,* **2** M.J. at 43 ("In *United States v. Davis*, . . . we rejected the notion that a serviceman's availability to testify at trial could be measured solely in terms of miles. . . . That rationale is equally appropriate . . . [at the Article **32** investigation, even though dealing with a] statutory standard of confrontation."). *See* United States v. Jones, 20 M.J. 919 (N.M.C.M.R.1985) (The investigating officer properly applied the *Ledbetter* balancing test in denying a defense request for production of his agents who investigated the case where the witnesses were 8000 miles away from the hearing site, the witnesses had a heavy workload, and the appointing authority elected not to fund travel for the witnesses.). *See* also United States v. Cumberledge, 6 M.J. **203** (C.M.A. 1979) (In dicta the court indicated that where TDY funds are available, time, distance, and expense were not very persuasive reasons to deny a defense request for production of the key prosecution witness at the Article *32* hearing.).

[148]*Ledbetter*, 2 M.J. at 44 (In applying the balancing test the substantial distance and **ex**pense involved in bringing the requested witness from Thailand to Florida was "diluted" by the fact that the witness had been transferred to Thailand only two weeks before the Article **32** investigation.).

is determined to be reasonably available can, and should, be ordered to testify absent the lawful assertion of a testimonial privilege.[149]

The Article 32 investigating officer's determination that a military witness is reasonably available can be reversed by the witness' immediate commander.[150] Any determination by the investigating officer or the witness' immediate commander that the witness is not reasonably available is reviewable at trial by the military judge.[151] The Article 32 investigating officer also makes the initial determination of whether a civilian witness is reasonably available by applying a balancing test.[152]

As a general proposition, a civilian witness cannot be compelled by subpoena to attend an Article 32 investigation.[153] If the civilian witness is employed by the United States Government and the Article 32 investigation concerns matters which are related to the civilian's job, the civilian witness can be ordered to testify as an incident of employment.[154] If

[149] United States v. Colter, 15 M.J. 1032 (A.C.M.R. 1983). In Colter the defense requested the production of PVT Jackson, the suspected confidential informant, as a witness at the Article 32 investigation. PVT Jackson appeared at the hearing but refused to testify. The Article 32 investigating officer, the appointing authority, and the general court-martial convening authority refused the defense request to order the witness to testify. The court ruled that absent a valid assertion of some privilege the accused was entitled to the compelled testimony of a reasonably available military witness. See generally Mil. R. Evid. 1101(The evidentiary rules of privilege are applicable to Article 32 investigations.).

[150] R.C.M. 405(g)(2)(A).

[151] R.C.M. 405(g)(2)(A); R.C.M. 906(b)(3). Disagreements between the investigating officer and the immediate commander of a requested witness can also be resolved in command channels. R.C.M. 405(g) analysis.

[152] R.C.M. 405(g)(1)(A).

[153] R.C.M. 405(g)(2)(B) discussion. This principle has been generally accepted in prior Manuals and in case law. *See, e.g.*, United States v. Chuculate, 5 M.J. 143 (C.M.A. 1978); MCM, 1951, para. 34d. *But* see United States v. Roberts, 10 M.J. 308, 310 n.1, 311 n.3 (C.M.A. 1981) where the court hinted that there may be some authority to support subpoena power at the Article 32 investigation. Citing the Index and Legislative History, Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess., 996-98, the court opined that "the legislative hearings on Article 32 provide some indication that the use of a subpoena at the pretrial investigation was contemplated in extraordinary situations." *Roberts*, 10 M.J. at 311 n.3. Although the majority apparently saw the issue as being open, the better view was probably expressed by **J. Cook** in the concurring opinion: "I see no justification for the suggestion, in footnotes 1 and 3, that there is uncertainty in military law as to whether a subpoena may issue to compel a civilian witness to appear and testify at an Article 32 investigation." *Roberts*, 10 M.J. at 316.

[154] *See, e.g.*, Weston v. Dept of Housing & Urban Development, 724 F.2d 943 (Fed. Cir. 1983)(A federal employee can be removed from his or her position for failure to cooperate in an internal agency investigation relating to matters which affect the efficiency of the agency. If the employee's testimony would tend to be incriminatory the testimony can still be compelled by granting the employee immunity from prosecution.).

the civilian witness is a foreign national, compulsion to testify at an Article 32 investigation would be covered by local law.[155]

Although a civilian witness may not be compelled to testify, if the witness is reasonably available they may be invited to attend,[156] and when previously approved by the general court-martial convening authority,[157] they may be paid transportation expenses and a per diem allowance.[158] As an alternative, civilian witnesses can be subpoenaed to a deposition proceeding.[159]

The Manual contains no separate provisions concerning the production of expert witnesses at the Article 32 investigation. Although at least one court of review has attempted to treat expert witnesses as a different category,[160] the better view is that their production should be governed

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[155]The U.S. military has no inherent authority to compel a foreign national to appear before an Article 32 hearing being held overseas, however local status of forces agreements may provide a mechanism for compelling attendance through host nation procedures. ***See generally*** United States v. Clements, 12 M.J. 842 (A.C.M.R. 1982).

'"R.C.M. 405(g)(2)(B) discussion.

[157]AR 27-10, para. 5-12. No civilian witness will be requested to appear at an Article 32 investigation until after approval by the GCM convening authority. The authority to approve the payment of transportation expenses and per diem may be delegated to the investigating officer or the GCM convening authority's SJA. Only the GCM convening authority can disapprove the payment of expenses to an otherwise reasonably available civilian witness.

[158]R.C.M. 405(g)(3) authorizes the payment of transportation expenses and a per diem allowance. Procedures to effect payment are to be prescribed by the Secretary of a Department. ***See,*** *e.g.*, AR 27-10, para. 5-12; DOD Joint Travel Regulations, paras. C3054, C6000.

[159]UCMJ art. 47(a)(1). While it is clear that a civilian witness can be subpoenaed to attend a deposition proceeding pertaining to a court-martial case which has been referred to trial, it is less clear whether a civilian may be subpoenaed to provide a deposition for use at an Article 32 investigation. For a general discussion of the issue **see** *Roberts,* 10 M.J. at 316 (Cook, J., concurring). R.C.M. 702 specifically provides that a witness may be deposed so that the deposition may be considered at the Article 32 investigation. A request for deposition may only be denied "for good cause." "Good cause" normally includes the fact that the witness will be available *for trial,* however the drafters contemplate the use of depositions when there has been an improper denial of a witness request at an Article 32 hearing or when an essential witness is unavailable to appear at the Article 32 hearing. R.C.M. 702 discussion. *But* **see** R.C.M. 702(a) analysis (Depositions are intended for exceptional circumstances when necessary to preserve testimony and are not generally to be used as a discovery device.).

[160]United States v. Taylor, CM 832910 (N.M.C.M.R. 21 Dec. 83). In *Taylor* the defense requested that Mr. Flynn, a fibers expert, be produced to testify at the Article 32 investigation. The defense had not previously interviewed the fiber expert and did not articulate any specific reason why the expert's presence was necessary. The court refused to apply the *Ledbetter* balancing test for "reasonable availability" in reviewing the non-production of Mr. Flynn. Instead the court held that the defense had not met the threshold "foundational'' requirements of United States v. Vietor, 10 M.J. 69 (C.M.A. 1980). In *Vietor* the admission of a laboratory report into evidence at trial did not give the accused the automatic right to the attendance of the person who performed the tests. Instead the defense counsel was required to show that the expert's testimony would reveal some "chink in the competence or credibility of the analyst, or cast doubt, in the slightest degree, on the reliability of the processes or the analysis or its results." *Vietor,* 10 M.J. 72. The Navy-Marine Court of Military Review acknowledged the "right to discovery" element of the Article 32 investigation but held that it was "not so broad as to subsume the *Vietor* foundational rule."

by the same reasonable availability balancing test applicable to other witnesses.

2. *Evidenceproduction.*

Upon timely request by the accused any documents or physical evidence "which is under the control of the government and which is relevant to the investigation and not cumulative shall be produced if reasonably available."[161]

"Reasonable availability" is initially determined by the investigating officer by applying a balancing test weighing the significance of the evidence against the difficulty, expense, delay, and effect on military operations of obtaining the evidence.[162] If the release of the evidence is privileged under Section V of the Military Rules of Evidence, it is not reasonably available.[164]

The investigating officer's determination that evidence is reasonably available can be reversed by the custodian of the evidence.[165] Any determination by the investigating officer (or the custodian of the evidence) that the evidence is not reasonably available is reviewable at trial by the military judge.[166]

3. *Testimony of the accused.*

At the Article **32** hearing the accused has the right to remain silent[167] or to make a statement in any form.[168] At trial the trial counsel may not directly produce evidence (or comment) on the fact that the accused elected to remain silent at the Article **32** investigation;[169] however, the accused's silence at the pretrial investigation may be raised collaterally

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[161]R.C.M. 405(g)(1)(B). Although the Jenck's Act is not expressly applicable to pretrial investigations (R.C.M. 914), the defense can use this provision to discover pretrial statements made by government witnesses.

[162]R.C.M. 405(g)(2)(C). *But cf.* United States v. Jackson, 33 C.M.R. 844, 890 (A.F.B.R. 1963) ("We conclude, as a matter of fundamental fairness under the general concept of 'military due process'. . . that the rights accorded under the 'Jencks Statute' should be available to an accused during an Article 32 investigation and we so hold.").

[163]Section V privileges are applicable to Article 32 investigations. Mil. R. Evid. 1101(d).

[164]R.C.M. 405(g)(1)(B).

[165]R.C.M. 405(g)(2)(C).

[166]R.C.M. 405(g)(2)(C); R.C.M. 906(b)(3). Disagreement between the investigating officer and the custodian of the evidence can also be resolved in command channels. R.C.M.405(g) analysis.

[167]R.C.M. 405(f)(7).

[168]R.C.M. 405(f)(12). Although the Manual does not specify what forms the accused's statement may take, the broad language used is probably intended to include all the traditional testimonial options, *e.g.*, sworn statement, personal unsworn statement, and unsworn statement through counsel.

[169]*See, e.g.*, United States v. Stegar, 16 C.M.A. 569, 37 C.M.R. 189 (1967); United States v. Tackett, 16 C.M.A. 226, 36 C.M.R. 382 (1966); United States v. Suttles, 15 M.J. 972 (A.C.M.R.1983); United States v. Langford, 15 M.J. 1090 (A.C.M.R.1983).

if the government attempts to show that the accused's in-court testimony was recently fabricated."[170]

V. PROCEDURE

A. SEQUENCE OF EVENTS

The Article 32 investigation was originally designed to be an informal proceeding with relaxed rules of evidence.[171] Although the Military Rules of Evidence generally do not apply,[172] the adversary nature of the current proceedings tends to make the hearing more formal.[173] The appointing authority has the power to prescribe specific procedures to be followed in conducting the investigation."[174] If the appointing authority does not provide procedural guidance or if (as is usual) the appointing authority directs the use of DA Pam 27-17[175] as procedural guidance, the investigating officer will have broad discretion in determining the sequence of events necessary to complete the investigation. The investigation may extend over as many sessions as necessary to thoroughly investigate the charges.[176] The investigating officer is free to determine the order in which the witnesses and evidence are presented,"[177] and the

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[170]United States v. Fields, 15 M.J. 34 (C.M.A. 1983); United States v. Reiner, 15 M.J. 38 (C.M.A. 1983); United States v. Fitzpatrick, 14 M.J. 394 (C.M.A. 1983). These three cases all deal with a similar scenario: the accused remained silent at the Article 32 investigation; all (or substantially all) of the government's evidence was presented at the Article 32 hearing; and, at trial the accused testified to an exculpatory version of the facts which to the maximum extent possible was consistent with, or fit "between the cracks" of, the government evidence. On cross-examination of the accused the trial counsel elicited testimony that the accused had an opportunity to hear all of the government's case at the Article 32 investigation, that since the pretrial investigation the accused had a long time to prepare a defense, and that the in-court testimony at trial was the first time the trial counsel had heard the accused's version of the facts. The defense argued that this cross-examination amounted to an impermissible comment on the accused's silence at the Article 32 investigation. The Court of Military Appeals disagreed, holding that the totality of the cross-examination was not designed to highlight the accused's exercise of his right to remain silent. Instead, the trial counsel was properly showing that the accused had the motive and the opportunity to fabricate a version of the facts consistent with the government evidence.

"[171]*See, e.g.*, United States v. Samuels, 10 C.M.A. 206, 27 C.M.R. 280 (1959) (Comparing the Article 32 hearing to its federal counterpart, the federal preliminary examination, the court endorsed the federal position that "proceedings in a preliminary examination are not expected nor required to be as regular and formal as in a final trial.").

[172]Mil. R. Evid. 1101(d).

[173]The Article 32 investigation was originally an *ex parte* proceeding with no government representative present. Now, R.C.M. 405(d)(3) specifically provides for the appointment of counsel to represent the government.

[174]R.C.M. 405(c) (so long as the procedural guidance is not inconsistent with the Rules for Courts-Martial).

[175]*See generally* DA Pam 21-17.

[176]DA Pam 21-17, para. 2-4*b*.

[177]*Id.*

order in which individual witnesses will be questioned by the investigating officer and counsel.[178]

Prior to commencement of any investigation the accused must be informed of the charges under investigation,[179] the identity of the accuser,[180] the witnesses and other evidence known to the investigating officer,[181] the purpose of the investigation,[182] and the right against self-incrimination.[183]

B. TIMELINESS OF THE INVESTIGATION

The investigating officer is charged with conducting the investigation as expeditiously as possible and with issuing a timely written report of the investigation.[184] Normally duties as an Article 32 investigating officer takes priority over all other assigned duties.[185] Although there are no hard and fast time limits for conducting a thorough investigation, the appointing authority will typically set a deadline as part of the procedural guidance to the investigating officer.[186] If the accused is ordered into arrest or confinement, the charges and the report of investigation "should" be forwarded to the general court-martial convening authority within eight days after the restraint.[187] Time spent conducting the Article 32 investigation may be time accountable to the government for speedy trial purposes,[188] so the investigating officer should maintain a chronology documenting all delays.[189]

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[178] *See* DA Pam 27-17, app. F, for suggestions regarding the examination of witnesses at the Article 32 hearing.

[179] UCMJ art. 32(b); R.C.M. 405(f)(1). **See** *also* DA Pam 27-17, app. B, for a sample notification letter informing the accused of rights afforded at the Article 32 investigation; DA Pam 27-17, app. A, for a boilerplate procedural guide to be used to advise the accused of rights at the Article 32 hearing; and DD Form 457 (Aug. 1984).

[180] R.C.M. 405(f)(2).

[181] R.C.M. 405(f)(5).

[182] R.C.M. 405(f)(6).

[183] UCMJ art. 32(b); R.C.M. 405(f)(7).

[184] R.C.M. 405(j)(1); DA Pam 27-17, para. 2-1.

[185] DA Pam 27-17, para. 1-2*a*.

[186] R.C.M. 405(c); DA Pam 27-17, para. 2-1.

[187] UCMJ art. 33.

[188] No case law specifically excludes time spent conducting the Article 32 investigation from government accountability under the "90 day rule" of United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971). The 1984 Manual provides for a new regulatory "120 day rule" and specifically purports to exclude from government accountability "any period of delay resulting from a delay in the Article 32 hearing." R.C.M. 707(c)(5).

[189] R.C.M. 405(j)(2)(F); DA Pam 27-17, para. 2-1.

C. CONTROL OF THE PROCEEDING

1. Presence of the accused.

The accused will normally be present throughout the taking of evidence.[190] The only two exceptions to this general rule are voluntary absence after being notified of the time and place of the proceeding[191] and removal by the investigating officer for disruptive conduct after being warned that continued disruptive conduct will cause removal.[192]

2. Presence of the counsel for the accused.

The accused is entitled to the presence and assistance of counsel throughout the hearing.[193] Civilian defense counsel cannot be excluded from the investigation because of a lack of security clearance.[194]

3. *Presence of the public.*

Although there is a preference for a "public" pretrial investigation,[195] the Manual provides that "access by spectators to all or part of the proceeding may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer."[196] This provision makes it seem like there is unfettered discretion to deny the public access to the Article **32** hearing. The better view, based on case law,"[197] is that the proceedings should be closed only if there is a rea-

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[190] R.C.M. 405(f)(3).

[191] R.C.M. 405(h)(4)(A).

[192] R.C.M. 405(h)(4)(B).

[193] R.C.M. 405(f)(4).

[194] United States v Nichols, **8** C.M.A. **119, 125, 23** C.M.R. **343, 349 (1957)** ("[T]he accused's right to a civilian attorney of his choice cannot be limited by a service-imposed obligation to obtain clearance for access to service classified matter.").

[195] R.C.M. 405(h)(3) discussion.

[196] R.C.M. 405(h)(3).

[197] By its terms. the sixth amendment guarantee of a right to a "public trial" onlv applies to "trials." Recent Supreme Court decisions have expanded the right beyond trial on the merits to voir dire proceedings (Press-Enterprise Co. v. Superior Court, **104** S. Ct. **819 (1984))** and pretrial suppression hearings (Waller v. Georgia, **104** S. Ct. **2210 (1984)).** In *Waller* the Court supported this extention by pointing out that suppression hearings often resemble a bench trial with witnesses giving sworn testimony and counsel arguing their positions. The same analogy might be applicable to the Article **32** investigation. *But* **see** MacDonald v. Hodson, **19** C.M.A. 582, 42 C.M.R. **194 (1970).** In *MacDonald*, the accused, Captain Jeffrey MacDonald, sought a writ of injunction and temporary restraining order enjoining the Article **32** investigating officer and the appointing authority from closing his pretrial investigation to the public. The court denied the petition holding that the Article **32** investigation is not a "trial" within the meaning of the sixth amendment. It should be noted, however, that this decision predates recent Supreme Court cases in the area and that the court in *MacDonald* relied in part on the fact that at the time the Article **32** investigation was an ***ex parte*** and not an adversarial proceeding.

sonable, articulable reason why closure is required,[198] and the closure should be limited to only those portions of the investigation where it is

D. REPORT OFINVESTIGATION

Article **32** provides that "if the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused."[200] The Manual goes further and specifies that the report of investigation shall include:

> (A) A statement of names and organizations or addresses of defense counsel and whether defense counsel was present throughout the taking of evidence, or if not present the reason why;
>
> (B) The substance of the testimony taken on both sides, including any stipulated testimony;
>
> (C) Any other statements, documents, or matters considered by the investigating officer, or recitals of the substance or nature of such evidence;
>
> (D) A statement of any reasonable grounds for belief that the accused was not mentally responsible for the offense or was not competent to participate in the defense during the investigation;
>
> (E) A statement whether the essential witness will be available at the time anticipated for trial and the reasons why any essential witness may not then be available;
>
> (F) An explanation of any delays in the investigation;
>
> (G) The investigating officer's conclusion whether the charges and specifications are in proper form;

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[198] *See, e.g.*, R.C.M. 405(h)(3) discussion ("Closure may encourage complete testimony by an embarrassed or timid witness."); R.C.M. 405(h) analysis which suggests looking to R.C.M. 806 for examples of some reasons why **a** pretrial investigation hearing might be closed.

[199] Even if the Article 32 investigation were held to be a "trial" within the meaning of the sixth amendment right to a public trial, the right to an open proceeding is not absolute. The right to a public trial may give way to overriding concerns such as ensuring that the accused will have a fair trial or protecting the government from disclosure of sensitive information. If the Article 32 investigation is a "trial" closure is still permissible under *Waller v. Georgia* if there is an overriding interest likely to be prejudiced, closure is tailored to a specific harm; the Article 32 investigating officer considers reasonable alternatives, and the Article 32 investigating officer articulates the basis for closure "on the record."

[200] UCMJ art. 32(b).

(H) The investigating officer's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged; and

(I) The recommendations of the investigating officer, including disposition.[201]

Normally the report of investigation will consist of a completed DD Form **457** (Investigating Officer's Report)[202] and an attached summary of the witnesses' testimony.[203] There is no requirement for, and the accused has no right to, a verbatim transcript of the witnesses' testimony.[204] The appointing authority does have the perogative of ordering a verbatim transcript[205] and should normally do so in particularly complex or serious cases, or when it is necessary to preserve a witness' testimony for later use at trial.[206]

Where there is no verbatim transcript authorized, the investigating officer is responsible for preparing a summary of each witness' testimony.[207] Typically a legal clerk or some other assistant will be present at the hearings to assist in preparing this summary. If substantially verbatim notes, or tape recordings, of a witness' testimony are made to assist in preparing the report of investigation, they should be preserved

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[201]R.C.M. 405(j)(2).

[202]R.C.M. 405(j)(2) discussion; DA Pam **27-17,** para. 4-1.

[203]R.C.M. 405(j)(2)(B).

[204]United States v. Allen, **5** C.M.A. 626, 18 C.M.R. **250** (1955). In ***Allen*** the defense challenged the Article 32 report of investigation based on the omission of some portions of witness testimony. Interpreting the Article 32(b) requirement that the "substance" of the testimony be included in the report, the court held that it was "manifest that this phrasing authorizes an impartial condensation of the information obtained from witnesses during this stage of the proceedings. . . . [I]t was not the Congressional intendment that the summaries of testimony taken during a proceeding held in conformity to Article 32 must of necessity reflect every clue which might possess meaning for a Sherlock Holmes." *Id.* at **255. See** *also* United States v. Matthews, 13 M.J. 501 (A.C.M.R. 1982) (Where retained civilian defense counsel voluntarily elected not to attend the Article **32** hearing and the accused was instead represented by detailed military counsel, the accused was not denied any sixth amendment right to effective assistance of counsel when the government failed to order a verbatim transcript of the Article 32 investigation.); United States v. Frederick, *7* M.J. 791 (N.C.M.R. 1979).

[205]R.C.M. 405(c).

[206]*See generally* Mil. R. Evid. 804(b)(1).

[207]R.C.M. 405(j)(2)(B).

until completion of the trial.[208] The accused has no right to tape-record the Article 32 proceeding but taping may be permitted as a matter within the investigating officer's discretion.[209] The substance of a witness' testimony which is produced for the report of investigation should, whenever possible, be shown to the witness so that the witness can sign and swear to the truth of the summary.[210]

When the Article 32 report of investigation is complete, a copy must be furnished to the appointing authority who will in turn ensure that a copy is served on the accused.[211]

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[208] R.C.M. 405(h)(1)(A) discussion. ***See generally*** United States v. Thomas, 7 M.J. 655 (A.C.M.R. 1979) (Jencks Act, 18 U.S.C. § 3500 (1982) is applicable to testimony given at an Article 32 investigative hearing); R.C.M. 914 (codification of Jencks Act). In ***Thomas*** a court reporter made tape recordings of the witnesses' testimony at the Article 32 hearing to assist the reporter in providing the investigating officer a summarized transcription. The trial defense counsel specifically requested that the tapes be preserved until final disposition of the charges. Due to a breakdown in communications between the investigating officer and the court reporter, the tapes were recorded-over. When the government witnesses testified at trial, the defense counsel requested production of the tapes pursuant to the Jencks Act and, in the alternative, moved that the government witness' testimony be stricken from the record (the prescribed statutory remedy for Jencks Act violations). The court held that although the Jencks Act applied to tapes of Article 32 testimony there was no prejudice in this case and the testimony need not be stricken. In finding a lack of prejudice, the court noted the ample opportunity defense counsel had had to observe, listen to, and cross-examine the witnesses, and pointed out that the testimonial summaries contained in the Article 32 report of investigation had only slight variances from the tape recordings. ***See also*** United States v. Patterson, 10 M.J. 599 (A.F.C.M.R. 1980) (In evaluating whether the negligent destruction of Article 32 tapes prejudiced the accused or was harmless error the court should look at whether the summarized statements made by the investigating officer substantially incorporated the testimony of the witness.); United States v. Scott, 6 M.J. 547 (A.F.C.M.R. 1977) (The Jencks Act was applied to tape recordings of Article 32 testimony and the court held that the testimony of government witnesses should have been stricken at trial where: (1) the government had a duty under applicable Air Force regulations to preserve the tapes; (2) the government could not claim any "good faith" loss because of the negligence of government officials in handling the tapes; and (3) the error was not harmless because the summaries of the witnesses' testimony contained in the report of investigation were inadequate to use as impeachment vehicles.). *Cf.* United States v. McDaniel, 17 M.J. 553 (A.C.M.R. 1983) (No Jencks Act issue was raised where the legal clerk attempted to record testimony at the Article 32 investigation but produced only blank tapes due to a lack of familiarity with the equipment. The blank tapes did not constitute a "statement" within the meaning of the Jencks Act. The sketchy written notes taken by the legal clerk were also not "statements" where they were not substantially verbatim and they were never signed or adopted by the witnesses.).

[209] United States v. Milan, 16 M.J. 730 (A.F.C.M.R. 1983); United States v. Svoboda, 12 M.J. 866 (A.F.C.M.R. 1982); United States v. Rowe, 8 M.J. 542 (A.F.C.M.R. 1979).

[210] R.C.M. 405(h)(1) discussion. ***See also*** United States v. Goda, 13 M.J. 893 (N.M.C.M.R. 1982) (Manual provision [in 1969 MCM] providing that the summarized testimony should be adopted by the witness under oath is not mandatory, but rather, is hortatory in nature.).

[211] R.C.M. 405(j)(3).

VI. NATURE OF THE ARTICLE 32 INVESTIGATION

A. GENERAL

Because the Article 32 pretrial investigation is sui generis, having no exact counterpart in any civilian criminal jurisdiction,[212] courts have struggled to define the precise nature of the proceeding.

Article of War 70 (1920), the precursor to UCMJ Article 32, was the subject of extensive litigation in federal district court based on writs of habeas corpus from soldiers alleging errors in their pretrial investigation. Initially, a majority of the federal district courts dealing with the issue held that the military's failure to provide an accused with all the rights guaranteed in Article of War 70 constituted either "jurisdictional error"[214] or a denial of due process.[215] Eventually the Supreme Court addressed the nature of the military pretrial investigation in Humphrey *v. Smith*,[216] holding that defects in the investigative procedures were nonjurisdictional.

Based on Humphrey *v. Smith* the drafters of the Uniform Code of Military Justice specifically provided that the "requirements of . . . [Article 32] are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error."[217]

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[212] *See supra* notes 5, 6. *See also* United States v. Schaffer, 12 M.J. 425, 530 (C.M.A. 1982) (Fletcher, J., concurring) ("An Article 32 investigation is akin to a grand jury indictment or a preliminary examination, not a brother but a cousin.").

[213] *See, e.g.*, Henry v. Hodges, 76 F. Supp. 968 (S.D.N.Y. 1948); Anthony v. Hunter, 71 F. Supp. 823 (D. Kan. 1947); Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa. 1946).

[214] *See, e.g., Henry v. Hodges* (jurisdictional error for military not to provide the accused a "thorough and impartial" investigation in accordance with Article of War 70 when the accuser in the case was also appointed as the investigating officer).

[215] *See, e.g.*, Anthony v. Hunter, 71 F. Supp. at 831 (The court found error in a general court-martial conviction because the accused was not afforded the opportunity to cross-examine available witnesses at the pretrial investigation as guaranteed by Article of War 70. In ordering the accused's release from detention the court held that "whether failure to do the things required be construed as a defect precluding the acquiring of jurisdiction or whether the failure be held to deprive the accused of due process contemplated by organic law, the result is the same."); Hicks v. Hiatt, 64 F. Supp. at 249 (The accused was denied due process of law when the investigating officer failed to develop, or allow the defense to develop, testimony concerning the alleged rape victim's bad moral character.). *But see* Waide v. Overlade, 164 F.2d 722 (7th Cir. 1947) (Alleged relaxations of pretrial investigation requirements were not of a nature to seriously impair any of the accused's fundamental constitutional rights.).

[216] Humphrey v. Smith, 336 U.S. 695, 700 (1949) ("We hold that a failure to conduct pretrial investigations as required by Article 70 does not deprive general courts-martial of jurisdiction so as to empower courts in habeas corpus proceedings to invalidate court-martial judgments.").

[217] UCMJ art. 32(d). *See generally Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Seruices,* 81st Cong. 1st Sess. 998 (1949); *Hearings on* S. *857 Before the Senate Comm. on Armed Services,* 81st Cong., 1st Sess. 170 (1949).

Although defects in the Article 32 investigation are not jurisdictional, courts have consistently maintained that the pretrial investigation is a "judicial proceeding"[218] and that it is "not a mere formality,"[219] but rather is "an integral part of the court-martial proceedings"[220] providing the accused with "substantial pretrial rights,"[221]

Defining the nature of the Article 32 investigation involves much more than merely assigning labels. Categorizing the proceedings as "judicial," 'honjurisdictional," or as "a substantial pretrial right" has practical consequences impacting upon how the proceedings must be conducted and affecting what remedies are available to an accused who has been afforded a less-than-perfect pretrial investigation.

B. ADEQUATE SUBSTITUTES FOR THE ARTICLE 32 INVESTIGATION

No Article 32 investigation is necessary if the subject matter of the charged offenses has already been investigated at a proceeding which afforded the accused the opportunity to be present, to be represented by counsel, to cross-examine available witnesses, and to present matters in his or her own behalf.[222] After being officially informed of the charges, the accused does have the right to demand further investigation to recall witnesses for further cross-examination and to offer any new evidence.[223]

When an Article 32 investigating officer discovers through the presentation of evidence at the hearing that the accused has committed additional uncharged offenses, additional charges may be referred to trial

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[218] *See, e.g.*, United States v. Payne, 3 M.J. 354, 355 n.5 (C.M.A. 1977)("[I]t has long been recognized that the investigation under Article 32 is judicial in nature. . . . [C]learly for that premise to have viability, the investigating officer must be viewed as a judicial officer, and function accordingly."); United States v. Samuels, 10 C.M.A. 206, 27 C.M.R. 280, 286 (1959)("It is judicial in nature."); United States v. Nichols, 8 C.M.A. 119, 124, 23 C.M.R. 343, 348 (1957)("Its judicial character is made manifest by the fact that testimony taken at the hearing can be used at the trial if the witness becomes unavailable.").

[219] *Nichols*, 8 C.M.A. at 124, 23 C.M.R. at 348.

[220] *Id.*

[221] *See, e.g.*, United States v. Mickel, 6 C.M.A. 324, 26 C.M.R. 104 (1958).

[222] UCMJ art. 32(c); R.C.M. 405(b). ***See generally*** United States v. Gandy, 9 C.M.A. 355, 26 C.M.R. 135 (1958) (commander's board of investigation appointed to investigate the theft of clothing from the ship's clothing sales store satisfied the requirements of Article 32(c)).

[223] UCMJ art. 32(c); R.C.M. 405(b).

along with the original charges without conducting an additional Article 32 investigation unless specifically requested by the accused.[224]

C. WAIVER OF THE ARTICLE 32 INVESTIGATION

The accused may completely waive the right to an Article 32 investigation.[225] Waiver may be made a condition of a pretrial agreement[226] so long as the accused freely and voluntarily entered into the agreement.[227] While the accused may offer to waive the Article 32 investigation, the offer does not bind the government.[228]

D. TREATMENT OF DEFECTS

One of the consequences of having the clear but unembellished congressional mandate that "defects in the Article 32 investigation are not jurisdictional"[229] is that the President and the courts are left to fashion guidelines as to when relief should be granted to cure defects which are raised at the trial and appellate levels. Some basic guidance is provided in the legislative history to Article 32(d):

> There has been a considerable amount of difficulty in construing the binding nature of the pretrial investigation. . . . The point we are trying to make clear is that the pretrial investigation is a valuable proceeding but that it should not be a jurisdictional requirement.
>
> It is a valuable proceeding for the defendant as well as for the Government. We desire that it be held all the time. But in the event that a pretrial investigation, less complete than is provided here, is held and thereafter at the trial full and complete evidence is presented which establishes beyond a reasonable doubt the guilt of the accused, there doesn't seem

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[224] *See, e.g.*, United States v. Holstrom, 3 C.M.R. 910 (A.F.B.R. 1967) (The fact that the investigating officer of the prior investigation became the accuser for the subsequent charges is not by itself error.); United States v. Lane, 34 C.M.R. 744 (C.G.B.R. 1964) (But if the investigating officer prefers the additional charges and thereby becomes the accuser he is disqualified from presiding over any additional sessions of the investigation that may be demanded by the accused.).

[225] R.C.M. 405(k).

[226] United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982); R.C.M. 705(c)(2)(E). In *Schaffer* the court held that waiver of the Article 32 investigation did not violate public policy where the accused proposed waiver as an inducement for a beneficial pretrial agreement. The court did not address the validity of waiver which originated from the government as a precondition to plea negotiations. R.C.M. 705(d) only requires that the offer to plead guilty must originate with the accused. Once the defense initiated negotiations the government is free to propose terms.

[227] R.C.M. 705(c)(1)(A).

[228] R.C.M. 405(a) discussion (emphasis supplied).

[229] UCMJ art. 32(d).

> to be any reason . . . [that] the case should be set aside *if the lack of full compliance doesn't materially prejudice his substantial rights*. . . . Now if it has, that is and should be grounds for reversal of a verdict of guilty.[230]

The courts have adopted this reasoning and consistently have held that even though defects in the Article 32 investigation are not jurisdictional they may constitute grounds for appropriate relief,[231] usually in the form of a continuance to cure the defect,[232] and when the defect operates to prejudice the substantial rights of the accused, may constitute grounds to reverse a conviction without regard to whether it touches jurisdiction.[233]

1. General rule,

The best and most often cited statement of how defects in the pretrial investigation should be treated is contained in *United States v. Mickel;*

> [I]f an accused is deprived of a *substantial pretrial right on a timely objection, he is entitled tojudicial enforcement of his right, without regard to whether such enforcement will benefit him at the trial.* At that stage of the proceedings, he is perhaps the best judge of the benefits he can obtain from the pretrial right, Once the case comes to trial on the merits, the pretrial proceedings are superseded by the procedures at the trial; the rights accorded to the accused in the pretrial stage merge into his rights at trial. If there is *no timely objection* to the pretrial proceedings *or no indication* that these proceedings *adversely affected the accused's rights at the trial,* there is *no good reason in law or logic to set aside his conviction.*[234]

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[230]United States v. Allen, 5 C.M.A. 626, 633, 18 C.M.R. 250, 257 (1955), *quoting* testimony of Mr. Larkin at *Hearings on H.R. 2498* Before *a* Subcomm. of *the House* Comm. *on* Armed Services, 81st Cong., 1st Sess. 998 (1949).

[231]*See, e.g.*, United States v. Worden, 17 C.M.A. 486, 38 C.M.R. 284 (1968) (The defense motion to dismiss charges because of a defective Article 32 investigation was treated as a motion for appropriate relief since that is the real basis for relief and counsels misdesignation of the motion is not fatal.).

[232]R.C.M. 906(b)(3) discussion.

[233]United States v. Allen, 5 C.M.A. 626, 18 C.M.R. 250 (1955); United States v. Rhoden, 1 C.M.A. 193, 2 C.M.R. 99 (1952).

[234]*Mickel*, 9 C.M.A. at 327, 36 C.M.R. at 107 (emphasis in original). In *Mickel* the accused was represented at the Article 32 investigation by a counsel who was not certified under the provisions of Article 27(b). The accused did not object to this defect until after trial on the merits. The court held that although the accused was excused from making a timely objection (because at the time the accused could not have fully understood his rights to qualified counsel), no relief should be granted unless there was a showing that the pretrial error prejudiced him at trial,

Although the Manual provisions are somewhat less clear, they are essentially consistent with the *Mickel* standard. R.C.M. *405* provides that no charge may be referred to a general court-martial unless there has been a thorough and impartial investigation made in "substantial compliance'' with the Manual.[235] A motion for appropriate relief[236] made prior to trial[237] should be granted to cure defects in the Article 32 investigation[238] which are raised and preserved through timely objection[239] if the defect "deprives a party of a right or hinders a party from preparing for trial or presenting its case."[240]

2. Timeliness of objections.

The first step for the accused to get judicial enforcement of substantial pretrial rights is to make a timely objection to the alleged defect.[241] If a defect is not objected to in a timely manner, the accused is entitled to relief only if there was less than substantial compliance with Article 32[242] or if the defect prejudiced the accused at trial.[243]

Defects in the pretrial investigation which are discovered during the course of the investigation must be raised to the investigating officer

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[235]R.C.M. 405(a).

[236]R.C.M. 906.

[237]R.C.M. 905(b)(1) requires objections to nonjurisdictional defects in the pretrial investigation of charges to be made prior to the entry of plea at trial.

[238]R.C.M. 906(b)(3) (correction of defects in the Article 32 investigation is a proper ground for appropriate relief).

[239]*See* generally R.C.M. 405(h)(2) and (j)(4).

[240]R.C.M. 906(a).

[241]United States v. Mickel, 9 C.M.A. 324, 26 C.M.R. 104 (1958).

[242]United States v. Persinger, 37 C.M.R. 631 (A.B.R. 1966). In *Persinger* the accused voluntarily waived representation by counsel. The investigation consisted only of the investigating officer's consideration of military police reports and an accusatory letter from an Assistant U.S. Attorney. Despite the absence of any defense objection at trial, the Army Board of Review reversed the accused's conviction because of this less than token compliance with Article 32, holding that substantial departures from fundamental pretrial procedures require reversal without "nice calculations as to the amount of prejudice resulting from the error."

[243]*See, e.g.*, United States v. Chuculate, *5* M.J. 143 (C.M.A. 1978) (the investigating officer's denial of the defense request to produce two civilian witnesses deprived the accused of a substantial pretrial right but, since the defense made no effort to depose the witnesses, the defect was not raised in a timely manner and the issue was waived.). For examples of other defects which were waived by the defense's failure to make a motion for appropriate relief at trial, see United States v. Donaldson, 23 C.M.A. 293, 49 C.M.R. 542 (1975) (two months after the Article 32 investigation was completed on the original charges, additional charges were preferred and referred to the same trial without re-opening the pretrial investigation); United States v. McCormick, 3 C.M.A. 361, 12 C.M.R. 117 (1953) (the investigating officer failed to inquire into one of the charges); United States v. Lassiter, 11 C.M.A. 89, 28 C.M.R. 313 (1950) (the investigating officer denied a defense request for the presence of a witness and instead considered the witness' unsworn statement); United States v. Tatum, 17 M.J. 757 (C.G.C.M.R. 1984) (investigating officer engaged in ex *parte* discussions with government counsel).

"promptly upon discovery of the alleged error."[244] The investigating officer can require that the objection be made in writing.[245] This requirement for prompt objection allows the government to cure obvious defects without unnecessary delay;[246] however, the investigating officer is not required to act on,[247] or even render a ruling on,[248] the objection. If the objection raises a substantial question regarding the validity of the proceedings, the appointing authority should be notified immediately.[249] Normally the investigating officer should discuss defense objections with the neutral legal advisor.[250]

All objections should be noted in the report of investigation even though the Manual only makes this mandatory when the objection relates to non-production of a defense-requested witness or evidence,[251] or when the defense counsel specifically requests that it be noted.[252]

Objections to defects discovered during the course of the investigation which are not raised in a timely manner are waived absent a showing of good cause.[253]

After the accused receives a copy of the report of investigation, the defense has only five days to object to the appointing authority about defects contained in the report.[254] Objections not timely made are waived absent a showing of good cause.[255] This provision will likely require some development of what constitutes "good cause" because the five-day time period begins with service of the report on the accused rather than service on the defense counsel.[256] This provision places a heavy burden on defense counsel to preserve objections because the rule purports to re-

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[244] R.C.M. 405(h)(2). This standard has some obvious enforcement problems. While it will be obvious when some defects were discovered, other defects will only be capable of being analyzed in terms of when they "reasonably should have been discovered."

[245] *Id.*

[246] R.C.M. 405(h)(2) analysis.

[247] *Id.* discussion.

[248] R.C.M. 405(h)(2).

[249] *Id.* discussion.

[250] These discussions cannot be held ex *parte* if they involve substantive matters.

[251] R.C.M. 405(g)(2)(D) (The investigating officer shall include a statement detailing the reasons why the witness or evidence was determined to be unavailable.).

[252] R.C.M. 405(h)(2).

[253] R.C.M. 405(k).

[254] R.C.M. 405(j)(4). Since there is no qualification placed on the time limit, this should be interpreted to mean five calendar days.

[255] R.C.M. 405(k).

[256] Are objections waived when the defense counsel is unavailable for consultation during the five-day period? When the accused is not permitted to consult with counsel? When the accused negligently fails to consult with counsel? When the accused loses the report of investigation?

quire defense counsel to object "again" if objections made during the course of the investigation are not noted in the report of investigation.[257]

If objections to defects in the Article 32 investigation are preserved, the accused may be entitled to relief at trial by making a motion for appropriate relief prior to entry of the plea.[258] Failure to make the motion prior to plea constitutes waiver of the objection absent a showing of good cause for relief from waiver.[259]

The Manual suggests that "even if the accused made a timely objection to the investigating officer's failure to produce a witness, a defense request for a deposition may be necessary to preserve the issue for later review."[260] Although this requirement is not very well defined, either in the Manual or in case law, some courts have maintained that a request to depose the witness is necessary as a matter of timeliness.[261] This contemplated use of the deposition as a discovery and interviewing device (or to cure error committed by the Article 32 investigating officer) is specifically authorized by the Manual[262] despite the fact that it clearly exceeds the permissible uses of the deposition sanctioned by federal courts.[263]

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[257]R.C.M. 405(k) discussion. "If the report fails to include reference to objections which were made under subsection (h)(2) of this rule, failure to object to the report will constitute waiver of such objections in the absence of good cause for relief from waiver." It is unclear whether this was meant to apply to all objections made during the course of the investigation or only to objections which the defense requested be noted in the report of investigation.

[258]R.C.M. 905(b)(1).

[259]R.C.M. 905(e).

[260]R.C.M. 405(k) discussion.

[261]United States v. Chuculate, 5 M.J. 143 (C.M.A. 1978). In *Chuculate* the defense requested the production of two civilian witnesses, one of whom was the victim of the charged offenses, at the Article 32 investigation. The witnesses were invited to attend the investigation but refused, Instead of deciding the case based solely upon the fact that the witnesses were not "reasonably available," the court decided that the refusal of the civilians to attend did not *eo ipso* nullify the defense right to cross-examine them, and the court specifically held that the accused had been deprived of a substantial pretrial right. *Id.* at 144. The court nonetheless denied the defense motion to re-open the Article 32 investigation because the defense had failed to timely urge the accused's substantial right—in this instance, the opportunity to depose in lieu of cross-examination at the Article 32 investigation—with no adverse effect at trial. ***See*** *also* United States v. Matthews, 15 M.J. 622 (N.M.C.M.R. 1982) (When the defense declined the military trial judge's offer to order a deposition of a witness the defense alleged was improperly denied at the pretrial investigation, they waived further litigation of the issue because they failed to timely urge the accused's substantial pretrial rights.); United States v. Stratton, 12 M.J. 998 (A.F.C.M.R. 1982).

[262]R.C.M. 702(c)(3)(A) discussion provides:

> The fact that the witness is or will be available for trial is good cause for denial [of the request for deposition] in the absence of unusual circumstances, such as improper denial of a witness request at an Article 32 hearing, [or] unavailability of an essential witness at an Article 32 hearing . . . .

[263]*See* ***generally*** R.C.M. 702(a) analysis (where the drafters recognize that under federal law the deposition is properly used only to preserve the testimony of witnesses likely to be unavailable at trial).

3. Standard for relief.

Once the threshold requirement of a timely objection is satisfied, the court must then decide whether the alleged defect involves a substantial pretrial right of the accused, which is thus entitled to enforcement without any showing of benefit at trial, or whether the accused must demonstrate some specific prejudice to get relief.[264] Analyzing cases in these terms, a direct result of the court's language in *Mickel*,[265] is essential to understand the reported decisions in the area, but also presents practical problems. The courts never define what constitutes a "substantial pretrial right" and they continually blur the distinction between "prejudice at the Article 32 investigation" and "prejudice at trial."[266] As a practical matter, the defense should get relief at trial (or on appeal) only if the defect is such that it denied the accused the right to discover evidence material to the charges, the right to confront adverse witnesses, the right to present matters which might affect the disposition of the case, or the right to a neutral recommendation as to disposition from the Article 32 investigating officer.

The courts have never expressly defined the distinction between defects involving substantial pretrial rights and "other defects." But, on a case-by-case basis they have held that the accused was denied a substantial pretrial right when the Article 32 investigation was ordered by an officer who lacked authority to appoint one,[267] when the accused was improperly denied representation at the investigation by counsel of choice,[268] when the accused was denied the effective representation of

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[264] United States v. Mickel, 6 C.M.A. 324, 26 C.M.R. 104 (1958).

[265] See *supra* note 234 and accompanying text.

[266] *See, e.g.*, *United States v. Mickel.* In *Mickel* the accused was excused from making a timely objection to his representation at the pretrial investigation by a counsel who was not qualified under UCMJ art. 27(b). When the court evaluated this defect for "prejudice to the accused," they considered both the fact that counsel at the Article 32 investigation did a good job and the fact that nothing which occurred at the pretrial investigation was used against the accused at trial.

[267] United States v. Donaldson, 23 C.M.A. 293, 49 C.M.R. 542 (1975) (The pretrial investigation was ordered by an officer-in-charge who exercised no court-martial jurisdiction over the accused.).

[268] United States v. Maness, 48 C.M.R. 512 (C.M.A. 1974). In *Maness* the accused's retained civilian defense counsel was denied an opportunity to be present at the Article 32 hearing because the investigating officer arbitrarily denied a reasonable defense request for postponement. The court held that it was "well settled that . . . improper exclusion of civilian counsel denies the accused a substantial right." *Id.* at 518.

counsel at the investigation,[269] when the investigating officer failed to produce reasonably available key government witnesses,[270] and when the accused was not mentally competent to understand the nature of the proceedings or to participate in his defense.[271] In each of these cases the accused was entitled to judicial enforcement of the right to a properly conducted Article 32 investigation without regard to whether it would eventually benefit the accused at trial. In fact, in ***United States v. Saunders***,[272] the Army Court of Military Review actually found that there was no reasonable possibility that the accused had been prejudiced either at the investigation or at trial. The court called upon the Court of Military Appeals to adopt a "test for prejudice" standard in all cases involving defective Article 32 investigations except those which, like ***Mickel,*** involve a denial of the right to counsel.[273]

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[269] United States v. Worden, 17 C.M.A. 486, 38 C.M.R. 284 (1968); United States v. Porter, 1 M.J. 506 (A.F.C.M.R. 1975). In both cases the accused's defense counsel was denied an opportunity to interview witnesses and prepare a defense case prior to the pretrial investigation. The courts held that under the circumstances the defense counsel was unable to prepare cross-examination and the accused was denied effective representation of counsel. When the accused is denied the effective assistance of counsel at the pretrial investigation, the court "will not indulge in nice calculations as to prejudice." ***Worden,*** 17 C.M.A. at 489, 38 C.M.R. at 287.

But see United States v. Davis, 20 M.J. 61 (C.M.A. 1985) (The court refused to reverse the accused's conviction even though he had been ineffectively represented at the Article 32 investigation. Examining for prejudice the court concluded that there was nothing more that any other counsel could have done at the Article 32 hearing *or* at trial.),

[270] United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976); United States v. Chestnut, 2 M.J. 84 (C.M.A. 1976). In both cases the defense was forced to proceed to trial without interviewing the key government witness under oath because the investigating officer failed to properly assess the reasonable availability of the witness to testify at the Article 32 investigation. The court in ***Chestnut*** succinctly reviewed the standard applicable to this type of defect saying, "This Court once again must emphasize that an accused is entitled to the enforcement of his pretrial rights without regard to whether such enforcement will benefit him at trial. Thus, Government arguments of 'if error, no prejudice' cannot be persuasive." ***Chestnut,*** 2 M.J. at 85 n.4. ***But see*** United States v. Teeter, 12 M.J. 716 (A.C.M.R. 1981) and United States v. Martinez, 12 M.J. 801 (N.M.C.M.R. 1981) where the courts went on to analyze whether the accused was prejudiced by the government's failure to provide a defense requested witness at the Article 32 investigation.

[271] United States v. Saunders, 11 M.J. 912 (A.C.M.R. 1981).

[272] *Id.*

[273] *Saunders*, 11 M.J. at 915 n.2.

> We respectfully request the Court of Military Appeals to reexamine its position . . . to the effect that an accused is entitled to the enforcement of a pretrial right without regard to whether such enforcement will benefit him at trial. The rule announced in ***Mickel*** . . . involved the denial of a right to counsel. . . . A violation of the right to counsel is of such magnitude that it can never be harmless. . . . We believe the rule in ***Mickel*** should be limited to the denial of the right to counsel.

It is interesting to note that the court in ***Saunders*** decided they could not test for prejudice because of ***Mickel*** when the court in ***Mickel*** actually denied the accused any relief by applying a prejudice test.

If the alleged defect in the pretrial investigation is objected to in a timely manner, but does not involve a substantial pretrial right, the court must determine whether the defect prejudiced the accused at trial.[274] Defects which should be tested for prejudice fall into five categories: (1) minor/technical irregularities; (2) nonproduction of defense requested witnesses;[275] (3) lack of impartiality of the investigating officer;[276] (4) investigating officer's improper receipt of *ex parte* or nonneutral legal advice,[277] and (5) consideration of improper evidence.[278]

The accused is not entitled to a perfect Article 32 investigation. Accordingly, the courts will look behind "minor irregularities" (such as the investigating officer's limitation of defense cross-examination on impeachment matters),[279] and "technical defects" (such as the defense counsel's lack of certification under Article 27(b))[280] to see whether the defect prejudiced the accused at trial by affecting the convening authority's

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> From one who is not aware of the error until after trial, we can except no less than a showing that the pretrial error prejudiced him at the trial. Here, the board of review concluded that the accused "could not" have fully understood his rights to qualified counsel at the pretrial investigation, but it did not inquire whether the failure to provide such counsel prejudiced him at the trial. In the absence of such prejudice, the pretrial error did not contaminate the proceedings in which the accused's guilt was actually determined.

Mickel, 6 C.M.A. at 327, 328, 26 C.M.R. at 107, 108.

[274] *See* supra note 234 and accompanying text.

[275] For a discussion of the accused's right to have reasonably available witnesses produced at the pretrial investigation see supra notes 138-160 and accompanying text.

[276] For a discussion of what constitutes impartiality see supra section III.

[277] For a discussion of the investigating officer's obligation to perform duties in a quasi-judicial manner see supra notes 74-96 and accompanying text.

[278] United States v. Martel, 19 M.J. 917 (A.C.M.R. 1985). In Martel the investigating officer gave ex parte consideration to police reports, a crime scene visit, and a discussion with a potential witness. Because of the difficulty in demonstrating prejudice from ex parte actions, the court applied a presumption of prejudice which the government was required to rebut by clear and convincing evidence, In Martel the investigating officer also improperly considered testimony and witness statements which should have been excluded by the marital privilege, Mil, R. Evid. 504(b). Because this information was presented at the hearing in the presence of defense counsel, the court did not apply any presumptions and instead put the burden on the defense to show specific prejudice.

[279] United States v. Harris, 2 M.J. 1089 (A.C.M.R. 1977). In *Harris* the investigating officer denied the defense counsel for Harris (a black soldier) the opportunity to cross-examine the victim (a white soldier) about his racial biases and prejudices.

[280] *United* States v. Mickel.

referral to general court-martial[281] or by hindering the accused's ability to conduct a defense.[282]

On at least two occasions the Court of Military Appeals has determined that the failure to produce the key government witness at the Article 32 investigation deprived the accused of a substantial pretrial right.[283] The better view is that nonproduction should be tested for prejudice. Obviously the accused is prejudiced when the government denies the defense an opportunity to interview the key government witness prior to trial.[284] On the other hand, as the Army and Navy-Marine Courts of Military Review have recognized, there is no good reason to reopen an Article 32 investigation if the witness' testimony would not affect the disposition of the case and the accused's "rights" to discovery and to cross-examine the witness under oath have been vindicated by granting the defense an opportunity to depose the witness prior to trial.[285] This view is consistent with provisions in the 1984 Manual which clearly contemplate the use of depositions to cure errors in the nonproduction of defense requested witnesses at the Article 32 investigation.[286]

When there is evidence that the Article 32 investigating officer may not have been "impartial" the courts will generally test for prejudice by looking at the way the investigation was actually conducted for indicia

[281] In Harris the court considered the investigating officer's testimony that even if the victim had admitted racial bias it would not have influenced his recommendation as to disposition and the court concluded that there was "no reason to believe that the convening authority would have disposed of this case differently." *Harris*, 2 M.J. at 1091.

[282] In *Harris* the accused was permitted to fully attack the witness' credibility at trial and the evidence of the accused's guilt was compelling. Harris, 2 M.J. at 1091. In *Mickel* the court noted that the accused's counsel did a good job at the Article 32 hearing, that nothing which occurred at the pretrial investigation was later used against the accused at trial, and that, in fact, the defense used evidence developed at the Article 32 investigation to impeach government witnesses at trial. *Mickel*, 26 C.M.R. at 107.

[283] United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976); United States v. Chestnut, 2 M.J. 84 (C.M.A. 1976).

[284] "This was the situation faced in both Ledbetter and Chestnut. The results in both of those cases would have been the same if the court had tested for prejudice.

[285] United States v. Teeter, 12 M.J. 716 (A.C.M.R. 1981); United States v. Martinez, 12 M.J. 801 (N.M.C.M.R. 1981).

[286] "R.C.M. 702(d)(3)(A).

of impartiality (*e.g.*, the thoroughness of the investigation and the reasonableness of the recommendations in light of the evidence).[287]

When the defense shows that the investigating officer received legal advice from someone performing a prosecution function, or received ***ex parte*** legal advice on substantive matters from a neutral legal advisor, the courts will apply a presumption of prejudice which the government must rebut by clear and convincing evidence.[288] If there have been such conversations and the government witnesses are unable to document or recall what the substance of the conversations were the accused is entitled to a new Article 32 investigation.[289]

There are a number of cases which have held that a plea of guilty at trial waives all pretrial objections that do not amount to jurisdictional error or constitute a denial of due process.[290] This waiver has been applied to defects in the Article 32 proceeding which otherwise would have

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[287] *See, e.g.*, United States v. Cunningham, 12 C.M.A. 402, 30 C.M.R. 402 (1961)(having the accuser serve as investigating officer was prejudicial error where the investigation failed to cover all the elements of the charged offenses and the investigating officer failed to examine a number of available witnesses); United States v. Natalello, 10 M.J. 594 (A.F.C.M.R.1980)(the accused was specifically prejudiced by the fact that the investigating officer had already formed and expressed an opinion that the accused was guilty before conducting the investigation). *But see* United States v. Castleman, 11 M.J. 562 (A.F.C.M.R. 1981) (the accused's substantial right to an impartial investigation was abridged where the investigating officer was the best friend of the main government witness and the accused was thus entitled to relief without any showing of specific prejudice).

[288] United States v. Payne, 3 M.J. 354, 357 (C.M.A. 1973).

> We are not unmindful of the inherent difficulties presented by requiring a defendant to demonstrate the prejudice resulting from improper actions by a judicial officer, the full extent or text of which he may be unaware in part or whole. We conclude that this is a matter requiring a presumption of prejudice. Absent clear and convincing evidence to the contrary, we will be obliged to reverse the case.

[289] *See, e.g.*, United States v. Brunson, 15 M.J. 898 (C.G.C.M.R.1982)(The court reluctantly set aside the accused's conviction where the record of trial did not contain the substance of ***ex parte*** conversations which had taken place between the investigating officer and the government representative.). The General Counsel, Department of Transportation, requested that the Court of Military Appeals review whether the court of military review erred in holding that the ***ex parte*** conversations were presumptively prejudicial rather than requiring a showing of actual prejudice. United States v. Brunson, 15 M.J. 72 (C.M.A. 1982). The Court of Military Appeals affirmed the lower court's use of the presumption of prejudice standard announced in ***Payne.*** United States v. Brunson, 17 M.J. 181 (C.M.A. 1983).

[290] United States v. Courtier, 20 C.M.A. 278, 43 C.M.R. 118 (1971)(accused was improperly denied individually requested counsel at the pretrial investigation); United States v. Lopez, 20 C.M.A. 76, 42 C.M.R. 268 (1970)(investigating officer was not impartial). ***See,*** *e.g.*, United States v. Rehorn, 9 C.M.A. 487, 26 C.M.R. 267 (1958)(accused's counsel at the pretrial investigation was not certified under Article 27(b)); United States v. Judson, 3 M.J. 908 (A.C.M.R.1977)(accused was denied effective assistance of counsel at the investigation).

constituted a deprivation of a substantial pretrial right.[291] While a guilty plea will clearly waive errors that might otherwise have affected findings of guilty as to the offenses covered by the plea, the plea should not constitute a waiver of objection to defects which might have affected the level of referral.[292]

E. REMEDY TO CURE DEFECTS

At trial the normal remedy available to cure a defective Article 32 investigation is a continuance to re-open the investigation.[293] Because the Article 32 investigation is not jurisdictional, charges do not have to be re-referred after the corrective action is taken at the investigation.[294] It is sufficient that the convening authority reaffirm the original referral.[295]

PART TWO—THE ARTICLE 34 PRETRIAL ADVICE

VII. GENERAL

A. STATUTORY REQUIREMENT

"Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate for consideration and advice."[296] The pretrial advice is a statutory prerequisite for trial by general court-martial but is not required for referral of charges to any inferior court-martial.[297]

B. PURPOSE OF THE PRETRIAL ADVICE

The courts have been inconsistent in discussing the nature and purpose of the pretrial advice. On one end of the spectrum the pretrial advice has been called "a substantial pretrial right"[298] which protects the

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[291] United States v. Courtier, 20 C.M.A. 278, 43 C.M.R. 118 (1971); United States v. Judson, 3 M.J. 908 (A.C.M.R. 1977).

[292] United States v. Engle, 1 M.J. 387 (C.M.A. 1976); R.C.M. 910(j).

[293] R.C.M. 906(b)(3) discussion.

[294] United States v. Clark, 11 M.J. 179 (C.M.A. 1981); United States v. Packer, 8 M.J. 785 (N.C.M.R. 1980).

[295] *United States v. Clark; United States v. Packer.*

[296] UCMJ art. 34(a); R.C.M. 406(a).

[297] R.C.M. 406(a) discussion.

[298] *See, e.g.*, United States v. Schuller, 5 C.M.A. 101, 105, 17 C.M.R. 101, 105 (1984) (The accused was deprived of "his right to have a qualified Staff Judge Advocate make an independent and professional examination of the expected evidence and submit to the convening authority his impartial opinion as to whether it supported the charges."); United States v. Heaney, 9 C.M.A. 6, 7, 25 C.M.R. 268, 269 (1958) ("Article 34 is an important pretrial protection accorded to an accused."); United States v. Greenwalt, 6 C.M.A. 569, 572, 20 C.M.R. 285, 288 (1955) (The pretrial advice "is an important protection accorded to an accused and Congress had in mind something more than adherence to an empty ritual."); United States v. Edwards, 32 C.M.R. 586 (A.B.R. 1962) (Sending the accused to a general court-martial on charges that were different than the ones discussed in the pretrial advice deprived the accused of a substantial pretrial right.).

accused from being brought to trial on baseless charges and from having his or her case referred to an inappropriate level of court-martial in contravention of the policy that charges be disposed of at the lowest appropriate level.[299] On the other end of the spectrum, the pretrial advice has been labeled a "prosecutorial tool"[300] which merely affords the accused the "salutory" benefit of having the charges examined by someone with legal training.[301]

1. UCMJ art. 34 (1951).

> The legislative history of the 1951 Code made it clear. . . that the purpose of the pretrial advice is to inform the convening authority concerning the circumstances of a case in such a manner that he personally will be able to make an informed decision whether there has been compliance with the other pretrial procedures; whether the case should be tried; and the type of tribunal to which the charges should be referred.[302]

The role of the staff judge advocate (SJA) was strictly one of a "legal advisor." The courts required that the pretrial advice contain all the facts which might have a substantial effect on the convening authority's decision to refer the case to trial[303] or which might have a substantial effect on the convening authority's decision as to level of court-martial.[304] In many respects the SJA's role was a matter of efficiency, saving the convening authority "the duty of going through a record with a fine tooth comb."[305] All of the SJA's legal conclusions and recommendations contained in the pretrial advice were purely advisory.[306] The convening authority exercised unfettered prosecutorial discretion.

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[299] R.C.M. 306(b).

[300] United States v. Hardin, 7 M.J. 399 (C.M.A. 1979). In *Hardin* the court rejected the view that the pretrial advice provided any judicial-type protection of a fundamental nature for the military accused. Instead the court held that the military trial judge judicially enforces the accused's "fundamental right" under Article 34 to have charges referred *to* a general court-martial only if the charge alleges an offense under the Code and is warranted by evidence indicated in the report of investigation. *Id.* at 403-04.

[301] *Id.* at 404.

[302] United States v. Foti, 12 C.M.A. 303, 30 C.M.R. 303 (1961).

[303] *See, e.g., United States* v. ***Foti*** (The accused is entitled to an individualized treatment of factors in the case which would have a substantial influence on the convening authority's referral decision.); United States v. Henry, 50 C.M.R. 685 (A.F.C.M.R. 1975) (It was error for the pretrial advice to discuss a witness' unsworn statement in a misleading manner because it might have affected the convening authority's decision to refer the case to trial.).

[304] *See, e.g.*, United States v. Rivera, 20 C.M.A. 6, 42 C.M.R. 198 (1970) (It was error for the pretrial advice to omit the unit commander's opinion that the accused should not receive a punitive discharge,).

[305] *Foti*, 12 C.M.A. at 304, 30 C.M.R. at 304.

[306] MCM, 1969, para. 35*b*.

2. *UCMJ art. 34 (1983).*

In response to criticism that the pretrial advice had become an administrative burden on SJA's and commanders,[307] Congress provided for a streamlined pretrial advice in the Military Justice Act of 1983.[308] Rather than have commanders make legal determinations about jurisdiction and the legal sufficiency of the charges, the new Article 34 requires that those determinations be made by the SJA.[309]

A direct consequence of this change is that some prosecutorial discretion is taken away from the convening authority. If the SJA concludes that there is no jurisdiction to try the accused by court-martial,[310] that the form of a charge is legally deficient,[311] or that a charge is not warranted by the evidence in the Article 32 report of investigation,[312] then the convening authority is precluded from referring that charge to a general court-martial.[313]

An indirect consequence of the 1983 changes to Article 34 may be that the pretrial advice has become less of a "prosecutorial tool" and become more "a substantial pretrial right of the accused." Correspondingly, the role of the SJA in rendering a pretrial advice may be less like a district attorney presenting a complaint to a grand jury for action[314] and more

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[307] *See* generally Military Justice Act of 1983: Hearings on S.974 Before the House Comm. on Armed Services, 98th Cong., 1st Sess. (1983).

> The staff judge advocate's advice has become a legal brief which can run from a few pages in length in simple cases, to scores of pages in more complicated ones. This takes the time and resources of lawyers, staff, and most importantly, the commander, The amendment of Article 34 removes the requirement that the convening authority examine the charges for legal sufficiency, and puts the burden where it belongs—on the shoulders of the staff judge advocate who is a lawyer.

Id. at 43 (statement of MG Hugh J. Clausen, The Judge Advocate General of the Army).

[308] The Military Justice Act of 1983 requires only that the pretrial advice include a written and signed statement by the staff judge advocate expressing his or her conclusions that

> (1) the specification alleges an offense . . .
>
> (2) the specification is warranted by the evidence indicated in the report of investigation . . . and
>
> (3) a court-martial would have jurisdiction over the accused and the offense.

The advice must also include the staff judge advocate's recommendation as to disposition.

[309] UCMJ art. 34(a).

[310] UCMJ art. 34(a)(3).

[311] UCMJ art. 34(a)(1).

[312] UCMJ art. 34(a)(2).

[313] UCMJ art. 34(a). The three legal conclusions that the SJA must make are binding on the convening authority; the SJA's recommended disposition is not. Even if the SJA's legal conclusion preclude referral of a charge to a general court-martial the convening authority would, in theory, retain the perogative to send the charge to some inferior level of court.

[314] United States v. Hayes, 7 C.M.A. 477, 22 C.M.R. 267 (1957).

like a quasi-judicial magistrate making a probable cause determination that protects the accused from being prosecuted on baseless charges.[315] Changing the fundamental nature of the SJA's pretrial advice could arguably have an impact on the standard of impartiality required of the SJA,[316] the role of the trial counsel in pretrial processing,[317] and the treatment of defects in the pretrial advice.[318]

VIII. CONTENTS

A. MANDATORY CONTENTS

The Military Justice Act of 1983contemplates that a legally sufficient pretrial advice need contain only the SJA's legal conclusions regarding jurisdiction, the form of the charges, and the sufficiency of the evidence at the Article 32 investigation, and the SJA's recommended disposition of the case.[319] This is in sharp contrast to prior case law which required that the pretrial advice highlight any matter which might have a substantial effect on the convening authority's referral decision.[320] It remains to be seen how the courts deal with the new "bare-bones" pretrial advice.

While the SJA is required to decide whether the charge is "warranted by the evidence indicated in the report of investigation,"[321] neither the UCMJ nor the Manual sets out an express standard against which the evidence must be weighed. The best view is that the charges must be supported by that "quantum of evidence . . . which would convince a reasonable, prudent person there is probable cause to believe a crime was committed and the accused committed it."[322]

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[315] Federal case law recognizes that the Article 32 pretrial investigation and the Article 34 pretrial advice, taken together, provide the military accused with due process guarantees which are equivalent to civilian indictment by grand jury or the federal preliminary examination. *See generally* Talbot v. Toth, 215 F.2d 22 (D.C. Cir, 1954).

In the past the Article 32 investigating officer has been the individual imbued with a judicial quality (United States v. Payne, 3 M.J. 354 (C.M.A. 1977)), and the Article 32 investigation was the substantial pretrial right which protected the accused against baseless charges. United States v. Samuels, 10 C.M.A. 206, 27 C.M.R. 280 (1959). This result is arguably skewed now that the staff judge advocate, a trained lawyer, makes binding legal conclusions concerning the sufficiency of the evidence to proceed to trial while the investigating officer, usually a layman, merely makes an advisory recommendation regarding disposition of the charges.

[316] *See generally supra* section III.

[317] *See generally supra* section III regarding *ex parte* advice to a "quasi-judicial" Article 32 investigating officer.

[318] *See generally supra* section VI regarding the enforcement of substantial pretrial rights without any showing of benefit at trial.

[319] UCMJ art. 34(a); R.C.M. 406(b).

[320] United States v. Foti, 12 C.M.A. 303, 30 C.M.R. 303 (1961).

[321] UCMJ art. 34(a)(2).

[322] United States v. Engle, 1 M.J. 387 (C.M.A. 1976). *Accord* Gerstein v. Pugh, 420 U.S. 103 (1975); Model Code of Professional Responsibility DR 7-103(A) (1980).

B. OPTIONAL CONTENTS

The legislative history to Article 34[323] and the non-binding discussion of the Manual[324] suggest that, when appropriate, the pretrial advice should include such things as "a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; and any previous recommendations by others who have forwarded the charges."[325] The Manual further suggests that failure to include these items can never constitute error,[326] presumably because the case file which accompanies the pretrial advice contains them should the convening authority be interested.

What matters are actually put into the pretrial advice is left to local practice—influenced primarily by the predilections of the convening authority. Any matters put into the pretrial advice, whether required or not, must be accurate.[327]

C. FORM OF THE ADVICE

Neither the UCMJ nor the Manual requires that the pretrial advice be in any particular form other than the requirement that the advice "shall include a written and signed statement" containing the mandatory conclusions and recommendation discussed above.[328] So long as this minimum requirement is met, additional matters can arguably be presented for the convening authority's consideration orally[329] or in the form of an unsigned back-up memorandum.

The Manual does require that a "copy of the advice of the staff judge advocate shall be provided to the defense if charges are referred to trial by general court-martial."[330] Arguably this provision would require the

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[323] S. Rep. No. 98-53, 98th Cong., 1st Sess. 17 (1983).
[324] R.C.M. 406(b) discussion.
[325] *Id.*
[326] *Id.*
[327] *Id.*
[328] R.C.M. 406(b).
[329] United States v. Treadwell, 7 M.J. 864 (A.C.M.R. 1979). In *Treadwell* the government urged that the staff judge advocate's oral advice to the convening authority cured a defective written pretrial advice which misstated the maximum punishment the accused could receive for the charged offenses. The court, in dicta, opined that, "Although the Manual . . . requires that the pretrial advice include a "written and signed statement" concerning specified matters (not including the maximum punishment), we know of no reason why the pretrial advice cannot be altered orally at least as to other matters, as was done in this case." *Id.* at 866 n.2. ***See also*** United States v. Heaney, 9 C.M.A. 6, 25 C.M.R. 268 (1958) (Since Article 34 does not prescribe the form or the manner of the advice it may be submitted in such manner and form as the convening authority may direct.); United States v. Clements, 12 M.J. 842 (A.C.M.R. 1982) (Staff judge advocate can orally cure a defective written pretrial advice.).
[330] R.C.M. 406(c).

SJA to disclose oral communications with the convening authority which are provided to assist the convening authority in making a referral decision.[331]

IX. PREPARATION OF THE PRETRIAL ADVICE

The staff judge advocate need not personally draft the pretrial advice but the final version which is presented to the convening authority must reflect the independent professional judgment of the staff judge advocate.[332]

If the advice remains a purely prosecutorial tool, as suggested in *United States v. Hardin*,[333] it may be acceptable for the trial counsel to draft the preliminary pretrial advice although a safer approach would be to have a neutral judge advocate perform that function.[334]

X. TREATMENT OF DEFECTS

Unlike the Article 32 pretrial investigation,[335] the pretrial advice generally has not been held to encompass substantial pretrial rights which are judicially enforceable without any showing by the accused of benefit at trial.[336] By making a timely motion for appropriate relief[337] the accused may be entitled to a continuance[338] and a new pretrial advice if the

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[331] R.C.M. 406(c) analysis provides that "the entire advice" should be provided to the defense so that "the advice can be subjected to judicial review when necessary,"

[332] R.C.M. 406(b) discussion. See *also* United States v. Foti, 12 C.M.A. 303, 30 C.M.R. 303 (1961) (Under the circumstances of the case, the SJA's use of a mimeographed form pretrial advice failed to afford the accused the "individualized treatment" required by Article 34.); United States v. Greenwalt, 6 C.M.A. 569, 20 C.M.R. 285 (1955) (Article 34 "places a duty on the staff judge advocate to make an independent and informed appraisal of the evidence as a predicate for his recommendation."); United States v. Schuller, 5 C.M.A. 101, 105, 17 C.M.R. 101, 105 (1954) (The accused has the right to "have a qualified Staff Judge Advocate make an independent and professional examination of the expected evidence and submit to the convening authority his impartial opinion as to whether it supported the charges.").

[333] United States v. Hardin, 7 M.J. 399, 403 (C.M.A. 1979).

[334] In *Hardin* the court relied at least in part on the fact that the advice was not binding on the convening authority, and the fact that with all the content requirements the court could review the 28-page pretrial advice and conclude it was an "exemplary," "dispassionate evaluation" of the case. The court held that having the trial counsel prepare the advice was not per se error and held that under the facts of Hurdin there was no error but the opinion falls far short of a wholesale endorsement of that procedure. Hardin, 7 M.J. at 404-05.

[335] *See* generally supra section VI.

[336] *But cf.* United States v. Porter, 1 M.J. 506 (A.F.C.M.R. 1975) (Where the pretrial advice omitted relevant information about the accused's prior service history the court ordered a new advice without speculating on whether the new information might affect the convening authority's referral decision and instead held that "an accused is entitled to have his case considered in light of accurate information.").

[337] R.C.M. 905(b)(1); R.C.M. 906(b)(3).

[338] R.C.M. 906(b)(3) discussion.

existing advice is so "incomplete, ill-considered, or misleading"[339] as to a material matter that the convening authority might have made an erroneous referral.[340]

Objections to defects are waived if they are not raised prior to the entry of a plea[341] or if the accused pleads guilty.[342]

XI. CONCLUSION

The pretrial procedures afforded a soldier accused of a major felony actually provide more rights and protections than a similarly situated civilian, Unfortunately, the Article **32** pretrial investigation and the Article **34** pretrial advice are frequently given less attention than they deserve, A convening authority that appoints top quality investigating officers will avoid wasting resources on meritless charges and will have a higher conviction rate at general courts-martial than the convening authority who views the pretrial investigation as a ***pro forma*** proceeding. Similarly, the trial counsel who prepares for and participates in the pretrial investigation ultimately will be more successful at trial.

The Article **32** investigation is truly a substantial pretrial right for the accused. It not only provides the defense counsel with an opportunity to test the government's case, but also is the best discovery vehicle available in any criminal justice system.

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[339] United States v. Greenwalt, 6 C.M.A. 569, 20 C.M.R. 285 (1955); United States v. Kemp, 7 M.J. 760 (A.C.M.R. 1979); R.C.M. 406(b) discussion.

[340] *See, e.g.*, United States v. Rivera, 20 C.M.A. 6, 42 C.M.R. 198 (1970) (Reversible error not to inform the convening authority of the unit commander's opinion that the accused should not receive a punitive discharge.); ***United States*** v. ***Greenwalt*** (Statement in the pretrial advice that the Article 32 investigating officer recommended trial by general court-martial, when in fact he recommended special court-martial, was a defect "likely to mislead the convening authority in the exercise of his power of referral."). *Cf.* United States v. Kemp, 7 M.J. 760, 761 (A.C.M.R. 1979) (Although there were several misstatements of fact in the pretrial advice, even taken together the court did "not believe that the convening authority might have referred the case to an inferior court."); United States v. Riege, 5 M.J. 938, 944 (N.C.M.R. 1978) (Not error to fail to discuss the element "prejudicial to good order and discipline" in the pretrial advice where the convening authority "was adequately advised of all the facts that might have had a substantial influence upon his decision."); United States v. Skaggs, 40 C.M.R. 344, 346 (A.B.R. 1968) (Failure to include unit commander's recommendation against a punitive discharge was not reversible error where there was "no reasonable likelihood . . . that the convening authority would have disposed of the charges differently . . . .").

[341] United States v. Heaney, 9 C.M.A. 6, 25 C.M.R. 268 (1958); United States v. Fountain, 2 M.J. 1202 (N.C.M.R. 1978); R.C.M. 905(e). *But* ***see*** United States v. Edwards, 32 C.M.R. 586 (A.B.R. 1962).

[342] ***See generally*** R.C.M. 910(j) and *supra* section VI. ***See also*** United States v. Packer, 8 M.J. 785 (N.C.M.R. 1980); United States v. Blakney, 2 M.J. 1135 (C.G.C.M.R. 1976); United States v. Henry, 50 C.M.R. 685 (A.F.C.M.R. 1975).

Although there are currently some unresolved legal issues pertaining to the Article 32 investigation and the Article 34 pretrial advice, most of the applicable rights, procedures, and legal standards are fairly clear. This article is intended to cover all the relevant law and to highlight all the important issues. It is designed to serve as a comprehensive guide for judge advocates serving in any criminal law position.

FEDERAL EMPLOYEE CHALLENGES TO CONTRACTING OUT: IS THERE A VIABLE FORUM?

by Major Richard K. Ketler, USMC*

I, INTRODUCTION

For nearly thirty years, the federal executive branch has espoused a policy of relying on private enterprise to supply the commercial products and services needed to perform its governmental functions.[1] Originally, the justification for this policy was that, in the process of governing, the government should not compete with private business. Economy and operational efficiency, however, have become the primary factors in determining whether the government's commercial activities[2] should be performed in-house[3] or under contract with private firms.[4]

The current commercial activities policy, promulgated in the Office of Management and Budget's Circular No. A-76,[5] requires that executive agencies conduct detailed comparisons of the estimated cost of the most efficient in-house performance of commercial activities with the cost of acquiring such services through competitive bidding by private contrac-

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[1] For a discussion of the development of the federal contracting-out policy through 1970, *see generally* Wildermuth, ***Contractingout: A Case for Realistic Contract vs. In-House Decision-Muking,*** **49** Mil. L. Rev. 1 (1970).

[2] A "commercial activity" is defined as "one which is operated by a Federal Executive agency and which provides a product or service which could be obtained from a commercial source. A commercial activity is not a Governmental function." Office of Management & Budget, Circular No. A-76, Performance of Commercial Activities, 48 Fed. Reg. 37,110, para. *6a* (Rev'd 1983) (hereinafter cited as OMB Circ. A-76). Further, a "governmental function" is "a function which is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government." *Id.* at para. 6e. Examples of commercial activities are audiovisual products and services; automatic data processing; food services; health services; industrial shops and services; installation and system operations, maintenance and testing services; office and administrative services; and security services. For a more complete listing of commercial activities, ***see id.*** Attachment A.

[3] The term "in-house" is used to indicate the performance of commercial activities by federal civilian employees or military personnel using government facilities.

[4] ***See infra*** notes 16-26 and accompanying text.

[5] OMB Circ. A-76. Hereinafter, OMB Circular No. A-76 will be referred to in the text as the Circular, Circular A-76, or A-76.

tors.[6] In general, if an acceptable contractor bid is lower than the in-house estimate, commercial activities are converted from government performed to contractor performed. If the activity can be performed less expensively in-house, the agency must do so by implementing the organization plan upon which the in-house estimate was based.

In view of the escalating federal deficit, government officials must strive for optimum economy and efficiency of operations. Federal employees and their unions, on the other hand, are understandably concerned about job security. Accordingly, employee challenges[7] to agency actions under the Circular have arisen in several forums, including administrative appeals under procedures mandated by the Circular itself;[8] negotiability and arbitration award appeals under Title VII of the Civil Service Reform Act of 1978 (CSRA)[9] before the Federal Labor Relations Authority (FLRA or Authority);[10] lawsuits in federal court under the Administrative Procedure Act" and various appropriations acts;[12] and procurement protest actions in the General Accounting Office (GAO).[13] This diversity of available forums has resulted in inconsistent rulings concerning the extent of discretion agency officials may exercise in contracting out, as well as in a lack of finality of government procurements under the Circular. Additionally, because commercial activity conversions generally are not delayed pending appeal, adversely affected em-

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[6]The Supplement to Circular A-76 provides substantive and procedural guidance for the heads of executive agencies to follow in determining whether commercial activities should be performed in-house or under contract with commercial sources. Office of Management & Budget, Supp., Circular No. A-76 (Revised), Performance of Commercial Activities (1983) (hereinafter cited as OMB Circ. A-76 Supp.).

'Direct challenges to contracting out decisions have been maintained in certain forums by individual employees, as well as by employee unions on behalf of bargaining unit members. To avoid confusion, the term "employee challenge" is used here to generally signify any direct challenge to an agency A-76 action that, in effect, is on behalf of adversely affected employees, regardless of whether maintained by an individual or labor organization. Individual employees discharged or demoted as a result of commercial activity conversions may also appeal on limited grounds to the Merit Systems Protection Board (MSPB) under Reduction-In-Force (RIF) regulations promulgated by the Office of Personnel Management. 5 C.F.R. §§ 351.901, 1201.3(a)(8) (1983). The MSPB, however, lacks jurisdiction to review managerial considerations underlying an agency's exercise of discretion in deciding to contract out a commercial activity. The board's authority is limited to reviewing the propriety of the agency's invocation or application of the RIF regulations. *Bona fide* decisions to contract out are reorganizations under 5 C.F.R. § 351.201(a) (1983) which justify the elimination of civil service jobs pursuant to RIF procedures. ***See, e.g.***, Griffin v. Dep't of Agriculture, 2 M.S.P.B. 335 (1980).

[8]***See infra*** notes 57-76 and accompanying text.

[9]Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified in scattered sections of 5 U.S.C.). Hereinafter, the Federal Service Labor-Management Relations chapter of the CSRA, 5 U.S.C. §§ 7101-7135 (1982), will be referred to as Title VII, as it was originally promulgated in the session law.

[10]***See infra*** notes 77-213 and accompanying text.

[11]5 U.S.C. §§ 701-706 (1982 & Supp. I 1983).

[12]***See infra*** notes 43-51, 214-57 and accompanying text.

[13]***See infra*** notes 258-91 and accompanying text.

ployees suffer from the lack of a single, expeditious procedure to challenge the propriety of agency contracting-out determinations.

This article examines employee challenges to federal contracting-out determinations in the various forums, with emphasis on *Equal Employment Opportunity Commission (EEOC) v. FLRA*,[14] a case pending review by the U.S. Supreme Court. The decision of the Court of Appeals for the District of Columbia in *EEOC v. FLRA* greatly expanded the scope of contracting-out determinations subject to grievance arbitration, thus making labor arbitration the predominant forum for federal contracting-out litigation. This article concludes that the court in *EEOC u. FLRA* misinterpreted the language and legislative intent of pertinent Title VII provisions. Moreover, contracting-out arbitration severely impairs government managerial flexibility and efficiency without providing an effective, expedient, and competitive review procedure to employees adversely affected by commercial activity conversions. The *EEOC v. FLRA* decision should be overturned by the Supreme Court. To the extent that independent review of employee challenges to Circular A-76 determinations is needed, Congress should provide standing for adversely affected employees[15] under GAO procurement protest procedures. Such legislation would foster implementation of the policies underlying the commercial activities program by providing for prompt, impartial consideration of employee interests by a forum that could, at the same time, adjudicate the procurement technicalities involved in challenges to contract awards under the Circular.

11. THE COMMERCIAL ACTIVITIES PROGRAM

A. OMB Circular No. A-76

The government's contractingout policy was first announced in President Eisenhower's 1954 budget message to the Congress.[16] He stated that that budget "mark[ed] the beginning of a movement to shift to . . . private enterprise Federal activities which can be more appropri-

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[14] 744 F.2d 842 (D.C. Cir. 1984), cert. *granted*, 105 S. Ct. 3497 (1985). *See infra* notes 164-84 and accompanying text.

[15] In the context of interested parties authorized to maintain GAO procurement protests under legislation proposed in this article, the term "adversely affected employees" is used to refer to federal employees who, because of a RIF resulting from a commercial activity conversion to contractor performance, are released from their competitive levels under 5 C.F.R. § 351.601 (1983). It is not intended to include all employees who may be eligible for the right of first refusal for employment with the private contractor under Federal Acquisition Reg. §§ 7.305(c), 52.207-3 (1 Apr. 1984) and implementing agency regulations, or who may be entitled to appeal an A-76 determination under agency administrative appeal procedures, *e.g.*, Dep't of Army, Reg. No. 5-20, Commercial Activities Program, para. 4-31*a* (1 Feb. 1985).

[16] For a thorough historical development of the government's early contractingout program and policies, **see** Wildermuth, supra note **1,** at 3-19.

ately and more efficiently carried on that way."[17] The then-existing Bureau of the Budget promulgated a series of bulletins implementing this policy.[18] Agency heads were instructed to inventory and study commercial activities to determine whether they should be converted to contract to further the general policy of performance through private enterprise. Specific methods of cost comparison were not required. In fact, relative cost was not a primary consideration.[19]

Circular No. A-76, first issued as a Bureau of the Budget circular in 1966,[20] marked a fundamental shift in the contracting-out policy from a goal of absolute reliance on private sources to meet the government's commercial activity needs to reliance on a cost-effective balancing between in-house and contractor performance.[21] The Circular was revised in 1967, 1979, and 1983. The current Circular states that it is the policy of the U.S. Government to achieve economy and enhance productivity through competition between in-house and commercial sources for performance of commercial activities; retain governmental functions[22] in-house; and rely on private enterprise for commercially available goods and services if the activity can be performed more economically in the private sector.[23] Specifically excluded from coverage under the Circular are government functions, Department of Defense (DOD) operations during wartime or military mobilization, and research and development contracts.[24] Agency heads are required to review all other commercial ac-

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[17] 100 Cong. Rec. 567 (1954).

[18] *See* Wildermuth, *supra* note 1, at 4-11.

[19] *Id.* at 4-5.

[20] Bureau of the Budget, Circular No. A-76, Policies for Acquiring Commercial or Industrial Products and Services for Government Use (1966).

[21] *See* Wildermuth, supra note 1, at 10-14, for an in-depth analysis of the original Circular A-76.

[22] Government functions fall generally into two categories: those involving (1) the discretionary exercise of government authority in the act of governing (*e.g.*, criminal investigations; prosecutorial and judicial functions; direction of the armed forces; management of government programs requiring value judgments; foreign relations; direction of federal employees; and regulation of space, natural resources, industry, and commerce); and (2) monetary transactions and entitlements (*e.g.*, tax collection, revenue disbursement, Treasury functions, and administration of public funds). OMB Circ. A-76, para. 6*e*.

[23] *Id.* at para. 5.

[24] *Id.* at para. 7*c*. In addition to activities specifically excluded from the provisions of the Circular, the Supplement provides that commercial activities involving ten or fewer Full-Time Equivalent (FTE) workyears may be converted to contract without conducting cost comparisons if the agency determines that "fair and reasonable prices can be obtained from qualified commercial sources." OMB Circ. A-76 Supp., pt. I, ch. 2, para. A1. An FTE is the planned w e of 2,087 straight-time paid hours in a fiscal year, approximately the amount of work performed, for example, by one full-time employee or two part-time employees each working 20 hours a week. *Id.* at n.1. The Department of Defense, however, may not convert any activity, regardless of size, without first conducting an A-76 cost comparison demonstrating that contractor performance is more economical. Dep't of Defense Federal Acquisition Reg. Supp. § 7.302(d) (1 Apr. 1984). The Dep't of Defense operates 75% of the commercial activities subject to Circular A-76. OMB Cir. A-76, Comment D, at 48 Fed. Reg. 37,111.

tivities under procedures set forth in the Circular and its Supplement. These activities may be continued to be performed in-house[25] only under the following conditions:

> a. No commercial source is capable of providing the needed goods or services, or such procurement would cause an unacceptable delay or disruption of an agency program;
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> b. The interests of national defense, as determined by the Secretary of Defense, justify in-house performance;
>
> c. The interests of patient care at government-operated hospitals, as determined by the agency head, justify retention of health care services; or
>
> d. A cost comparison prepared in accordance with the A-76 Supplement demonstrates that in-house operation of the activity can be accomplished at a lower estimated cost than by a qualified private contractor.[26]

Agency heads are required to complete initial reviews of all existing commercial activities by September 30, 1987.[27] These reviews must determine whether the activity may be retained in-house for any of the foregoing reasons. If in-house performance is based on lower cost (reason d), it must be justified under detailed standards set forth in the Supplement for equitably comparing the cost of in-house performance with the cost of contract performance by the lowest acceptable bidder.[28] Any activity approved for retention following the initial review must again be reviewed at least once every five years.[29]

A basic familiarity with the Circular and its Supplement is necessary to understand the issues presented in the various employee challenges to contracting-out determinations. Once a commercial activity is identified and approved for a cost comparison, the agency must develop a Performance Work Statement (PWS) and a Quality Assurance Plan. Basically, the PWS sets forth the contract specifications. It includes a complete

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[25] This article deals only with agency determinations pursuant to Circular A-76 involving existing commercial activities and expansions of existing activities being performed by federal employees in government facilities. The Circular and Supplement prescribe separate procedures concerning performance of a "new requirement," *i.e.*, "a newly established need for a commercial product or service." OMB Circ. A-76 Supp., pt. I, ch. 1, para. C4*a*. Though not inconceivable, it is unlikely that federal employees would have standing to challenge an agency determination to contract out a function not previously performed by them. ***See,*** *e.g.*, *infm* notes **214-22** and accompanying text.

[26] OMB Circ. **A-76,** para. 8.

[27] *Id.* at para. ***9e.*** This requirement, however, appears to have been modified since the 1983 revision of the Circular was promulgated. ***See*** *infra* note **55** and accompanying text.

[28] OMB Circ. **A-76** Supp., pt. I, ch. **1**, para. C1*a*.

[29] *Id.* pt. I, ch. **1**, para. C1*c*.

analysis of the jobs that need to be performed and the acceptable standards of performance. The PWS provides the basis for both the agency's in-house cost estimate and the contractor's bids. For purposes of competitive cost comparison, the government's and the contractors' estimates are thus based on the same scope of work and performance standards.[30] The Quality Assurance Plan outlines the methods and schedules by which the agency will manage, monitor, and review contractor performance should the activity be converted to contract. Part II of the Supplement provides policy guidance to assist agency officials and management analysts in exercising sound managerial judgment in drafting these documents.[31]

The agency's next step is to conduct a management study to develop the "most efficient and cost effective in-house operation" for accomplishing the requirements of the PWS pursuant to federal civil service personnel and staffing regulations.[32] The purpose of the study is to analyze current operations and develop an organizational structure and operating procedure that incorporate whatever changes—such as workforce reorganization, consolidation or elimination of jobs, or grade-level changes—necessary to achieve optimum productivity.[33] Part III of the Supplement sets forth recommended procedures for conducting the management study. It suggests management principles, analysis techniques, and performance indicators for consideration in conducting studies of commerical activities.[34] The application of any specific technique or method of analysis depends upon the type of activity under review, and the time, data, and analysts available.[35] The exercise of managerial judgment in determining the relative efficiency of organizational alternatives remains within the discretion of responsible agency officials.

The agency, usually through a management task group, then develops an in-house cost estimate based on the PWS and the Most Efficient Organization (MEO) Plan. Estimates of agency labor, material, overhead, and other in-house performance costs are prepared. Agency costs associated with potential contractor performance, other than those dependent on the contract bid price, are also estimated. These include, for example, the costs of contract administration and one-time conversion expenses.

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[30] *Id.* pt. 1, ch. 2, para. B1.

[31] Part II of the Supplement is still being revised. It will be adapted, without anticipated significant change, from Office of Federal Procurement Policy, Pamphlet No. 4, A Guide for Writing and Administering Performance Statements of Work for Service Contracts (1980).

[32] OMB Circ. A-76 Supp., pt. I, ch. 2, para. E1.

[33] *Id.* pt. 111, ch. 1, para. A.

[34] *Id.* pt. III.

[35] *Id.* pt. 111, ch. 2, para. A.

The estimates are reviewed by an independent agency audit activity and then submitted with supporting data in a sealed envelope to the agency contracting officer. The agency's cost estimates remain confidential until the bid opening.[36]

In the meantime, the contracting officer prepares and issues a bid solicitation or request for contractor proposals. When the bids are opened, the contracting officer conducts a comprehensive comparison of the lowest contractor bid and the in-house estimate. The agency's estimated costs associated with contractor performance are added to the contractor's bid price, and the amount of federal income tax the government would recoup from the contractor is deducted.[37] Finally, a conversion differential of ten percent of the estimated in-house personnel cost is added to the contractor's bid to cover the agency's temporary loss of productivity during conversion, certain federal employee reduction-in-force (RIF) benefits, and any other "unpredictable risks."[38] Upon comparison, a lower commercial price supports a decision to contract out, while a lower in-house estimate results in cancellation of the solicitation. The final decision rests with the agency's contracting officer pursuant to the conditions set forth in the solicitation. If the cost comparison results in a decision to retain the activity in-house, the agency's MEO Plan must be implemented within six months.[39]

Commercial activity reviews and cost comparisons are complex, expensive, and time-consuming undertakings that require the coordinated efforts of management engineers, procurement specialists, line managers, and the workforce. But, the potential taxpayer savings can be substantial. For example, the U.S. Army Corps of Engineers contracted out the operation and maintenance of the locks and bridges of the Atlantic Intracoastal Waterway. The management study was initiated in December, 1981, and the contract award was made in November, 1982, to a private contractor whose bid, following anticipated inflation adjustments,

[36] *Id.* pt. IV, ch. 1, para. C2
[37] *Id.* pt. IV, ch. 3.
[38] *Id.* pt. IV, ch. 4, para. A.
[39] *Id.* pt. I, ch. 2, para. E5.

was still $700,000 below the in-house cost estimate of the most effective agency operation of the Waterway.[40]

Commercial activity conversions, however, can have serious consequences for displaced civil servants. In the Intracoastal Waterway example, even though all the displaced employees were hired by the contractor at salaries equal to or greater than what they received as civil servant they suffered a significant loss of fringe benefits. The health insurance premiums of some workers increased from $59.50 to $204.00 per month; group term life insurance coverage was eliminated; and there were substantial decreases in sick leave and vacation time.[42] In view of the thousands of executive branch commercial activities subject to mandatory review under Circular A-76, the magnitude of the competing interests involved is staggering.

B. CONGRESSIONAL INVOLVEMENT IN THE COMMERCIAL ACTIVITIES PROGRAM

Circular A-76 promulgates executive branch managerial policy. Congress, however, has become increasingly involved in the commercial activities program, primarily through temporary and permanent DOD appropriations legislation. In the 1975 DOD Appropriation Authorization Act,[43] Congress directed the Secretary of Defense to consider the advantages of converting from one form of manpower to another—civilian, military, or contractor—and to select the least costly methods of operation consistent with national defense. A "full justification" for any such

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[40] U.S. Army Corps of Engineers v. AFGE, Local 3026, 81 Lab, Arb. (BNA) 510, 510-11 (1983) (Everitt, Arb.). The opinion does not specify the length of the contract term. Usually, commercial activities bids are solicited for comparison with in-house estimates for a one-year term with options for two or three additional one-year periods. The Department of Defense reported in March 1984, that the 235 commercial activity contracts it awarded under Circular A-76 between October 1, 1980 and October 1, 1982 saved the taxpayers $250 million through September 30, 1983. Gen. Accounting Office, Report to the Subcomm. on Civil Service, Post Office & Gen. Services, Comm. on Governmental Affairs, U.S. Senate, Information from Previous Reports on Various Aspects of Contracting Out Under OMB Circular A-76, GAOINSIAD-85-107 at 2 (July 5, 1985) (discussing Ass't Sect'y of Defense (Manpower, Installations, and Logistics), Reports to Congress on the Commercial Activities Program (Mar. 12, 1984)). A General Accounting Office survey of 20 Department of Defense sample functions contracted out from October, 1978, through February, 1981, also disclosed that despite subsequent cost increase in all but one of the functions, significant savings were still realized in 17 of the 20 activities. Gen. Accounting Office, DOD Functions Contracted Out Under OMB Circular A-76: Contract Out Increases and the Effects on Federal Employees, GAOINSIAD-85-49 (Apr. 15, 1985).

[41] Private contractors bidding on contracts for activities then being performed in-house are required to provide displaced federal employees a right of first refusal for positions under the contract for which they are qualified. Federal Acquisition Reg. §§ 7.305(c), 52.207-3 (1 Apr. 1984).

[42] 81 Lab. Arb. (BNA) at 510.

[43] Dep't of Defense Appropriation Authorization Act, 1975, Pub. L. No. 93-365, 88 Stat. 399 (1974).

conversion was required to be included in the annual manpower report to Congress.[44] A congressional moratorium was also placed on Fiscal Year 1978 conversions under Circular A-76 until ninety days following submission of a joint report by the Secretary of Defense and the Director of the OMB relating the findings of a comprehensive review of DOD's method of conducting commercial activity cost analyses.[45]

In 1981 and 1982, Congress established permanent restrictions and reporting requirements with regard to all proposed conversions of existing commercial activities performed by eleven or more DOD civilian employees, No conversion to contractor performance may be used to circumvent a civilian personnel ceiling. Additionally, no contract may be awarded prior to receipt of submissions from the Secretary of Defense that **(1)** notify Congress prior to any decision to study a commercial activity for conversion; **(2)** provide Congress with a detailed summary of the cost comparison, demonstrating that conversion will result in savings to the government; **(3)** certify that the agency's in-house cost estimate was based on the most efficient and cost effective organization; and **(4)** report the potential economic effect of A-76 conversions on displaced employees and local communities if more than fifty employees are affected.[46]

This appropriations legislation reflects congressional appreciation of the conflicting, though equally compelling, interests of governmental economy and employee job security. While Congress wishes to protect employees from arbitrary or unwarranted **A-76** conversions, it carefully avoided excessive regulation that would unduly impair agency managerial discretion, thus diminishing the potential savings generated by the

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[44] *Id.* § 502, 88 Stat. at 404.

[45] Dep't of Defense Appropriation Authorization Act, 1978, Pub. L. No. 95-79, § 809, 91 Stat. 323, 335 (1977). Similarly, in fiscal year 1979, Congress directed the Secretary of Defense to report to the House and Senate Armed Services Committees any proposed changes in policy or regulations concerning commercial activity conversions to contract performance. Conversions were temporarily prohibited pending receipt of the report. Dep't of Defense Appropriation Authorization Act, 1979, Pub. L. No. 95-485, § 814, 92 Stat. 1611, 1625 (1978).

[46] 10 U.S.C. § 2304 note (1982). Congress also has acted with respect to particular types of commercial activities. The provisions of Circular **A-76** were waived for certain research and development activities, Dep't of Defense Authorization Act, 1980, Pub. L. No. 96-107, § 802, 93 Stat. 803, 811 (1979), and temporary prohibitions have been placed on conversions to contract performance for DOD firefighting and security guard services. Dep't of Defense Authorization Act, 1984, Pub. L. No. 98-94, § 1221, 97 Stat. 614, 691-692 (1983); Dep't of Defense Authorization Act, 1983, Pub. L. No. 97-252, § 1111, 96 Stat. 718, 747 (1982).

commercial activities program.[47] Accordingly, proposed language was deleted from the House of Representatives amendment to the 1980 DOD Authorization Act that would have given congressional committees thirty legislative days before contractor performance could begin to review any DOD decision to contract out.[48] Similarly, a proposal was dropped from the 1981 House bill that would specifically have authorized employees receiving RIF notices due to A-76 conversions to file suit in a U.S. district court.[49]

In 1978, Congress also enacted Title VII of the CSRA, which for the first time provided a statutory framework for federal sector labor-management relations. The statute grants public employee labor organizations the statutory right to engage in collective bargaining. It also permits unions to invoke grievance arbitration on virtually any matter affecting conditions of employment of bargaining unit members.[50] But, to

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"In proposing to exclude DOD functions involving less than **50** civilian employees from the reporting requirements of 10 U.S.C. § 2304 note (1982), the Senate Armed Services Committee noted:

> Cost studies of commercial activities currently performed by Department of Defense personnel have demonstrated that significant savings can be achieved and military readiness improved as a consequence of the process, whether or not an activity is subsequently contracted. Efficient management of this program can enhance the potential for savings.
>
> . . . .
>
> The committee believes that continued oversight of the commercial activities review process is necessary. . . . However, the requirement for detailed cost studies on all functions except those under $100,000 as required by OMB Circular A-76 [1979 Revision] as well as the detailed reporting requirements . . . may impede efficient management of this program. In addition to delaying the CITA [commercial or industrial-type activity] review process, the cost of conducting detailed cost studies for small functions can reduce the potential savings.

S. Rep. No. 330, 97th Cong., 2d Sess. 154-55, *reprinted in* 1982 U.S. Code Cong. & Ad. News 1555, 1564-65. The final compromise bill exempted activities with 10 or less employees from the congressional reporting requirements. H.R. Conf. Rep. No. 749, 97th Cong., 2d Sess. 173, *reprinted in* 1982 U S. Code Cong. & Ad. News 1569, 1578-79.

[48] H.R. Conf. Rep. No. 564, 96th Cong., 1st Sess. **53,** *reprinted in* 1979 U.S. Code Cong. & Ad. News 1832, 1836. The DOD Authorization Act of 1980 placed restrictions on commercial activity conversions during Fiscal Year 1980 that were virtually identical to the permanent legislation enacted in subsequent authorization acts. *Cf.* Dep't of Defense Authorization Act, 1980, Pub. L. No. 96-107, § 806, 93 Stat. 803, 813 (1979) *with* 10 U.S.C. § 2304 note (1982).

[49] H.R. Conf. Rep. No. 1222, 96th Cong., 2d Sess. 93, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2666, 2669.

[50] 5 U.S.C. §§ 7103(a)(9), (12), 7114, 7121 (1982). "Conditions of employment" are defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions," except for policies, practices, and matters relating to prohibited political activities, position classifications, or otherwise specifically provided for by law, such as pay and benefits. *Id.* § 7103(a)(14). *See also infra* note 151.

maintain the flexibility and managerial authority needed for an efficient and responsive government, Congress specifically reserved to agency managers the exclusive right to make contracting-out determinations.[51]

Congressional concern over implementation of the commercial activities program continues. Despite repeated revisions of the Circular, the controversy over contracting out prompted the House Subcommittee on Human Resources of the Committee on Post Office and Civil Service to conduct an oversight hearing on September 20 and 25, 1984. Its purpose was to find ways to reduce federal workforce disruption caused by the A-76 program. The hearing chairman, Representative Donald J. Albosta, noted three basic areas of concern: the identification of government functions not appropriate for contractor performance; the accuracy of A-76 studies in determining the true comparative costs of contractor and in-house performance; and the adverse employee impact of A-76 conversions.[52]

Representatives of major federal employee unions testifying at the oversight hearing noted numerous deficiencies and inequities in the A-76 program. Most of their criticisms—such as the loss of institutional knowledge and accountability resulting from elimination of the civil service, contractor underbidding, and poor contract performance and cost overruns—concerned the basic policy question of whether any commercial activity should be performed by the private sector. Specific objections to the Circular included the lack of employee notification prior to the issuance of commercial activity solicitations, inaccurate or inadequate in-house estimates and cost comparisons, and administrative agency appeal procedures marred by procedural defects and biased decision-making.[53]

In partial response, the Deputy Director of the OMB, Joseph R. Wright, Jr., while admitting that the commercial activities program has not been effectively implemented in its twenty-nine-year history,[54] informed the subcommittee of A-76 policy changes. Under new guidelines, only activities with demonstrated savings potential are to be targeted

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[51] 5 U.S.C. § 7106(a)(2)(B) (1982). See infra note 66.

[52] *Implementation* of Circular *A-76:* Hearings Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service, 98th Cong., 2d Sess. 2 (1984) (statement of Rep. Albosta) (hereinafter cited as Oversight Hearing).

[53] *Id.*

[54] *Id.* at 124, 127 (statement of Joseph R. Wright, Jr., Deputy Director, OMB).

for contracting-out reviews,[55] and competitive bids for the performance of commercial activities will be accepted both from the private sector and other federal agencies.[56] Employee objections to existing agency administrative appeal procedures and other aspects of the A-76 process are discussed in greater detail below.

III. CIRCULAR A-76 ADMINISTRATIVE APPEALS

Currently, the A-76 Supplement requires each executive agency to establish an administrative procedure for directly affected parties—employees, labor organizations, and unsuccessful bidders on commercial activity solicitations—to appeal cost comparisons under Part IV of the Supplement, as well as determinations to contract out in instances where cost comparisons are not required.[57] This appeal process is intended "to provide an administrative safeguard to ensure that agency decisions are fair and equitable and in accordance with procedures in Part IV of, . . [the] Supplement."[58] Specifically excluded from consideration are management decisions and selections of one contractor over another.[59] "Management decisions'' include choices relating to development of the most efficient in-house organization and identification of particular activities as governmental functions.[60]

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[55] *Id.* at 126, 130-31. Agencies will be required to concentrate their management review efforts on the following areas: automatic data processing, data recording, accounts management, loan processing, architectural and civil engineering, training, audiovisual services, food services, mail and filing services, libraries, laundry and dry cleaning services, facilities maintenance, warehousing, and motor vehicle operation and maintenance. Furthermore, four categories of commercial activities will not be reviewed for possible private contractor performance: activities with less than ten full-time equivalent employees (except those in the areas listed above or those that can be combined with similar activities to result in substantial potential savings); activities employing handicapped employees or veterans who could not be reassigned to government positions; activities involved in determining government policy or monitoring contracts; and activities exempted for reasons of national defense. Id. at 131; Office of Management and Budget Memorandum on Improving Productivity Through Use of Circular A-76 (Sept. 27, 1984), reprinted *in* 42 Fed. Cont. Rep. (BNA) 479081 (Oct. 1, 1984).

"Oversight Hearing, supm note 52, at 126, 130 (statement of Joseph R. Wright, Jr., Deputy Director, OMB).

[57] OMB Circ. A-76 Supp., pt. 1, ch. 2, para. 11.

"Id. pt. 1, ch. 2, para. 12.

"Id. pt. 1, ch. 2, para. 11.

[60] OMB Circ. A-76, Comment H. 48 Fed. Reg. at 37.112. The Dep't of the Army regulation implementing the 1983 revision of Circular A-76 'provides, with regard to "the-Army's administrative appeal procedure, that:

> Appeals based on factors other than the validity of the cost comparison will not be considered. For example, the economic effect of the conversion on the local community or the choice of one contractor over another may not be considered. In addition, the organizational structure and staffing established by an approved management study is not subject to appeal.

Dep't of Army, Reg. No. 5-20, Commercial Activities Program, para. 4-31d. (1 Feb. 1985) [hereinafter cited as AR 5-20].

The administrative appeal procedure must be objective, independent, and expeditious.[61] Decisions must be rendered within thirty days. To be eligible for review, appeals must specify errors in the cost comparison which if corrected would change the decision to contract out or retain the function in-house. Further, appeals must be submitted no later than fifteen days after the agency makes available to affected parties the documentation upon which the cost comparison was based. The filing time may be extended at agency discretion up to thirty days in cases of particularly complex cost studies.[62]

Regarding the scope of matters subject to review, employee criticism of the administrative appeal procedure has centered on non-reviewability of MEO Plans and agency determinations that particular activities are not government functions exempt from contracting out.[63] Because federal employees are required, in effect, to compete with private enterprise for the awarding of government contracts, should they not be afforded an opportunity to challenge the accuracy of the MEO Plan and the propriety of decisions that certain activities are suitable for non-governmental performance? While the Circular encourages employee input with respect to development of the PWS and MEO Plan,[64] this argument overlooks the fact that, except to the extent specifically authorized by law,[65] federal employees have no greater legal interest in or standing

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[61] The official who rules on the appeal must be impartial and serve in an agency position at an organizational level higher than the official who approved the decision to contract out or cancel the solicitation. OMB Circ. A-76 Supp., pt. 1, ch. 2, para. 13. For example, the Department of Army procedure provides that once appeals are filed with the installation contracting officer who made the tentative decision on a cost comparison, they will be forwarded to the next higher command. Following the close of the appeal period, rebuttals to any appeals may be filed by interested parties within ten calendar days. The appeals and rebuttals are then considered by an appeals board composed of at least three military or civilian members with experience or training in A-76 costing procedures and program requirements. Excluded from board membership is any person who took part in the cost study, was directly associated with the activity under review, works or has relatives working in the activity, or works for the command or organization with control over the activity. The board does not hear oral appeals, and its decisions must be rendered within 30 days of the close of the rebuttal period. Any revisions of cost comparisons directed by the board must be audited by the Army Audit Agency prior to the contracting officer's announcement of the impact of the decision on the initial cost comparison result. AR 5-20, para. 4-31e-I.

[62] OMB Circ, A-76 Supp., pt. I, ch. 2, para. I3·6. At a minimum, the following documents must be made available to interested parties: the in-house cost estimate with supporting data; the completed cost comparison form; and the name of the winning bidder or, in cases of in-house retention, the price of the lowest acceptable contractor bid. *Id*. pt. I, ch. 2, para. 5.

[63] *See, e.g.*, OMB Circ. A-76 Supp., Comment H, 48 Fed. Reg. at 37,112; Oversight Hearing, ***supra*** note 52.

[64] OMB Circ. A-76 Supp., pt. 1, ch. 2, para. E2.

[65] *E.g.*, 5 U.S.C. §§ 4303(e), 7513(d) **(1982)** (providing for employee appeals to the Merit System Protection Board of various individual adverse actions allegedly in violation of law or regulation).

to assert allegations of government mismanagement than do ordinary taxpayers. Government policies and affairs, of course, are subject to the democratic process. The responsibility for day-to-day agency management, however, is entrusted to the discretion of elected or appointed officials. Because of the overriding requirement that the government be able to function responsively at all times, Congress placed greater limitations on workforce involvement in management decisions than exist in private industry.[66] To grant federal employees standing to subject basic managerial choices to independent review "would be tantamount to permitting third parties to dictate to agency management."[67] That is not to say that all aspects of the commercial activities program involve discretionary exercises of managerial judgment. Application of the cost estimate criteria in Part IV of the Supplement, though often complex and subject to dispute, is fundamentally a non-discretionary function subject to review under objective standards.

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[66]For example, in addition to the illegality of federal employee strikes, 5 U.S.C. § 7311(3) (1982), and limitations on political activities, 5 U.S.C. §§ 7321-7328 (1982), Congress specifically reserved to agency officials the authority to exercise managerial judgment, unrestricted by collective bargaining, with respect to certain matters. The Management Rights section of Title VII provides:

> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
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> (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
>
> (2) in accordance with applicable laws—
>
> (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
>
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
>
> (C) with respect to filling positions, to make selections for appointments from—
>
> (i) among properly ranked and certified candidates for promotion; or
>
> (ii) any other appropriate source; and
>
> (D) to take whatever actions may be necessary to carry out the agency mission during emergencies.
>
> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating—
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> (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. § 7106 (1982).

[67]OMB Circ. A-76, Comment H, 48 Fed. Reg. at 37,112

Procedural criticisms of the administrative appeal mechanism include a lack of advance notice of potential A-76 conversions, an unduly restrictive fifteen-day appeal period, and limitations on union access to information.[68] Significant changes with respect to these matters, however, are probably unwarranted. The Supplement already provides for disclosure, after bids are opened, of the in-house estimate and other documentation used in computing the cost comparison.[69] Public disclosure prior to that point would destroy the integrity of the competitive bidding process. Employee notice of scheduled management productivity studies is provided in the annual congressional reports[70] and in publicized bid solicitations. Moreover, unions are authorized to negotiate over procedures by which an agency exercises its rights to make contracting-out determinations.[71] Consultation requirements and pre-bid disclosure of non-confidential information are permissible subjects for collective bargaining.[72]

The fifteen-day filing requirement, with possible extensions in complex cases, also seems reasonable. Prompt resolution of government procurement appeals is imperative. Funds must be obligated, if at all, during the fiscal year for which they are appropriated,[73] and undue delay in implementing either a contract award or in-house MEO plan may, because of rapidly changing economic conditions, invalidate the original cost comparison. By way of comparison, most GAO bid protests, regardless of the size or complexity of the government procurement, must be filed with the contracting agency or the GAO within ten days after bid opening.[74]

A justifiable criticism of the internal administrative appeal procedure is the absence of independent review. Protests are accepted by the GAO from unsuccessful bidders challenging cost comparison computations.[75] Should not adversely affected employees, having been placed in competition with private contractors, have the right to ensure that their proposal, the in-house estimate, is properly compared to competing bids? Agency management, though technically the party submitting the in-house estimate, also awards the contract. Thus, a faulty cost comparison, resulting in a high in-house estimate that benefits the contractor bidders, will be appealed, if at all, only by affected employees, individually or

[68] Oversight Hearing, supra note 52.
[69] *See* supra note 62.
[71] See supra note 46 and accompanying text.
[71] 5 U.S.C. § 7106(b)(2) (1982). See supra note 66.
[72] *See* infra notes 127, 130 and accompanying text,
[73] 31 U.S.C. § 1502 (1982).
[74] GAO Bid Protest Procedures, 4 C.F.R. § 21.2 (1984).
[75] *See* infra notes 261-72 and accompanying text.

through their union.[76] As a consequence of the unavailability of GAO consideration of this type of otherwise reviewable A-76 protest, employees seek independent review—principally through FLRA negotiability appeals and grievance arbitration—in forums which lack the GAO's expertise, experience, and ability to resolve such disputes expediently.

IV. CHALLENGES UNDER THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

A. *IMPACT AND IMPLEMENTATION BARGAINING*

1. FLRA Negotiability Standards.

Unlike the private sector labor relations statute,[77] under which contracting-out decisions are generally negotiable,[78] Title VII of the CSRA specifically excludes such determinations from the collective bargaining obligation.[79] The Senate and House of Representative reports accompanying their respective bills to reform federal service labor relations emphasized the need to maintain government flexibility by removing certain matters from the scope of bargaining, such as workforce organization, employee assignments, layoffs, and contracting out.[80] Even with regard to these reserved management rights, however, agencies are obliged to negotiate over procedures for agency officials to exercise their authority, as well as appropriate arrangements for employees adversely affected by such determinations.[81]

Distinguishing "procedural" matters subject to collective bargaining from "substantive" management rights is no easy task. Even during the

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"Int'l Ass'n of Firefighters, Local F-100 v. Dep't of the Navy, 536 F. Supp. 1254, 1266 (D.R.I. 1982). *See infra* notes 252-57 and accompanying text.

[77] 29 U.S.C. §§ 141-187 (1982).

[78] *E.g.*, Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

[79] 5 U.S.C. § 7106(a)(2)(B) (1982). *See supra* note 66.

[80] S. Rep. No. 969, 95th Cong., 2d Sess. 12-13, 104-05 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2734-35, *and in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., at 743, 749-50, 764-65 (Comm. Print 1979) (hereinafter cited as Legislative History); H.R. Rep. No. 1403, 95th Cong., 2d Sess. 43-44 (1978), *reprinted in* Legislative History, at 677, 689-90.

[81] 5 U.S.C. § 7106(b)(2), (3) (1982). *See supra* note 66. Representative William D. Ford, a leading advocate of employee rights during the enactment of Title VII, emphasized:

> By the clear language of the bill itself, any exercise of the enumerated management rights is conditioned upon the full negotiation of arrangements regarding adverse effects and procedures. . . . Only after this obligation has been completely fulfilled is an agency allowed to assert that a retained management right bars negotiation over a particular proposal.

124 Cong. Rec. 38,715 (1978), *reprinted in* Legislative History, *supra* note 80, at 993.

House debates, this problem was anticipated. Representative William D. Ford remarked:

> In negotiating appropriate arrangements for employees adversely affected by exercise of a management right, it may obviously be necessary to address the substance of the exercise itself. If, for example, an agency initially contemplates transferring 10 employees into quarters suitable for only half that number, an "appropriate arrangement" cannot be negotiated without changing (at least somewhat) the number of employees to be relocated. Thus, the need for giving first priority to negotiating the arrangements for the adversely affected employees even if these negotiations impinge on the management right to transfer.[82]

It has been left to the FLRA to determine, on a case-by-case basis, whether proposals ostensibly involving impact and implementation unduly restrict the exercise of management right. The ramifications of these negotiability determinations are extremely significant. Because of the prohibition against federal employee strikes, bargaining impasses may be submitted for resolution to the Federal Services Impasses Panel, which has the authority to dictate collective bargaining agreement language.[84] Disputes over the interpretation of contract language are grievable under negotiated grievance procedures, which must provide ultimately for binding arbitration if requested by the union or by agency management.[85]

In a consolidated appeal of FLRA negotiability decisions involving the management rights clause,[86] the Court of Appeals for the District of Columbia approved two distinct tests developed by the Authority to identify negotiable implementation procedures and arrangements for employees adversely affected by an agency's exercise of management rights. From Title VII's legislative history, the court discerned congressional intent to create a framework for labor-management relations that balances agency authority to manage the government efficiently against

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[82] 124 Cong. Rec. 38,715 (1978), reprinted in Legislative History, supra note 80, at 993-94.

[83] 5 U.S.C. § 7117(c) (1982) provides for an expedited informal procedure for FLRA resolution of negotiability disputes. *But cf.* NFFE, Local 1167 v. FLRA, 681 F.2d 886, 892-93 (D.C. Cir. 1982) (commenting on the FLRA's 21-month delay in resolving a negotiability dispute).

[84] 5 U.S.C. § 7119(c)(5)(B)(iii) (1982).

[85] 5 U.S.C. §§ 7103(a)(9)(C)(i), 7121(a)(1), (b)(3)(C) (1982).

[86] Army-Air Force Exchange Serv. v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982). This case involved appeals by both union and management from various negotiability determinations rendered by the FLRA in AFGE v. Air Force Logistics Command, Wright-Patterson Air Force Base, 2 F.L.R.A. 604 (1980) and AFGE, Local 1999 v. Army-Air Force Exchange Serv., Dix-McGuire Exchange, 2 F.L.R.A. 153 (1979).

legitimate employee interests in being protected from arbitrary or unwarranted personnel actions. But, the statutory language was sufficiently ambiguous that it could be interpreted to permit bargaining over implementation procedures that would swallow management's substantive rights.[87] As the FLRA was given administrative responsibility for interpreting Title VII,[88] the court deferred to the Authority's formulation of separate standards for determining whether two basic types of arguably procedural proposals fall within the permissible scope of bargaining contemplated under the statute.

Proposals that are more "purely" procedural, such as those purporting to regulate the manner in which criteria established by management are applied to particular employees, are negotiable unless they preclude management from "acting at all." Others, while cast in procedural language, that specify agency decision-making standards are negotiable only if they do not "directly interfere" with the exercise of management rights.[89]

The "acting at all" test was applied to a union proposal providing that when management decides to remove or suspend an employee for disciplinary reasons, the employee will remain on the job in a pay status pending exhaustion of appeal rights. The agency argued that this proposal was not "procedural" because it would unreasonably delay, and hence eviscerate, management's right in section 7106(a)(2)(A) to discipline employees.[90] The Authority disagreed, holding that the proposal did not prevent the agency from acting at all. It placed no restriction on management's ultimate ability to take a disciplinary action; rather, it was a procedural requirement merely specifying when the agency could act.[91]

Other proposals required that management make certain work assignments on the basis of seniority.[92] The Authority applied the "direct interference" test to these proposals, holding that the agency's reserved right to assign employees under section 7106(a)(2)(A) necessarily encompassed

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[87] 659 F.2d at 1144-46, 1151-52.

[88] *See infra* note 98.

[89] 659 F.2d at 1152.

[90] *Id.* at 1153. Hereinafter, unless otherwise indicated, textual references to statutory section numbers refer to provisions of Title VII of the CSRA, 5 U.S.C. § 7101-7135 (1982).

[91] 659 F.2d at 1153.

[92] For example, one of the disputed proposals from the *Wright-Patterson Air Force Base* case provided:

> *Section 3. Details to Lower Graded Positions*
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> Details to lower graded positions will be rotated among qualified and available employees in inverse order of seniority.

Id. at 1149 n.54.

the discretion to identify individual employee qualifications needed for each position. The union asserted that the statute, strictly construed, granted management just the legal authority to assign employees to perform particular tasks, not the right to identify the standards for selection of employees eligible to be assigned. The court, concluding that the Authority's ruling reflected the congressional intent to balance managerial flexibility and employee participation, upheld the decision that the seniority proposals were non-negotiable. Moreover, because the proposals purported to establish decision-making criteria, the court found the application of a standard different from the one used to test "purely" procedural proposals to be warranted.[93]

Justification exists in the legislative history for the Authority's dual standard approach. The House and Senate members of the conference committee reporting the final version of Title VII, commenting on the deletion of language in the Senate bill that would have prohibited negotiations on procedures causing "unreasonable delay" in the exercise of management rights, stated, "[T]he conference report deletes these provisions. However, the conferees wish to emphasize that negotiations on such procedures should not be conducted in a way that prevents the agency from acting at all, or in a way that prevents the exclusive representative from negotiating fully on procedures."[94] And, after Title VII was signed into law, Representative Ford elaborated upon the intention of the conferees (which he felt was inadequately developed in the conference report because of end-of-session pressures to secure the bill's passage),[95] stating that "[o]nly bargaining proposals which directly related [sic] to the actual exercise of the enumerated management rights are to be ruled nonnegotiable. An indirect or secondary impact on a management right is insufficient to make a proposal nonnegotiable."[96] Furthermore, language from the Senate bill providing for negotiation over procedures by which management could exercise its authority both to "decide or act" on enumerated rights was omitted for being redundant.

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[93] *Id.* at 1159-61.

[94] H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 158 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 2860, 2892, *and in* Legislative History, *supra* note 80, at 793, 826. This passage from the conference report appears only to reflect the concern of the conferees that *negotiations* over the impact and implementation of management rights not be so protracted as to prevent management from acting at all. However, numerous references throughout the legislative history to earlier decisions of the Federal Labor Relations Council (predecessor of the FLRA), which held union proposals to be non-negotiable because their operation would unreasonably delay *exercise* of management rights, indicated that the conferees intended that union proposals would be non-negotiable only if their eventual inclusion in a collective bargaining agreement would preclude agencies from implementing decisions on management rights matters. See *Army-Air Force Exchange Serv.*, 659 F.2d at 1154-57, for a complete discussion of the legislative history in this regard.

[95] 124 Cong. Rec. 38,713 (1978), *reprinted in* Legislative History, *supra* note 80, at 989.

[96] 124 Cong. Rec. 38,715 (1978), *reprinted in* Legislative History, *supra* note 80, at 994.

Representative Ford stated that "[t]he management authority in section 7106(a) . . . is obviously the authority 'to decide or act.' Equally obviously, procedures and arrangements are to be negotiated with regard to both the decision-making and implementation phases of any exercise of management's authority."[97]

Still, the legislative history of section 7106 provides no guidance as to the precise extent of exclusive management authority with regard to the enumerated rights. Consequently, the Authority's applications of its two standards have been inconsistent in subsequent negotiability appeals concerning contracting out. The only explanation for these inconsistencies is that the rulings reflect what the Authority judged to be appropriate for collective bargaining in the particular factual context of each case."

2. *The Scope of Bargaining Over Contracting Out.*

NFFE, Local 1167 v. Homestead Air Force Base,[99] is the FLRA's seminal case on the scope of bargaining over contracting out. One of the proposals at issue stated: 'The Employer agrees that work shall not be contracted out when it can be demonstrated that work performed 'in-house' is more economically and effectively performed."[100] Clearly, this proposal purports to define substantive criteria by which agency contracting-out determinations must be made. It is not clear from the decision, however, which test the Authority applied in ruling the proposal to be non-negotiable. The Authority held that the limitation on contracting out when work can be more economically performed in-house would prevent the agency from acting at all.[101] But, in response to the union's

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[97] *Id.*

[98] Congress assigned the FLRA primary responsibility for interpreting Title VII and developing standards by which the federal service labor-management relations program shall be conducted pursuant to broad congressional policies underlying the statute. 5 U.S.C. § 7105(a)(1) (1982) provides: "The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter." Moreover, responsibility for "distinguishing negotiable procedures from management's reserved substantive authority involves questions of judgment and balance, about which reasonable people could easily differ. And Congress intended the needed judgments to be made, not by . . . [the] court[s], but by the Authority." Army-Air Force Exchange Serv., 659 F.2d at 1161. The scope of judicial review of FLRA decisions is thus quite limited. Great judicial deference is paid to interpretations of statutes by agencies responsible for their implementation and administration, *See id.* at 1161-62 and cases cited therein. FLRA negotiability determinations will be set aside on review only if they are "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law." *E.g.*, AFGE, Local 1167 v. FLRA, 681 F.2d 886, 889 n.3 (D.C. Cir. 1982) (quoting Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982)).

[99] 6 F.L.R.A 574 (1981), *aff'd*, 681 F.2d 886 (D.C. Cir. 1982).

[100] *Id.* at 575.

[101] *Id.* at 576.

argument that the provision merely reiterated mandatory restrictions contained in OMB Circular A-76, the Authority stated that regardless of the existence of any third-party restrictions on the exercise of management rights, the imposition of an independent contractual requirement on the agency's contracting-out discretion would "interfere with management's rights" under section 7106.[102]

The "direct interference" analysis was definitely more appropriate. The Authority should have applied the same rationale by which it found the seniority-based work assignments in *Wright-Patterson Air Force Base* to be non-negotiable.[103] Management's right to make contracting-out determinations is not limited solely to the legal authority to enter into a commercial activity contract; it necessarily includes the discretion to determine the conditions warranting contracting out. Because the union's proposal would have directly placed restrictions on the exercise of that managerial discretion, it was an impermissible subject of collective bargaining.

In dicta, the Authority suggested that a proposal requiring the agency merely to act in accordance with existing OMB contracting-out directives would not violate section 7106(a). The Authority reasoned that any OMB regulation on contracting out is subject to change. Hence, the *Homestead Air Force Base* proposal might bind the agency in the future to collective bargaining agreement restrictions not otherwise placed on its section 7106(a) discretion. But, a proposal requiring no more than that the agency comply with whatever Circular provisions were currently in effect would place no additional limitation on management's contracting-out authority.[104]

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[102] *Id.* at 577. The Authority reached the same conclusion concerning proposals restating other prohibitions contained in the Circular and agency implementing regulations. *Id.* at 578-79 (union proposal prohibiting, in part, contracting out to avoid personnel ceilings or to supply services provided by the agency to the public). *Accord,* AFGE, Local 1923 v. Health Care Financing Admin., 17 F.L.R.A. 661, 661-62 (1985) (union proposal prescribing criteria for management to apply in determining the in-house cost estimate); AFGE, Local 1622 v. Directorate of Facilities & Engineering, Ft. George G. Meade, 17 F.L.R.A. 429, 429-30 (1985) (proposal requiring management to use actual local fringe benefit costs, rather than standard percentages, in the cost comparison analysis); Int'l Assoc. of Machinists & Aerospace Workers, Local 2424 v. Aberdeen Proving Ground, 8 F.L.R.A. 679, 680, 682 (1982) (union proposals identical to those in *Homestead Air Force Base).* Additionally, the Authority now holds that union proposals establishing substantive contracting-out criteria conflicting with Circular A-76 are nonnegotiable on the alternative ground that the Circular is a government-wide rule or regulation. Under 5 U.S.C. § 7117(a)(1) (1982), the duty to bargain in good faith does not extend to matters which are the subject of any rule or regulation having government-wide applicability. AFGE, Local 225 v. United States Army Armament Research and Development Command, 17 F.L.R.A. 417, 419-20 (1985). *See also Health Care Financing Admin.,* 17 F.L.R.A. at 662-66; *Directorate of Facilities & Engineering,* 17 F.L.R.A. at 430-31.

[103] *See supra* notes 92-93 and accompanying text.

[104] 6 F.L.R.A. at 577.

Not every Circular A-76 procedure necessarily falls within the ambit of implementation procedures under section 7106(b). The Authority, in *AFGE, Local 3403 v. National Science Foundation*,[105] was presented with negotiability disputes over provisions of the agency's draft directive implementing Circular A-76. The union desired to bargain over the directive's applicability to small-scale commercial activities, as well as agency procedures for preparation, maintenance, and review of the commercial activities inventory. The FLRA held that since neither proposal related directly to the conditions of employment of bargaining unit members, they were outside management's statutory obligation to bargain. The size of activity studied for possible conversion to contract and the frequency with which cost comparisons are conducted could have significant potential effects on employees. The Authority determined, however, that while management decisions to contract out may ultimately affect bargaining unit members, the speculative impact of these proposals was too remote even to fall within the scope of matters affecting conditions of employment.[106]

The union in *Homestead Air Force Base* also had proposed a requirement that the agency provide it with copies of contracting-out "milestone charts." Further, it asked to negotiate over union representation at pre-bid and bid-opening conferences.[107] As described in the current edition of the A-76 Supplement, milestone charts are managerial planning documents recommended to aid in monitoring the progress of contracting-out feasibility studies. They list particular actions to be accomplished, the official responsible for each action, and the required completion dates.[108]

On the surface, these proposals appear to be precisely the sort of implementation procedures contemplated by section 7106(b)(2). The milestone charts and the opportunity to attend pre-bid conferences would simply have provided the union means of acquiring information about the existence of contracting-out determinations likely to affect the workforce. Because the union failed to make a timely submission required by the FLRA,[109] however, the agency's explanation of the purpose of the charts and conferences was adopted. The Authority thus found that milestone charts were "internal management recommendations, developed from feasibility studies, used by management officials in determining whether to contract out."[110] It concluded that the conferences were

[105] 6 F.L.R.A. 669 (1981).
[106] *Id.* at 670-73.
[107] 6 F.L.R.A. at 575, 579.
[108] OMB Circ. A-76 Supp., pt. IV, App. A.
[109] 6 F.L.R.A. at 574.
[110] *Id.* at 577.

"wholly management related meetings at which the management aspects of the contracting out issue are either discussed or acted on, and which occur after the union has been afforded the opportunity to comment on the contracting out proposal."[111]

Based upon these uncontroverted assertions, the Authority properly applied the "direct interference" standard. The agency interpreted the provisions as requiring it to disclose internal managerial recommendations and accept union input during technical discussions at the pre-bid and bid-opening conferences. The Authority thus concluded that the charts and conferences constituted "integral part[s] of management's deliberations concerning the relevant factors upon which [to base] a determination whether to contract out."[112] The proposals were found to be non-negotiable as they would directly interfere with management's discretionary authority under section 7106(a): "[T]he right of management officials to make contracting out determinations includes the right to discuss among themselves and deliberate concerning the relevant factors upon which such determinations will be based."[113]

The Authority's analysis of the milestone chart and bid conference proposals were the most well-reasoned aspects of the *Homestead Air Force Base* decision. Its holdings with respect to these proposals, however, are questionable. Less than three years later, a virtually identical bid conference proposal was found to be negotiable in *NFFE, Local 1263 u. Defense Language Institute*.[114] This time, having the benefit of the union's submissions, the Authority concluded that pre-bid and bid-opening conferences at the Defense Language Institute were "informal meetings open to any member of the general public who wants to gather information about the bidding process and the contract in question."[115] Therefore, the union's presence was not considered to interfere with management's decision-making process on contracting out.

The *Defense Language Institute* opinion did not specify the test applied, but the Authority appears to have settled generally on the "direct interference" test as the more workable standard. In *Federal Union of Scientists &Engineers, Local R1-144 v. Dep't of the Navy*,[116] the union proposed to negotiate a seat on a Commercial Activities Steering Committee. The Authority found that this committee was responsible for recommending commercial activities appropriate for feasibility studies, suggesting whether activities should be consolidated for cost comparison

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[111] *Id.* at 580 (quoting Agency's Statement of Position).
[112] *Id.* at 577,580.
[113] *Id.* at 580.
[114] 14 F.L.R.A. 761 (1984), *rev'd on other grounds*, 767 F.2d 1398 (9th Cir. 1985).
[115] *Id.* at 762.
[116] 14 F.L.R.A. 709 (1984).

under master contracts, and establishing guidelines for employee involvement in the development of Performance Work Statements and contract specifications. Thus, the committee was concerned with overseeing the entire A-76 process. The Authority considered such a formal organizational structure for engaging in contracting-out deliberations to be an integral part of management's decision-making process. Reiterating the view expressed in *Homestead Air Force Base,* it affirmed that the right to contract out necessarily encompasses the right to determine the conditions under which such decisions will be made. Accordingly, any union participation would have the effect of interfering directly with management's rights.[117]

The Authority has also applied the "direct interference" standard in holding that management has no duty to bargain over proposals requiring that in-house estimates and contractor bids be based on the same scope of work,[118] that in-house estimates reflect the most effective and cost efficient organization,[119] and that contracting out determinations be subject to grievance arbitration under a collective bargaining agreement.[120] This latter proposal was found to violate section 7106(a) because it would subject "the agency's exercise of those reserved rights to arbitral review and therefore to the possibility of arbitrators substituting their judgment for that of the agency with respect thereto."[121] The Authority held that no grievance procedure could be negotiated that would have the effect of denying or interfering with management's right under section 7106(a) to determine the factors on which to base a decision to contract out.

This proposal concerning the grievability of substantive contracting out determinations must be distinguished from the type of proposal, considered by the Authority in the *Dix-McGuire Exchange* case,[122] that would only delay the implementation of a management decision pending resolution of appeals otherwise available. In *AFGE, Local 2736 v. Wurtsmith Air Force Base,* one of the union's proposals stated: "No contract

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[117] *Id.* at 709-10.

[118] *Army* Armament Research &Development Command, 17 F.L.R.A.at 417-18; AFGE, Local 2736 v. Wurtsmith Air Force Base, 14 F.L.R.A.302,303-04 (1984).

[119] *Army* Armament Research & Development Command, 17 F.L.R.A. at 417-18; Wurtsmith Air Force Base, 14 F.L.R.A. at 303-04.

[120] "National Science Foundation, 6 F.L.R.A.at 673-75.

[121] *Id.* at 674. See also Army Armament Research &Development Command, 17 F.L.R.A. at 421-22 (union proposal 4). But *cf.* AFGE, Nat'l Council of EEOC Locals v. Equal Employment Opportunity Comm'n, 10 F.L.R.A.3 (1982), *aff'd*, 744 F.2d 842 (D.C.Cir. 1984), cert. granted, 105 S. Ct. 3497 (1985) (holding that a union proposal requiring management to comply with Circular A-76 is negotiable, thereby subjecting contracting-out disputes to grievance arbitration if the proposal is contained in a collective bargaining agreement); see infra notes 164-84 and accompanying text.

[122] *See* supra notes 90-91 and accompanying text.

award shall be made until all grievance procedures, up to and including arbitration, are exhausted in regard to any contract provision pertaining to the impact and implementation of a contracting-out decision."[123] The agency argued unsuccessfully that this proposal would impose so lengthy a delay on the implementation of contracting-out procurements that it would prevent the agency from acting at all concerning several of its enumerated section 7106(a) rights. The Authority was not persuaded by the agency's seemingly meritorious contention that the economic basis for an initial contracting-out decision would become invalid due to delays from arbitration over impact and implementation. The Authority did not feel that the agency supported its assertion that it would be placed in a continuous "cycle of studying, deciding and justifying but never implementing" its contracting-out decisions.[124] Possibly the FLRA would have found the proposal to be non-negotiable had the agency submitted empirical data demonstrating the average length of grievance arbitrations and the extent to which economic factors affecting contracting out could change over that period of time. However, in view of the specific rejection by Congress of "unreasonable delay" as a justification for non-negotiability of 7106(b) proposals,[125] it is unlikely that the Authority will ever be persuaded that delay, in itself, precludes management from acting at all to implement contracting-out determinations.

The FLRA's negotiability decisions on contracting out tend to create a false impression that few impact and implementation proposals are negotiable. Actually, in the great majority of cases, agencies engage in collective bargaining without ever raising the issue of negotiability. Federal sector collective bargaining agreements are replete with provisions requiring management to notify unions in advance of proposed feasibility studies;[126] to consult over methods of minimizing adverse affects on displaced employees;[127] to solicit union participation in and comment on Performance Work Statements;[128] to provide written justifications for contracting-out determinations;[129] to disclose information relating to the

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[123] 14 F.L.R.A. at 304.

[124] *Id.* at 305 (quoting Agency Brief at 22).

[125] *See supra* note 94 and accompanying text.

[126] *E.g.*, *Aberdeen Proving Ground*, 8 F.L.R.A. at 680-81; NAGE, Local R7-51 v. Department of the Navy, Naval Training Center, Great Lakes, LAIRS 15800, at 4 (Mar. 29, 1984) (Cyrol, Arb.); United States Army Communications Command, Redstone Arsenal v. AFGE, Local 1858, 21 Gov't Empl. Rel. Rep. (BNA), 1438, 1438 (Mar. 4, 1983) (Byars, Arb.) (appeal filed with the FLRA).

[127] *E.g.*, *Aberdeen Proving Ground*, 8 F.L.R.A. at 680-81; *Naval Training Center, Great Lakes*, at 4; *Army Corps of Engineers*, 81 Lab. **Arb.** (BNA) at 512; *Redstone Arsenal*, 21 Gov't Empl. Rel. Rep. at 1438.

[128] *E.g.*, *Aberdeen Proving Ground*, 8 F.L.R.A. at 681-82; *Naval Training Center, Great Lakes*, at 4.

[129] *E.g.*, *Equal Employment Opportunity Comm'n*, 10 F.L.R.A. at 5-6.

procurement process;[130] and to permit union attendance at bid-opening meetings.[131]

With respect to appropriate arrangements for adversely affected employees under section 7106(b)(3), the Authority has caused agencies to bargain over proposals requiring them to consider attrition patterns and restrictions on new hires,[132] and to maximize retention or reassignment of employees affected by contracting out.[133] Since the language of these proposals was "hortatory rather than mandatory,"[134] they were viewed as not interfering with management's rights to contract out, layoff, or assign employees. The Authority noted only that the union could not require their application in violation of personnel laws or the provisions of Title VII.[135] On the other hand, proposals *mandating* that all displaced employees be reassigned or retrained were found to interfere directly with management's rights under section 7106(a) to assign or layoff employee~.'~~

It thus appears that, with regard to appropriate employee arrangements under section 7106(b)(3), the threshhold for determining what constitutes direct interference with management's right to contract out differs from that applied by the Authority to proposals involving implementation procedures under section 7106(b)(2). Management is required to bargain over whether it must consider attrition patterns, maximize reassignments, and justify any lack of employee accommodation. However, management need not negotiate over proposals requiring consideration of union views in determining the factors upon which contracting-out decisions are made. Possibly, the Authority's acceptance of a greater quantum of interference with management rights concerning section 7106(b)(3) proposals can be traced to Title VII's fundamental purpose of balancing managerial flexibility with employee protection. Implementation procedures under section 7106(b)(2) relate to the actual decision-making process, while employee arrangements under section 7106(b)(3) concern the consequences of management's decisions to contract out.

3, *A "Sliding Standard" for Negotiability.*

When applying the "acting at all" and "direct interference" standards, the Authority's reasoning appears to lack consistency and predictability.

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[130] *E.g., Naval Training Center. Great Lakes,* at 4; U.S. Army Communications Command, Ft. McClellan, Alabama v. Local 1941, AFGE, LAIRS 15588, at *6* (Aug. 9, 1983) (Clarke, Arb.) (appeal filed with the FLRA); *Redstone Arsenal,* **21** Gov't Empl. Rel. Rep. at 1438.

[131] *E.g., Redstone Arsenal,* 21 Gov't Empl. Rel. Rep. at 1438.

[132] *Homestead Air Force Base,* 6 F.L.R.A. at 582-83.

[133] *Aberdeen Proving Ground,* 8 F.L.R.A. at 681-82.

[134] *Homestead Air Force Base, 6* F.L.R.A. at 583.

[135] *Aberdeen Proving Ground,* 8 F.L.R.A. at 682.

[136] *Equal Employment Opportunity Comm'n, 10* F.L.R.A. at 7-8.

The impact and implementation decisions involving contracting out provide little insight into the FLRA's rationale for determining what actually constitutes a sufficiently direct substantive interference with management rights causing a proposal to be non-negotiable.

The opinions disclose that purely procedural proposals invoking the "acting at all" test are rare. In fact, its application has been limited, at least in the context of contracting out, to procedures that tend to delay implementation of agency decisions without in themselves purporting to restrict the exercise of managerial discretion. The "direct interference'' standard, on the other hand, has been used for the majority of disputed bargaining proposals. Apparent inconsistencies by the Authority in applying the "direct interference" test may be attributable to the fact that an appropriate balance between government efficiency and the interests of individual employees may be struck differently for each proposal. Thus, the degree of permissible substantive interference may vary from case to case.

The FLRA's impact and implementation decisions may be more intelligible if considered on a continuum roughly equivalent to the chronological events occuring during the contracting-out study, solicitation, and appeal process. Certain managerial determinations having only a speculative impact on identifiable employees are so removed from the workplace that they do not even involve conditions of employment. Thus, the Authority did not require the agency in *National Science Foundation* to bargain over a proposal purporting to specify the commercial activities to which the Circular applies.[137] The necessity for government flexibility in determining such broad managerial policy clearly outweighs its totally speculative impact on any particular employee.

Once particular commercial activities are targeted for study, the need for managerial flexibility is still predominant, but the potential for impact on identifiable employees increases. Bargaining proposals pertaining to this phase of the A-76 process include union membership on management steering committees and specific contractual restrictions on managerial discretion, either through establishment of decision-making criteria or provision for third-party review of substantive managerial determinations. During this phase, prior to the actual decision to contract out or retain a function in-house, the balance continues to favor government efficiency. Thus, any union involvement in management's deliberation and decisional process, beyond a contractual requirement that the union be provided an opportunity for comment, constitutes direct interference.

[137] *See supra* notes 105-06 and accompanying **text.**

During implementation of contracting-out decisions, the balance swings in favor of the interests of affected employees. The agency at this point has generally exercised its discretion on fundamental managerial matters. Accordingly, the Authority has permitted negotiation over proposals that, to a greater degree, place substantive restrictions on, or prescribe criteria for, management's ability to act. Such proposals include requirements that the agency consider and utilize to the maximum extent certain accommodations for individually affected employees. Only if this type of proposal violates federal personnel law or mandates a final action in contravention of other reserved management rights is it considered to interfere directly with an agency's discretion to contract out.

Finally, proposals having no substantive effect on contracting-out determinations, but which concern procedures for employees to enforce otherwise appropriate impact and implementation rights, have been tested under the "acting at all" standard. Congress determined at this point to subordinate economy and efficiency to consideration of employee interests. For instance, an agency would be severely burdened if it agreed to the proposal in *Wurtsmith Air Force Base*[138] providing for suspension of commercial activity contract awards pending completion of all grievance arbitration. This proposal, however, would create no basis for arbitral review of managerial determinations not otherwise encompassed within section 7106(b). Accordingly, the Authority found it to be negotiable because it would not completely preclude the agency from contracting out.

B. GRIEVANCE ARBITRATION

1. *Grievability of Circular A-76 Determinations.*

Without specifying whether it involved impact or implementation, the FLRA held in *AFGE, National Council of EEOC Locals v. Equal Employment Opportunity Commission*[139] that the following proposal was negotiable: "The Employer agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out."[140] This proposal would appear to subject management determinations in all phases of the contracting-out process to grievance arbitration.[141] Thus,

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[138] *See supra* notes 123-25 and accompanying text.
[139] 10 F.L.R.A. 3 (1982).
[140] *Id.* at 3.
[141] 5 U.S.C. § 7103(a)(9) (1982) provides:

> (9) "grievance" means any complaint—
>
> (c) by any employee, labor organization, or agency concerning—
> (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement.

arbitral review would exist for purely managerial and policy decisions, such as whether a commercial activity should be classified as a government function, or whether certain performance indicators should be used in developing the MEO Plan. Clearly, this result is incompatible with even the most liberal interpretation of section 7106, by eliminating altogether managerial flexibility to contract out in the interest of government efficiency. Moreover, it is inconsistent with the Authority's previous ruling in National Science Foundation prohibiting negotiation of a grievance procedure that would interfere with management's discretion under section 7106(a) to determine the factors upon which to base contracting-out decisions.[142] A close reading of National Council *of* EEOC Locals, however, discloses that the Authority actually may not have intended to extend the scope of grievance arbitration to matters not otherwise involving impact or implementation procedures under section 7106(b).

Reaffirming its dicta in Homestead Air Force *Base*,[143] the Authority found the disputed proposal not to be inconsistent with the agency's exercise of its section 7106(a)(2)(B) right to make contracting-out determinations. The language placed no substantive contractual restriction on management. It merely recognized the existence of external limitations. Agency management would be unrestrained in complying with any future regulations promulgated by the OMB or the agency itself.[144]

In addition to claiming that the proposal violated section 7106(a)(2)(B), the agency argued that Circular A-76 established an exclusive appeal procedure for disputes involving application of the Circular.[145] The Authority rejected this argument for reasons previously set forth, under similar factual circumstances, in AFGE Local 2782 *v.* Dep't *of* Commerce, Bureau *of* the *Census*.[146] At issue in Bureau *of* the Census was the negotiability of a proposal requiring the agency, except for good cause, to repromote employees who had been involuntarily downgraded for reasons other than misconduct or unsatisfactory performance. The

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[142] *See supra* notes 120-21 and accompanying text.
[143] *See supra* note 104 and accompanying text.
[144] 10 F.L.R.A. at 3-4.
[145] OMB Circ. **A-76,** para. 7*c* (8) provides:

> c. This Circular and its Supplement shall not:
>
> (8) Establish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency or inaction (sic) on the basis that such action or inaction was not in accordance with this Circular, except as specifically set forth in Part I, Chapter **2,** paragraph I of the Supplement, "Appeals of Cost Comparison Decisions."

[146] 6 F.L.R.A. 314 (1981).

Authority found the proposal not to be incompatible with management's right under section 7106(a)(2)(C) to make employee selections from any appropriate source. It required the agency to consider repromotion eligible employees, but the "except for good cause" proviso permitted management to exercise its section 7106(a) discretion by selecting a better qualified candidate or by deciding to abolish the position altogether. Thus, the proposal was negotiable because, as an appropriate arrangement under section 7106(b)(3) for employees adversely affected by the exercise of a management right, it did not directly interfere with management's authority under section 7106(a)(2)(C).[147]

The Authority went on in *Bureau of the Census* to address the agency's additional claim that the proposal was non-negotiable because an OPM regulation provided that employees not selected for promotion could only grieve certain aspects of their non-selection under agency administrative grievance procedures. Disputes over the agency's identification and ranking of qualified candidates were grievable, but the actual exercise of managerial judgment in selecting an applicant from among a group of properly certified candidates was not.[148] The Authority rejected this contention on grounds that while the OPM could limit the scope of an administrative grievance procedure created by regulation, it could not restrict the scope of a grievance procedure negotiated under the authority of section 7121 of Title VII. The legislative history of section 7121 provided for a broad scope negotiated grievance procedure covering all matters not specifically excluded by statute or by the parties through negotiation.[149]

The agency in *National Council of EEOC Locals* asserted that OMB Circular A-76, a government-wide regulation, precluded grievances concerning application of the Circular. Though Title VII provides that an agency's duty to negotiate does not extend to matters inconsistent with law or government-wide regulations,[150] the Authority held, as in *Bureau of the Census,* that the Circular still could not limit the scope of the par-

[147] *Id.* at 317-19.
[148] FPM 355.1-6.
[149] 6 F.L.R.A. at 322.
[150] 5 U.S.C. § 7117(a)(1) (1982)

ties' negotiated grievance procedures as "*statutorily* prescribed" in the section 7103(a)(9) definition of "grievance."[151]

In this regard, the FLRA believed that the agency misinterpreted the proposal's legal effect on the grievability of A-76 determinations. In the Authority's opinion, the proposal would neither expand nor diminish the scope of contracting out-determinations already grievable under the statute:

> That is, under . . . [Title VII], even in the absence of the contract provision proposed by the Union, disputes concerning conditions of employment arising in connection with the application of the Circular would be covered by the negotiated grievance procedure unless the particular grievance is inconsistent with law . . . or unless the parties exclude such grievances through negotiations.[152]

Moreover, to support the conclusion that particular grievances inconsistent with law would continue to be non-grievable regardless of the inclusion of the instant proposal in a collective bargaining agreement, the Authority cited its holding in *National Science Foundation* that union proposal 3 was non-negotiable.[153] That proposal would have permitted management determinations with respect to contracting out to be challenged under the parties' negotiated grievance procedure.[154]

Both *National Science Foundation* and *Bureau of the Census* cited with approval the Authority's earlier decision in *AFGE, Local 1968 v.*

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[151] 10 F.L.R.A. at 4 (emphasis in original). All collective bargaining agreements are required to include a negotiated grievance procedure. 5 U.S.C. § 7121(a)(1) (1982). "Grievance" is defined broadly as follows:

> (9) "grievance" means any complaint—
> (A) by any employee concerning any matter relating to the employment of any employee; or
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
> (C) by any employee, labor organization, or agency concerning—
> (i) the effect or interpretation or a claim of breach, of a collective bargaining agreement; or
> (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

5 U.S.C. § 7103(a)(9) (1982).

[152] 10 F.L.R.A. at 5 (citations omitted).

[153] *See supra* notes 120-21 and accompanying text.

[154] 6 F.L.R.A. at 674.

Saint Lawrence Seaway Dev. Corp.[155] which stood for the proposition that "no matter could be grieved under a procedure negotiated pursuant to section 7121 . . . which would deny the authority of an agency to exercise its statutory rights under section 7106."[156] Because the proposal in *Bureau of the Census* involved an arrangement for adversely affected employees under section 7106(b)(3), grievances with respect thereto would not deny management's authority to exercise its section 7106(a) rights.[157] The Authority, however, found the *National Science Foundation* proposal to be non-negotiable because it would subject the exercise of management's reserved right to make contracting-out determinations to the possibility of arbitrators substituting their judgment for that of agency officials.[158]

Accordingly, the Authority concluded that the *National Council of EEOC Locals* proposal would have absolutely no legal effect on either party to the collective bargaining agreement.[159] It would recognize the existence of external limitations on management's authority to contract out; however, it would not provide for enforcement of such limitations beyond what is otherwise specified by Title VII as within the scope of matters grievable under the negotiated procedure. Whether or not a collective bargaining agreement contains any reference to Circular A-76 or implementing agency regulations, management contracting-out determinations can be grieved only if the particular grievance is neither excluded through negotiations nor inconsistent with law. The Authority's reliance on *National Science Foundation* reaffirms that matters inconsistent with law include, under section 7106(a), all exercises of managerial discretion except impact and implementation procedures proper-

[155] 5 F.L.R.A. 70, at 79-80 (1981) (proposal providing for arbitral review of management's establishment of performance standards and identification of the critical elements of employees' positions is non-negotiable since it "would permit negotiated grievance procedures to extend to the Agency's exercise of its rights to direct employees and to assign work under section 7106(a)(2)(A) and (B)," thereby creating "the possibility of arbitrators substituting their judgment for that of the Agency with respect to those statutory rights"), aff'd, 691 F.2d 565 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983).

[156] *Bureau of the Census*, 6 F.L.R.A. at 320-21 (footnotes omitted) (citing Saint Lawrence Seaway Dev. Corp., 5 F.L.R.A. 70).

[157] *Id.* at 322.

[158] 6 F.L.R.A. at 674.

[159] 10 F.L.R.A. at 5.

ly negotiable, and hence grievable, under section 7106(b).[160] Disputes concerning the factors and conditions upon which contracting out determinations are based would thus not become subject to arbitral review by operation of the contested proposal in *National Council of EEOC Locals.*

Notwithstanding its reaffirmance of *National Science Foundation,* the Authority failed to specify which aspects of the contracting-out process pertain to non-grievable management rights. The Equal Employment Opportunity Commission (EEOC), in petitioning the FLRA for reconsideration, specifically requested clarification in this regard. The Authority refused to provide such guidance on grounds that the agency, in effect, was asking it to make arbitrability determinations in a factual vacuum.[161] Senior Judge MacKinnon of the Court of Appeals for the District of Columbia has suggested that this refusal by the Authority may indicate, in actuality, that it considers the scope of **A-76** determinations subject to grievance arbitration to be virtually unlimited. He stated:

> The FLRA's cavalier, conclusory treatment of the EEOC's legitimate request [for clarification as to the grievable aspects of Circular **A-761** can be seen as an implicit admission that disclosure of the parts it considers *might* be grievable would amount to such an extreme denial of elementary managerial authority as to make it perfectly obvious that its construction is a plain violation of the intent expressed by Congress.[162]

Indeed, subsequent rulings by the Authority on the arbitrability of grievances involving contracting out tend to support Senior Judge MacKinnon's assumption. Seizing upon sweeping conclusions reached by the court of appeals in its affirmance of *National Council of EEOC Lo-*

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[160] 5 U.S.C. § 7121(c) also prohibits grievances pertaining to certain specified matters:

> (c) The preceeding subsections of this section [pertaining to the negotiated grievance procedure] shall not apply with respect to any grievance concerning—
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> (1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);
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> (2) retirement, life insurance, or health insurance;
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> **(3)** a suspension or removal under section 7532 of this title;
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> (4) any examination, certification, or appointment; or
>
> ***(5)*** the classification of any position which does not result in the reduction in grade or pay of an employee.

5 U.S.C. § 7121(c) (1982).

[161] AFGE, Nat'l Council of EEOC Locals v. Equal Employment Opportunity Comm'n, 10 F.L.R.A. No. 1 (Mar. 18, 1983) (order denying request for reconsideration).

[162] Equal Employment Opportunity Comm'n v. FLRA, 744 F.2d 842, 860 (D.C. Cir. 1984) (MacKinnon, S.J., dissenting) (emphasis in original).

cals, the Authority appears to have abandoned any notion that section 7106(a) limits the definition of grievance in section 7103(a)(9).[163]

On appeal, the EEOC asserted three grounds for the non-negotiability of the proposal requiring agency compliance with applicable laws and regulations concerning contracting out. First, the proposal conflicted with the plain language of section 7106(a)(2)(B) reserving contracting-out determinations to management. Second, the proposal subjected all A-76 disputes to the negotiated grievance procedure, thus infringing on management's reserved right. And finally, Circular A-76 itself prohibited enforcement of the provisions of the Circular through any procedure other than an agency administrative appeal.[164] The court's analyses with respect to the EEOC's first and third contentions are not particularly troubling. Generally, it adopted the FLRA's conclusions that the proposal placed no substantive contractual limitation on the agency's contracting-out discretion not otherwise required by law or regulation and that the OMB had no authority to limit by regulation the statutorily-defined scope of matters grievable under a negotiated grievance procedure. The court's handling of the EEOC's second contention, however, misinterprets Title VII and seriously threatens the continued viability of the commercial activities program.

The EEOC argued that under the contested proposal, contracting-out decisions would become the prerogative of arbitrators, thus negating the intent of section 7106(a). Noting the definition of grievance in section 7103(a)(9), the court considered disputes involving Circular A-76 to fall within the category of "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." It rejected the EEOC's assertion that section 7106(a) excludes matters pertaining to reserved management rights from the section 7103(a)(9) definition of grievance. The EEOC reasoned that because section 7106(a) provides that "nothing" in Title VII "shall affect" management's right to contract out, such determinations are removed from the scope of permissible subjects of grievance arbitration. The court, however, focused on the language of section 7106(a) requiring that management's contracting-out determinations be made "in accordance with applicable laws."[165] Determining Circular A-76 to be an "applicable law," it found any alleged violation of the Circular to be grievable. The court concluded that "[a]grievance alleging noncompliance with the Circular. . . does not affect management's substantive authority, within the meaning of the statutory language, to contract-out. Rather, it pro-

[163] *See infra* notes 186-90 and accompanying text.
[164] 744 F.2d at 847.
[165] *Id.* at 849-51.

vides a procedure for enforcing . . . [Title VII's] requirement that contracting-out decisions be made in accordance with applicable laws."[166]

Senior Judge MacKinnon, in dissent, stressed that the majority's interpretation of section 7106(a) was never advanced by the FLRA as a basis for its ruling. The court therefore was prohibited from relying on this ground to uphold the Authority's decision.[167] Furthermore, the Authority has never suggested that the clause "in accordance with applicable laws" could be used to make management's non-negotiable substantive authority under section 7106(a) reviewable under a negotiated grievance procedure. To the contrary, in *National Science Foundation* the Authority specifically held that contracting-out determinations under the Circular may not be grieved.[168] The very possibility that an arbitrator's judgment may be substituted for that of an agency official operates to affect the official's authority in violation of section 7106(a).

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[166] *Id.* at 850 (footnote omitted). The Ninth Circuit Court of Appeals recently declined to adopt the District of Columbia Circuit Court's reasoning in Equal Employment Opportunity Comm'n v. FLRA. In Defense Language Institute v. FLRA, 767 F.2d 1985 (9th Cir. 1985), the agency appealed the Authority's ruling that management must negotiate a proposal requiring that prior to awarding a commercial activity contract, the agency must correct all data concerning the in-house estimate that the "union demonstrates . . . is not valid or prepared in accordance with existing directives." *Id.* at 1399 (emphasis omitted). The FLRA relied on *National Council of EEOC Locals* to find the proposal negotiable. NFFE, Local 1263 v. Defense Language Institute, 14 F.L.R.A. 761, 763 (1984). The Ninth Circuit held that the Authority's ruling divested management of its substantive right to make contracting out determinations by subjecting such determinations to arbitral review. Furthermore, the court rejected the Authority's assertion that the broad statutory definition of grievance in section 7103(a)(9) is not limited by the section 7106(a)(2)(B) proscription that "nothing in this chapter shall affect the authority of any management official . . . to make determinations with respect to contracting out." Defense Language Institute v. FLRA, 767 F.2d at 1401.

[167] 744 F.2d at 856 (MacKinnon, S.J., dissenting) (citing SEC v. Chenery Corp., 318 U.S. 80, 95 (1943)).

[168] 6 F.L.R.A. at 674-75. In making this point, Senior Judge MacKinnon cited the Authority's decision in *Bureau of the Census*, 6 F.L.R.A. at 319-21. EEOC v. FLRA, 744 F.2d at 856 & n.6 (MacKinnon, S.J., dissenting). *See supra* notes 144-89 and accompanying text. *National Science Foundation* and *Bureau of the Census* stand for the same proposition, and both holdings were based on *St. Lawrence Seaway Dev. Corp.*, 5 F.L.R.A. 70, 79-80. *See supra* note 155.

How, then, can the section 7106(a) language "in accordance with applicable laws" be explained?[169] The answer may lie in a passage from the legislative history used by the majority in *EEOC v. **FLRA*** to defend its interpretation.[170] In explaining the intended operation of section 7106, Representative Udall provided the following example:

> [M]anagement has the reserved right to make the final decision to "remove" an employee, but that decision must be made in accordance with applicable laws and procedures, and the provisions of any applicable collective bargaining agreement. The reserved management right to "remove" would in no way affect the employee's right to appeal the decision through statutory procedures, or, if applicable, through the procedures set forth in a collective bargaining agreement.[171]

The court asserted that Congress thus "unambiguously stated that the management rights clause . . . does not affect an employee's right to enforce the Act's requirement that management exercise its reserved right in accordance with applicable laws and regulations."[172] The court's argument is flawed, however, in that the term "applicable laws" in section 7106(a) refers to statutes prescribing ***employee*** rights and benefits—particularly procedural rights in conjunction with adverse personnel actions. It was not meant to extend to regulations, not mandated by statute, that direct agency managers in the exercise of reserved management rights.

Using Representative Udall's example, the specific grounds and procedures agencies must adhere to in removing an employee for misconduct

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[169] The dissent suggested that, in addition to the absence of any indication in Title VII's legislative history that "specifically denominated, non-negotiable rights conferred on 'management officials' were nevertheless to be subjected to grievance and arbitral review," 744 F.2d at 857 (MacKinnon, S.J., dissenting), the majority's interpretation of the section 7106(a) "applicable laws" language results in an unreasonable construction of the statute.

> To reach its conclusion that the whole grievance procedure is somehow excluded from . . . [the] sweep [of the provision that nothing in Title VII shall affect management's authority, in accordance with applicable laws, to make contracting out determinations], the majority must read the phrase "applicable laws" to include *the remainder of . . .[Title VII].* Thus, it in effect reads the statute as follows: "Nothing in . . [Title VII], EXCEPT ALL THE OTHER PROVISIONS OF . . .[TITLE VII], INCLUDING § 7121 (PRESCRIBING GRIEVANCE PROCEDURES), shall affect the authority of any management official of any agency . . . to make determinations with respect to contracting out . . ." (italicized matter supplied). It is absurd to construe the act to say that *"nothing"* in the rest of . . . [Title VII] affects management's right, but that the rest of . . . [Title VII] *does* affect that right.

Id. at 857 (MacKinnon, S.J., dissenting) (emphasis in original).

[170] *Id.* at 851 n.20.

[171] 124 Cong. Rec. 29, 183 (1978), *reprinted in* Legislative History, *supra* note 80, at 924.

[172] 744 F.2d at 851 n.20 (emphasis added).

or unsatisfactory performance are established by Congress.[173] Unlike the conditions for contracting out in Circular A-76, the standards of cause under which federal competitive service employees may be removed are not devised or established by the executive branch. Furthermore, Representative Udall's comment about appeals through applicable bargaining agreement procedures refers to the fact that Congress provided, as an alternative to appealing to the Merit Systems Protection Board, that an employee may challenge a removal action through a negotiated grievance procedure if management and the union did not decide to exclude such grievances.[174] Thus, for the benefit of employees, Congress placed specific substantive and procedural limitations on management's reserved right of removal. No comparable legislation exists restricting agency authority to make contracting-out determinations.

The failure of the court in *EEOC* v. *FLRA* to recognize this distinction accounts for its disregard of the FLRA's references to *National Science Foundation* and *Bureau of the Census* in the *National Council of EEOC Locals* decision. OMB Circular A-76 is essentially a managerial directive providing substantive decision-making policy to officials of the executive agencies.[175] Although the Circular prescribes certain functions that must be performed in implementing the commercial activities program, these requirements are placed upon agency managers by higher management. The responsibility for correcting any misapplication of the Circular is also reserved to management as an inherent part of its section 7106(a) authority. To consider Circular A-76 an "applicable law" will encourage the OMB and high-level agency management simply to stop providing policy guidance on contracting-out. If agency contracting officers at the lowest levels were merely delegated the authority to

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[173] An agency may remove an employee from the federal competitive service for misconduct only for such cause as will promote the efficiency of the service. 5 U.S.C. §§ 7512, 7513 (1982). Moreover, the statute requires that an employee is entitled, *inter alia*, to 30 days' advance written notice of a proposed removal, attorney representation in responding to the proposed action, and an appeal to the Merit Systems Protection Board. *Id.*

[174] 5 U.S.C. § 7121(e)(1) (1982).

[175] *E.g.*, Local 2855, AFGE v. United States, 602 F.2d 574, 582-83 (3d Cir. 1979) (OMB Circular A-76 and implementing Army regulations "do not provide rules or specifications that would permit a court to adjudicate . . . disagreements with the formulas, factors, and cost projections relied upon by the Army. The absence of fixed standards reflects an understanding that the type of decision made by the Army here is necessarily a matter of judgment and managerial discretion." (footnotes omitted)); AFGE v. Hoffman, 427 F. Supp. 1048, 1082 (N.D. Ala. 1976) (Finding challenges under the Army's regulation implementing Circular A-76 to be nonreviewable, the court stated that "[t]he regulations and directives plaintiffs allege have been transgressed are not directed at individuals or military personnel policies. They are essentially managerial and policy directives concerning the procurement of goods and services to satisfy Government requirements."); *In re* NAGE, Local R5-87, Comp. Gen. Dec. B-212735.2 (Dec. 29, 1983), 84-1 CPD ¶ 37, at 1 ("[T]he provisions of A-76 are matters of executive branch policy which do not create legal rights or responsibilities.").

contract out in their sole discretion, no "application laws" would exist to provide a basis for employee grievances. It is ludicrous to conclude that Congress intended by section 7106(a) to preserve the discretion of first-line managers to determine the factors upon which to make contracting-out decisions, but to deny senior management officials that same discretion to determine uniform conditions for contracting out on an agency-wide basis.

As Representative Udall's example clearly demonstrates, the term "applicable laws" was meant to refer to personnel laws for the benefit of federal employees that agencies must follow in implementing management rights decisions.[176] Similarly, "conditions of employment," as used in Title VII's definitions of "grievance" and "collective bargaining," are "*personnel* policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions."[177] Agencies must comply, for instance, with laws governing reductions-in-force and severence pay for employees displaced as a result of a decision to contract out. While having personnel implications, Circular A-76 itself is fundamentally a procurement directive establishing methods by which agencies shall determine the most efficient and economical means of obtaining needed goods and services.[178]

The decision in *EEOC v. FLRA*, coupled with the Authority's refusal to specify which parts of the Circular it views as subject to grievance arbitration, will have a devastating impact on the commercial activities program. Contrary to the intent of Congress and the principles of *National Science Foundation*, any alleged misapplication of the Circular may now be resolved through arbitration. For example, a union could obstruct or unduly delay a contracting-out decision merely by grieving that an MEO Plan, which was developed through a "technical estimate" method of analysis, should have been based on a more specialized technique.[179] The only standard by which this determination could be evalu-

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[176] *See supra* notes 171-174 and accompanying text.

[177] 5 U.S.C. § 7103(a)(14) (1982) (emphasis added).

[178] The dissenting judge in *EEOC v. FLRA* went even a step further, arguing that a decision to eliminate work performed by federal employees does not affect environmental "working conditions," as this term is generally interpreted in private sector labor relations caselaw. Therefore, a decision to contract out would not involve "conditions of employment" within the meaning of section 7103(a)(14). 744 F.2d at 857-59 (MacKinnon, S.J., dissenting).

[179] The Supplement to Circular A-76 provides that techniques used in management studies "can range the entire spectrum of work measurement, value engineering, methods improvement, organizational analysis, position management and systems and procedures analysis." OMB Circ. A-76 Supp., pt. III, ch. 2, para **A.** "Technical estimates," requiring "informed subjective judgments by analysts and functional personnel," may be used when there is insufficient time or expertise available for more specialized techniques, such as "flow process charting, layout analysis, systems and procedures analysis, process measurement analysis, work distribution analysis, lineal responsibility charting, functional model and PERT." *Id.* pt. III, ch. **2,** paras. B, C.

ated by an arbitrator is the Supplement's provision that "[t]he techniques chosen depend on the type of function involved and the data, time, and analysts available."[180] Resolution of the dispute would thus depend entirely upon the arbitrator's managerial judgment. Moreover, the arbitrator's decision would be virtually free from effective review by the FLRA. The Authority may only set aside an arbitrator's award if it is contrary to law, rule, or regulation, or on other grounds similar to those applied by the federal courts in private sector arbitration appeals.[181]

If exceptions to an arbitrator's award are filed with the FLRA, a decision may not be reached until several years after performance has begun on the commercial activity contract.[182] Should the Authority rule against management, judicial review may follow in an enforcement action brought by the FLRA.[183] As noted in the *EEOC v. FLRA* dissent, even if the grievance is finally denied on the merits because it involves an exercise of managerial discretion, this protracted litigation itself violates the legislative purpose.

> Even if the grievance is eventually denied, and that denial is affirmed, the prolonged litigation will have cast a cloud over the agency's contracting-out decision, subjected the decision to considerable delay, and wasted valuable agency assets on an essentially frivolous claim. This extraordinary potential for vexatious litigation will significantly infringe upon management's specifically designated right to make contracting-out decisions. The majority's construction thus fails to comply with Congress' admonition that . . . [Title VII] 'be interpreted in a manner consistent with the requirement of an effective and efficient government." 5 U.S.C. § 7101(b).[184]

The serious practical consequences of *EEOC v. FLRA* are evident upon examining arbitration awards involving contracting-out, several of which are pending review by the FLRA. Moreover, because all areas of government operations are covered by agency regulations and policy

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[180] *Id.* pt. 111, ch. 2, para. A.

[181] 5 U.S.C. § 7122(a) (1982).

[182] For example, in the Spring of 1982, contractor bids for performance of facilities maintenance and firefighting services at Naval Air Station, Whiting Field, Florida, were opened and compared to the in-house estimate. On September 28, 1982, the union grieved, alleging noncompliance with provisions of the DOD Authorization Act of 1983; commencement of contract performance was scheduled for October 1, 1982; and, following a hearing, an arbitrator directed the Navy to cancel the procurement action on April 29, 1983. Naval Air Station, Whiting Field v. AFGE, Local 1954, LAIRS 14985, at 2-3, 15 (Apr. 29, 1983) (Fulford, Arb.) (appeal filed with the FLRA). Exceptions to the award are still pending before the FLRA.

[183] 5 U.S.C. § 7123(b) (1982).

[184] 744 F.2d at 860-61 (MacKinnon, S.J., dissenting) (footnote omitted). *See also* Defense Language Institute v. FLRA, 767 F.2d 1398, 1401 (9th Cir. 1985).

directives, extending the *EEOC v. FLRA* decision to the other management rights in section 7106(a) would subject virtually every government action involving civilian employees to grievance arbitration.

2. Arbitration Awards.

In two arbitrability decisions issued shortly after *EEOC v. FLRA*, the Authority used the court's expansive interpretation of "in accordance with applicable laws" to effectively overrule *National Science Foundation* and other decisions limiting grievances involving management rights.[185] In *Fitzsimons Army Medical Center v. AFGE, Local 2214*,[186] the union claimed the agency's decision to contract out laundry and dry cleaning services violated a provision of the 1981 DOD Authorization Act.[187] *AFGE, Local 1904 v. Army Communication & Electronics Materiel Readiness Command*[188] also involved a contracting-out challenge under the Authorization Act, as well as under agency regulations implementing Circular A-76.[189] The FLRA held in each case that section 7106 now places no restriction on the scope of arbitrability. Only those subjects specifically excluded in section 7121(c) or through negotiation are nongrievable. Fully adopting the holding in *EEOC v. FLRA*, the Authority stated:

> The court noted that under the expansive definition of grievance in section 7103(a)(9) and with no exclusion of 7121(c) of the Statute applicable to the subject of contracting out, a

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[185] *But* see Army Research & Development Command, 17 F.L.R.A. at 421-22 (union proposal authorizing arbitration to resolve all disputes involving collective bargaining agreement provisions relating to contracting out is nonnegotiable). The FLRA now attempts to reconcile National Science Foundation with EEOC v. FLRA by distinguishing union proposals that would subject to arbitration disputes over specific substantive limitations imposed on management's contracting out authority by a collective bargaining agreement (nonnegotiable) from arbitral resolution of disputes stemming from a collective bargaining agreement requirement that management comply with all existing contracting-out regulations (negotiable). This apparent distinction overlooks the fact that since union proposals containing specific restraints on contracting-out are nonnegotiable in the first place, they could never become collective bargaining agreement provisions. Moreover, under Circular A-76 and its Supplement, most of the significant decisions involving the commercial activities program depend upon the exercise of managerial judgment. Thus, arbitrators reviewing such determinations must necessarily substitute their judgment for that of agency managers. This is precisely the reason for the Authority's ruling in National Science Foundation that negotiation of a proposal to resolve disputes over contracting-out determinations through a negotiated grievance procedure would violate section 7106(a)(2)(B).

[186] 16 F.L.R.A. 355 (1984).

[187] 10 U.S.C. § 2304 note (1982). See supra note 46 and accompanying text.

[188] 16 F.L.R.A. 358 (1984).

[189] *Id.* at 358. Actually, the agency only asserted the non-arbitrability of the alleged violations of the DOD and Army regulations implementing Circular A-76, not the statute. See AFGE, Local 1904 v. United States Army Communications & Electronics Materiel Readiness Command, LAIRS 15590, at 2 (Aug. 30, 1983) (Carey, Arb.), appeal denied, 16 F.L.R.A. 358 (1984).

> complaint that an agency failed to comply with the OMB Circular or with any other law or rule governing contracting out plainly is a matter within the coverage of the grievance procedure prescribed by the Statute. . . . After determining that such a matter was subject to grievance and arbitration, the court further concluded that "a grievance asserting that management failed to comply with its statutory or regulatory parameters in making a contracting-out decision is not precluded by the management rights clause."[190]

The *Fitzsimons Army Medical Center* decision did not specify which provision of 10 U.S.C. § **2304** the union claimed to be violated by the agency's contracting-out determination. Presumably, as in *Army Communications & Electronics Materiel Readiness Command,* the grievance was based upon an alleged failure by the agency to choose the most cost efficient plan for continued in-house performance. This statutory provision, however, is not a personnel law enacted for the benefit or protection of federal employees. It is merely a means by which Congress requires contracting agencies to certify that the most efficient organization was used to develop the in-house estimate. It provides no statutory standards for the courts, the Authority, or an arbitrator to apply in deciding whether an agency chose the most efficient organization. As under Circular A-76, development of the MEO Plan is left entirely to the managerial discretion of agency officials. Thus, under the Authority's unqualified adoption of *EEOC v. FLRA,* it appears that arbitrators will have virtually unbridled discretion to determine how government operations shall be conducted.

The agency in *Army Communications & Electronics Materiel Readiness Command* argued persuasively, though unsuccessfully, that the grievance involved a "procurement issue which is not grievable as a personnel policy, practice, or condition of employment would be."[191] OMB Circular A-76 implements the federal procurement policy requiring acquisition of goods and services in the most competitive and economical manner. The intent of Congress in Title VII, particularly as expressed in section 7106(a), was to establish a system for negotiation and binding arbitration over personnel matters, without impairing the fundamental

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[190] *Fitzsimons Army Medical Center,* 16 F.L.R.A. at 356; *Army Communications & Electronics Materiel Readiness Command,* 16 F.L.R.A. at 359-60 (citations omitted).

[191] LAIRS 15590 at 5.

authority of agency managers to run the government.[192] Congress never intended for the FLRA and labor arbitrators to exert jurisdiction over the government procurement process.[193]

Several reported arbitration awards involve alleged agency non-compliance with provisions of collective bargaining agreements pertaining to section 7106(b) impact and implementation procedures.[194] There is little doubt that these subjects fall within the scope of arbitrability envisioned by Congress. Additionally, at least one arbitrator, in *AFGE, Local* 896 *v. United States Naval Academy*,[195] preserved the essential managerial authority acknowledged by the FLRA in *St. Lawrence Seaway Dev. Corp.* and *National Science Foundation*, even though he found alleged substantive violations of the Circular and implementing Navy directives to be arbitrable. He rejected the agency's argument that section 7106(a) precludes arbitration. He concluded, however, with regard

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[192]On the management rights clause, Representative Ford expressed the expectation that it would "protect genuine managerial prerogatives," while permitting labor involvement with regard to the consequences of those managerial choices on agency personnel. 124 Cong. Rec. 29,199 (1978), reprinted in Legislative History, supra note 80, at 956. Thus, he continued, "although management has the right to direct the work force, proposals aimed at lessening the adverse impact on employees of an exercise, perhaps arbitrary, of that right are fully negotiable." *Id.*

[193]For varying reasons, several arbitrators have also found grievances alleging Circular A-76 violations not to be arbitrable. In Navy Exch., Naval Air Station, Miramar v. AFGE, Local 3723, LAIRS 14650, at 10-14 (Dec. 27, 1982) (Ansell, Arb.), the arbitrator found Circular A-76 to be a managerial policy tool to aid in the agency's exercise of independent discretion. As such, it did not create a redressable right for the benefit of employees. Accordingly, relying on the Authority's National Science Foundation decision, the matter was held to be non-arbitrable. In Naval Air Station, Memphis v. AFGE, Local 2172, LAIRS 15792, at 10-12 (Aug. 9, 1984) (Nicholas, Arb.), the collective bargaining agreement specified that it was to be administered in accordance with all applicable laws and regulations. The arbitrator thus found that Circular A-76, to include its prohibition on appeals other than under the A-76 appeals procedure, was binding on the parties by incorporation in the labor contract. Finally, the arbitrator in Pacific Missile Test Center, Point Mugu v. Point Mugu Council of NAGE-NFFE, 926 Gov't Empl. Rel. Rep. (BNA) 43, 45 (July 30, 1981) (Rule, Arb.), appeal dismissed on other grounds, 6 F.L.R.A. 708 (1981), held that language in the collective bargaining agreement specifically precluded arbitration over issues of contracting out. He suggested, however, that absent such language, the grievance would likely have been arbitrable. Of course, following the Authority's rulings in Fitzsimons Army Medical Center and Army Communications & Electronics Materiel Readiness Command, the grievances in Naval Air Station, Miramar and Naval Air Station, Memphis would have been found to be arbitrable.

[194]*E.g.*, U.S Armv Corps of Eneineers v. AFGE. Local 3026. 81 Lab. Arb. (BNA) 510 (1983) (Everitt, Arb.) (union failed to make a timely request to bargain over the implementation of the agency's decision to contract out bargaining unit work); U.S Army Communications Command, Ford McClellan, Alabama v. Local 1941, AFGE, LAIRS 15588 (Aug. 9, 1983) (Clarke, Arb.) (arbitrator ordered recission of commercial activities contract for agency denial of union access to the statement of work prior to the solicitation, as required by the contract) (appeal filed with the FLRA); U.S. Army Communications Command, Redstone Arsenal v. AFGE, Local 1858, 21 Gov't Empl. Rel. Rep. (BNA) 1438 (Mar. 4, 1983) (Byars, Arb.) (order to rescind commercial activities contract due to the agency's failure to provide the union with a copy of the solicitation) (appeal filed with the FLRA).

[195]21 Gov't Empl. Rel. Rep. (BNA) 2165 (Aug. 8, 1983) (Rothschild, Arb.).

to the merits of each individual grievance, that management's reserved rights under Title VII and the collective bargaining agreement do come into play. Thus, in response to union attacks on management's judgment in developing the PWS and the MEO Plan, the arbitrator admitted that his inquiry was limited simply to determining whether management officials prepared these documents as required by regulations. He considered his personal views on the wisdom of the agency's managerial judgment to be immaterial.[196]

Few arbitrators exhibit the circumspection displayed in the Naval Academy case. Most arbitration awards on contracting out demonstrate the extent to which fundamental policy decisions involving government operations may be assumed by arbitrators who, however well intended, may not possess the expertise to understand fully the complexities of the issues presented.

In NAGE Local ***R7-51*** *v.* Naval Training Center, Great Lakes,'" the union grieved, in part, that the MEO Plan and the in-house cost estimate for family housing maintenance at the Naval Training Center were faulty. The arbitrator gave little, if any, consideration to the agency's argument that these grievances involved matters of managerial discretion reserved under section 7106(a). He proceeded to examine technical data used by the agency's management analysts in developing the MEO Plan and the in-house estimate. In effect, the union sought to require management to re-create the MEO Plan using a lengthy and expensive industrial engineering study. The agency's plan was based on historical cost data and expert estimates of reorganizations that would maximize efficiency. The union also challenged the judgment of agency procurement officials in determining that the lowest contract bidder was financially capable of performing at the bid price.[198]

The arbitrator admitted that the grievance involved decisions requiring the application of managerial expertise. He said that "[t]he process and methodology of assembling a bid of the complexity of the bid involved is not readily understood by persons who have not had some training and experience in this area."[199] Fortunately, he concluded that the agency's management analyst "satisfactorily explained" the agency's procedures.[200] He also determined that the contractor's responsibility was a contractual issue to be worked out between the agency and the contractor.[201] The arbitrator's willingness to defer to the agency's judg-

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[196] *Id.* at 2168-69.
[197] "LAIRS 15800 (Mar. 29, 1984) (Cyrol, Arb.).
[198] *Id.* at **7-9.**
[199] *Id.* at 16.
[200] *Id.*
[201] *Id.* at 15-16.

ment, however, may have been due primarily to the fact that, even after the agency increased its in-house estimate by $20,000 in response to an administrative appeal filed by the union, the difference between the winning bid and the in-house estimate was $976,832. Errors in the cost computation alleged by the union would have altered this figure by only a "trivial amount."[202]

The *Nuval Training Center* arbitration highlights the potential for vexatious litigation over contracting out. The union's grievance was frivolous. Even if the alleged errors were established, their effect on the difference between the in-house estimate and low bid price would have been negligible. The grievance's only purpose was to obstruct and delay the contracting-out process.[203] Furthermore, the case demonstrates the extent to which the clear congressional purpose behind section 7106(a) is thwarted by arbitration of issues that obviously involve, but the exercise of fundamental managerial discretion, not the application of definitive regulatory standards. In a situation where the soundness of an agency's judgment is less readily apparent to an arbitrator lacking expertise in management engineering, the likelihood that responsible agency officials will be "second-guessed" increases drastically.

In Blytheville *Air* Force Base *v. AFGE*,[204] a cost comparison of in-house and contractor performance of transient aircraft maintenance at Blytheville Air Force Base resulted in a difference of approximately $34,000 over a three-year period. The union protested that the agency erroneously upgraded an existing temporary Wage Grade 7 position to Wage Grade 8 in the MEO Plan, failed to include in the in-house estimate the cost of obtaining security clearances for contractor personnel, and used an improper in-house wage inflation factor in the cost comparison for the second and third years of the contract term. The arbitrator found for the union on all three grounds and ordered the agency's contract award for aircraft maintenance terminated.[205]

Based upon language in the collective bargaining agreement defining "grievance" and "management rights" in terms identical to sections 7103(a)(9) and 7106 of Title VII, the arbitrator ruled the grievance to be arbitrable because it alleged failure by the agency to make contracting-out determinations in accordance with law.[206] Though the opinion dealt

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[202] *Id.* at 12, 16-17.

[203] *See also* Federal Aviation Admin., Supporting Serv. Br., Logistics Serv. Div. v. AFGE, LAIRS **15205** (Aug. 15, 1983)(Mullaly, Arb.) (union grieved the agency's refusal to rescind a commercial activities contract even though correction of errors in the MEO Plan and in-house estimate identified by the union would not have resulted in an in-house cost less than the contractor's bid).

[204] LAIRS 14383 (Aug. 9, 1982)(Moore, Arb.) (appeal filed with the FLRA).

[205] *Id.* at 2, 14-16.

[206] *Id.* at 11-13.

summarily with the agency's position on the merits, the arbitrator appears to have discounted entirely the agency's assertion that, in fact, its management engineer did assign security clearance conversion costs as general administrative expenses.[207] Moreover, these costs would likely have been negligible in view of the "right of first refusal" clause required in the conversion contract. Most contractor employees, formerly employed by the agency, would already have received clearances. The union also alleged that the upgrading of an existing temporary position, merely because it resulted in a higher in-house labor cost, necessarily violated the requirement that the in-house estimate be based on the most efficient organization.[208] The arbitrator's uncritical adoption of this assertion[209] seems to have ignored the equally reasonable conclusion that, especially with regard to temporary work, a position staffed at a higher grade level might result in greater efficiency by attacting a higher quality employee than would a lower-graded position. In any event, agency organization is exclusively a managerial function. The "in accordance with applicable laws" limitation does not even apply to the authority of management officials "to determine . . . [agency] organization" in section 7106(a)(1).

On the other hand, two of the issues raised by the union in *Blytheville Air Force Base* did not involve matters of managerial discretion. The agency allegedly included inflation increases on the Cost Comparison Form for second and third-year in-house labor costs.[210] Also, the union disputed whether management knew, prior to completing the in-house estimate, that the federal employee wage increase for the next year had been capped by Congress at a level below what previously had been anticipated.[211] Whether the agency correctly computed these figures was a question of fact, not an exercise of managerial judgment. Furthermore, these alleged errors in the cost comparison had a direct effect on the competitiveness of the procurement process. Employees potentially affected by the award of a commercial activities contract, as *de facto* bidders for in-house performance, may be justified in seeking independent review to ensure that the in-house estimate was evaluated with contractor bids on a competitive basis. Grievance arbitration under the collective bargaining agreement, however, is not the proper forum—in terms

[207] *Id.* at 10, 15-16.
[208] *Id.* at 6.
[209] *Id.* at 15.
[210] Dep't of Defense Directive No. **4100.33-H,** DoD In-House vs. Contract Commercial and Industrial Activities Cost Comparison Handbook, ch. III, para. H1 (Apr. 1980), provides that labor costs for the second and subsequent years of in-house performance of a commercial activity may reflect expected salary increases and changes in the scope of work, but inflation factors are not to be added to individual elements of cost.
[211] *Blytheville Air Force* **Base,** at 6-7.

of expertise, timeliness, or congressional authority—for resolution of such disputes over the propriety of government procurement awards.[212]

Hopefully, the U.S. Supreme Court will overrule *EEOC v. FLRA*, adopting instead the Ninth Circuit Court's approach in *Defense Language Institute v. FLRA*.[213] At the very least, section 7106(a) requires that deference be given to agency determinations involving the MEO Plan, PWS, in-house estimate, solicitation, and other managerial decisions lacking objective standards for review. Labor arbitrators and the FLRA do not have the expertise or statutory responsibility to make procurement policy determinations, such as whether a violation of the Circular warrants resolicitation under conditions no longer conducive to competition because of disclosure of an in-house estimate, Moreover, regardless of outcome, the serious potential of grievance arbitration for undue delay and obstruction of the procurement process is incompatible with the goal of government efficiency intended by both Title VII and the commercial activities program. The Supreme Court should remove the ambiguity in Title VII, limiting arbitration to matters of impact and implementation contemplated in section 7106(b). The following federal court decisions on employee challenges to the contracting-out decisions clearly support reversal of *EEOC v. FLRA*.

V. FEDERAL COURT CHALLENGES

Direct attempts by government employees to challenge agency contractingout determinations in federal court generally have been unsuccessful. The opinions focus primarily on either the non-reviewability of A-76 determinations or the lack of employee standing to assert violations of various statutes or regulations. Inherent in these decisions, because of the absence of objective standards for agency action, is the recognition that managerial determinations with respect to contracting-out are committed solely to the discretion of agency officials.

In *AFGE v. Hoffmann*,[214] Army civil servants and their union sought to enjoin a RIF at the Ballistic Missile Defense Systems Command, Huntsville, Alabama. The case did not involve a commercial activity conversion from in-house to contractor performance. Rather, a reorganization and RIF at Huntsville resulted from reduced ballistic missile defense needs following strategic arms limitations agreements with the Soviet Union. The plaintiffs sought to preserve their jobs by attacking

[212] See infra notes 285-93 and accompanying text for a discussion of a **GAO** bid protest action involving some of the same issues raised in the *Blytheville* Air Force Base arbitration.
[213] *See* supra note 166.
[214] 427 F. Supp. 1048 (N.D. Ala. 1976).

private contract awards for new work, claiming that it could be performed less expensively by government employees.[215]

Though the court appeared to consider at length the merits of the agency's procurement decisions, its fundamental justification for refusing to grant relief was that the plaintiffs lacked standing to assert violations of Circular A-76 and implementing agency regulations. Moreover, the contract awards were not within the scope of agency actions subject to judicial review under the APA. To establish standing, the Huntsville employees would have had to show that the agency's action in fact caused them injury and that the interests they sought to protect were within the zone of interests covered by the statute or regulation allegedly violated. The court determined that the plaintiffs had not proven their capability to perform the work contracted out. They failed to establish a causal link between the agency action and their alleged injury.[216] The court also considered Circular A-76 and its implementing regulations to be "managerial and policy tools to aid in the procurement of supplies and services for the Federal Government and military services."[217] They were not issued to benefit federal employees, nor did they create implied private rights of action for employee enforcement.[218]

Judicial intrusion into managerial decisions involving the government's procurement of goods and services has been narrowly prescribed: "Constant judicial intervention to review the merits of a particular procurement decision would unduly burden the managerial effectiveness of the executive branch."[219] Judges have neither the assets, information, nor expertise to rule competently and expeditiously on such matters.[220] The *Hoffrnann* court did note certain exceptions to the nonreviewability of procurement decisions for complaints by unsuccessful bidders concerning bidding and contract award procedures prescribed by statute or regulation.[221] The plaintiffs were not unsuccessful bidders, however, nor did they allege errors in the methods by which the bids were solicited or the contracts awarded.[222]

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[215] *Id.* at 1051-53.
[216] *Id.* at 1083.
[217] *Id.*
[218] *Id. Cf.* Lodge 1858, AFGE v. Paine, 436 F.2d 882 (D.C. Cir. 1970) (NASA civil servants and their union have standing to challenge a commercial activity contract under NASA's enabling statute, which arguably could be interpreted to restrict NASA from obtaining support services from private sources).
[219] 427 F. Supp. at 1079 (citations omitted).
[220] *Id.* at 1079-80. The court also determined that the controlling test in the Fifth Circuit for reviewability of military decisions under the APA, Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), precluded judicial review of the plaintiffs' claims. 427 F. Supp. at 1080-82.
[221] *See* 427 F. Supp. at 1979 and n.37, and cases cited therein.
[222] *Id.* at 1979-80.

The principles of judicial non-interference identified in *Hoffmann* apply equally to government contracts involving commercial activities with considerably less impact on national security. Federal civilian stevedores and their union sought in *Local 2855, AFGE v. United States*[223] to enjoin the Army from contracting out stevedoring and terminal services performed by them at the Military Ocean Terminal in Bayonne, New Jersey. The plaintiffs attacked the contract conversion on three grounds. They alleged the in-house cost estimate was erroneous. They also claimed that the ensuing RIFs violated civil service regulations and veterans preference statutes, thereby depriving them of due process property interests. And, finally, they maintained that the conversion resulted in an illegal personal services contract under applicable civil service standards.[224]

In a well-reasoned opinion, the court fully developed the doctrine of non-reviewability of actions committed to agency discretion as it pertains to contracting out under Circular A-76. The Administrative Procedure Act provides for judicial review of an agency action by any person adversely affected by such action, except to the extent precluded by statute or committed by law to agency discretion. Whether a matter is committed to agency discretion for purposes of the Act depends upon an appraisal of the entire legislative scheme, to include a balancing of the policy implications and practical impact on government operations resulting from judicial scrutiny.[225] The court's analysis of cases in which agency actions had been found to be non-reviewable under the Act disclosed several criteria bearing upon the contracting out issue. The agency must have broad discretionary power to act. In effect, the statutory grant of authority must be so general that there is no law to apply. Particularly non-susceptible to judicial review are agency decisions that are "the product of political, military, economic, or managerial choices. . . . Indeed, given the separation of powers between the judiciary and the other branches of government, it would appear unseemly in such circumstances for a court to substitute its judgment for that of an executive or agency official."[226] This is particularly so with regard to choices an agency official must make from among alternatives, no single one of which can satisfy all competing interests. Such determinations are essentially non-legal in the sense that judges possess no greater com-

[223] 602 F.2d 574 (3d Cir. 1979).

[224] *Id.* at 577. The plaintiffs based their third claim on the "Pellerzi-Mondello Standards," 32 C.F.R. § 22.102 (1984) originally authored by former General Counsel of the Civil Service Commission, predecessor to the Office of Personnel Management. These standards were intended to preclude the procurement of services by contract in such a way that contractor employees in effect became employees of the government.

[225] 602 F.2d at 578.

[226] *Id.* at 579.

petence than agency officials to accommodate the diverse social, governmental and economic interests involved.[227] Furthermore, the court noted:

> [C]ourts have been especially inclined to regard as unreviewable those aspects of agency decisions that involve a considerable degree of expertise or experience, or that are based upon economic projections and cost analysis, at least when the agency has broad leeway to devise the formula to be applied in any particular situation and when there are no discernible guidelines against which the agency decision may be measured.[228]

These considerations led the court to conclude that Congress never intended for federal employees adversely affected by agency contracting-out determinations to be provided a judicial forum to contest A-76 feasibility studies.[229] Congress granted the head of each executive agency broad general authority to regulate the performance of agency business[230] and to delegate to subordinate officials the power to take final action on matters of personnel administration.[231] Without specifying standards or guidelines, Congress also directed agency heads, under regulations prescribed by the President, to review agency organization and activities to obtain optimum efficiency and economy in government

Examining the 1967 revision of Circular A-76 and its implementing Army regulation, the court found that these directives identified cost elements and decision-making factors only in general terms. In view of varying circumstances from activity to activity, no precise standards were prescribed by which a court could resolve alleged errors in the agency's analysis techniques and cost projections.[233] Accordingly, the decision to contract out terminal services at Bayonne was found to be a matter committed to Army judgment and managerial discretion. It thus was not subject to judicial review.[234] The court determined further that the Circular and agency regulation, which were intended primarily as managerial tools for implementing the government's commercial activities policy, were more in the nature of internal operating procedures

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[227] *Id.* (quoting Kendler v. Wirtz, 388 F.2d 381, 383 (3d Cir. 1968)).
[228] *Id.* at 579.
[229] *Id.* at 579-81.
[230] 5 U.S.C. § 301 (1982).
[231] 5 U.S.C. § 302(b)(1) (1982).
[232] 5 U.S.C. § 305(b), (c)(1) (1982). The President's authority under § 305(b) was delegated to the Director of the OMB. Exec. Order No. 12,152, 3 C.F.R. 423 (1979), *reprinted in* 3 U.S.C. § 301 (1982).
[233] 602 F.2d at 581-82.
[234] *Accord* AFGE, Local 1872 v. Stetson, 86 Lab. Cas. (CCH) ¶ 33,819 (D.D.C. 1979).

than official regulations prescribing binding rules of law. Therefore, they created no individual right of action for challenging an agency decision.[235]

The court disposed of the plaintiffs' remaining contentions with little difficulty. The decision to eliminate their jobs through contracting out was a proper reorganization justifying a RIF under civil service regulations. Various statutory and regulatory veterans preference provisions, while granting certain employment advantages, clearly did not create property interests in continued employment to the extent of prohibiting the government from abolishing positions held by veterans. Finally, the plaintiffs failed to exhaust available administrative remedies before the Civil Service Commission concerning their allegations that the stevedoring contracts were illegal personal service contracts.[236]

Even under the contracting out provisions of the DOD Authorization Acts, Congress did not diminish agency discretion. In ***AFGE,*** *Local* 2017 *v.* ***Brown,***[237] civilian employees and a local union at Fort Gordon, Georgia, attempted to enjoin the Army from contracting out post housing, maintenance, supply, and transportation functions. They alleged that provisions of section 806(a) of the DOD Authorization Act of 1980 had been violated.[238] Specifically, the plaintiffs contended that the conversion was done to circumvent civilian personnel ceilings and that the in-house cost estimate was not based on the most effective and cost efficient organization for government performance.[239]

Prior to making the contract award, agency officials at Fort Gordon conducted a management study to develop the MEO Plan and the in-house estimate. Comparison of the agency's estimated cost with the low contractor bid disclosed that a savings of **$32** million over nearly a five-year period would be realized through contracting out. Pursuant to section 806(a), the Army reported this result to Congress and certified that the in-house cost was based on an estimate of the most efficient and cost-effective organization. Congress did not object to the Army's calculations and the contract was awarded.[240]

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[235] 602 F.2d at 582 n.28 (quoting Concerned Residents of Buck Hill Falls v. Grant, 537 F.2d 29, 38 (3d Cir. 1976)).

[236] *Id.* at 583-84. ***See*** *also* AFGE v. Stetson. 640 F.2d 642. 645-46 (5th Cir. 1981) (federal employees' union lacks standing to allege that the minimum wage-rate determination for contractor employees in a commercial activity contract was improper under the Service Contract Act, 41 U.S.C. §§ 351-358 (1976); AFGE v. Dunn, 561 F.2d 1310, 1312-15 (9th Cir. 1977) (union lacks standing to challenge commercial activity conversion under the Service Contract Act, 41 U.S.C. §§ 351-358 (1982); Veterans Preference Act, 5 U.S.C. §§ 3309-3318 (1982); and the "Pellerzi Standards," 32 C.F.R. § 22.102 (1984)).

[237] 680 F.2d 722 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983).

[238] ***See supra*** notes 46, 48 and accompanying text.

[239] 680 F.2d at 725.

[240] *Id.* at 724-25.

Applying the reviewability criteria identified in *Local 2855 v. United States*, the court found that the provisions of the Authorization Act continued to vest the executive agencies with broad contracting out discretion, prescribing no legal standards for the courts to apply in assessing the propriety of agency decisions. Congress expressed its general intent that commercial activities be contracted out only if in-house performance is more costly, and it established agency reporting requirements in order to increase congressional oversight. However, section 806(a) imposed no standards to guide agency officials in exercising their discretion.[241] The court thus concluded that the Army's MEO Plan and in-house cost estimate were not reviewable. The court also noted that operation of a military installation involves the exercise of managerial choices on which even experts may disagree. Substituting judicial judgment for that of responsible agency managers would have denied the congressional intent that these determinations be based solely on the special expertise and experience of agency officials.[242]

The District of Columbia Circuit in *EEOC v. FLRA* thus erred in holding that Circular A-76 and implementing agency regulations are "applicable laws" within the context of section 7106(a) of Title VII. These regulations, as well as the requirements of the DOD Authorization Acts, provide no more discernible legal standards for arbitrators, than for judges, to apply. Certainly, arbitrator competence to make managerial choices for the operation of executive agencies does not surpass that of the judiciary. Through the explicit reservation of management's rights in section 7106(a), Congress provided that contracting-out determinations are committed to agency discretion for all purposes. Substituting an arbitrator's judgment for that of an agency official on managerial and economic choices is no more justified than a court's substitution of its judgment on similar matters.

This is not to say that every aspect of the contracting-out process is totally committed to agency discretion. *Moore Business Forms, Inc. v. United States*[243] involved a protest by an unsuccessful contract bidder seeking to enjoin the Government Printing Office (GPO) from cancelling a solicitation for private contractor publication and distribution of the Commerce Business Daily. The GPO decided to retain the activity in-house because the lowest bid price was approximately $1.2 million higher than the cost of government performance over the five-year contract term.[244] The GPO, a legislative agency, was not legally bound to ad-

[241] *Id.* at 726 (quoting AFGE, Local 2017 v. Brown, No. CV 180-136 at 12 (S.D. Ga. Aug. 29, 1980)).
[242] *Id.* at 726-27.
[243] 4 Cl. Ct. 186 (1983).
[244] *Id.* at 189-91.

here to the provisions of OMB Circular A-76. But, because the GPO's solicitation stated that a "feasibilitylcost analysis" would be accomplished "as outlined in OMB Circular A-76," the Claims Court concluded that, through incorporation by reference, the Circular's cost comparison principles became material terms of the implied contract of fairness between the GPO and the bidders on the procurement.[245]

Addressing the GPO's argument that the court's have unanimously found agency determinations under Circular A-76 not susceptible to judicial review,[246] the Claims Court noted that none of these decisions involved an unsuccessful bidder's claim on a procurement incorporating the Circular's provisions. Rather, the court cited with approval a GAO decision holding that while government contracting-out decisions are generally matters of agency discretion, the Comptroller General will consider allegations that agencies failed to comply with the Circular's detailed cost comparison procedures. The reason for this exception is that an erroneous cost comparison having a material effect on the decision to contract out would be detrimental to the integrity of the procurement system.[247]

The merits of the plaintiff's objections in *International Graphics* were not considered. By referring to the GAO decision, however, the court clearly indicated that only the cost comparison was subject to review. Managerial choices involving other phases of the contracting-out process were still committed to agency discretion. The court thus reaffirmed Congress' intent that agency officials determine, free from judicial interference, the scope of the agency's operations, organization, operating procedures, and manner of work performance, On the other hand, it recognized a need for independent review to foster competition by ensuring that the in-house cost estimate and the contractor bid are based on the same scope of work and account for all objectively measurable component costs.

The Claims Court distinguished *International Graphics* from *Local 2017 v. Brown, Local 2855 v. United States,* and similar decisions primarily because the federal employee plaintiffs in those cases were not

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[245] *Id.* 189, 197-98.

[246] *Id.* at 198 (citing *Local* 2017 *v. Brown; Local 2855 v. United States: Local 1872 v. Stetson; AFGE v. Hoffrnann).*

[247] *Id.* at 199 (quoting *In re* Holmes & Narver Services, Inc., Comp. Gen. Dec. B-212191 (Nov. 17, 1983), 83-2 CPD ¶ 435).

bidders with a stake in the procurement process.[248] Also, their claims of agency noncompliance with Circular A-76 were directed at the PWS and the MEO Plans. They did not attack the inclusion or omission of nondiscretionary cost factors in the preparation of the cost comparison. In fact, as pointed out in *International Graphics*, the version of Circular A-76 considered by the courts in the earlier employee challenges provided no procedures for agency contracting officers to follow in comparing the in-house estimate and the low contractor bid. The detailed Cost Comparison Handbook, now contained in Part IV of the Supplement, was not in existence at the time of the procurements at issue in those cases.[249]

No court appears to have ruled specifically on the reviewability of an employee claim that a commercial activity procurement was noncompetitive because the agency failed to comply with A-76 cost comparison procedures.[250] While displaced employees technically are not official parties to a procurement, they possess a very real interest in seeing that the "bid" for in-house performance is compared to the contractor bid on a competitive footing. The Circular's provision for administrative appeals of cost comparison determinations recognizes the legitimacy of the employees' interest. Moreover, federal employees facing a commercial activity conversion are in a different situation than contractor employees, who generally are viewed as having no redressable interest in the propriety of government procurement actions.[251] Contractors will protect the interests of their employees when the final computation of the cost of government performance does not include measurable component costs specified in Part IV of the Circular. Only the displaced employees themselves, however, are in a position to challenge agency errors in, or omissions from, the final cost of contractor performance. It is no more justifiable to presume that the administrative appeal procedure, without external review, will fully redress employee interests in a com-

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[248] *Id.* at 198. Moreover, the Claims Court would not have had jurisdiction to entertain a bid protest from a non-bidding party. *See, e.g.*, Indian Wells Valley Metal Trades Council v. United States, 553 F. Supp. 397, 398-99 (Cl. Ct. 1982) (The equitable jurisdiction of the Claims Court under 28 U.S.C. § 1491(a)(3) (1982) is limited to "contract claims," i.e., bid protests from bidders on the procurement, filed before the contract is awarded. The remedy for federal employees aggrieved by a commercial activity procurement would lie, if at all, in federal district court under the APA, 5 U.S.C. §§ 701-706 (1982 & Supp. I 1983)).

[249] 4 Cl. Ct. at 198 n.14.

[250] Though presented with this issue in *Indian Wells Valley Metal Trades Council*, the Claims Court determined that it lacked jurisdiction to entertain the claim. *See supra* note 248.

[251] *See, e.g.*, Motion Picture Laboratory Technicians & Film & Tape Editors Local 780 v. National Aeronautics & Space Admin., 587 F. Supp. 1467 (N.D.Ill. 1984) (union representing private contractor's employees lacks standing to challenge NASA's decision, without having conducted a Circular A-76 cost study, to reassign to government employees work performed under contract by union members).

petitive cost comparison than to presume that it will do so on behalf of contractor bidders. Furthermore, from a public policy perspective, efficiency and economy in government operations are equally impaired whether the absence of competition in contracting out works to the benefit or detriment of private contractors.

Though not presented with allegations of a faulty A-76 cost comparison, one district court was willing to review claims by a federal employees' union that the interests of its members were adversely affected by non-competitive bidding procedures in a commercial activity conversion. *Int'l Ass'n of Firefighters, Local F-100 u. Dep't of the Navy*[252] involved an attempt by the firefighter's union at the Naval Education & Training Center, Newport, Rhode Island, to set aside the resolicitation of an A-76 contract for installation firefighting services. The original solicitation was cancelled by higher headquarters because its specifications were ambiguous. The union contended that the resolicitation violated the competitive bidding procedures mandated by the Armed Services Procurement Act[253] and Defense Acquisition Regulations[254] because the in-house estimate had been disclosed to the contractor bidders.[255]

The court distinguished *AFGE v. Hoffmann* and *Local 1872* v. *Stetson* because those cases did not involve challenges based on defects in the bidding and award process specifically prescribed by law or regulation. Rather, they purported, in part, to attack agency managerial discretion under the guidelines of Circular A-76.[256] Furthermore, the court found that the displaced Navy employees suffered injury in fact; that the Center's in-house estimate was, in effect, an unsuccessful bid for government performance; that the Center, an agency within the Department of the Navy, could not judicially challenge the decision of higher headquarters to resolicit bids; and that the interests of civil service employees adversely affected by the conversion arguably fell within the zone of interests protected by provisions of the Armed Services Procurement Act mandating full and free competition.[257] The court's conclusions would have been equally persuasive with regard to an employee allegation that an A-76 cost comparison violated the objectively enforceable provisions of Part IV of the Supplement, which likewise are designed to ensure maximum competition in commercial activity procurements.

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[252] 536 F. **Supp.** 1254 (D.R.I. 1982).
[253] 10 U.S.C. § 2305(c) (1982).
[254] 32 C.F.R. § 2-404.1 (1984).
[255] 536 F. Supp. at 1255-59.
[256] *Id.* at 1260.
[257] *Id.* at 1261-66.

VI. GAO PROCUREMENT PROTESTS

Prior to enactment of the Competition in Contracting Act of 1984,[258] the GAO had no specific authority for resolving bid protests from unsuccessful bidders on government procurements. Due to the federal courts' lack of jurisdiction over such actions,[259] the GAO accepted bid protests under its statutory authority to adjust claims against the United States.[260] While, as a general rule, it has viewed contracting-out protests as being outside its bid protest function, the GAO does entertain allegations of agency non-compliance with Circular A-76 and implementing regulations when necessary to preserve competition and the integrity of the procurement process.[261]

An agency's authority to contract out has always been considered a managerial prerogative. In *In re Rand Information Systems*,[262] for example, the GAO dismissed a disappointed bidder's protest of a Dep't of Agriculture decision, based on an A-76 comparative cost analysis, to retain in-house computer software conversion work. Rand claimed that performance under contract would be more advantageous because the agency lacked adequate in-house staff to accomplish the software conversion. The GAO considered the agency's determination to be a fundamental exercise of managerial discretion. Similarly, in *In re General Telephone Company of California*,[263] it rejected a protest alleging noncompliance with Circular A-76 in connection with a determination by the Marine Corps to cancel a solicitation for telephone service using leased equipment. The Marine Corps decided to purchase the equipment in order to provide training to military personnel in its operation and maintenance. General Telephone maintained that the agency erred by comparing the cost of in-house operation of government-owned telephone equipment with the cost of leasing equipment and services under contract. Additionally, according to General Telephone, the 8.2% annual savings resulting from in-house performance was insufficient under Circular A-76 to justify cancellation of the solicitation. The GAO held that while the agency is required to obtain optimum competition in its procurements, its determinations of operational needs and methods of per-

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[258] Pub. L. No. 98-369, 98 Stat. 1175 (to be codified at 10 U.S.C. §§ 2301-2306, 31 U.S.C. §§ 3551-3556, 40 U.S.C. § 759(h), 41 U.S.C. §§ 253, 254). *See infra* notes 278, 290-91 and accompanying text.

[259] Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

[260] 31 U.S.C. § 3702 (1982).

[261] An agency argument that the Circular precludes the GAO from examining the results of a cost comparison following a final agency decision issued by an A-76 administrative appeals board was specifically rejected in *In re* Griffin-Space Services Co., Ms. Comp. Gen. Dec. B-214458.3; B-214458.4 (Nov. 14, 1984).

[262] Comp. Gen. Dec. B-192608 (Sept. 11, 1978), 78-2 CPD ¶ 189.

[263] Comp. Gen. Dec. B-189430 (July 6, 1978), 78-2 CPD ¶ 9.

formance are matters of agency judgment, which are beyond the scope of GAO review unless competition is unduly restricted. It was not the GAO's

> function, under. . . [its] Bid Protest Procedures . . . to review determinations made pursuant to OMB Circular A-76. . . . On the contrary, . . . [the GAO] regard[s] directives contained in Circular A-76 as matters of Executive policy, rather than of statutory or regulatory requirements, which are not within the decision function of the General Accounting Office.[264]

A significant exception to this rule was made for an erroneous A-76 cost comparison in *In re Crown Laundry & Dry Cleaners, Inc.*[265] That protest stemmed from the inclusion of admittedly erroneous information in an Invitation for Bids for laundry and dry cleaning services at Keesler Air Force Base, Mississippi. Crown claimed that its bid was higher than the agency's in-house estimate because Crown relied on improperly high rates stated in the solicitation for health and retirement benefits that employees would receive if employed by the government. The GAO dismissed the protest as untimely. Moreover, as the Air Force argued, the incorrect fringe benefit rates applied only to in-house performance and did not affect what Crown would have had to pay its employees had it been awarded the contract. Nonetheless, the GAO clearly expressed its willingness to review allegations of non-compliance with the Circular's rules concerning cost comparison calculations. It stated:

> Generally, we regard a dispute over an agency decision to perform work in-house rather than to contract out for those services as involving a policy matter to be resolved within the Executive Branch. . . . When, however, an agency utilizes the procurement system to aid in its decisionmaking, spelling out in a solicitation the circumstances under which the Government will award/not award a contract, we believe it would be detrimental to the system if, after the agency induces the submission of bids, there is a faulty or misleading cost comparison which materially affects the decision as to whether a contract will be awarded.[266]

In subsequent protests, the GAO has examined cost comparisons to determine whether agencies made reasonable attempts to estimate conversion costs associated with relocation expenses, severance pay, and re-

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[264] *Id.* at 4-5 (citations omitted). ***See also In re*** American Mutual Protective Bureau, Comp. Gen. Dec. B-190563 (Mar. 22, 1978), 78-1 CPD ¶ 226.

[265] Comp. Gen. Dec. B-194505 (July 18, 1979), 79-2 CPD ¶ 38. ***See also In re*** Kahoe Enterprises Inc., Comp. Gen. Dec. B-183866 (June 17, 1976), 76-1 CPD ¶ 389.

[266] 79-2 CPD ¶ 38, at 2 (citations omitted).

tained pay for employees displaced by a decision to contract out;[267] whether, under a solicitation arguably calling for a fixed price contractor bid with no wage price adjustment, the labor costs for in-house performance should have reflected wage increases for the second and subsequent years;[268] and whether costs attributable to under-utilization of the agency's work center as a result of contracting out were accurately computed.[269]

The GAO also indicated in ***In re MAR, Inc.***,[270] that it will entertain claims that agencies violated cost comparison "ground rules" specified in the solicitation, if failure to do so would be detrimental to competition. Thus, in addition to resolving MAR, Inc.'s allegation that several of the line item costs associated with conversion to contract on the Cost Comparison Form were improperly calculated, the GAO sustained a claim that the solicitation did not accurately correspond to the statement of work upon which the in-house estimate was based.[271] The GAO also considered, but rejected on the merits, a bidder's objection in ***In re D-K Associates***,[272] to the agency's cancellation of a solicitation as a result of an administrative appeal challenging the MEO Plan. Although the agency was not required to consider this appeal involving a matter of managerial discretion, the GAO found nonetheless that the solicitation was properly cancelled because the action reflected the agency's actual minimum needs.

Contrary to its position with respect to protests from disappointed bidders, the GAO has steadfastly refused to entertain identical claims from employees adversely affected by contracting-out determinations. A union's petition alleging that the agency failed to conduct a cost comparison study prior to contracting out was dismissed in ***In re NFFE***[273] because the GAO viewed the Circular as a matter of executive policy not establishing legal rights and responsibilities. In ***In re*** *AFGE,* ***Local 3347***,[274] the GAO stated:

> OMB Circular A-76, while expressing policy guidance with respect to whether certain services should be provided in-

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[267] *In* re Jets, Inc., 59 Comp. Gen. 263, 267-69 (1980).

[268] *In* re Serv-Air, Inc., 60 Comp. Gen. 44, 46-49 (1980).

[269] *In* re Midland Maintenance, Inc., Comp. Gen. Dec. B-202977.2 (Feb. 22, 1982), 82-1 CPD ¶ 150.

[270] Comp. Gen. Dec. B-205635 (Sept. 27, 1982), 82-2 CPD ¶ 278.

[271] *Id.* at 2-5. See also *In* re Griffin-Space Services Co., Comp. Gen. Dec. B-214458.2 (Sept. 11, 1984), 84-2 CPD ¶ 281.

[272] Comp. Gen. Dec. B-206196 (Jan. 18, 1983), 83-1 CPD ¶ 55.

[273] Comp. Gen. Dec. B-187838 (Nov. 26, 1976), 76-2 CPD ¶ 451. See *also In* re Local F-76, Int'l Ass'n of Firefighters, Comp. Gen. Dec. B-194084 (Mar. 28, 1979), 79-1 CPD ¶ 209 (union alleged contract bidder had an unfair competitive advantage because the contractor employed a retired agency official formerly involved in A-76 cost studies).

[274] Comp. Gen. Dec. B-183487 (July 3, 1975), 75-2 CPD ¶ 12.

> house or purchased from commercial sources, is not a regulation in the sense that failure of an agency to comply may affect the validity of the procurement and, therefore, the issue [of agency violation of the Circular's provisions] presented [by the union claimant] is not properly for consideration under our bid protest procedures.[275]

The opinion further stated, however, that agency compliance with the Circular is of "deep concern" from a "management-audit standpoint." Implicitly acknowledging the union's role in policing the commercial activities procurement process, the Comptroller General dispatched an auditor-attorney team to examine the agency's operation. Information provided in the union's protest was utilized in connection with the GAO's audit responsibilities.[276] Nonetheless, despite the GAO's increased willingness in *Crown Laundry* and subsequent cases to entertain protests concerning A-76 cost comparisons and related agency practices, this exception was narrowly drawn to protect only parties induced to submit bids in response to solicitations incorporating the Circular's provisions. In construing the extent of its authority to adjust claims against the United States, the GAO has been unwilling to recognize potentially displaced employees as *de facto* bidders for in-house performance on commercial activity contracts. Ultimately, its position was codified in the Competition in Contracting Act of 1984.[278]

The adverse consequences resulting from the availability of arbitral review to challenge commercial activity conversions are compounded by the denial of employee standing before the GAO. This is evident from an

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[275] *Id.* at 2.

[276] *Id.* at 3.

[277] *See, e.g., In re* Hawaii Fed. Lodge No. 1998, Int'l Ass'n of Machinists & Aerospace Workers, Comp. Gen. Dec. B-214104 (Jan. 23, 1984), 84-1 CPD ¶ 109; *In re* NAGE, Local R5-87, Comp. Gen. Dec. B-212735.2 (Dec. 29, 1983), 84-1 CPD ¶ 37; *In re* NAGE, Local R14-89, Comp. Gen. Dec. B-211903 (July 11, 1983), 83-2 CPD ¶ 77; *In re* Taxpayers Generally and Fed. Empl. of Fort Eustis, Va., Comp. Gen. Dec. B-2101188 (Jan. 17, 1983), 83-1 CPD ¶ 52; *In re* Jake O. Black, Comp. Gen. Dec. B-199564 (Aug. 6, 1980), 80-2 CPD ¶ 95; *In re* William T. Springfield, Comp. Gen. Dec. B-197752.2 (Apr. 28, 1980), 80-1 CPD ¶ 301; *In re* Local 1662, AFGE, Comp. Gen. Dec. B-197210 (Mar. 3, 1980), 80-1 CPD ¶ 169; *In re* Locals 1857 & 987, AFGE, Comp. Gen. Dec. B-195733, B-196117 (Feb. 3, 1980), 80-1 CPD ¶ 89.

[278] The Competition in Contracting Act of 1984 defined an "interested party" entitled to file a procurement protest with the GAO as follows:

> (2) 'interested party,' with respect to a contract or proposed contract . . . means an actual on prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.

Pub. L. No. 98-369, § 2741(a), 98 Stat. 1175, 1199 (to be codified at 31 U.S.C. § 3551(2)). For a general overview of the significant provisions of the Act, *see* Ackley & Cornelius, *The Competition in Contracting Act of 1984*, The Army Lawyer, Jan. 1985, at 31.

examination of the facts presented in ***In re RCA Service Co.***[279] and ***In re Holmes & Narver Services, Inc.***[280] At issue in ***RCA Service*** Co. was an Army solicitation under Circular A-76 for custodial and security guard services at West Point. After examining the contractor proposals, the contracting officer requested that the agency's Commercial Activities Steering Committee review the solicitation before he entered into negotiations with the bidders. Apparently he felt that it overstated the services historically performed in-house. The solicitation's scope of work was thus reduced; however, the agency's Director of Engineering advised that the in-house cost estimate was not thereby affected. Following negotiations, best and final offers were submitted on the revised solicitation and the contract was conditionally awarded to RCA Service Co. The local employees union and Federal Managers Association contested the award through the administrative appeal process, contending in part that the in-house cost should have been reduced under a modified statement of work comparable to the revised solicitation. The agency appeal board agreed, and since the bids had been disclosed, the Academy cancelled the solicitation instead of recomputing the in-house cost.[281]

RCA Service Co. protested the cancellation, claiming that the appeal board's decision was erroneous and that, in any event, recomputation of the in-house cost was the proper remedy. The GAO did not undertake to supplant the agency's judgment in determining the in-house cost estimate. Rather, finding that the Army failed to show the unfeasibility of recomputing the estimate, the GAO recommended only that it be adjusted, if warranted, to reflect the in-house cost under the same scope of work set forth in the solicitation. To foster true competition and maintain the integrity of the procurement process, the Army was required to adhere to the procedures mandated by Circular A-76 and upon which the bidders, pursuant to the solicitation, relied in submitting their proposals.[282]

RCA Service Co. clearly shows the salutary effect of GAO review on commercial activity procurements in terms of government efficiency and economy through increased competition. But, it also demonstrates that the denial of GAO procurement protest standing to adversely affected employees is unjustified. The low contractor bidder in ***RCA Service Co.*** was entitled to appeal the administrative board decision in favor of in-house performance. Had the board erroneously denied the employees' appeal, however, no GAO review would have been permitted,

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[279] Comp. Gen. Dec. B-208204.2 (Apr. 22, 1983), 83-1 CPD ¶ 435.
[280] Comp. Gen. Dec. B-212191 (Nov. 17, 1983), 83-2 CPD ¶ 585, ***modified,*** Comp. Gen. Dec. B-212191.2 (Apr. 17, 1984), 84-1 CPD ¶ 425.
[281] 83-1 CPD ¶ 435, at 1-2.
[282] *Id.* at 3-4.

even though only the displaced employees would have been able to represent the interests of the in-house "bid." It cannot be assumed that agency appeal boards will always err, if at all, in favor of government performance. The sheer complexity of A-76 cost comparisons undoubtedly accounts for as many mistakes for, as well as against, contractor bidders. A faulty cost comparison or material discrepancy between the PWS and the solicitation, regardless of which party thereby benefits, is equally detrimental to the procurement system.

Holmes & Narver Services, Inc. involved a contractor protest to a decision by the Army at Redstone Arsenal to cancel an A-76 solicitation and continue in-house performance of base operations and maintenance services. The Holmes & Narver bid was initially determined to be $986,867 less than the in-house cost of performance for the four-year and ten-month contract term. A successful appeal of the cost comparison by a local employees' union under the administrative appeal procedure resulted in a revised in-house cost $106,583 less than Holmes & Narver's bid. Holmes & Narver then took its own appeal to the administrative board; four of its contentions of error in the cost comparison were sustained. But, in a third claim by an individual employee, the board found discrepancies between the statement of work and the solicitation. The net result, following resolution of all administrative appeals, was an in-house estimate $1,972,874 lower than Holmes & Narver's bid.[283]

Before the GAO, Holmes & Narver raised several specific errors in the cost comparison computation. The GAO found that the first-year in-house labor cost on the Cost Comparison Form should have reflected a salary increase for wage-grade employees. This raise was anticipated at the time of the cost comparison and it was not off-set by adjustments to the contract price that the contractor could claim upon incurring increased labor costs due to Dep't of Labor wage determinations under the Service Contract Act.[284] Such adjustments were not required during the first year of contractor performance.[285] Additionally, Holmes & Narver successfully challenged the Army's failure to apply an OMB directive modifying Circular A-76, which resulted in an overstatement of overhead costs attributable to underutilization of the agency's work center in the event of conversion to contract. As the potential impact of the ap-

[283] 83-2 CPD ¶ 585, at 1-2.
[284] 41 U.S.C. §§ 351-358 (1982).
[285] 83-2 CPD ¶ 585, at 5-6 (quoting *In re* Joule Maintenance Corp., Comp. Gen. Dec. B-208684 (Sept. 16, 1983), 83-2 CPD ¶ 333).

proved adjustments cast sufficient doubt on the validity of the cost comparison, the GAO recommended its recomputation.[286]

Some of the complex procurement issues in ***Holmes & Nurver*** were identical to those considered by the arbitrator in the ***Blytheville Air Force Base*** arbitration.[287] A very real potential exists for inconsistent decisions in the two forums, even in connection with the same procurement. A comparison of these two decisions also demonstrates the adverse impact on procurement policy and governmental efficiency caused by the availability of arbitration, but not GAO review, for displaced employees to challenge commercial activity cost comparisons. The GAO obviously had expertise in understanding and determining the propriety of commercial activity procurement procedures. The Comptroller General speaks with a single voice in applying the Circular's provisions consistently. Moreover, the GAO's bid protest mechanism is well established in, and responsive to, the government contracting process. The ***Blytheville Air Force Base*** bids, for example, were opened on March 22, 1982.[288] A final decision on exceptions to the arbitral award is still pending before the FLRA. On the other hand, in ***Holmes & Nurver,*** the bidders' final offers were submitted on February 24, 1983.[289] The GAO ruled initially on November 7, 1983, and even with a reconsideration, the final decision was issued on April 17, 1984.

Under the Competition in Contracting Act of 1984, which established a statutory bid protest procedure, GAO decisions must now be rendered in ninety days, with extensions only for exceptionally complex cases.[290] The Act also requires that contract awards be stayed pending final action on any bid protest, unless the agency head certifies that compelling circumstances affecting the interests of the United States will not permit delay in commencement of contract performance while awaiting

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[286] 83-2 CPD ¶ 585, at 6-8, 14. The Comptroller General subsequently modified this decision with regard to costs attributable to under-utilization of the work center. The Army was found to have properly refused to apply the OMB directive because it created an erroneous result. The directive was withdrawn by the OMB shortly thereafter. Holmes & Narver argued that nonetheless it was a binding regulation having the effect of law. The Comptroller General disagreed, ruling that Circular A-76 and its amendments are merely policy directives. The GAO only reviews commercial activity procurements to ensure that cost comparisons, in fact, are fair and accurate. 84-1 CPD 4 425.

[287] *See* ***supra*** notes 204-12 and accompanying text,

[288] LAIRS 14383, at 2.

[289] 83-2 CPD ¶ 585, at 1.

[290] Pub. L. No. 98-369, § 2741(a), 98 Stat. 1175, 1201 (to be codified at 31 U.S.C. § 3554(a)(1)).

the Comptroller General's decision.[291] Potentially displaced employees would thus benefit, as much as contractors and agencies, from swift and competent GAO dispute resolution, Unlike labor arbitrators and the FLRA, the GAO possesses the expertise, experience, and procedural capability to resolve A-76 appeals in a manner that is timely, responsive to sound procurement principles and the interests of all affected parties, and fosters consistency in the interpretation of Circular A-76 and implementation of the commercial activities program.

VII. CONCLUSION AND RECOMMENDED LEGISLATION

Federal employees adversely affected by commercial activity conversions should be entitled to a competent, independent, and responsive

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[291] *Id.* **98** Stat. at **1200** (to be codified at **31** U.S.C. § 3553(d)(1)). The stay provision of the Competition in Contracting Act, as well as a provision authorizing the Comptroller General to award attorneys' fees and bid protest costs to prevailing protesters, have come under attack, President Signs HR **4170,** Challenges Validity of Bid Protest Provisions, **42** Fed. Cont. Rep. (BNA) 105 (July **23, 1984).** Dep't of Justice Views on Constitutionality of Competition, Bid Protest Provisions Enacted by Congress, **42** Fed. Cont. Rep. (BNA) **122** (July **23, 1984).** The Dep't of Justice has advised the executive agencies not to comply with these provisions, which are viewed as violating the separation of powers under the Constitution. Dep't of Justice Memorandum on Implementation of the Bid Protest Provisions of the Competition in Contracting Act (Oct. **17,** 1984), *reprinted in* Dep't of Justice Memorandum on the Constitutionality of the Bid Protest Provisions in CICA, **42** Fed. Cont. Rep. (BNA) **755** (Oct. **29, 1984)** (hereinafter cited as Justice Memorandum), Although the executive agencies may avoid the stay provision by certifying that compelling government interests do not permit delay in the commencement of contract performance, the Justice Department views the authority of the Comptroller General, an agent of Congress, *to* lift, or refrain from lifting, a stay as amounting to an unconstitutional legislative veto under Immigration & Naturalization Service v. Chadha, **462** U.S **919 (1983).** Similarly, the provision for awarding attorneys' fees and bid preparation costs is viewed as a congressional attempt to alter executive branch legal rights and duties in violation of *Chadha,* in addition to constituting an impermissible vesting of judicial power in a congressional agent. Justice Memorandum, ***supra,*** **42** Fed. Cont. Rep. at 760-62. Following the Justice Department's advice, OMB has instructed executive agencies not to implement the stay and bid protest cost provisions. OMB Tells Agencies Not to Implement Key CICA Bid Protest Provisions, **43** Fed. Cont. Rep. (BNA) **55** (Jan. **14, 1985).** The GAO contends that in view of agency power to override the stay requirement, plus the fact that GAO bid protest decisions continue only to be declarative of whether contract awards or proposed awards comply with law and regulations, the stay and damages provisions are constitutional. Contracting agencies need not adopt the GAO's recommendations. General Accounting Office's View on Constitutionality of Bid Protest Provisions Enacted by Congress, **42** Fed. Cont. Rep. (BNA) **124** (July **23, 1984).** These arguments will likely overcome the Justice Department's objections to the stay provision. The apparent final authority of the Comptroller General to award monetary damages is more constitutionally suspect. The possible unconstitutionality of these two provisions, however, would not impair the salutary effect of granting those civil service employees who would be released from their competitive levels as a result of a proposed **A-76** conversion, or their unions, the right to maintain a GAO protest on the same limited grounds available to disappointed contractor bidders. GAO protests have always been an integral part of the procurement process: contracting agencies would undoubtedly be willing, if not desirous, of delaying commencement of a major commercial activity conversion for **90** days pending GAO review: and adversely affected employees would receive the satisfaction of independent review of the contracting-out process.

forum in which to object to the elimination of their jobs when not actually justified by increased government efficiency. In many cases, such challenges may also be the only method by which taxpayer interests can effectively be asserted.

Labor arbitration is not a viable forum for resolving contracting-out disputes. Even assuming arbitrator competence in the complex field of government contracting, grievance arbitration is not conducive to the development of consistent, fiscally sound procurement policies. Congress never contemplated that the FLRA's charter should include responsibility for monitoring the procurement process. Not only are such matters beyond the Authority's competence, the inordinate delays associated with FLRA rulings on exceptions to arbitral awards operate to the detriment of displaced employees and constitute an unwarranted interference with finality in government contracting that, in itself, impairs economy and efficiency. Furthermore, the intent of Congress to preserve the fundamental authority of government officials to determine agency organization and methods of operation is completely disregarded if OMB Circular A-76 is enforceable in its entirety in grievance arbitration. If the *EEOC v. FLRA* decision is affirmed, such judgments will be matters of arbitrator discretion, completely negating the mandate of Congress that the "provisions of . . . [Title VII] should be interpreted in a manner consistent with the requirement of an effective and efficient Government."[292] The Supreme Court should finally eliminate the statutory ambiguities in Title VII by restricting contracting-out arbitration to impact and implementation procedures negotiated between labor and management under section 7106(b).

The availability to federal employees of the GAO's protest procedure, on the other hand, would provide responsive and independent review of agency contracting-out decisions. The GAO has demonstrated its ability to resolve commercial activity procurement protests competently and promptly. It has carefully refrained from interfering with managerial prerogatives, requiring only that the cost of government performance under the organization developed by management be compared equitably with contractor bids under the terms of the solicitation. Considering that protests from bidders on Circular A-76 solicitations are already entertained, there is little justification for denying GAO review to adversely affected employees merely because the in-house estimate is not technically a bid. Not only do potentially displaced employees have considerable personal interests at stake, their protests would further the public's interest in competition currently lacking representation because

[292] 5 U.S.C. § 7101(b) (1982).

of the non-existence of an "agency bidder" on commercial activity contracts.

By amending the definition of "interested party" in section 2741 of the Competition in Contracting Act of 1984, Congress could easily provide for GAO jurisdiction to entertain employee protests concerning A-76 conversion solicitations. Such limited action would satisfy much of the public and congressional concern over the accuracy of A-76 cost comparisons and the impact of the commercial activities program on federal employees. Moreover, it would obviously be preferable to more drastic steps that have been proposed, such as comprehensive contracting-out legislation[293] or creation of United States district court or Claims Court jurisdiction over A-76 challenges brought by adversely affected employee.[294] Coupled with reversal of *EEOC v. FLRA*, the inclusion of adversely affected employees as interested parties in A-76 procurement protests before the GAO would provide an exclusive, viable forum for employee challenges to contracting out; foster consistency and equity in the implementation of the commercial activities program; and enhance government economy through increased procurement competition and the elimination of unnecessary litigation in the context of labor-management relations.

[293] *See, e.g.*, Oversight Hearing, *supra* note 52 (statement of John Sturdivant).
[294] *See supra* note 49.

THE GOVERNMENT'S RIGHT TO TERMINATE FOR DEFAULT: A DEATH KNELL FOR CURE NOTICE REQUIREMENTS IN SERVICE CONTRACTS?

by Major Harry Lee Dorsey*

I. INTRODUCTION

The federal government spent $168 billion in fiscal year 1983 in contracting for construction, supplies and services.[1] In many of its contracts the government did not get what was called for by the contract; these are breaches of contract. Professor Corbin has said of contract breach: "A breach of contract is always a non-performance of duty; but it is not every non-performance of duty that is a breach of contract."[2] His words belie the complexity of the concept of breach of contract. The determination of whether or not a contract has been breached has challenged the business and legal communities for years. There has been considerable litigation over whether one of the parties to a contract had failed to perform the duties which it undertook upon entering the contract and whether this failure will support a unilateral decision to end the contract.

Government contract law has its roots firmly set in the common law principles of offer, acceptance, consideration, mutuality, performance, and requirements for formalization of the contract. There are differences, however, between the common law theory of contract and government contract law and these differences have a significant impact on the rights and obligations of the government and the contractor.[3] One of these differences is the contractual term which creates a unilateral right in the government to terminate contracts either for its convenience or for default.

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[1] Telephone information from Federal Procurement Data Center (2 Apr. 1984).
[2] 4 A. Corbin, Corbin on Contracts § 943 (1951).
[3] G. Cuneo, Government Contracts Handbook (1962).

The typical government fixed-price supplylservice contract contains a default clause.[4] This clause allows the government to terminate the contract for default, without further notice, "if the contractor fails to make delivery of the supplies or to perform the service within the time specified."[5] Additionally, it provides that a contractor's failure to perform any other provision of the contract in accordance with its terms, or failure to make progress so as to endanger completion of the contract in accordance with its terms, will justify a termination for default. It requires, however, the government to give the contractor notice of the perceived failure and a ten-day period to cure the deficiencies before the contract may be terminated.[6]

The application of these relatively simple rules have created situations where it is frequently perceived that termination for default is all but impossible. Beginning in the mid 1960s, a loose series of decisions from the U.S. Court of Claims and the various boards of contract appeals seriously questioned the government procedures in defaulting contracts using the supplylservice default clause.[7] These cases were, over time, col-

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'Defense Acquisition Reg. § 7-103.11(1 July 1976)(rev. 28 Aug. 1980)(hereinafter cited as DAR). On 1 Apr. 1984 the Federal Acquisition Reg. (hereinafter cited as FAR) became effective and replaced the DAR as the governing acquisition regulation for the Department of Defense and the rest of the federal government. In this article parallel citations will be made to the appropriate FAR and DAR sections.

[5]DAR § 7-103.11 (rev. 28 Aug. 1980);FAR § 52.249-8.

[6]DAR § 7-103.11 (rev. 28 Aug. 1980);FAR § 52.249-8.

[7]Kisco Co., Inc. v. United States. 610 F.2d 742 (Ct. Cl. 1979) (a default termination was overturned because the government failed to send a cure notice); Franklin E, Penny Co. v. United States, 524 F.2d 668 (Ct. Cl. 1975) (extending the right to a cure situation where the contractor had delivered defective goods in an untimely manner); DeVito v. United States, 413 F.2d 1147 (Ct. Cl. 1969);Radiation Technology, Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966) (a contractor had a right to a cure period if substantially conforming goods were delivered in a timely fashion and the defects in the goods were minor and susceptable of easy correction); Wainwright Transfer Co., of Fayetteville, Inc., ASBCA Nos. 23311 & 23651, 80-1 BCA ¶ 14313 (The government may not choose courses of action in contract administration which are inconsistent with termination and then terminate for default, *i.e.*, if the government chooses not to terminate for default, it will be held to have elected a remedy for a given failure to perform and will not be allowed to terminate for the same failure.); W.M. Grace, Inc., ASBCA No. 23076, 80-1 BCA ¶ 14256; Soledad Enter., Inc., ASBCA Nos. 23376, 20423, 20424, 20425 & 20426, 77-2 BCA ¶ 12552 (government failure to use contractual inspections standards fatal to termination for default); Vaqueria Tres Monjitas, Inc., VACAB No. 1120, 75-1 BCA ¶ 11308 (contract terminated for default overturned when the government failed to inspect a perishable product in a prompt manner); Contract Maintenance, Inc., ASBCA No. 19603, 75-1 BCA ¶ 11097 (the government's failure to inspect in accordance with the terms of the contract was fatal to the termination for default); Contract Maintenance, Inc., ASBCA No. 18528, 75-1 BCA ¶ 11247 (Contractual provisions which allow reduction in contract price for defective performance are a remedy short of termination for default. Use of these terms is not consistent with termination for default. Additionally, the government failed to correlate the reductions in contract price with the reduced value received.); ***See,*** *e.g.*, B & C Janitorial Serv., ASBCA No. 11084, 66-1 BCA ¶ 5355 (In the case there was agreement that the contractor had failed to perform the contract and that the government has a right *to* terminate for default. The government, however, gratuitiously gave a cure period, but terminated the con-

lectively read to stand for the proposition that the rules governing cure notices and the doctrines of substantial compliance and election of remedies allowed contractors to breach the contract and avoid termination for default because it appeared from these cases that a contractor had a right to a specific cure notice for every defect in performance upon which the government based the default, and it was believed that the record-keeping and inspection requirements necessary to support an adequate cure notice were impossible to meet. These propositions were never expressly stated, but resulted from the willingness of boards of contract appeals and the U.S. Court of Claims to overturn terminations for default for a wide variety of reasons related to defective cure notice procedure.

Several recent decisions[8] have seriously questioned whether or not the language in the supply/service default clause requires the government to give contractors notice of deficiencies in performing service contracts,[9] The current state of the case law concerning cure notices in service contracts runs from a mechanical and absolute requirement to give cure notices[10] to the position that there is no prejudice from a failure to issue a cure notice." These conflicting decisions create uncertainty for contractors who are forced "to vainly grasp for [their] ever receding rights"[12] and for contracting officers who do not know how to terminate a contract for default so that it will be sustained on appeal. This confusion and uncertainty concerning the procedural requirements for termination for default has existed for at least a decade[13] and is becoming increasingly severe with new decisions every month interpreting this default clause.

The following problem illustrates some of the perceived difficulty in determining whether the government has a basis to terminate the contract for default. A guard service contractor is required to provide twenty-four-hour-per-day guard services at five geographically distinct

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tract before the end of the cure period. The termination was overturned because the Armed Services Board of Contract Appeals (ASBCA) believed that the cure notice constituted an agreement not to terminate during the cure period.).

[8] *See* Milmark Services, Inc. v. United States 2 Cl. Ct. 116 (1983), *aff'd.,* 731 F.2d 855 (Fed. Cir. 1984); Ohnstad Const., Inc., AGBCA No. 81-160-1, 83-1 BCA ¶ 16144. Sentry Corp., ASBCA No. 29308, 84-3 BCA ¶ 17601; Smart Products Co, ASBCA No. 29008, 84-2 BCA ¶ 17426; Gossette Contract Furnishers, GSBCA No. 6758, 83-2 RCA 9 16590.

[9] 26 The Government Contractor No. 1, ¶ 10 n.3.

[10] *See, e.g.,* Electromagnetic Refinishers, Inc., GSBCA No. 5053, 79-1 BCA ¶ 13697; Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13082.

"Gossette Contract Furnishers, GSBCA No. 6758, 83-2 BCA 7 16590.

[12] Ohnstad Const., Inc., AGBCA No. 81-160-1, 83-1 BCA ¶ 16144.

[13] *See* McGrath & Shearer, *Terminating the Breaching Contractor: The Problem and a Possible Solution,* 7 Nat'l. Cont. Mgmt. J., Spring 1973, at 1, *reprinted in 10* Yearbook of Procurrent Articles 659 (1973).

locations. The services required at each location involve multiple, repetitive, discrete tasks. Initially, performance under the contract is acceptable, although there are a number of identified deficiencies that the government inspector or contracting officer's representative discusses with the contractor. Performance deteriorates until the contracting officer issues a cure notice for a large number of failures to perform required services, at each of the locations. The contractor's response is to cure the stated defects by moving personnel from one location to another and in the process fails to perform a different set of the required tasks.[14] This anomalous situation, where the contractor has technically complied with the contractually-required cure notice but continues to fail to perform the services required by the contract, was frequently perceived by contracting officers as a situation where the government could not terminate for default because there were no uncured defects at the end of each cure period. There were defects, but they were new and the government had not yet issued a cure notice for them. This situation creates great frustration for the command and in some cases exposes government personnel and property to unncessary risk. Much of the rationale for these conclusions is without merit. More significantly, the government is not getting what it bargained for, *i.e.*, services performed in accordance with the specifications. There is authority for the proposition that the government is entitled to obtain the benefit of its bargain.

"This scenario is based on a contract for guard services in Bad Kreuznach, West Germany. After a series of cure notices, the contractor became unable to shift assets quickly enough and sufficient deficiencies were uncured at the end of the 10-day cure period to support a termination for default. The period of time during which the government received substantially less than was required by the contract was substantial. During 1982-1983, there was a risk of terrorist activity in the area and government personnel and material were put in a position of unnecessary risk due to the government's perceived inability to terminate a contract that was clearly in default. This approach to contract termination was taken needlessly because of a misunderstanding of cure notices and the doctrine of substantial completion. This misunderstanding has a rational basis. In General Optical Ltd., ASBCA Nos. 25387 and 25593, 85-1 BCA ¶ 17844, the ASBCA lamented that after seven months of nonperformance, the "procurement picture" was not pretty and that a stalemate had been brought to an end. But the board's language in its decision was couched in terms that indicate that the contracting officer's decision to terminate was upheld in part because the default was not issued until after the delivery date and in part because the appellant had failed to demonstrate that its failure to perform was beyond its control and without its fault or negligence. This case clearly illustrates a problem. The contracting officer felt constrained to issue a cure notice after five months of nonperformance. After two months, the government was considered justified in concluding that the contractor had abandoned the contract. It is ironic that the board found this picture of the procurement process distressing. Contracting officers are unsure as to what the procedural requirements are for a successful termination for default. A large measure of this uncertainty results from problems surrounding cure notices. The Claims Court has compounded the notice problem by holdong that a contracting officer's failure to give a notice of intent that was not required under the contract, but which was required under the default instructions at DAR ¶ 8-602(3)(b)(1), was sufficient to create a material issue of fact as to whether the contract had been properly terminated. UDIS v. United States, 7 Cl. Ct. 379 (1985).

The problem is that this authority either has been forgotten or confusing case law has created such a complex procedural gloss in this area that it is hard to identify the core principle that failure to perform the contract will support a termination for default.[15]

There is another reason for some of the difficulty in terminating service contracts for default. The clause used for service contracts is the same clause used in supply contracts.[16] Identical treatment of failures to perform supply and service contracts fails to account for the fundamental differences between these two kinds of contracts. A supply contract, even for a complex piece of electronic equipment, has a fixed delivery date or an incremental series of fixed delivery schedules. On the stated date either the equipment has been delivered or it has not. This is an easy determination. Additionally, supply contracts are likely to have relatively more objective standards for evaluation, *e.g.*, revolutions per minute, hardness factors, temperature limits, *etc.* On the other hand, service contracts frequently have many delivery dates, often with multiple tasks to be performed in differing locations at the same time. Many service contracts call for daily performance of tasks; reperformance the next day is meaningless. Also, the standards for evaluating service contracts are likely to be relatively more subjective, *e.g.*, cleanliness standards, continuing maintenance requirements, and security requirements are tasks in which deficiencies in performance may not be observed until long after the performance failure, for example, when a vehicle fails or a terrorist strikes. There are radically different processes at work in these two types of contracts, with divergent forms of failures to perform. These failures impact on the government differently. Therefore, it is inherently wrong to use the same remedy granting clause in both cases.

This article has two separate and distinct substantive parts: an analysis of the government's contract law right to terminate contracts for default using the supplyhervice default clause and a proposal to modify the default clause for service type contracts. It specifically focuses on the government's exercise of its right to terminate for default, with an emphasis on the factors required for successful termination for default. There are many issues discussed in this article which

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[15] *See, e.g.*, L.M. Copeland, ASBCA No. 13646, 69-1 BCA ¶ 7586 (A summary termination, *i.e.*, one without notice, was upheld when the contractor failed to provide services in accordance with the technical provisions of the contract and failed to perform the required services with the frequency called for in the contract. The government was entitled to all the services called for in the contract. Accordingly, the government was not required to issue a cure notice to support the termination for default.); Pride Unlimited, Inc., ASBCA No. 17778, 75-2 BCA ¶ 11436 (A contractor who fails to substantially perform the contractually required services may be terminated for default.); Smart Products Co., Inc., ASBCA No. 29008, 84-2 BCA ¶ 17426 (there is an implied term in every contract calling for a certain level of competency and quality).

[16] DAR § 7-103.11 (rev. 28 Aug. 1980); FAR § 52.249-8.

can be viewed as contractor rights, but the analysis of defensive responses to a governmental termination for default is beyond the scope of this article and will not be discussed in depth. The concepts discussed in this article should help the government practitioner to understand the rights of the government to terminate a service contract for default, and will explore a possible solution to a perceived problem in the termination of service contracts.

II. GOVERNMENT CONTRACT LAW AND THE RIGHT TO TERMINATE FOR DEFAULT UNDER THE STANDARD SUPPLY/SERVICE DEFAULT CLAUSE

A. INTRODUCTION

> The only universal consequence of a legally binding promise is that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves . . . [the promisor] free to break his contract if he chooses.[17]

In a government contract there are additional consequences for the contractor if it chooses to break its contract with the government. These consequences are contractual in nature and are outlined in various default clauses. The government's acquisition regulation requires every government contract to contain termination clauses.[18] These termination clauses are of two types: termination for convenience of the government and termination for default. Within the latter category, termination clauses are tailored to the way the contractor will be paid, *i.e.*, firm fixed price or cost reimbursement, and the nature of the goods or services being acquired.[19] Unfortunately, both the Defense Acquisition Regulation (DAR) and the Federal Acquisition Regulation (FAR) combine in one clause all supply contracts and most forms of service contracts, *e.g.*, personal services and architect-engineer service contracts have specific default clauses tailored to the type of service required. This structure presents an array of wordy clauses which often confuse the contractor and the government attorney. These clauses are fertile ground for litigation. The purpose of this section is, first, to briefly discuss the transition from the Defense Acquisition Regulation to the Federal Acquisition Regulation and, second, to analyze the existing case law which has interpreted the default clause used in supply and service contracts.[20]

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[17] J. Cibinic, *The Government$ Non-Judicial Remedies for Breach of Contract: A Comparison of Inspection and Default Clause With The U.C.C.*, 34 Geo. Wash. L.R. 719 (1966) (quoting O. Holmes, The Common Law 301 (1881)).

[18] FAR §§ 49.501-49.504. *See also* DAR §§ 8-700-8-712.

[19] *See generally FAR* §§ 49.501-49.504 and DAR §§ 8-700-8-712.

[20] DAR § 7-103.11 (rev. 28 Aug. 1980).

B. THE FEDERAL ACQUISITION REGULATION

On September 19, 1983, the long-promised Federal Acquisition Regulation was published in *The Federal Register*.[21] The FAR was designed to be a government-wide consolidation of acquisition procedures and became effective on April 1, 1984. This article will not discuss the transition from the DAR to the FAR in-depth.[22] Accordingly, this section is limited to a brief review of the termination provisions and clauses of the FAR, for they are the clauses that will be used in the future.

There are many similarities between the DAR default clause[23] for supplies and services and the FAR clause.[24] The FAR retains the DAR's single default clause for supplies and services. Thus, the FAR suffers from the same erroneous unification of fundamentally different contract subjects as did the DAR.[25] The FAR clause makes a fair number of stylistic changes to the DAR clause, but retains the same basic structure. The operational impact of these changes is likely to be minimal. Among the stylistic changes are:

1. The splitting of DAR § 7-103.11a(ii) into separate subparagraphs;

2. The clarification of the last sentence in paragraph (b) of the default clause to provide that the contractor shall not continue to perform on any defaulted portion of the contract;

3. The splitting of DAR § 7-103.11(c) into two paragraphs;

4. Simplification of DAR 7-103.11(e) to reflect the *Christian*[26] Doctrine; and

5. The elimination of DAR § 7-103.11(f) by incorporating the definition of subcontractor in FAR § 52.249-8(c).[27]

The drafters of the FAR have broken down long, multi-concept paragraphs into separate paragraphs, making the FAR default clause easier to read than the DAR clause. This stylistic improvement will undoubtedly improve the understanding of the concepts embodied in the clause.

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[21] 48 Fed. Reg. 42,102 (1983) (codified at 48 C.F.R. § 1).

[22] Because the FAR has not been in use for an extended period of time and there are few reported decisions expressly interpreting FAR language, reference in this article will be made to cases which have been decided involving pre-FAR clauses, *i.e.*, principally DAR clauses. *See supra* text accompanying note 21.

[23] DAR § 7-103.11 (rev. 28 Aug. 1980).

[24] FAR § 52.249-8.

[25] *See supra* text accompanying note 10.

[26] G.L. Christian & Assoc. v. United States, 320 F.2d 345 (1963) (termination for convenience clause is included in all government contracts even if physically omitted from the contract).

[27] FAR § 52.249-8.

The FAR clause differs from the DAR clause in one major respect: there is an alternative format for transportation or transportation-related services. The addition of an Alternate I for transportation contracts recognizes that tailoring the remedy granting clause is appropriate. The concept of specifically tailoring the default clause to accommodate the different nature of these types of service contracts, currently absent in the DAR, is a significant and commendable improvement.

Because of the similarities in substance and language between the DAR default clause and the FAR default clause it is appropriate to conclude that there will probably be no immediate wholesale revision of termination for default principles as the FAR becomes applicable to Department of Defense acquisitions. It is reasonable to assume, therefore, that existing case law may be relied upon to interpret the language of the default clauses. Accordingly, the remainder of this section is devoted to an analysis of case law relating to the existing supplyhervice default clause.[28]

C. OPERATION OF THE SUPPLY/SERVICE DEFAULT CLAUSE

1. General Bases for Default and Limitations on the Right to Default.

The supplyhervice default clause[29] provides that the government may terminate the contract if (a) the contractor fails to make delivery or perform services within the time stated in the contract, or any extension of that time; (b) the contractor fails to make progress in performing the contract so as to endanger its ability to perform the contract in accordance with its terms, including timely delivery or performance; or, (c) the contractor fails to perform any other provision of the contract.[30] This clause stresses the government's substantial interest in the timely performance of its contracts and allows for summary termination, without notice or opportunity to cure, for failure to deliver or perform by the due date. Accordingly, timeliness is a critical factor in understanding the operation of the supplylservice default clause. Defaults by a contractor may be broken into two categories: those that occur as a result of failure to make delivery by the delivery date stated in the contract, and those which are not specifically related to timely delivery. Within this broad analytical structure there are a multitude of types of default and factors which must be considered before a contract may be successfully termi-

[28] DAR § 7-103.11 **(rev. 28 Aug. 1980).**
[29] DAR § 7-103.11 **(rev. 28 Aug. 1980); FAR § 52.249-8.**
[30] DAR § 7-103.11 **(rev. 28 Aug. 1980).**

nated for default. The government's right to terminate contracts for default is not as unfettered as is its right to terminate for convenience.[31]

The first limitation on the government's right to terminate for default is quite basic and represents a well-established rule of contracting in the private sector. Contracts which provide a right of termination upon certain failures of performance may not be contractually terminated without those events coming to pass.[32] The Supreme Court in *Anvil Mining Co. v. Humble* held that provisions within a contract giving one party the right to terminate the contractual relationship upon the occurrence of a stated set of events did not create a power which could be used arbitrarily to terminate without at least making a determination that the stated event had occurred.[33] The general regulatory policies for termination for default of service and supply contracts reflect this principle by requiring the termination action to be taken after a contractor has failed to perform its obligations under the contract.[34] The contracting officer is required to consider the specific failure of the contractor.[35]

The second general rule allows the government to terminate only the executory portions of a contract.[36] The government is generally forbidden to terminate for default work which has been accepted and for which payment has been made.[37] This rule may be limited by the inspection clause or any warranty provisions which may be contained in the contract.[38] The inspection clause excepts 'latent defects, fraud and such gross mistakes as may amount to fraud'' from a limitation of action based on acceptance as a defense.[39] In some instances, therefore, initial acceptance may be overcome by the operation of these clauses and it may be possible to terminate for default after acceptance and payment.

Default based on partial performance is also limited. This concept was first used by the government in construction contracts and was known

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[31] *See* Pearlman & Goodrich, Termination *for* Convenience Settlement, 10 Pub. Cont. L.J. 1 (1978); *cf.* Kalvar Corp. v. United States, 543 F.2d 1298 (Ct. Cl. 1976). Contra Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982); S&W Tire Serv., Inc., GSBCA No. 6376, 82-2 BCA ¶ 16048.

[32] Anvil Mining Co. v. Humble, 183 U.S. 540 (1894).

[33] *Id.* at 547.

[34] DAR § 8-601; FAR § 49.401.

[35] DAR § 8-602(a) (specifically, DAR § 8-602(a)(ii)); FAR § 49.402-1, 49.402-3. *See also* Federal Contracting Corp., VABCA No. 1710, 83-2 BCA ¶ 116874.

[36] 2 R. Nash & J. Cibinic, Federal Procurement Law 1646 n.2 (3d ed. 1980). See also G.A. Karnavas Painting Co., VABCA No. 992, 72-1 BCA 9369 (The executory concept carried to an extreme where the contract was terminated for default where only correction of defects remained to be performed.)

[37] DAR § 7-103.5 (rev. 26 Nov. 1982); FAR § 52.246-2.

[38] *See* generally DAR § 1-324; DAR § 7-103.5 (rev. 26 Nov. 1982); FAR § 52.246-2.

[39] DAR § 7-103.5 (rev. 26 Nov. 1982); FAR § 52.246-2.

as the theory of substantial completion.[40] This concept prohibits the termination of the entire contract if the contractor has substantially performed the work required, *i.e.*, the government received the benefit of its bargain and beneficial use of the structure. This concept is rooted in the equitable prohibition of unjust enrichment." Over the years it has expanded to include supply contracts[42] and there are several board of contract appeals decisions that have considered the application of theories of partial performance to service contracts.[43]

Another limitation on the government's ability to terminate contracts for default is the duty to exercise independent judgment. In *Schlessinger v. United States*[44] the Court of Claims overturned a termination for default because it found the language of the default clause discretionary and not mandatory.[45] In *Schlessinger*, the contracting officer believed that he was required to terminate the contract and he failed to consider the contractor's response to government inquiries concerning the late delivery or the contractor's actual performance status on the date of termination.[46]

> The record affirmatively shows that nobody in the Navy, neither the contracting officer nor his superiors, exercised the discretion they possessed under the [default clause]. Plaintiff's status of technical default served only as a pretext for the taking of action felt to be necessary on other grounds unrelated to the plaintiff's performance or the propriety of an extension of time.[47]

Schlessinger requires contracting officers to "exercise [their] own judgement."[48] A default without a more careful analysis of the contractor's failures and an assessment of whether termination really makes sense in light of all factors related to the contract will not support a termination for default."[49]

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[40] Andrews & Peacock, *Terminations: An Outline of the Parties' Right and Remedies*, 11 Pub. Cont. L.J. 269, 298 (1980).

[41] *Cf.* Building Contr., Inc. ASBCA Nos. 14840, 15221, 71-1 BCA ¶ 8884.

[42] RadiationTechnology, Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966).

[43] *E.g.*, Orlando Williams, ASBCA Nos. 26099 & 26872, 84-1 BCA ¶ 16983; Contract Maintenance, Inc., ASBCA No. 18528, 75-1 BCA ¶ 11247, Pride Unlimited, Inc., ASBCA Nos. 17778. 75-2 BCA ¶ 11436; Reliable Maintenance Serv., ASBCA No. 10487, 66-1 BCA ¶ 5331.

[44] Schlessinger v. United States, 390 F.2d 702 (Ct. Cl. 1968).

[45] *Id.* at 707.

[46] *Id.* at 706-09.

[47] *Id.* at 709.

[48] *Id.*

[49] *Id.* at 708-10. *See* Darwin Constr. Co., ASBCA No. 29340, 84-3 BCA ¶ 17672 (Contractor in fact in default at the time of termination; but ready willing and able to perform. Default overturned because the board perceived the termination as an effort to "get rid of" the contractor.).

2. *Subparagraph a(i): Failure to Deliver on Time.*

(a) *Immediate right to terminate for default.*

The failure to make delivery of contractually required supplies or services by the date stated in the contract is, conceptually, the clearest type of contract default. The provisions of subparagraph a(i) of the supplyhervice default clause authorize termination for default under these circumstances:

> (a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances.
>
> (i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof;. . . .[50]

Despite its apparent simplicity, this language raises a number of issues concerning the nature of delivery which have been litigated and which are potential pitfalls for the unwary. This subparagraph creates an immediate right to terminate for default. Subparagraphs a(ii), which is used when there is a failure to make progress so as to endanger performance of the contract in accordance with its terms, and a(iii), which is used when there is a failure to perform other provisions of the contract, do not authorize summary termination. Terminations under subparagraphs a(ii) and a(iii) require written notice of deficiencies and a tenday period to cure those defects.

In *Marshall Electronics Co.*,[51] the Court of Claims succinctly summarized the basic principles of a termination for default using subparagraph a(i). "If a default in delivery has occurred and the contractor has no acceptable excuse and the Government is not at fault, an outright termination notice is the appropriate course without a cure notice."[52]

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[50]DAR § 7-103.11 (rev. 28 Aug. 1980).

[51]206 Ct. Cl. 830 (1975). This contract was for the manufacture of electronic tubes. It called for delivery in several increments. After difficulties arose, the first delivery date was extended three times. The contractor made the first delivery. The second delivery was due on 31 August 1969. On 3 September 1969 the contract was terminated for default. The ASBCA had concluded that once the contractor fails to meet a delivery date, "the Government was given the right to terminate for default, and this right is not limited so long as it is properly exercised." It further held that:

> A summary termination for default is unwarranted if the failure to meet on incremental delivery schedule arises out of causes beyond the control of the contractor and is without its fault or negligence. In such cases, the delay is excusable and a contractor is entitled to an extension in performance time.

ASBCA No. 14565, 71-1 BCA ¶ 8843.

[52]206 Ct. Cl. at 831. ***See also*** Woodside Screw Mach. Co., Inc., ASBCA No. 6936, 1962 BCAQ 3308.

The first basic rule is that terminations for default must be based on a contractor's failure. Fairness prevents the government from causing the failure and then terminating for default. Similarly, the default clause states that the government may not terminate for default if the contractor's failure was totally beyond its control and without fault or negligence. These factors must be considered before termination for default,

In *Woodside Screw Machine Co.*,[53] the Armed Services Board of Contract Appeals (ASBCA) discussed an impact of an improper termination for default.

> [T]he Government acquired the right to terminate for default [after the delivery date]; subject of course to the possibility that it might later be determined that the failure to deliver was due to causes beyond the control and without the fault or negligence of the appellant, in which case—pursuant to subparagraph (e) of the 'Default article'—such termination for default would be deemed a termination for the convenience of the Government.[54]

The importance of evaluating the factual evidence cannot be underestimated. Crucial to sustaining a termination for default under subparagraph a(i) is a determination that, in fact, there was no delivery by the due date and there existed no credible evidence to show government fault or excusable contractor delay.[55] The definition of an excusable delay has been litigated often and is beyond the scope of this article. This discussion does, however, highlight the need to consider whether a failure to deliver on time was due to the fault of the government or was within the control of the contractor. Failure to correctly make this analysis has a dramatic impact on the validity of a default termination.

(b) *Delivery.*

Understanding when the contractor has made delivery for the purposes of subparagraph a(i) is the key to a justifiable use of the summary right to terminate. With all of the emphasis which is placed on timely delivery, a shrewd contractor might conclude that a termination for default under subparagraph a(i) could be avoided by delivering nonconforming supplies or services. Having thus beat the clock, the contractor would then be automatically entitled to a ten-day cure period to correct the defects under subparagraphs a(ii) or a(iii) of the default clause, irrespective of the magnitude of the non-conformity. This argument was rejected by the Court of Claims in *Radiation Technology, Inc. v. United*

[53] ASBCA No. 6936, 1962 BCA ¶ 3308.
[54] *Id.*
[55] *See* King's Point **Mfg.** Co., Inc., ASBCA No. 21279, 83-2 BCA ¶ 16883.

States.[56] But, the court did not adopt the ASBCA's long held belief that delivery of non-conforming supplies or the performance of non-conforming services is not a delivery of, or a performance of, the supplies or services called for by the contract.[57] The ASBCA rule simply excludes a tender of non-conforming goods, or services from the definition of "delivery." The Court of Claims in Radiation Technology, *Inc.*, however, opined that a timely delivery of a product which is non-conforming, in minor ways, may be cured.[58]

In *Logal* Electronic *Corporation*[59] the government allowed a contractor to submit a first article test report after the delivery date. By failing to reject the report when it was tendered, the government surrendered a potential right to terminate under subparagraph a(i). The government's subsequent discovery, however, during first article testing that the report described a non-conforming product reinstated its right to summary termination under subparagraph a(i) because the contractor had failed to deliver a conforming product.[60] The summary right to terminate depends in part on knowing whether there has been a failure to deliver a product which is intended for acceptance by the government. In *IT&T v.* United *States*,[61] a defective preproduction sample was submitted to the government for evaluation. The government terminated without giving IT&T an opportunity to cure the defects. The termination was overturned because the delivery of preproduction samples was intended to be conditioned on the right to cure any defects discovered by the government.[62] As can be seen from these cases, there is a need to understand what is being delivered and for what purpose; whether the government has accepted late delivery and whether minor defects in timely delivered goods can be corrected. All of these factors must be analyzed in determining whether termination under subparagraph a(i) is appropriate.

(c) Does immediate really mean immediate?

The simple answer to this question is that the failure to deliver by the time stated in the contract triggers the operation of subparagraph a(i) and creates in the government a right to terminate for default.[63] As with many simple answers, this answer does not tell the complete story. In this instance, there is considerable authority to support either the posi-

[56] 366 F.2d 1003 (Ct.Cl. 1966).
[57] Metal-Tech Inc., ASBCA No. 14828, 72-2 BCA ¶ 9545.
[58] 366 F.2d at 1007.
[59] ASBCA No. 13054, 70-1 BCA ¶ 8083.
[60] *Id.*
[61] 509 F.2d 541 (Ct. Cl. 1975).
[62] *Contra* Harco Mfg. Co., ASBCA No. 27567, 85-1 BCA ¶ 17926 (The government has the option to retest. The burden is on the contractor to show that the defect is correctable.).
[63] Meyer Labs, Inc., ASBCA No. 17335, 72-2 BCA j 9643.

tion that there is or that there is not an immediate right to terminate due to failure to deliver.

Strong support for the position that the government has an immediate right to terminate if the contractor fails to deliver by the due date can be found in *Nuclear Research Associates, Inc.*[64] In this case the contract called for the delivery of a specially manufactured recorder. The contractor fell behind in performance and was granted an extension of performance until 12 July 1968. On 10 July, the contractor requested permission to ship the recorder minus one part and offered to have that part delivered to the government by 26 July, the date the government expected to begin testing. This proposal was rejected by the contracting officer and the contractor was advised that there would be no extension of the due date. The contractor delivered the recorder three days late. The contracting officer terminated the contract for default approximately one-half hour before the contractor ultimately delivered. The ASBCA ruled that once delivery is late, it is not a race to see whether the contracting officer terminates before the contractor delivers: "[O]nce an appellant [contractor] has failed to deliver on time, the Government, absent an excusable cause of delay, has an *indefeasible right* to terminate the contract, unless its own conduct deprives it of that right."[65] The board concluded that the untimely delivery of some part of the product prior to the act of termination for default by the contracting officer would not bar the termination.[66]

The ASBCA in *Fairfield Scientific Corp.*[67] has defined some of those factors of government conduct which could deprive it of the right to terminate:

> The Government's right to terminate [immediately after a failure to deliver in accordance with the contract] could only be defeated by a showing of either excusable cause of delay or some conduct by the Government by which "it condones the default, encourages or asks for continued performance or fails to set a new delivery schedule . . . after it has permitted performance to continue unhampered for too long a period of time,[68]

"ASBCA No. 13563, 70-1 BCA ¶ 8237.

[65] *Id.* (emphasis added). ***See*** *also* Aerospace Prod., Inc., ASBCA Nos. 12898 & 13164, 68-2 BCA ¶ 7383; W.M.Z. Mfg. Co., Inc., ASBCA No. 28410, 84-3 BCA ¶ 17569; Banner Eng'g. Corp., ASBCA No. 29467, 85-1 BCA ¶ 17831.

[66] Nuclear Research Assoc., Inc., ASBCA No. 13563, 70-1 BCA ¶ 8237.

"ASBCA No. 21152, 78-1 BCA ¶ 12689.

[68] *Id.* (quoting H.N. Bailey & Assoc., ASBCA No. 21300, 77-2 BCA ¶ 12681, and citing Nuclear Research Assoc., Inc., ASBCA No. 13563, 70-1 BCA ¶ 8237).

The contrary position, *i.e.*, that there may be no immediate right to termination for default, was set forth by the Court of Claims in *Radiation Technology, Inc. v. United States:* 'The contractor is entitled to a reasonable period in which to cure a non-conformity, provided that the supplies shipped are in substantial conformity with the contract specifications."[69] The court rejected the argument that time is of the essence, even when performance is needed on a specific day: 'This factor does not demand that performance be measured in terms of strict conformity. It does require that the performance be timely, but assuming this, these would thereafter remain for inquiry the question as to whether performance was substantial in other respects."[70]

While the language of *Radiation Technology* sounds like a wholesale rejection of the concept of termination for timely delivery of nonconforming goods, it does not excuse non-performance. It is important to remember that there must be timely delivery and that the nonconformity be both minor and susceptible of correction in a short period of time. Additionally, the court noted that as the urgency of the government's need increased, government could demand increasing conformity with the contract.[71]

This decision does not foreclose the government's right to terminate for timeliness. *Radiation Technology* does not stand for the proposition that the government must always allow a contractor a period of time to correct defects. The rule of *Radiation Technology* has been mistakenly overextended; perhaps the Court of Claims is primarily responsible for this error. In *Franklin E. Penny Co. u. United States*,[72] the right to a cure period was extended to goods which were delivered late and which were also defective. A logical, but erroneous, conclusion can be drawn from *Radiation Technology* and *Franklin E. Penny:* neither a failure to meet the delivery schedule nor a failure to comply with the specifications are serious enough breaches to support a termination for default. It is submitted that a more careful reading of these cases does not support such an expansive reading.

(d) *Incremental performance.*

Government contracts are frequently set up to allow the contractor to deliver in increments. A great many of the reported cases dealing with termination under subparagraph a(i) of the default clause involve multiple delivery, supply contracts. In contracts which call for incremental deliveries, a logical question to ask relates to the impact of a contractor's

[69] 366 F.2d at 1006.
[70] *Id. See infra* text accompanying notes 137-163.
[71] *Id.*
[72] 524 F.2d 668 (Ct. C1.1975).

failure to deliver one of the increments. When the government terminates the contract under subparagraph a(i) of the default clause,

> the Government did not have to wait until appellant [contractor] failed to meet the last delivery date in the delivery schedule. The right to terminate in "whole or in part" accrues upon failure to deliver on any delivery date, whether it be the final delivery date or an intermediate delivery date.[73]

In *Artisan Electronics Corp. v. United States*,[74] the Court of Claims affirmed a termination for default one day after the contractor missed the first incremental delivery, notwithstanding the contractor's request for a two month extension and a major reduction in the quantity required by the government. The contractor argued that the Uniform Commercial Code did not permit a termination in whole after a failure to make one delivery.[75] The court rejected this argument because the language of the contract authorized default in whole or in part, and held that the parties to a contract should be entitled to rely on the plain language of the contract.[76]

The principle which allows the government to terminate the entire contract for default for failure to make one of several incremental deliveries also governs a failure to deliver totally conforming goods within a single delivery.[77] "The Government is not compelled to accept that portion of the shipment which complied with the specifications and reject only those which are non-conforming. On the contrary, the government may accept the goods which are in accordance with the contract and reject the rest or it may reject [them] all."[78] In short, the government possesses sweeping options to either terminate the contract or continue performance in failures relating to incremental deliveries.

(e) *Cure notices and show cause notices under a(i).*

The language of subparagraphs a(ii) and a(iii) of the supplyhervice default clause clearly require the government to give the contractor notice of contractual deficiencies and a ten-day period in which to cure those deficiencies before the contract may be terminated for default.[79] There is no such language in subparagraph a(i).[80] Notwithstanding this linguistic

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[73] Interspace Eng'g & Support, ASBCA No. 14459, 70-1 BCA ¶ 8263.
[74] 499 F.2d 606 (Ct. Cl. 1974).
[75] U.C.C. § 2-612 (1977).
[76] 499 F.2d at 609. *See also* Banner Eng'g Corp., ASBCA No. 29467, 85-1 BCA ¶ 17831.
[77] Metal-Tech Inc., ASBCA No. 14828, 72-2 BCA ¶ 9545.
[78] *Id.* (citing Shallcross Mfg., ASBCA No. 8726, 65-1 BCA ¶ 4594; Golding Packing Co., ASBCA No. 7736, 1962 BCA ¶ 3392). *But see* Pulley Ambulance, VABCA No. 1954, 84-3 BCA ¶ 17665.
[79] DAR § 7-103.11(a)(ii); FAR § 57.249-8(a)(2).
[80] *Compare* DAR § 7-103.11(a)(i) *with* DAR § 7-103.11a(ii).

distinction, defaulted contractors have argued that subparagraph a(i) entitles them to a similar cure period or, alternatively, to a show cause notice. This argument has been rejected, even in situations where the contracting officer might have terminated under subparagraphs a(ii) or a(iii). A contract terminated for failure to deliver under subparagraph a(i) does not require the government to grant a ten-day cure period. Additionally the contracting officer need not give a show cause notice, as outlined in DAR § 8-602.3, because the show cause notice is a tool for the contracting officer to use in determining whether termination is in the government's best interest. A show cause notice is not a contractor right when the termination is based on subparagraph a(i).[81]

(f) *Timely delivery and service contracts.*

All of the contracts which have been discussed in this analysis of termination under subparagraph a(i) have been supply contracts. Do the principles of subparagraph a(i) apply to service contracts, where delivery is somewhat more amorphous?

The U.S. Claims Court recently considered this issue in *Milmark Services, Inc. v. United States*.[82] The contract called for the Immigration and Naturalization Service to provide documents to the contractor on a weekly basis. The contractor was to keypunch the data from the documents and create a computer readable magnetic tape and deliver the completed computer data within fourteen days. The contractor submitted one-half of the first batch of documents twenty-one days late, the other half twenty-four days late. The second batch was between four and nine weeks late and 2.8 million documents were picked up but never processed. Additionally, there were numerous defects in the keypunching which the contractor managed to perform and violations of other contractual provisions. The government terminated for default, without a cure notice or cure period, citing a failure to deliver in a timely fashion. The Claims Court said, "It is clear that [the contractor] did not comply with the delivery schedule prescribed in the contract, insofar as any weekly group of [documents] . . . was concerned."[83] In this situation, where the contractor repeatedly failed to deliver the required services on the dates required, termination for failure to make timely delivery was appropriate. It was not necessary to reach a discussion of other contract violations or cure periods required by other contract provisions, as advo-

[81] Interspace Eng'g & Support, ASBCA No. 14459, 70-1 BCA ¶ 8263; ***see also*** Meyer Labs, Inc., ASBCA No. 17335, 72-2 BCA ¶ 9643 and Federal Contracting Corp., VABCA 1710, 83-2 BCA ¶ 16874.

[82] 2 Cl. Ct. 116 (1983), *aff'd*, 731 F.2d 855 (Fed. Cir. 1984).

[83] *Id.* at 119.

cated by the contractor.[84] The Claims Court upheld the subparagraph a(i) termination for default, concluding that this was a failure of timely delivery.

Under subparagraph a(i) of the supplylservice default clause, the government possesses the right to terminate contracts for default without notice, if there has been a failure to deliver goods or perform services within the time stated in the contract. Notwithstanding the holding of *Radiation Technology* and its progeny, this power to terminate exists. Failures to perform which are appropriately classified as failures to perform within the time stated in the contract may result in the contract being terminated without a cure notice or cure period.[85] The continuing validity of this concept should be remembered as subparagraphs a(ii) and a(iii) are considered.

3. *Subparagraphs a(ii) and a(iii): Performance Failures Other Than Failure To Deliver or Perform on the Due Date.*

It is not difficult to conceive of a whole range of performance failures which do not specifically relate to delivery or performance failure on the delivery date. Some of these failures may arise before the delivery date, others after, *e.g.*, failure to make progress, anticipatory repudiation, failure to perform in accordance with the specifications, failure to cure defects identified by the government in a cure notice, failure to perform warranty work. These failures of performance raise issues of whether a contract may be terminated before the due date, and are the subject matter of subparagraphs a(ii) and a(iii) of the supplylservice default clause.

The Supreme Court addressed the problem of the right to terminate prior to the delivery date in *United States v. O'Brien*.[86] In that case the contract had a termination provision which allowed the government to "annul" the contract if, in the opinion of the government engineer in charge, the contractor failed to diligently and faithfully prosecute the work in accordance with the contract's requirements." The Court observed that:

> The sole material express promise of the contractor was to complete the **work** by July **1,** 1902. If the work was done at that date, the promise was performed, no matter how irregularly or with what delays in earlier months. Under the terms the United States was not concerned with the stages of per-

[84] *Id.* at 124. This position has been adopted on at least one occasion by the Armed Services Board of Contract Appeals. ***See*** Sentry Corp., ASBCA No. 29308, 84-3 BCA ¶ 17601.
[85] 2 Cl. Ct. at 124.
[86] 220 U.S. 321 (1911) (referenced in 2 R. Nash & J. Cibinic, Federal Procurement Law 1659 n.1 (3d ed. 1980)).
[87] 220 U.S. at 375.

> formance, but only the completed result. . . . Its interest in the result, however, made it reasonable to reserve the right to employ someone else if, when enough time had gone by to show what was likely to happen, it saw that it probably would not get what it bargained for from the present hands [sic].[88]

The court went on to point out that there was a difference between a contractor's express promise to perform with diligence and extending that promise to impute a right to annul if the contractor failed to use enough diligence to satisfy the government inspector: "It is one thing to make the right to continue work under the contract depend on his [the project engineer's] approval, another to make his dissatisfaction with progress conclusive of breach."[89] The court held that this language did not create a right to terminate before the due date: "This suit is upon the contract, but the United States asks more than, in our opinion, the contract gives."[90] Thus, the Supreme Court recognized the burden on the drafter of the contract to create a provision which expressly provided for termination before the due date; failure to do so will limit termination to defaults at the delivery date.

Subparagraphs a(ii) and a(iii) of the default clause are the contractual provisions which allow the government the right to terminate for failures before the delivery date. Generally, these provisions require the government to notify the contractor of defects or failures of performance and to allow the contractor a period of time to cure the defects.

> (a)(1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to—
>
> . . . .
>
> (ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or
>
> (iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).
>
> **(2)** The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) af-

[88] *Id.* at 326-27.
[89] *Id.* at 327.
[90] *Id.* at 328.

ter receipt of the notice from the Contracting Officer specifying the failure.[91]

The discussion in this article relating to causes of default beyond the control of the contractor and without its fault or negligence, and to the conversion of erroneous terminations for default to terminations for the convenience of the government, applies equally to any analysis of the provisions of subparagraphs a(ii) and a(iii).[92] Accordingly, it will not be repeated. The similarities, however, between subparagraph a(i) and subparagraphs a(ii) and a(iii) ends here.

(a) *Requirements for cure notice.*

There is no common law right to a cure notice.[93] The government contract law principles of cure notice are created by contractual agreement in the default clause. This clause allows the government to unilaterally terminate contracts for default either before or after the due date for stated failures to perform by the contractor.

Under the common law, a party to a contract could not consider its own duty discharged before the due date for performance unless there had been an anticipatory breach of contract.@The provisions of subparagraphs a(ii) and a(iii) extend this right to terminate the contract before the delivery date, by not requiring the government to wait for an anticipatory repudiation by the contractor.[95]

The failure to deliver on the contract's due date and true anticipatory repudiation are both certain and uncurable events. There is little point in telling a contractor to cure a delivery failure, because once the delivery date has been missed it can never be met. Similarly, if a contractor has repudiated the contract there is no need to require the government to request a cure and wait ten days before termination. Because subparagraphs a(ii) and a(iii) carve out new bases for termination and expand the rights of the government, the cure notice and cure period serve to protect the contractor from summary termination for a failure which is less definite than either a failure to deliver or an anticipatory repudiation. The cure notice is a procedural safeguard which recognizes the severity of termination for default and the importance of mutually known dates

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[91]FAR § 52.249-8.

[92]*See supra* text accompanying notes 44-48.

[93]Gossett Contract Furnishers, GSBCA No. 6758, 83-2 BCA ¶ 16590; Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13082. *Contra* U.C.C. § 2-609 (allowing a reasonable time to cure).

[94]McGarvie, The *Common Law Discharge of* Contract *Upon* Breach, 4 Melb. U. L Rev. 254, 257-61 (1963). See *also* 11 S. Williston, A Treatise on The Law of Contract §§ 1300, 1305 (W. Jeager ed., 3d ed. 1968); W. Anson, Principles of the Law of Contract 266-84 (1880).

[95]Fairfield Scientific Corp., ASBCA No. 21151. 78-1 BCA ¶ 13082.

after which termination for default may be undertaken without further notice. It serves as the functional equivalent of the delivery date established by the contract, *i.e.*, a mandatory date by which the contractor must have taken certain action.

A cure notice serves the additional purpose of removing speculation about whether the contractor would be able to correct defects in performance.[96] By creating a procedure which requires documentation of the basis for dissatisfaction and demands a cure, a record is made so that the contractor's progress or actions, or lack thereof, are measured. Without such a device, the government and the contractor might be able to speculate as to what might have been. The cure notice serves the useful function of tying the parties to a position. While this may happen in some cases, it should not be forgotten that the basic purpose for cure notices ought to be the improvement of deficient performance.

Under subparagraphs a(ii) and a(iii), the minimum cure period is ten days.[97] Contracting officers may grant longer cure periods, if appropriate. There are several limitations on the requirement for a cure period. The first such limitation is imposed by regulation. Cure notices will not be issued if less than ten days remain before the delivery date or the end of the contract period.[98] This is true even if the failure to perform was discovered before the delivery date.[99] In such circumstances, it is appropriate to await the due date or the end of the contract term and then issue a show cause notice because the due date or the end of the contract is a fixed date and a summary termination for default is possible after the delivery date.[100] The government should not be forced to grant any automatic extensions to the contract period because of a cure notice requirement designed to provide a substitute for the original delivery date. Another limitation on the cure notice requirement relates to the length of time required to fix the deficiency. Cure notices and cure periods are not intended to allow contractors the opportunity to completely redo the job during the cure period. The rule from *Radiation Technology* provides that "[t]he right to a cure notice assumes that the defects are susceptible to correction within a reasonable time."[101] In *Inforex, Inc.*, the General Services Board of Contract Appeals applied this standard and held that a contractor's inordinate amount of time to correct a defect defeated its right to a cure and that termination under subparagraph a(i) was appropriate.[102] Accordingly, the timing of the discovery of the defect, the

[96] Churchill Chem. Corp., GSBCA No. 3790, 74-1 BCA ¶ 10639.
[97] FAR § 52.249-8(a)(2); DAR § 7-103.11(a)(ii).
[98] FAR § 49.607; DAR § 8-811.
[99] Desert Laboratories, Inc., ASBCA No. 18360, 78-1 BCA ¶ 12990.
[100] *Id. See also* FAR § 49.607 and DAR § 8-811.
[101] 366 F.2d at 1006.
[102] GSBCA No. 3859, 76-1 BCA ¶ 11679.

length of time required for cure, and nature of the failure all serve to limit cure notice requirement.

Electromagnetic Refinishers, Inc.[103] provides a typical application of the principles relating to cure notices and cure periods. This was an indefinite quantity contract for furniture refinishing. The government was aware of the contractor's limited capacity but, unilaterally and without objection from the contractor, increased the number of agencies who could order against the contract. The contractor received more work than it could handle and fell behind and was unable to meet the contract's time limits. Several of the ordering agencies orally drew this problem to the contractor's attention. The government terminated the contract without a written cure notice, for failure to deliver, under subparagraph a(i). The board overturned the termination. It concluded that this situation was not a failure to deliver, but a failure to make progress so as to insure timely completion of the contract because the specific failures complained of by the government were related to the contractor's failure to notify the ordering activity and its failure to start work within the time limits of the contract. The contractor was steadily falling behind on work, but had not failed to deliver. The board held that the oral admonitions were not sufficient and that a written cure notice with a ten-day period to correct the deficiencies was a prerequisite to the right to terminate for default under subparagraph a(ii).[104]

The termination will be erroneous if the government gives a cure period and then fails to honor it, even if one was not required. In *San Antonio Construction Co.*,[105] the contracting officer could have terminated under subparagraph a(i) for failure to deliver. Instead, the contracting officer chose to issue a cure notice and granted a ten-day period to cure. In this case an independent right to default without notice under subparagraph a(i) existed before the cure notice was issued. The gratuitous cure notice operated as a waiver of defective performance before the date of the cure notice. Accordingly, the government was required to look to defects in the period after the cure notice for a basis to terminate for default. In this case there were none and the termination for default was overturned.[106] Even if the parties agree that the contractor was not adequately performing the contract at the time the cure notice was issued, a termination for default before the end of the cure period is wrong and will be overturned.[107]

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[103] GSBCA No. 5053, 79-1 **BCA ¶ 13697.**
[104] *Id.*
[105] ASBCA No. **8110, 1964 BCA** ¶ 4479.
[106] *Id.*
[107] B&C Janitorial Serv., **ASBCA** No. **11084, 66-1 BCA ¶ 5355.**

A contract termination after the issuance of a cure notice must be timely and based on defects which are not cured. In *Mr.'s Landscaping & Nursery*,[108] an oral cure notice was given to the contractor. After a cure period of approximately six weeks, the parties agreed that performance had become satisfactory. This agreement operated as a waiver of all prior poor performance. The government subsequently terminated the contract for default. The Housing & Urban Development Board of Contract Appeals ruled that the termination for default was improper because it was based on defects which the contractor had cured and because the government had accepted the contractor's subsequent performance of services (as evidenced by payment of invoiced amount less authorized reductions). Therefore, there was no defective performance upon which to base the default.

In *Bill Powell*[109] the government terminated a contract when there was no defective performance upon which to base a termination for default. Additionally, the contract was terminated before the end of the cure period, A cure notice was issued and the contract terminated seven or eight days after receipt of the notice. During the cure period the contractor continued to perform the contract. On the day that the government terminated the contract, the contractor was in fact performing the contract and not in default. The termination for default was considered to be wrongful and was converted to a termination for the convenience of the government.[110] The issuance of a cure notice by the government is an agreement that the contract will not be terminated during the cure period and that the contract will continue in existence if the defects are corrected."[111]

The three cases discussed above, and others,[112] represent a formalistic approach to cure notices. Read collectively there is a mathematical precision about cure notices. Every defect must be identified in a cure notice and the full tenday cure period must be given to correct every defect. This approach to cure notices is a correct and literal reading of the existing default clause in supply and service contracts. While this construction may be literally correct, it is inadequate to respond to the wide

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[108] HUDBCA Nos. 75-6 & 75-7, 76-2 BCA ¶ 11968. See also Bill Powell, ASBCA Nos. 10345 & 10393, 65-2 BCA ¶ 4916 (sometimes known as Bill Powell d/b/a/ Bill's Janitor Serv.).

[109] ASBCA Nos. 10345 & 10393, 65-2 BCA ¶ 4916.

[110] *Id.*

[111] Giltron Assoc., ASBCA Nos. 14561 & 14589, 70-1 BCA ¶ 8316. See also *B & C Janitorial* Serv.

[112] *See* Electromagnetic Refinishers, Inc., GSBCA No. 5053, 79-1 BCA ¶ 13697; Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13082; Mr.'s Landscaping & Nursery, HUDBCA Nos. 75-6 & 75-7, 76-1 BCA ¶ 11968; Contract Maintenance, Inc., ASBCA No. 19603, 75-1 BCA ¶ 11097; Contract Maintenance, Inc., ASBCA No. 18528, 75-1 BCA ¶ 11247; Bill Powell, ASBCA Nos. 10345 & 10393, 65-2 BCA ¶ 4916.

range of deficiencies which can occur in a typical service contract. If a contract calls for the performance of a large number of discrete tasks on a daily basis, it becomes almost impossible to maintain adequate records and cure notices to support a termination.[113] Cases such as these are the source of the perception that service contracts are impossible to terminate for default.

The impact of the failure to properly comply with the contract's cure notice provisions is significant if the contract is terminated for default. "A default termination is the Government's way of telling the contractor that he has breached the contract. In a default termination, the Government assumes the risk of having the default termination converted to a convenience determination [sic] if the government is wrong. . . ."[114] Terminations for default are considered to be severe remedies, in part because of the financial impact on the contractor. Accordingly, a general rule has developed that default termination provisions will be strictly construed against the government.[115] This means that boards of contract appeals and the U.S. Claims Court seem to have little hesitation in overturning a default termination if the government has not carefully followed the provisions of the default clause. Accordingly, the procedural failure to issue a sufficient cure notice is a defect which will make the default termination erroneous and will lead to conversion of the termination for default into a termination for the convenience of the government.[116]

While the rules concerning cure notices and cure periods sometimes seem to be quite mechanical and rigid, it is important to remember that reasonableness is a consideration in assessing the government's handling of the cure requirement.[117] There are legitimate and useful functions for a cure notice and a cure period. The most cogent reason for complying

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[113] *Cf.* Mr.'s Landscaping & Nursery, HUDBCA Nos. 75-6 & 75-7, 76-1 BCA ¶ 11968; Contract Maintenance, Inc., ASBCA 19603, 75-1 BCA ¶ 11097.

[114] Dynalectron Corp. v. United States, 518 F.2d 594, 602 (Ct. Cl. 1975).

[115] *See, e.g.*, Kisco Co. v. United States, 610 F.2d 742, 750 (Ct. Cl. 1979); DeVito v. United States, 413 F.2d 1147 (Ct. Cl. 1969).

[116] *Dynalectron Corp.*, 518 F.2d at 602. ***See*** *also* Pulley Ambulance, VABCA No. 1954, 84-3 BCA ¶ 17655.

[117] *E.g.*, Smart Products Co., ASBCA No. 29008, 84-2 BCA ¶ 17426 (implied level of workmanship required in every contract, even for defects that do not affect performance); Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13082 (no cure period required if there is true anticipatory repudiation); Soledad Enter., Inc., ASBCA Nos. 20376, 20423, 20424, 20425 & 20426, 77-2 BCA ¶ 12552 (a cure period was cut short when contractor failed to take the agreed upon steps and services continued to deteriorate); Giltron Associates, ASBCA Nos. 14561 & 14589, 70-1 BCA ¶ 8316 (termination for violation of the Service Contract Act of 1965 does not require a cure notice); Sancomar, ASBCA Nos. 15339, 16277 & 16477, 73-2 BCA ¶ 10086 (termination for violation of labor standards does not require a cure notice); Porter Construction, Inc., ASBCA No. 16178, 72-1 BCA ¶ 9372 (characterization of the failure as a failure to deliver allowed a termination without a cure notice).

with cure notice requirements is that they are contractual terms which have been agreed upon by the parties. Once inserted into the contract, the cure notice provisions must be followed. Additionally, cure notices and cure periods can help the government and the contractor to reach a resolution of a problem in contract performance without resorting to termination for default. Cure provisions should not, however, become a shield for nonperformance. Unfortunately, cure notice requirements are frequently perceived as obstacles to the effective exercise of a contractual right. Perhaps this misperception flows from an over emphasis on the bifurcated nature of the service default clause; *i.e.*, failure to deliver or perform, which does not require a cure notice, as opposed to a failure to progress, which does require a cure notice before termination. Another source of this perception is the existence of the line of cases discussed above which requires the government to strictly comply with formalistic rules.

The requirement for a cure notice and a fixed period to cure the defective performance are designed to allow the government, in mid-contract, to establish a fixed date by which the contractor must perform in accordance with the specifications of the contract. The cure period should prevent the government from terminating a contract by surprise. It should not, however, be used by a contractor to avoid performing the contract.

(b) *Grounds for termination using subparagraphs a(ii) and a(iii).*

The language of subparagraphs a(ii) and a(iii) sets forth two conditions for their use: failure to perform any other provision of the contract, and failure to make progress so as to endanger performance of the contract in accordance with its terms. These subparagraphs are also the authority for termination for default if a contractor fails to cure defects in performance within the allowed cure period.[118]

"Failure to perform any other provision of the contract'' sounds like a broad concept. On the contrary, the boards of contract appeals have given it a rather narrow, non-performance oriented meaning.[119] Many of the so-called socio-economic policy clauses in the DAR and the FAR call for termination if their provisions are violated.[120] Failure to pay wages to contractor employees in violation of the Service Contract Act of 1965 was held to be a separate basis for default in *Giltron* Assoc., *Inc.*[121] Defaults based on violations of the Davis-Bacon Act and the Contract Work

[118] FAR § 52.249-8; DAR § 7-103.11 (rev. 28 Aug. 1980).

[119] *See* Andrews & Peacock, *Terminations: An Outline of the Parties' Rights and Remedies*, 11 Pub. Cont. L.J. 269, 304 (1980).

[120] DAR § 7-602.23 (viii) (rev. 13 Mar. 1978) (apparently there is no parallel provision in the FAR).

[121] ASBCA No 14589, 70-1 BCA ¶ 8316.

Hours Safety Act [122] have been upheld as well. In ***Denney Furniture***,[123] the contractor was required to furnish brochures with the products delivered under the contract. Upon its failure to do so, the government issued two cure notices. When the contractor continued to fail to produce the brochures, the government terminated for default. Similarly, contractors who have been unable to obtain the contractually required performance bonds have been terminated for default for failure to comply with other provisions of the contract.[124] Contracts often contain warranty provisions which become sources of dispute and later become the bases for terminations for default. These terminations are frequently classified as failure to perform other provisions of the contract.[125] From these cases it is possible to conclude that the terminology "any other provision of the contract" relates to ancillary requirements, not the essence of the contract. Government contracts tend to have a large number of such provisions which require contractors to perform auxillary tasks or comply with requirements outside the common-sense scope of the contract. Therefore, failure to perform other provisions of the contract should be limited to those deficiencies which do not directly relate to delivery, performance, or failures to make progress which endanger completion of the contract in accordance with its terms.

Professors Nash and Cibinic point out that there is a tendency to try to squeeze a contractor's failure to perform in accordance with the specifications, *i.e.*, technical failures, into the category of failure to perform other provisions of the contract.[126] They criticize this approach and argue that failure to comply with specifications should be treated as a failure to make progress which endangers the performance of the contract in accordance with its terms.[127] This may be a distinction without a difference because subparagraphs a(ii) and a(iii) require the use of a cure notice irrespective of whether the theory of default is failure to progress or failure to perform other provisions of the contract. The substantive rights and positions of the government and the contractor are the same under either theory.

The default clause has three provisions for dealing with substantive contractor failures: failure to deliver within the time stated in the con-

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[122] Edgar M. Williams, General Contractor, ASBCA Nos. 16058, 16237, 16305, 16306, 16381 & 16617, 72-2 BCA ¶ 9734 (note that this case involved contracts with the construction default clause at DAR § 7-602.5).

[123] GSBCA No. 4502, 76-2 BCA ¶ 12095.

[124] Gupta Carpet Professionals, GSBCA No. 5229, 79-1 BCA ¶ 13834.

[125] *E.g.*, K-Square Corp., IBCA No. 959-3-72, 73-2 BCA ¶ 10363 (default termination overturned because government failed to prove claimed warranty defects were, in fact, caused by defects in manufacture).

[126] 2 R. Nash & J. Cibinic, Federal Procurement Law 1654 n.8 (3d ed. 1980).

[127] *Id.*

tract (subparagraph a(i)) and failure to make progress (subparagraph a(ii)), and failure to perform any other provision (subparagraph a(iii)); the latter two require a cure notice, the former does not.

> Failure to make progress is obviously something different from failure to deliver, or else the default clause would not provide separately for both.
>
> . . . .
>
> The 'cure notice' provision for failure to make progress terminations is obviously intended to supply the absence of a specific time marker to advise when the minute for default has been reached, such as exists when a contract delivery date has passed without delivery.[128]

Both the contract performance period and contractor performance are continua. Along these continua, failure to deliver on a delivery date is an event which is fairly easy to identify. This easy recognition factor, along with the long standing common law tradition which considers failure to timely deliver a breach of contract,[129] support the subparagraph a(i) summary termination procedure, *i.e.*, termination without notice and without opportunity to cure.

A more difficult problem is presented by failure to progress. At what point along the continuim of contract performance can a contractor's failure to make progress be said to cross over the line where it endangers performance? If the government believes the contractor is failing to make progress, a cure period is created to redefine, in effect, the contract period into a stated period, frequently ten days, and give the contractor a specific portion of the task to perform, *i.e.* correct the stated defects, within the stated time. The government has in reality created a delivery date for the correction of defects in performance. Failure to meet this new delivery date is analogous to failure to meet the original delivery date and allows an immediate termination if the deficiencies are not cured.

Recalling the rationale for the Supreme Court's ruling in *United States v. O'Brien*,[130] the government must allow the contractor leeway in its methods and rate of performance. But, this leeway is not infinite.[131]

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[128] Universal Fiberglass Corp. v. United States, 537 F.2d 393, 398 (Ct. Cl. 1976).

[129] 11 S. Williston, A Treatise on the Law of Contract § 1290 (W. Jaeger ed., 3d ed. 1968).

[130] 220 U.S. 321 (1911).

[131] *See, e.g.*, Universal Fiberglass Corp. v. United States, 537 F.2d 393 (Ct. Cl. 1976); Litton Systems, ASBCA No. 13413, 78-1 BCA ¶ 13022; Melcor Elec. Corp., ASBCA No. 17211, 73-1 BCA ¶ 10015; Ubique Ltd., DOT CAB Nos. 71-28 & 71-28A, 72-1 BCA ¶ 9340.

While the government's primary concern is the completion of the contract by the due date, the provisions of subparagraph a(ii) create the express right in the government to terminate for failure to make progress prior to the due date.

If the government is to have a legally sustainable termination for default under subparagraph a(ii), it must establish that at the time of termination the failure to perform endangered completion of the contract in accordance with its terms.[132] In *Strickland* Co.,[133] there was a "ridiculously long" period of performance. During the early stages of the contract there were real problems concerning the testing of materials to be used in the contract, which might have justified a termination for default for failure to make progress. The government sent a proper cure notice and gave a forty-fiveday period to cure. At the end of the cure period, a show cause notice was sent. The contractor did not, in the opinion of the government, correct the problem. The government terminated the contract for failure to make progress when 10% of the work was completed. As of the date of termination the approved performance schedule called for 14% of the work to be completed. The ASBCA said that there was no proof that completion of the contract was endangered at the time of termination, and overturned the termination. The *Strickland* Co. ruling represents one position frequently taken by Boards of Contract Appeals, *i.e.*, that failure to progress requires there must be some showing of probability that the contract completion date will not be met.

The other position adopted by the various boards of contract appeals does not require as strong a showing of probability that the contractor will miss the completion date. A pattern of failures to meet intermediate milestones, without a showing that the contractor could not meet the completion date, has supported a default termination for failure to make progress. In *Melcor Electronics Corp.*,[134] after many slips in the delivery date the government and the contractor agreed, in principle, to allow the contractor to obtain the product from a subcontractor. **A** firm date was set for the contractor to tell the government about the subcontractor arrangements. When the date for notice of the subcontract was missed, the revised date for final delivery was still several months away. The government terminated the contract for default notwithstanding that it was still possible for the contractor to make final delivery. The termination was upheld: 'The contracting officer's discretion and forebearance" did not excuse the contractor from its duty to perform.[135] The government was not required to show that it was impossible for the contractor

"'Strickland Co., ASBCA No. 9840, 67-1 BCA ¶ 6193.
[133] *Id.*
[134] ASBCA No. 17211, 73-1 BCA ¶ 10015.
[135] *Id.*

to meet the somewhat distant delivery date. The contractor's past poor responsiveness to milestones could be projected onto the remaining performance period. When the contractor then missed a firm intermediate date set by a cure notice, termination for failure to make progress was appropriate.

"Refusal to perform or repudiation of a contract is, in a sense, the ultimate extreme of failure to make progress."[136] *Fairfield Scientific Corp.* defined and distinguished repudiation and abandonment. Anticipatory repudiation is "a positive, definite, unconditional, and unequivocal manifestation of intent, by words or conduct, on the part of a contractor of his intent not to render the promised performance when the time fixed therefore by the contract shall arrive."[137] Repudiation must be unequivocally communicated to the other party.[138] Abandonment, on the other hand, can occur in a vacuum, without notice to the government. The ASBCA cited numerous cases where the terms have been interchanged and the default upheld. It distinguished them from a real repudiation by observing that some cases were summarily terminated under subparagraph a(i) for failure to deliver while others were terminated under subparagraph a(ii) after a cure notice. The concept of abandonment will not support a termination without a cure notice, under subparagraph a(ii).[139]

> The only exception to the rule demanding strict compliance with the 10-day cure notice prerequisite to an effective (a)(ii) default termination arises where there has been an anticipatory repudiation by the contractor. This exception is proper because an anticipatory repudiation, although occurring before the time fixed for performance has arrived, is a total breach of contract creating an immediate right of action.[140]

The government need not send a cure notice in the event of an anticipatory repudiation because it "should not be required to go through a useless motion."[141] There already has been a clearly identifiable event which

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[136] Andrews & Peacock, *Terminations: An Outline of the Parties' Rights and Remedies*, 11 Pub. Cont. L.J. 269, 303 (1980). Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13082.

[137] Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13082 (quoting Mission Valve & Pump Co., ASBCA Nos. 13552, 13821, 69-2 BCA ¶ 8010.) *See also* Norfolk Air Conditioning Serv. & Equip. Corp., ASBCA Nos. 14080 & 14244, 71-1 BCA ¶ 8617.

[138] *Id.*

[139] *Id. But see* Carpet Cleaners, Inc., VABCA No. 1965, 84-3 BCA ¶ 17585 (A withdrawal of contractor workers, apparently without any further action supports termination for default on an abandonment theory.).

[140] "Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13082 (citations omitted). *See also* Kennedy v. United States, 164 Ct. C1.507 (1964) (the law of anticipatory repudiation applies to government contracts).

[141] "Dan's Janitorial Service, ASBCA No. 27837, 85-1 BCA ¶ 17924; Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13082.

is not only the equivalent of failure to deliver or perform by the due date, but also proof that there will be such a failure when the due date arrives. The government need not sit by idly awaiting the passage of time.

(c) *Cure notices distinguished from show cause notices.*

Much has been written in this article about cure notices and many references have been made to show cause notices. Cure notices and show cause notices are not the same thing, A cure notice is a prerequisite to the exercise of termination under subparagraphs a(ii) or a(iii) of the supplylservice default clause. The default clause makes no reference to a show cause notice and its use is not a prerequisite to a termination for default under subparagraphs a(i), a(ii), or a(iii). As has been discussed above, a show cause notice is a tool to help the contracting officer learn of any factors which might show that the failure to perform was beyond the control of the contractor and without its fault or negligence.[142] Armed with this knowledge, or the absence of such factors, the contracting officer is better able to assess whether termination for default should be pursued and whether there are any factors which might later be a basis to convert the termination for default into a termination for the convenience of the government. The only time a show cause notice is directed by the DAR or the FAR is for terminations under subparagraphs a(i), a(ii), or a(iii) when less than ten days remain in the contract period and then only after the breach has occurred and there exists an immediate right to terminate.[143]

Show cause notices should not be sent indiscriminately nor should they be confused with cure notices. In *Litcom Division, Litton Systems,')'* the government sent a show cause notice when a cure notice should have been sent, because the contractor was failing to make progress. The ASBCA allowed the termination for default to stand, but went to some length to explain that there had been "no substantive prejudice'' to the appellant. The *Litton Systems* decision indicates that a show cause notice will not be an acceptable substitute for a cure notice should the contractor suffer any substantial prejudice in the process.[145]

D. PARTIAL PERFORMANCE EQUITY APPLIED TO GOVERNMENT CONTRACTS

In evaluating the impact of partial performance on the government's ability to terminate a contract for default, three concepts apply: first,

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[142]FAR § 49.607; DAR § 8-811.
[143]FAR § 49.607; DAR § 8-811.
[144]ASBCA No. 13413, 78-1 BCA ¶ 13022.
[145]*Id*. *See also* Dubrow Elec. Indus., ASBCA No. 8464, 65-1 BCA ¶ 4859 (show cause notice is not a sufficient cure notice).

time is of the essence in contracts containing fixed dates for performance,[146] second, the government is entitled to strict compliance with its specifications,[147] and third, the equitable principle of substantial performance operates to prevent forfeiture.[148] All three of these principles must be considered when determining whether or not a contractor is in default and whether the government may terminate the contract for default.

'The contractor is entitled to a reasonable period in which to cure nonconforming goods provided that the supplies shipped are in substantial conformity with contract specifications."[149] The contractor must prove that it had a reasonable belief that the supplies shipped conformed to the contract specifications. The right to cure defects also requires that the defects be "minor in nature and extent *and* . . . susceptible to correction in a reasonable time."[150] If "extensive repair or readjustment" is required, the government need not allow the contractor the opportunity to cure.[151] The court listed three additional factors to be considered in determining whether or not a shipment is in "substantial conformity" with the requirements of the contract: the usability of the item in its present state; the complexity of the item; and, the urgency of the need for the item.[152] A great urgency of need will allow the government to insist on a higher "overall level of strict conformity." The court limited the applicability of the rule, however even where performance is required on a certain date.

> It is our view that even where time is of the essence, *i.e.*, where performance must occur by a given date, this factor does not demand that performance be measured in terms of strict conformity. It does require that performance be timely, but assuming this, there would remain for inquiry the question of whether performance was substantial in other respect~.~~~

Radiation Technology clearly operates to limit the government's right to terminate under paragraph a(i) of the supplyhervice default clause. When there has been a timely delivery of supplies which the contractor

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[146] DeVito v. United States, 413 F.2d 1147 (Ct. C1. 1969).

[147] Maxwell Dynometer Co., v. United States, 386 F.2d 855 (Ct. Cl. 1967). *See also* H.L.C. Assoc. Constr. Co. v. United States, 367 F.2d 586 (Ct. Cl. 1966); Environmental Tectronics Corp., ASBCA No. 20340, 76-2 BCA ¶ 12134.

[148] Franklin E. Penny Co. v. United States, 524 F.2d 668 (Ct. C1. 1975).

[149] Environmental Tectronics Corp., ASBCA No. 20340, 76-2 BCA 9 12134. *See also* Federal Contractors, Inc., ASBCA No. 14336, 77-1 BCA 9 8723.

[150] *Radiation Technology*, 366 F.2d at 1006 (emphasis added).

[151] *Id.*

[152] *Id.*

[153] *Id.*

believes conform to contract requirements and which are defective in minor ways and susceptible of quick correction, the contractor is not in default and may not be summarily terminated. This is not to say that the contractor can force the government to accept the defective product, but, rather, that the government must use subparagraph a(ii) or a(iii) of the default clause if it desires to terminate for default. *Radiation Technology* eliminates, in appropriate cases, the summary right to terminate. It is important to conceptually understand the impact of a timely delivery of goods in substantial conformity with the requirements of the contract. Once there has been such a delivery, there has been no default by the contractor and the contractor has a right to cure these defects.[154]

"[T]he doctrine of substantial conformity . . . is applied to supply contracts in order to guard against surprise rejections by the buyer occurring subsequent to timely delivery in situations where the seller's performance departs in only minor respects from that which had been promised."[155] Given this premise, the contractor's subjective belief concerning its compliance with the requirements of the contract is crucial to its right to a cure period. If it knows that it has shipped defective goods there can be no surprise when the contract is terminated for default.[156]

Additionally, a contractor's right to obtain a period to cure has been defeated by the delivery of supplies which contained major defects; the failure to deliver accessorial equipment; and the delivery of supplies containing "a multitude of workmanship deficiencies [which were] cumulatively neither minor nor easily correctable."[157] The ASBCA has also held that "[a]multitude of deficiencies alone precludes a finding that the deficiencies. . . were minor and easily correctable . . . [neither] are we persuaded by the fact that the unit performed its function."[158] Minor defects which do not approach a multitude may, nevertheless, be cumulatively considered. In doing so, it is appropriate to consider also the usability of the product and the urgency of the government's need.[159] When the defects reach the point either in quantity or magnitude where there is "substantial nonconformity," the right to cure ceases.[160]

In *Allegany Technologies, Inc.*[161] the ASBCA considered the impact of a contractor's failure to cure defects after having attempted to do so. In this case, the contractor attempted to fix a defect. In the process it be-

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[154]*Id.*
[155]Gen. Ship & Engine Works, Inc., ASBCA No. 19243, 79-1 BCA ¶ 13657.
[156]Environmental Tectronics Corp., ASBCA No. 20340, 76-2 BCA ¶ 12134.
[157]*Id.*
[158]Consolidated Mach. Corp., ASBCA Nos. 14176 & 14366, 72-1 BCA ¶ 9212.
[159]*Id.*
[160]Astro Science Corp. v. United States, 471 F.2d 624, 627 (Ct. Cl. 1973).
[161]ASBCA No. 18395, 74-1 BCA ¶ 10487.

came apparent that there were major defects in the product. The board ruled that the contractor had been given a chance to cure the defect and was unable to do so. Accordingly, the contract could be terminated under subparagraph a(i) without further notice.[162]

Another factor to consider in analyzing substantial conformity is whether or not the product works. In *Cosmos Engineers, Inc.* the ASBCA held that the fact that the system being installed under the contract was operable was sufficient to consider the work substantially performed.[163] The concept of "operability" can and probably should have a somewhat narrower meaning. The product must be "capable of serving its intended purpose."[164] This position represents a more reasonable approach to the question of how operability impacts on conformity. Accordingly, the government should exercise extreme caution in terminating a contract for default where the product works. The mere *prima facie* showing of operability will not always bar a termination for default. The doctrine of substantial compliance does have its limit~.'~~

The impact of *Radiation Terminology* has been significant. It is frequently cited by the various boards of contract appeals and the Claims Court. It has created a *de jure* modification to the government's right to terminate under subparagraph a(i) of the supplylservice default clause. Additionally, it limits the traditional concept of the government's entitlement to strict compliance with contract requirements and of time being of the essence in contracts with fixed performance dates. *Radiation Technology* does not make it impossible to terminate a contract. It does frequently require that the government surrender the right to immediate termination in favor of a reasonable cure period,

Nine years after *Radiation Technology*, in *Franklin E. Penny Co. v. United States*,[166] the Court of Claims again explored the area of the contractor's delivery of nonconforming goods. Again, the traditional concepts of strict conformity with the specifications and timeliness were seriously questioned and limited, and the idea of substantial performance expanded. On first reading this case appears to consume the old rule concerning timeliness by indicating that "short delays" do not justify termination of the entire contract:

> It has long been the rule that, save in situations where "time is of the essence," the timeliness of a contractor's perform-

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[162] *Id.*

[163] ASBCA No. 19780, 77-2 BCA 7 12713. Contra Consolidated Mach. Corp., ASBCA Nos. 14176 & 14366, 72-1 BCA 7 9212.

[164] Gen. Ship & Engine Works, Inc., ASBCA No. 19243, 79-1 BCA 7 13657. See also Astro Science Corp., 471 F.2d 624. (Ct. C1.1973).

[165] Gen. Ship & Engine Works, Inc., ASBCA No. 19243, 79-1 BCA 7 13657.

[166] 524 F.2d 668 (Ct. C1.1975).

> ance is as much a factor to be considered in evaluating the substantiality of that performance as are all other factors which might bear upon the adequacy of completeness of that performance. . . .
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> [I]n contracts for work or skill, and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to perform within the time stipulated, followed by a substantial performance after a short delay will not justify the aggrieved party in repudiating the entire contract. . . .[167]

If strictly applied, this language would severely limit the government's ability to terminate for a failure to make timely delivery, and perhaps for failure to make progress. However, the *Franklin E. Penny Co.* decision has never been fully applied by the Court of Claims.[168] Moreover, it has been criticized by the ASBCA. Labeling the *Penny* discussion as dicta, the board opined:

> [W]e do not question the essential accuracy of the idea that the doctrine of substantial performance has a place in both construction and supply contracts. How often it may be applied in view of the competing rules that time is of the essence in any case where fixed dates for performance are specified and that the government is entitled to require strict compliance with its specifications, is another question.[169]

Franklin E. Penny Co. does not destroy the government's right to terminate for default. Its apparent purpose is to point out that "timeliness" is only one part of the analysis of substantial performance and is a tool to "avoid the harshness of forfeiture."[170] The case attempted to extend the principles of *Radiation Technology* and to reduce the significance of timeliness as a controlling factor. It does not vest contractors with unlimited rights to ignore the terms of the contract. In fact, Franklin E. Penny Co. lost its appeal.

> [T]he doctrine [of substantial performance] should not be carried to the point where the non-defaulting party is compelled to accept a measure of performance fundamentally less than had been bargained for. Substantial performance "is never properly invoked unless the promisee has obtained all the

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[167] *Id.* at 676 (quoting Beck & Pauli Litographing Co. v. Colorado Milling & Elevator Co., 52 F. 700, 703 (8th Cir. 1892))(citation omitted).
[168] 2 R. Nash & J. Cibinic, Federal Procurement Law 1649. (3d ed. 1980).
[169] Gen. Ship & Engine Works, Inc., ASBCA No. 19243, 79-1 BCA ¶ 13657.
[170] 524 F.2d at 677.

> benefits which he reasonably anticipated receiving under the contract."[171]

The area of partial performance is not filled with firm rules. It is a topic where equitable principles govern. Accordingly, predicting outcomes of appeals from termination for default is risky. The rules outlined in *Radiation Technology,* as opposed to those of *Franklin E. Penny* Co., are the ones widely accepted. This is not to say that the *Franklin E. Penny Co.* rule might not be applied if warranted by the facts. A safe course in such matters is to avoid surprising the contractor or inducing the contractor to believe that less than full performance is acceptable. Additionally, using reasonable cure periods may prevent the otherwise proper termination for default from being converted to a termination for the convenience of the government.

E. ELECTION TO WAIVEDELIVERYSCHEDULE

Notwithstanding the *Franklin E. Penny* Co. opinion, a great deal of emphasis in government contract law is placed on the concept of timely completion of performance. It would be dangerous to ignore this attention to timeliness. Up to this point in the article, the emphasis has been on contractor performance of contractual obligations. The government, in its administration of contracts, also has obligations. How the government performs its contract administration duties has a substantial impact on the exercise of its right to terminate for default. For example, the government's failure to promptly exercise the right to terminate may create a situation commonly referred to as "waiver of the delivery schedule."

It is rare that a single case dominates any area of the law. In the area of waiver, however, there is such a case: *DeVito v. United States.*[172] DeVito was the receiver for Seaview Electric Co., which was awarded a contract for wire splicing kits. A number of problems developed during the performance of the contract. As a result, the due date was formally and informally modified. The last mutually agreed upon, but not formally recognized, date for the first delivery was 29 November 1960. It became apparent in November that the contractor would not make timely delivery. The contracting officer sought legal counsel concerning the right to terminate for default and was advised that there was a legal basis for default after 29 November, but that the termination should be

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[171] *Id.*

[172] 413 F.2d **1147** (Ct. C1.1969). The concepts outlined in *DeVito* are still being vigorously applied. ***See,*** *e.g.*, W.M.Z. Mfg. Co., **ASBCA** No. **28410, 84-3 BCA ¶ 17569** (termination for default is inappropriate if the government has unreasonably delayed and the contractor has continued to perform in reliance upon the forebearance. If the contractor fails to continue, however, termination is appropriate).

promptly executed. The contracting officer did not have authority to terminate the contract and was required to obtain permission to terminate from a higher headquarters. This approval took approximately forty-six days and was received forty-eight days after the missed delivery. The contracting officer then terminated the contract. During the forty-eight days, the contractor continued to perform, incurred costs, hired employees, and made substantial efforts to make up for time lost earlier in the contract. The Court of Claims found that the government was actually or constructively aware of these efforts.[173]

The Court of Claims observed that the government is "habitually lenient in granting reasonable extensions of time for contract performance."[174] It then established a two-step analysis to evaluate whether or not the right to terminate continues to exist after a delay by the government in exercising that right.

> The necessary elements of an election by a non-defaulting party to waive default under a contract are (1) failure to terminate within a reasonable time after default, under circumstances indicating forebearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract with the Government's knowledge and implied or express consent.[175]

The court created a balancing of conduct test to determine whether the right to terminate continued to exist. There are two actors in this situation: the government and the contractor. It is important to remember that an election to waive delivery schedule is not based on unilateral conduct.[176] This factor is frequently forgotten or misunderstood. The court emphasized that the conduct of the government in not promptly terminating must have been relied upon by the contractor. Additionally, the contractor must continue to perform the contract in reliance upon the government's failure to terminate. The determination of how quickly the government must act may depend on whether the contractor is "on the verge of full production"[177] (as was the case in *DeVito),* or whether it has ceased its efforts to perform. Clearly, the government must act more quickly in the first situation.[178] The court concisely summarized the test:

> Time is of the essence in any contract containing fixed dates for performance. When a due date has been passed and

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[173] *DeVito*, 413 F.2d at 1149-52.
[174] *Id.* at 1153.
[175] *Id.* at 1154.
[176] *Id.*
[177] *Id.* at 1153.
[178] *Id.* at 1154.

> the contract not terminated for default within a reasonable period of time, the inference is created that time is no longer of the essence so long as the constructive election not to terminate continues and the contractor proceeds with performance. The proper way thereafter for time to again become of the essence is for the Government to issue a notice under the Default clause setting a reasonable but specific time for performance on pain of default termination. The election to waive remains in force until the time specified in the notice, and thereupon time is reinstated as being of the essence. The notice must set a new time that is both reasonable and specific from the stand point of the performance capabilities of the contractor at the time the notice is given.
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> . . . .
>
> The so-called cure-notice is that which is authorized in para. 1(ii) of the Default clause . . . .[179]

The text of the clause referred to as paragraph 1(ii) is the same as subparagraph a(ii) of the DAR supplylservice clause.

The Court of Claims pointed out that the term waiver is not accurate to describe the government's decision not to terminate on the due date. The government is choosing between alternate and inconsistent remedies when it does not terminate the contract and allows contract performance to continue. The court found this process to be more accurately identified as an election of remedies.[180] The impact of an election to waive the delivery date is the loss of the right to terminate immediately under subparagraph a(i) and a requirement to use the provisions of subparagraphs a(ii) or a(iii) if there continues to be a need to terminate for default. The proper procedure for the government to follow if it again wants to establish a delivery date, as noted above, is to issue a cure notice and create a cure period. Thus, it is possible for the government to "condone non-delivery" and thereby waive the right to summary termination and continue to insist on a "demonstration of progress" in completing the contract.[181] The government, again using a cure notice as a vehicle, has superimposed on the contract period a new fixed date for performance. A contractor's failure to meet this date, if it has been reasonably established, will allow termination for default.[182] The net effect of this action is to reverse the government's prior election to allow the

[179] *Id.*
[180] *Id.* at 1153.
[181] *Id.* at **1154.**
[182] *Id.*

contractor to continue. It is the cure notice and cure period which removes the effects of the prior decision not to terminate.

There is an impression upon reading *De Vito* that contracting officers must be ever vigilant and pounce upon a defaulting contractor as soon as the delivery date is past. This is not so. A contracting officer has "a reasonable period of time within which to determine whether a default termination would be in the best interest of the Government."[183] This reasonable period of time has been called a period of forebearance, during which the right to terminate for default without notice under paragraph a(i) of the supplylservice default clause remains.[184] When this period of forebearance becomes an election to waive is not delineated by a black letter rule of law.[185] It must be stressed that silence by the government alone will not always be construed as an election to waive;[186] the conduct of both parties must be considered.[187]

Fairness demands that where the delivery date has passed and the government knew that the contractor was continuing to perform and incurring cost, the right to immediately terminate be promptly exercised or notice given to the contractor of the intent to terminate.[188] "[I]t is the contractor's reliance that counts rather than the government's failure to have insisted upon strict adherence to the terms of the delivery schedule."[189] The factors of conduct which either support an election by the government or reliance by the contractor must be analyzed on a case-by-case basis.[190] Some of the factors which commonly reflect a government election to waive the delivery schedule or which have been construed as an inducement to the contractor to rely on the government's apparent decision not to terminate are acceptance of late deliveries; issuance of new orders; new delivery dates set;[191] approval of specification waivers; encouragement of correction;[192] and, refusal by the government to respond to show cause response from the contractor.[193] There can be, however, no correct application of the election theory without both government conduct and contractor reliance.

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[183] Pelliccia v. United States, 525 F.2d 1035, 1044 (Ct. Cl. 1975).
[184] Raytheon Serv. Co., ASBCA No. 14746, 70-2 BCA ¶ 8390.
[185] Westinghouse Elec. Corp., ASBCA No. 20306, 76-1 BCA ¶ 11883.
[186] Raytheon Serv. Co., ASBCA No. 14746, 70-2 BCA ¶ 8390.
[187] Westinghouse Elec. Corp., ASBCA No. 20306, 76-1 BCA ¶ 11883. *See also* W.M.Z. Mfg. Co., ASBCA No. 28410, 84-3 BCA 7 17569.
[188] *Id.*
[189] A.B.G. Instrument & Eng'g. v. United States, 593 F.2d 394, 404 (Ct. Cl. 1979); W.M.Z. Mfg Co., Inc., ASBCA 28410, 84-3 BCA ¶ 17569.
[190] *De Vito*, 413 F.2d at 1154.
[191] Aargus Poly Bag, GSBCA Nos. 4314 & 4315, 76-2 BCA ¶ 11927 (citing Free Flow Packaging Corp., GSBCA Nos. 3992, 4040, 75-1 BCA ¶ 11105).
[192] Bainfield Indus., ASBCA Nos. 14582 & 14583, 72-2 BCA ¶ 9676.
[193] Westinghouse Elec. Corp., ASBCA 20306, 76-1 BCA ¶ 11883.

The government's actions in the timing of the termination for default will be strictly scrutinized, in part because default terminations are strictly construed and in part because contractors might be exposed to substantial financial losses if attempts to perform continue and the government then terminates long after the due date.[194] If the government intends to place tight demands on the contractor for delivery by a stated date, then equally tight demands may be placed on the government to promptly exercise its right to terminate a contract without notice.[195] The Court of Claims has not found it difficult to hold the government to "precise" action when the issue was failure to terminate promptly.[196]

The concept of government election to waive a delivery date is a concept which deals with fairness. It attempts to protect contractors that have continued to perform from being surprised by a default long after the delivery date. It does so using the conventional tools that have been discussed throughout Section II of this article. The right to terminate summarily will be allowed when there is a mutually known delivery date and the default termination is promptly effected based on the contractor's failure to deliver on that date. Under subparagraphs a(ii) and a(iii), with the exception of anticipatory repudiation, the government possesses the right to terminate for default only if it imposes a new delivery date by issuing a cure notice. This principle applies equally when a contractor fails to make progress, fails to comply with other provisions of the contract, or when the government, by its inaction, has not terminated a contract after the due date and the contractor continues to perform. It also applies when the contractor has made timely delivery of goods which substantially comply with the contract's specifications, To terminate for default in any of these situations, the government must create the same kind of new fixed date for performance. The key to understanding these situations lies in the principle that contracts cannot be terminated without notice of the government's mandatory due date. This date may be established when the contract is executed, *i.e.*, the original due date, or it may be established by cure notice, either during performance or after the delivery date.

III. THE SERVICE CONTRACT: CONSIDERATIONS IN TERMINATION FOR DEFAULT

This section of the article focuses on the particular problems faced by the government in terminating service contracts for default. The nature

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[194] *DeVito*, 413 F.2d 1147 (Ct. C1.1969).

[195] H.N. Bailey & Assoc. v. United States, 449 F.2d 387, 391 (Ct. Cl. 1971) (While the principle articulated in this decision was geared to the 15 day correction period allowed when defects in first article samples are discovered, the **rule,** perhaps with some relaxation, should apply in cases of potential election to waive the delivery schedule.).

[196] *Id.*

of the process of providing services is fundamentally different from the process of providing supplies or construction. It is important to keep in mind the nature of services when considering whether a contractor is in default, whether the government possesses the right to terminate for default, whether the government may withhold money from the contract and for what purposes, and whether the government may terminate without giving the contractor a period to cure defects.

The nature of construction contracts and their payment structure play an important role in the concept of substantial completion. Recall that traditionally the landowner kept all of the improvements provided by the contractor. From this fact grew the concept that it would be unjust to allow the owner to benefit substantially and to totally penalize the contractor for minor deviations from the contract's requirements. Accordingly, termination for default is not appropriate if the contractor has substantially completed the contract.[197] Recall also that the concern for a contractor's financial exposure resulting from continuing performance of a supply contract after the due date forms a part of the rationale for the concept that government election to waive the due date requires the government to surrender its normal right to terminate without notice if there is no delivery on the due date.[198]

So too does the nature of a service contract affect how the government may deal with a contractor's failure to perform.[199] For example, a service contractor is paid for acceptable work performed up to the date of termination. Conversely, a supply contractor's costs incurred prior to termination are not as easily recoverable. Accordingly, a supply contractor has a greater need for notice of impending default and an opportunity to cure defects than does a service contractor. Both construction and supply contracts are somewhat more objectively evaluated than are service contracts because quantifiable delivery dates, testing, and other measurement criteria are more appropriate for supply and construction

[197]The concept that some level of performance less than total compliance with a contract's specifications may prevent a default termination had its origins in construction contracting. In a construction contract, the owner of the land kept what has been performed in good faith. Because the owner has benefited and gotten the essence of the bargain, the contractor should be paid, less damages. The theory rests on the preposition that it is unfair and unjust to allow the landowner to keep the benefit and not pay for it. In construction contracts, payment is usually made as materials are delivered and work progresses. "There is less likelihood that a showing of forfeiture may be made so as to call for the application of the doctrine of substantial performance, and upset an otherwise proper termination for default." General Ship & Engine Works, Inc., ASBCA No. 19243, 79-1 BCA ¶ 13657 (citing S. Williston, A Treatise on the Law of Contract §§ 842-844 (W. Jaeger ed., 3d ed. 1968). *See also* Andrews & Peacock, *Terminations: An Outline of the Parties' Rights and Remedies,* 11 Pub. Cont. L.J. 269, 303 (1980).

[198]*See supra* text accompanying notes 140-159. Gossette Contract Furnishers, GSBCA No. 6758, 83-2 BCA ¶ 16590.

[199]*See* Orlando Williams, ASBCA Nos. 26099 & 26872, 84-1 BCA ¶ 16983.

contracts than for service contracts. Finally, service contracts frequently call for repetitive, *e.g.*, daily, weekly, or monthly, performance of the same task. Thus, failures of performance in service contracts are not easily corrected. In many cases, there can be no cure because performance of the same task is called for on the very next day.

There are many competing interests involved when a contractor begins to fail to perform a service contract: the need for continuity of service; the need to develop contingency plans in the event of a total failure; the command's desire to avoid commiting in-house assets to perform the tasks; the right of the government to obtain what was contracted for; the rights of the contractor under the contract; and the length of time required for reacquisition of the services from another contractor. These interests become especially difficult to balance when the government is faced with a contractor whose performance is marked by shifting defaults, *i.e.*, a series of defaults in a multi-task contract, the defaults differing from time to time in relation to the government's concerns as expressed in cure notices. The purpose of this section is to analyze several principles which are crucial to understand the default process in service contracts.

A. THE STANDARD FOR DEFAULT TERMINATION OF SERVICE CONTRACTS

Faced with a unique kind of contract and a burden to document complex multi-task contracts,[200] the government is frequently challenged to decide when a contractor's performance is defective enough to support a default action. In answering this question, the issues tend to surround the operation of subparagraphs a(ii) and a(iii) of the supplyl service default clause and cure notices. This is because failures to perform by the delivery date, including daily failures to perform required services, and anticipatory repudiation are relatively easy to identify and allow an immediate right to terminate under subparagraph a(i). A more difficult question is presented by the issue of whether a contractor is failing to make progress so as to endanger performance of the contract in accordance with its terms. After the government decides to issue a cure notice, it must then evaluate whether or not the contractor has cured the defects, thus leading to the ultimate issue of whether or not to terminate for default,

[200] *See* Soledad Enter., Inc., ASBCA Nos. 20376, 20423, 20424, 20425, & 20426, 77-2 BCA ¶ 12552; Contract Maintenance Inc., ASBCA No. 18528, 75-1 BCA ¶ 11247; Contract Maintenance, Inc., ASBCA No. 19603, 75-1 BCA ¶ 11097. In all three cases the government's terminations for default were overturned because it failed to document its inspection efforts to prove that the contractor had failed to meet the standards of the contract.

> "In deciding whether the Government had a legal right under the contract to terminate the contract for default after the expiration of the cure period, we are primarily concerned with what happened after the issuance of the cure notice. After the expiration of the cure period, the Government had a right to terminate the contract for default for either (1) the contractor's failure to cure deficiencies in performance set out in the cure notice or (2) a new default or defaults occurring after the issuance of the cure notice."[201]

The ASBCA articulated in *Pride Unlimited* the test which consistently has been applied in service contracts. The criteria established are phrased in broad general terms and are susceptable of many interpretations. Under existing law, if the deficiencies can be characterized by the following three factors, the contract should not be terminated for default:

1. The deficiencies are occasional or infrequent.
2. The deficiencies are minor. Or,
3. The deficiencies can be considered insubstantial.[202]

Not surprisingly, it is this last evaluative criterion, substantiality, which has been litigated frequently.[203]

Like supply and construction contracts, service contracts are subject to a rule of substantial compliance.[204] This rule is colored by the nature of the services required under many modern service contracts.

> Appellant's failure thus did not lie so much in not correcting the deficiencies when brought to its attention but "in failing to perform the particular required task at the time when, and in the manner in which, the contract required it to be performed."
>
> The failure to perform a daily task is not cured by the performance of a similar task which is also required on a following day. Each individual failure is technically a default, though not necessarily the basis for a default termination, and when a sufficient number of the individual defaults

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[201] Pride Unlimited, Inc., ASBCA No. 17778, 75-2 BCA ¶ 11436 (quoting Murcole, Inc., ASBCA Nos. 17230 & 17473, 74-1 BCA ¶ 10545).

[202] *Id.*

[203] *See, e.g.*, Orlando Williams, ASBCA Nos. 26099 & 26872, 84-1 BCA ¶ 16983; Handyman Bldg. Maintenance Co., IBCA Nos. 1335-3-80 & 1411-12-80, 83-2 BCA f 16646; W.M. Grace Inc., ASBCA No. 23076, 80-1 BCA ¶ 14265; Mr's Landscaping & Nursery, HUDBCA Nos. 75-6 & 75-7, 76-2 BCA ¶ 11968.

[204] Pride Unlimited, Inc., ASBCA No. 17778, 75-2 BCA ¶ 11436.

> accumulate that it can be said the contract has not been substantially performed, the contract is then terminated under subparagraph a(i) of the Default clause.[205]

Service contracts are awarded to provide a completed service. The contract and its specifications define the tasks to be performed. It is the contractor's responsibility to perform the tasks. In *Acme of Colorado*,[206] quoted in *Pride Unlimited*, the contractor believed that it was the government's duty to advise it of defects and allow it a chance to cure the deficiencies. The ASBCA rejected this position holding that it was the contractor's duty to get the job done correctly on the first try. Absent a specific contractual cure procedure, when daily defects are brought to the attention of the contractor and a grace period for correction allowed, the only cure period is provided by subparagraphs a(ii) or a(iii) of the supply/service default clause.

After such a cure notice has been given, "[e]ach such event, further default during the 'cure' period allowed the contractor constitutes a failure to cure an existing default and justifies the termination of the contract for default."[207] Second, when services called for by the contract are to be performed on a daily basis, there usually can be no effective reperformance or cure.[208] In this situation, cumulative treatment of the failures of performance becomes appropriate because individual minor failures, if treated individually, may never meet the substantiality test of *Pride Unlimited*. The decision as to when the accumulation of individual deficiencies equals a substantial failure to comply with the contract's requirements is a very difficult one indeed. There is an analogy between this situation and the principle that allows an incremental delivery supply contract to be terminated for default for failure to make one delivery.[209]

A greater awareness of the contractor's duty to get the job done right, without continual prompting, is warranted in service contracts.[210] Recall the broad discretion of the government to reject defective items de-

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[205] *Id.* (quoting Acme of Colorado, ASBCA No. 7974, 1963 BCA ¶ 3914 and Reliable Maintenance Serv., ASBCA No. 10487, 66-1 BCA ¶ 5331) (citation omitted).

[206] ASBCA No. 7974, 1963 BCA ¶ 3914. *See also* JMNI, Inc. v. United States, 4 Cl. Ct. 310 (1984).

[207] 1963 BCA ¶ 3914.

[208] *Pride Unlimited, Inc. Cf.* Pulley Ambulance, VABCA No. 1954, 84-3 BCA ¶ 17655.

[209] In the incremental delivery supply contract, a failure to make one delivery was considered sufficient to terminate the whole contract. In the multi-task service contract, a group of failures is considered sufficient to support the termination of the whole contract. In *Pulley Ambulance*, the VABCA seemed to be pulling away from the concept that one failure to perform will support a default. The board considered the nature of the defect, the gravity of the failure, and the number of defects before concluding that the termination for default could be sustained.

[210] *See* Cervetto Bldg. Maintenance Co. v. United States, 2 Cl. Ct. 299 (1983).

livered in supply contracts and the option to accept or reject in part or to terminate the whole contract for default. The government should possess the same broad authority if a contractor's general performance fails to meet this standard. A cure notice should be issued and failure to correct the stated deficiencies, or similar deficiencies, should support the default termination. There should be no prolonged debate on the matter.

A relatively recent development in service contracts is the increased use of contractually formalized deductions from the contract price for defective performance.[211] In *Handyman Building Maint. Co.*,[212] such a reduction scheme was seen as a "mechanism short of default to deal with omissions'' in contractor performance. The board, in dicta, commented that by including such a deduction procedure, the government expected deviations from the contract and implied that the reduction procedure would be used instead of the termination procedure. By including such provisions the government indicates a willingness to tolerate some degree of non-performance.[213] This type of contract, then, may only be terminated for default when "the number of individual deficiencies have accumulated to the point where it may be said that the contract has not been substantially performed."[214] At least before the Department of the Interior Board of Contract Appeals, this will require a contracting officer to make a specific finding that the accumulated defaults are sufficient to conclude that the contract is not being substantially performed.[215] It is not clear, at this point, whether the board was merely applying the substantial performance test of *Pride Unlimited* or whether it was weighing the addition of a deduction scheme to create a

[211] In October 1980, the Office of Federal Procurement Policy issued *A* Guide For Writing and Administering Performance Oriented Statements of Work for Service Contracts (OFPP Pamphlet Number 4). This policy statement firmly endorses the concept of contract administration by formalized use of deductions from the contract price for defective performance. This procedure has been soundly criticized by the Comptroller General of the United States. The objection is that the deduction scheme fails to apportion the deductions to the actual failures. Comp. Gen. Dec. B-207771, et seq. (Feb. 28, 1983), 83-1 CPD para. 194. See *also* JMNI, Inc., v. United States, 4 Cl. Ct. 310 (1984) (the reduction contract price for defective service must not be a penalty and must reflect the lost valve received by the government).

[212] Handyman Bldg. Maintenance Co., **IBCA** Nos. 1335-3-80 & 1411-12-80, 83-2 BCA ¶ 16646.

[213] *Id*. The government, however, must not allow the use of deductions to be construed as penalties for nonperformance, under a liquidated damages scheme. Such penalties are unenforceable. Linda Vista Indus., Inc., B-214447, B-214447.2 (Oct. 2, 1984) 84-2 CPD ¶ 380; Environmental Aseptic Services Admin., B-214405 (Nov. 7, 1984) 84-2 CPD ¶ 510.

[214] *Handyman* Bldg. Maint. Co.

[215] *Id*.

higher standard of performance failures before termination for default becomes appropriate.[216]

In *Gossette Contract Furnishers*,[217] a reasonable contractor standard was articulated. A termination for default was upheld when "[t]he deficiencies in appellant's performance far exceeded what would have been expected from a competent contractor."[218] The situation becomes clearer where a contractor has been issued a cure notice and fails to correct the deficiencies of the cure notice and continues "to experience repetitive performance failures."[219] Even in this case, where the contractor left many daily tasks "unperformed," the ASBCA applied the substantiality of performance test of *Pride Unlimited*. Such failures were failures to perform by the date specified by the contract and termination without notice under subparagraph a(i) would have been appropriate, using the standards of *Milmark Services, Inc. v. United States*[220] and *Sentry Corp.*[221]

B. ELECTION OF REMEDIES BY THE GOVERNMENT

Subparagraph b(ii) of the inspection of services clause[222] authorizes the government to reduce the contract price if services are provided which are not in conformity with the contract's requirements. The price reduction is intended to reflect the reduced value of the services which the government has received. How the government exercises this right to reduce the contract price may determine whether it has the right to terminate the contract for default. The leading case in this area is *W.M.*

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[216] *Compare with* Cervetto Bldg. Maintenance, Co. v. United States, 2 Cl. Ct. 299 (1983) which expressly permits an express contract provision to allow the government to make deductions for defective performance and to terminate the contract for default, for the same performance failures. *But* see JMNI, Inc. v. United States, 4 Cl. Ct. 310 (1984) which holds that there are limits to the deductions which the government can make. The deductions must reflect the reduced value of the services received and not be penalties "to serve only as a spur to performance." *But* see DMJM/Norman Eng'g Co., ASBCA No. 28154, 84-1 BCA ¶ 17226; IBM Corp., ASBCA No. 28821, 84-3 BCA ¶ 17689; Pat's Janitorial Serv., ASBCA No. 29129, 84-3 BCA ¶ 17549. In each of these cases, the ASBCA clearly ruled that the Debt Collection Act of 1982, 31 U.S.C. 3716 (1982) requires the government to comply with the Act's notice requirement and the requirement to provide the contractor an opportunity to inspect and copy agency records and its decision to offset funds due on a contract. These cases create substantial doubt as to whether the practice of reducing contract payments will continue to be an efficient part of contract administration. If contracting officers are required to hold mini-hearings to establish the right to withhold funds, it is likely that this practice will be discontinued.

[217] GSBCA No. 6578, 83-2 BCA ¶ 16590.

[218] *Id.*, Smart Products Co., ASBCA No. 29008, 84-2 BCA ¶ 17426.

[219] *Orlando* Williams.

[220] 2 Cl. Ct. 116 (1983), *aff'd*, 731 F.2d 855 (Fed. Cir. 1984).

[221] Sentry Corp., ASBCA No. 29308, 84-3 BCA ¶ 17601; See also L.M. Copeland, ASBCA No. 13646, 69-1 BCA ¶ 7586 (sometimes referred to as L.M. Copeland, d/b/a Riteway Sanitation Serv.).

[222] FAR § 52.246-4; DAR § 1902.4 (rev. 27 Dec. 1982).

Grace, Inc.,[223] where the government did a very poor job of inspecting, The inspection system was such that the documents relied on by the contracting officer in making deductions from the contract price did not show conclusively that a given task was not performed on a given day. The board ruled that the government's inspectors were aware of this systemic flaw and that the inspection documents could not be used to prove that a given task was not performed. Accordingly, the government failed to meet its burden to prove the contractor's default.

The second major problem for the government relates to the deductions it made in the contract price.

> Authorization for payment for services for which no deductions were taken constituted a determination that such services had actually been accepted. The Government cannot ground a default termination on the quality of the performance of services which it has already accepted, regardless of how unsatisfactory the performance of those services may appear in retrospect.[224]

In this contract the government made deductions in the contract price over a three-month period and then cited the same performance failures as a basis for the termination for default.

> These failures were substantial and would have justified the default termination of the contract. However, instead of terminating the contract for these performance failures, the Government ***elected*** to reduce the contract price for the reduced value of these services under the Inspection of Services clause.
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> . . . .

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[223] ASBCA No. **23076, 80-1 BCA ¶ 14256.** In this contract for janitorial services, a dispute arose over whether certain tasks were required once or twice a week. This problem arose before the award of the contract and ultimately was the cause of its termination. The language of the specification was ambiguous, but through a series of pre-award letters, the contractor was aware, at least constructively, of the government's interpretation of the language as requiring service twice a week. Ultimately, the **ASBCA** found that the contract required the tasks twice a week. The contractor acknowledged that the tasks were performed only once a week during the period **1** March-12 June. During these three months, the government made substantial reductions in the contract price, under the inspection of services clause. The contractor's invoices, with the reductions, were paid by the government. On 12 June the contractor was given a cure notice and told to correct the situation by **16** June. The government terminated the contract on **16** June citing two reasons for the termination: first, for deficiencies during the period **1** March through **12** June and, second, for deficiencies during the period **13-16** June. The **ASBCA** overturned the termination for default.

[224] *Id.*

> By deducting amounts from the contractor's invoice [for] April and May 1978, to reflect the reduced value of the services performed, the Government effectively waived the performance failures occurring in those months as a basis for a default termination, while still reserving its right to terminate the contract for default if these failures were not cured in the future.[225]

The government lost this default termination because it had elected a remedy other than termination for performance failures and was unable to support its allegation of subsequent failures to perform in accordance with the contract's requirements.

To understand the ASBCA's decision in *W.M. Grace,* one must consider the concept of election of remedies. The government is required to be consistent when faced with optional remedies in administering its contracts, *i.e.*, it may not pursue inconsistent courses of conduct.[226] *An* important part of the determination to terminate a contract for default is a review of the contract's administration to ensure that there has not been an election of an inconsistent course of administration, *i.e.*, a prior choice of remedies which is now inconsistent with a termination for default.[227]

Less than one month after *W.M. Grace,* the ASBCA further elaborated on the treatment to be afforded failures of performance which had been the basis for prior deductions in contract price. The board analyzed the inspection of services clause and concluded that the government was required to elect its remedy:

> The "Inspection Of Services" clause only permits termination as a remedy (1) if the services for which deductions were taken are not promptly reperformed in a satisfactory manner, or (2) if necessary steps are not taken to insure their proper future performance. Stated another way the Government's right [under the "Inspection Of Services" clause] to elect, among other remedies, to terminate the contract for default arises only after there has been a later failure to perform services for which deductions had previously been taken. Thus, the Government may not use as grounds for this default action those same discrepancies for which it already made deductions from the contract price under the "Inspection Of Services" clause.[228]

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[225] *Id.* (emphasis added).
[226] DeVito v. United States, 413 F.2d 1147 (Ct. C1. 1969).
[227] *See generally DeVito*, 413 F.2d 1147 (Ct. C1. 1969); *Grace*, 80-1 BCA ¶ 14756.
[228] Wainwright Transfer Co. of Fayetteville, Inc., ASBCA Nos. 23311, & 23651, 80-1 BCA ¶ 14313.

The *W.M. Grace* and *Wainwright Transfer* Co. decisions firmly establish a sequential use of the inspection of services clause,[229] with particular reference to services not correctable by reperformance, *i.e.*, daily services.[230] The government may reduce the contract price and demand that immediate steps be taken to ensure future contract compliance.[231] According to *Grace* and *Wainwright*, it may not, however, later use these same failures to support a termination for default.[232] Alternatively, the government may choose not to exercise the right to reduce the contract price and pursue its termination remedies under subparagraphs a(i), a(ii), or a(iii) of the supplyhervice default clause. Depending on the language of the contract, this choice may foreclose alternative action at a later date.[233]

The ASBCA in *Wainwright* explained the use of events that were the basis for a government decision to issue a cure notice. Such events should be "used as guides" to measure whether the performance failures continue "to a sufficient extent to justify the default action."[234] The board appeared to be making a conceptual distinction between a performance defect cited in a cure notice and the same defect occurring during or at the end of the cure period. The former cannot be the basis for the default action, the latter can.[235] It is the failure to cure the "antecedent default" which constitutes the justification for the termination of the contract under subparagraphs a(ii) or a(iii) of the supplyhervice default clause.[236]

The ASBCA in *W.M. Grace* took care to point out that full payment of the contract price was not a condition precedent to the right to terminate for default. Under the payments clause,[237] the government is authorized to make payment less deductions for reduced value received. The government, if it elects to terminate and does so properly, is only required to pay for the value of the services received. The key is that the deduction must be taken under authority of the payment clause after a proper termination and not under the inspection of services clause be-

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[229] FAR § 52.246-4; DAR § 1902.4 (rev. 27 Dec. 1982).

[230] *W.M. Grace Inc.*; Wainwright Transfer Co. of Fayetteville, Inc., ASBCA Nos. 23311 & 23651, 80-1 BCA ¶ 14313.

[231] FAR § 52.246-4; DAR § 7-1902.4 (rev. 27 Dec. 1982).

[232] *See also* Orlando Williams, ASBCA Nos. 26099 & 26872, 84-1 BCA ¶ 16983 (the contract specifically authorized the taking of deductions and the concurrent exercise of termination rights).

[233] *See* Cervetto Bldg. Maintenance Co. v. United States, 2 Cl. Ct. 299 (1983); Orlando Williams, ASBCA Nos. 26099 & 26872, 84-1 BCA ¶ 16983.

[234] *Wainwright*, 80-1 BCA ¶ 14313; Murcole, Inc., ASBCA No. 12291, 73-2 BCA ¶ 10310. *See also* Bill Powell, ASBCA Nos. 10345 & 10393, 65-2 BCA ¶ 4916.

[235] *Wainwright*, 80-1 BCA ¶ 14313.

[236] Murcole, Inc., ASBCA No. 12291, 73-2 BCA ¶ 10310.

[237] The ASBCA referred to ASPR which is now DAR § 7-103.7 (1958 Jan.); FAR § 52.232-1.

fore the termination.[238] To put it another way, the government may not induce the contractor into believing that less than perfect performance will be accepted in the future because the government is paying for that imperfect service now. After such payment there can be no termination for default for the same failure to perform. Absent a contractual term to the contrary, the government will only be allowed to exact one punishment, not two.

The Claims Court, in *Ceruetto Building Maint. Co. v. United States*[239] carved out an exception to the *Grace-Wainwright* rule requiring the government to choose between reduction in contract price for defective performance and termination for default. The contract in *Ceruetto* contained an express provision which allowed the government to make price reductions and to terminate for default for the same defects in performance. The Claims Court concluded that such an expression of intent should be enforced and that it was sufficient to overcome the rule that inconsistent remedies can not be exercised. This position was adopted by the ASBCA in *Orlando Williams*.

C. TERMINATION OF SERVICE CONTRACTS WITHOUT CURE NOTICE

In the supplylservice default clause, the failure to perform services within the time specified is the functional equivalent of a failure to deliver supplies by the due date.[240] The ASBCA has long held that each "failure to perform a daily task . . . is a default.[241] When the required task is to be performed daily there can be no reperformance at a later date.[242] These three facts effectively neutralize one of the functions of a cure notice: to direct the contractor to fix a defect in performance so that the government gets what it bargained for in the contract. The problem, according to the ASBCA in *Orlando Williams,* is determining at what point these performance failures justify termination for default. The real problem for the government is determining whether the contract may be terminated without notice under subparagraph a(i) or whether there is a requirement to rely on subparagraphs a(ii) or a(iii) and their cure notice requirements.

There is authority which allows the government to terminate under subparagraph a(i) even if the contractor has not completely failed to perform by the due date or the end of the contract term:

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[238] *W.M.* Grace,
[239] 2 Cl. Ct. 299 (1983).
[240] Machelor Maintenance & Supply Corp., ASBCA No. 7789, 1962 BCA ¶ 3411. See also Porter Construction, Inc., ASBCA No. 16178, 72-1 BCA ¶ 9372.
[241] Reliable Maint. Serv., ASBCA No. 10487, 66-1 BCA ¶ 5531.
[242] Machelor Maint. & Supply Corp., ASBCA No. 7789, 1962 BCA ¶ 3411.

> Failing to perform all of the daily services would not be cured by the appellant performing them at a later date. If a contractor's service is inadequate, the Board finds no necessity for a cure notice. We believe the language in [a](i) was so intended and we ascribe that meaning to it. Accordingly, we find that a notice giving the appellant 10 days to cure conditions was not a legal prerequisite to termination for default.[243]

In *Machelor Maint. Supply Corp.*, the ASBCA found that the contractor was making no real effort to improve its performance, which at the time of the termination was estimated to be at only 10% of the level of the required contract services. While in this case a cure notice was sent, it was sent sometime before the termination for default and the board found that the termination without another cure notice was appropriate. There was no direct relationship between the defects in the cure notice and defects upon which the default was based. Noting the practical impact of the situation, the board concluded that it was a matter of administrative discretion to decide when the "government's patience with inadequate service" would be "exhausted."[244]

The same principle was applied in *Porter Construction, Inc.* During a major snowstorm, a snow removal contractor became "utterly incapable of coping with the work."[245] The contractor was on the scene, but was literally buried by the snow he was supposed to remove. Under these circumstances no cure period was required and termination under subparagraph a(i) was justified. Although not discussed directly in the opinion, it should be remembered that this was an emergency situation and, in general, greater latitude is given to the government in times of urgent need.[246]

In *Utah Waste Paper Co.*[247] a contractor failed to make the required number of refuse pick-ups over several months. The Veteran's Administration Contract Appeals Board held that a termination for failure to perform without a cure period was appropriate. The board concluded that there is no requirement to send a ten-day cure notice if "the contractor has failed to perform the services contracted for on time."[248] The rationale for this conclusion was found by analyzing the timing of the default: "A contractor already in default is not entitled to a [cure] no-

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[243] *Id.*
[244] *Id.*
[245] ASBCA No. 16178, 72-1 BCA ¶ 9372.
[246] Radiation Technology, Inc., 366 F.2d at 1006.
[247] VACAB No. 1104, 75-1 BCA ¶ 11058.
[248] *Id.*

tice . . . ."[249] Accordingly, if it can be shown that there was an emergency, or that the failure of the contractor was due to a complete inability to do the job, or if the performance deficiencies can be labeled as failures to perform[250] there is a right to default the contract without a cure period. This theory was affirmed by the Claims Court in *Milmark Services, Inc. v. United States*. The court held that it was not necessary for the government to give a contractor a cure notice if the contractor "was properly chargeable with default in the matter of failure to make timely delivery of contractual services."[251] The Claims Court went further and held that the existence of such a default would preclude the necessity for considering other contractual deficiencies and would eliminate the need for "notice of and an opportunity to cure, the alleged [other] deficiencies."[252] In this case, the court dismissed without discussion all of the contractor's arguments related to its right to a cure notice and a cure period because it found the summary termination appropriate. The ASBCA adopted the *Milmark* analysis in *Sentry Corp.*, where it held that a failure to perform guard services over a seven-day period was failure to perform within the meaning of subparagraph a(i) and that a cure notice was not required.[253]

Accordingly, a cure notice is required, if the contractor is not already in default, for a failure to perform in a timely manner at the time the decision to terminate for default is being evaluated. In this situation, the meaning of "in default" is limited to a failure to perform the services within the time allowed. This a(i) default effectively bars a contractor's right to demand a cure period. A fundamental question to ask is when does the right to terminate arise? The government must act consistently and expeditiously once the right to terminate arises, or it may well find itself precluded from exercising the right to terminate for default.[254]

D. EMERGING TRENDS?

While it is impossible to fully evaluate the impact of recent decisions, several cases decided during the last year have the potential to significantly impact how service contracts are terminated for default.

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[249] *Id.*

[250] *See, e.g.*, Tennessee Dep't of Employment Security, LBCA No. 81 BCA 9, 84-1 BCA ¶ 16978 (contractor performed erroneously; failure characterized as a total failure to perform services); Carpet Cleaners, Inc., VABCA No. 1965, 84-3 BCA ¶ 17585 (contractor pulled workforce off the job in a dispute over contract terms); Mercantile Bldg. Maint. Co., ASBCA No. 16953, 72-2 BCA ¶ 9560 (contractor's employees walked off the job during "cure period").

[251] 2 Cl. Ct. at 124.

[252] *Id.*

[253] 84-3 BCA ¶ 17601.

[254] DeVito v. United States, 413 F.2d 1147 (Ct. Cl. 1969). *See also* The Aircraftsmen, ASBCA Nos. 3592 & 3965, 58-1 BCA ¶ 1667 (also sometimes known as Frank Chichester *ex. rel.* The Aircraftsmen).

In *Orlando Williams* a custodial service contract was terminated for default because the contractor failed to cure cited deficiencies and continued to experience repetitive performance failures. The **ASBCA** ruled that the contractor "failed to perform a multitude of services required . . . during the cure period."[255] One of the contractor's defenses to the default termination was that taking deductions for defective performance precluded the use of those events as a basis for the default applying the rule of *W.M. Grace.* On the facts of *Orlando Williams,* the ASBCA found no problem with the deductions and the termination for default based on the same defective performance that had been accepted by the government at a reduced price because the contract contained an express reservation of remedies clause which allowed the government to exercise its rights under both the default (DAR § 7-103.11) and the inspection of services (DAR § 7-7902.4) clauses. The rule in *W.M. Grace, i.e.*, that the government must elect between default remedies and inspection of service remedies, "is not for application" where there is an express reservation by the agency of a right to exercise inconsistent remedies.[256] This recognition of the efficacy of a reservation by the government allowing it to exercise inconsistent rights, which under situations without the reservation would bar termination, is a major step towards eliminating one of the road blocks created by the default clause in service contract termination.

Gossette Contract Furnishers[257] also involved a termination of a custodial service contract where the somewhat unusual terms of the contract allowed a termination for default to be sustained. Gossette's contract contained no cure notice provision. It is unclear from the opinion whether this omission was intentional or accidental. Even though the contract did not require a cure notice, the government issued one. The government was unable, however, to prove receipt of the cure notice by the contractor. Under other conditions, this failure to prove receipt of a cure notice might well be fatal to the termination for default because the government would be unable to bear its burden of proving that the contractor was in default.[258] The GSBCA persuasively discussed the role of cure notices in service contracts:

> When we look at appellant's situation in light of its contract, we see no contractual requirement for a cure notice. The Government undertook to send one anyway, and we are assuming that it misfired. The situation, then, was as if appellant's right to proceed was terminated for default with no

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[255] 84-1 BCA ¶ 16983.
[256] *Id.*
[257] GSBCA No, 6758, 83-2 BCA ¶ 16590.
[258] *Id.*

warning. Lacking a contractual requirement for a warning, the question we must answer is whether we can infer one applicable to this situation from general contract law. The answer is no.

Perhaps the argument is that appellant should have been given one last warning before the guillotine blade fell. If so, then the answer is that the record teems with warnings to appellant. . . . We do not think the law requires a party in the Government's position to send out one final "I-really-mean-it" notice before terminating a contract for default in a situation as aggravated as this one. . . .

Appellant was not betrayed or misled into anything. General contract law (assuming no provision in the contract) may require a cure notice in certain cases for the protection of the contractor. But what consequences would follow if no notice was sent in a case such as this one? For lack of notice, appellant would continue to perform. After the default termination, it would stop. Unlike a supply contractor, appellant would not have performed without recompense. **A** supply contractor unable to deliver as of the date of termination would forfeit all its expenditures through termination unless protected by a notice requirement. But appellant is a service contractor, paid at a monthly rate, and it would receive either payment or credit for all work done through termination. If its bid had allowed for a profit, it might even have made money for that period. So there would have been no detrimental reliance by appellant of the sort that a requirement for a cure notice is supposed to protect.

There may be exceptions. If the contract contains an express requirement for a notice, then the situation is necessarily different. If the Government is on notice that the contractor is planning a major capital expenditure in an effort to get its work back on track, then perhaps a termination without warning would be prohibited. We cannot analyze all the possible fact situations that could develop. But we have analyzed this one, and we hold that on the facts of this appeal there was no legal requirement that the Government send appellant a notice before terminating appellant's contract for default.

Appellant did not meet its contractual obligations. The Government did.[259]

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[259] *Id.*

This extensive quote from the GSBCA contains several very significant concepts. First, the board found that there was no common law requirement for a cure notice. Second, an essential factor in determining the propriety of the termination was whether the issuance of a cure notice would serve any useful purpose. Third, the board considered whether or not the government had misled the contractor. Finally, the board framed its decision specifically around the nature of a contract calling for the repetitive delivery of services.

This case has the potential to restructure much of the current thinking about termination for default of service contracts because its reasoning is sound and practical. It concludes that a cure notice is solely a contractual right and that a government contract need not contain a provision for a cure notice. Additionally, the equitable considerations which formed so much of the basis of the *Radiation Technology* rationale that a supply contractor has a right to a cure period are considered in *Gossette Contract Furnishers* and found to be not controlling in service contracts. The forfeiture concept which is at the center of the doctrine of substantial completion arose in the construction contract area. Its applicability to supply contracts makes sense, but its rationale is less compelling. When the doctrine is applied to service contracts its rationale is stretched to the breaking point. If the keystone of substantial compliance which compels a right to cure is an equitable aversion to forfeiture, as the Court of Claims stated in *Radiation Technology* and in *Franklin E. Penny*, there is little risk of forfeiture in terminating service contracts without a cure period.[260] The construction contractor whose contract contains a default clause without a cure notice provision (DAR § 7-602.51, FAR § **52.249-10)** is exposed to the same potential loss of future business and liability for excess reprocurement costs as is a service contractor whose contract contains cure provisions. Accordingly, the cure notice cannot be said to protect against these potential losses. Moreover, in a service contract, the contractor is paid for correctly performed work accepted prior to termination. There is, therefore, no compelling reason for a cure period in a service contract where the risk of forfeiture is low.

Milmark Services, Inc. v. United States is a decision which considered the interplay of failure to deliver and failure to correctly perform the services called for in the contract. A termination for default which is based on a failure to deliver precludes the necessity of giving a cure notice or cure period for defects in performance.[261]

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[260] *Cf.*, Gossette Contract Furnishers, GSBCA No. 6758, 83-2 BCA ¶ 16590.
[261] 2 Cl. Ct. at 124.

Cervetto Building Maint. Co. v. United States[262] dealt with the concept of government election of remedies and expanded the concept of cumulative defects to support a termination. Cervetto's contract was for custodial services. In some instances it failed to perform the required tasks. For these failures the government made reductions in the contract price. Other tasks were performed incorrectly and the contractor was required to correct the problem. Shortly after the contract was awarded, the contractor was sent a cure notice based on its failure to provide a list of manufacturers and products it was using. A second cure notice was sent detailing a wide range of performance and supervisory failures. The contracting officer decided to terminate the contract no later than the morning of the tenth day of the cure period.[263] At the hearing the government relied on evidence of failures for which reductions had been taken as proof of the default. The contractor complained that the government could not reduce the contract price and terminate the contract on the basis of the same failures to perform based upon a strict application of the rule in *W.M. Grace*. The Claims Court found that the contract contained a specific provision which authorized correction of defects and which provided that "[r]epeated . . . deficiencies will be cause for reduction in payment , , , or default action."[264] The court distinguished between occasional failures to perform which could be "addressed through remedies short of termination for default, . . [and] deficiencies [which] become the rule."[265] The court held that when "corrections or deductions" are necessary "virtually every day, overall performance under the contract can be deemed unsatisfactory even though individual problems are resolved."[266] The court expressly recognized a contractual right to reserve and cumulate remedies,[267] echoing the ASBCA position in *Orlando Williams*. More significantly the court expanded upon the frequently followed rule of *Pride Unlimited:* service contracts may be terminated for default when performance fails to substantially comply with the contract. Restating the ASBCA's position in *Acme of Colorado*,[268] the court looked on the contractor's performance wholistically. If the contract is for custodial services, the contract calls for more than clean floors. A contractor may not escape default, even if it returns to clean the floors, if its day-to-day failures are such that daily remedial action by the government is necessary.[269]

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[262] 2 Ct. Cl. 299 (1983).
[263] *Id.* at 301.
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] ASBCA No. 7974, 1963 BCA 3 3914.
[269] Cervetto Bldg. Maint. Co. v. United States, 2 Ct. C1. 299 (1983).

In *Sentry Corp.*, the contract was awarded in April 1983 and performance was acceptable until January 18, 1984. Between January 18 and 25, the contractor failed to provide the required guard services at various posts for periods of up to thirty-six hours. This was documented by time clocks. The ASBCA held that these failures to perform were substantial. More significantly, it rejected the appellant's argument that it had corrected the defects and was performing acceptably on the date the contract was terminated for default. The board found that these failures to perform did not require a cure notice and that the government had an immediate right to terminate for default. In response to the appellant's claim that the defects had been cured, the board found that the government had not manifested an intent to waive the default and that the two days it took to process the termination for default was reasonable.[270] *Sentry Corp.* represents a significant shift in position by the ASBCA. It places greater emphasis on the failure to perform than it does on analyzing whether the failure is substantial. This decision, if followed in the future by the ASBCA, will significantly reduce some of the speculation that contractors and contracting officers engage in when determining whether a failure to perform is substantial.

These recent cases provide authority under subparagraph a(i) for terminating service contracts for default if the deficiencies in performance can be characterized as failures of timely performance. This extension of the scope of subparagraph a(i) to include services which are performed incorrectly, or repeatedly performed incorrectly, is not supported in the language of the current default clause. Such failures are more appropriately failures to make progress which endanger performance of the contract in accordance with its terms, requiring a cure notice. More significantly, there is case law to support the proposition that such failures require a cure notice. Thus, contracting officers must speculate as to whether a cure notice will be required.

The cases which have supported a summary right to terminate for default have all turned on the court being able to characterize the contractor's failure as being one of timeliness. This emerging trend is pragmatically based on the principle articulated earlier in this article: that failure to correctly perform a contract will support a termination for default, without resort to formalistic procedural prerequisites. Unfortunately, the conclusion drawn by the courts is not clearly supported in the language of the default clause currently in use in supply and service contracts.

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[270] *Id.*

IV. A SOLUTION TO THE PROBLEM OF TERMINATING SERVICE CONTRACTS

A. *THE PROBLEM RE VISITED*

The problem stated in the hypothetical at the beginning of the article was that a contractor could, by accident or design, avoid a termination for default by alternately failing to perform and making efforts at correction. By shifting the failures from task to task and by applying effort to those tasks which were cited in the government's cure notice (or latest cure notice), the contractor seemingly could avoid the "guillotine blade" of default indefinitely. This appeared to be possible because a literal reading of the supplyhervice default clause does not permit summary termination for default unless there is a failure to perform within the time stated in the contract or any extensions granted to the contractor.[271] Additionally, the concept of substantial partial performance would seem to require that the contractor be given a chance to cure defects in performance, at least if there was timely performance,[272] and maybe even if there was not.[273]

Within Department of the Army contracting activities, it is believed that service contracts are the most difficult to administer, partly because service contracts tend to be complex multi-function contracts. Another part of the problem is a perception that if the contract "goes bad" it is impossible to terminate a service contract for default. The Commerce Clearing House's *Board of Contract Appeals Reporter* is repleat with decisions where the government failed to give a cure notice when one was required,[274] terminated before the end of the cure period,[275] failed to maintain appropriate records,[276] failed to inspect in accordance

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[271]FAR § 52.249-8; DAR § 7-103.11.

[272]Radiation Technology, Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966). *See also* Nat'l Farm Equip. Co., GSBCA No. 4921.78-1 BCA ¶ 13195.

[273]Franklin E. Penny Co. v. United States, 524 F.2d 668 (Ct. C1.1975).

[274]Bailey Specialized Bldg. Inc. v. United States, 404 F.2d 355 (Ct. Cl. 1968); Fairfield Scientific Corp., ASBCA 21151, 78-1 BCA ¶ 13082. *See also* Roberts Int'l Corp., ASBCA No. 10954, 68-2 BCA ¶ 7074 (vague inquiry by the government is not a sufficient cure notice); Dubrow Elec. Industries, Inc., ASBCA No. 8464, 65-1 BCA ¶ 4859 (show cause notice is not sufficient cure notice); Screw Craft Prod. Co., ASBCA No. 8414, 1964 BCA j 4015 (mere establishment by government of a new delivery date, without citing failures, not a sufficient cure notice); Denison Research Found., ASBCA No. 7653, 1963 BCA ¶ 3651 (government erroneously concluded that contractor had anticipatorily breached the contract; failure to give cure period fatal); FACS Products, Inc., ASBCA No. 3336, 57-1 BCA ¶ 1215 (no cure notice issued); Bienenfield Glass & Mirrors, ASBCA No. 3568, 57-2 BCA ¶ 1462.

[275]*E.g.*, Moustafa Mohamed, GSBCA No. 5760-R, 5812-R & 5901-R, 83-2 BCA ¶ 16805; Harvey L. Monk, PSBCA No. 995, 82-3 BCA ¶ 15797; Introl Corp., DOTCAB No. 1030, 80-1 BCA j 14380; B & C Janitorial Servs., ASBCA No. 11084, 66-1 BCA ¶ 5355.

[276]*E.g.*, Mr.'s Landscaping & Nursery, HUDBCA Nos. 75-6 & 75-7, 76-1 BCA ¶ 11968; Contract Maintenance, Inc., ASBCA No. 19603, 75-1 BCA ¶ 11097.

with the contract,[277] or reduced the contract price for defective services and then terminated for default.[278] All of these procedural errors, and a great many more, have been found to be fatal to the successful termination for default of a service contract.[279] Boards of contract appeals appear willing to overturn default terminations based on bewildering precedents, or sometimes with no citation to precedent or authority.[280] It is fairly clear that if contractors can frustrate the purpose of their contracts with the government with impunity that something needs to be done to revise the way we think about service contracts. A revision of the default clause, tailored for service contracts, is needed. This article is not the first to propose a revision of the default clause. Over ten years ago an analysis of the case law concerning default concluded that the existing default clause was unworkable.[281] That clause is still in use today,

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[277] *E.g.*, Soledad Enter. Inc., ASBCA Nos. 20376, 20423, 20424, 20425 & 20426, 77-2 BCA ¶ 12552.

[278] *E.g.*, W.M. Grace, Inc., ASBCA No. 23076, 80-1 BCA ¶ 14256; Wainwright Transfer Co. of Fayetteville, Inc., ASBCA Nos. 23311 & 23651, 80-1 BCA ¶ 14313.

[279] *See* Dynalectron Corp. v. United States, 518 F.2d 594, 602 (Ct. Cl. 1975). ***See*** *also* supra note 216.

[280] The decisions of the ASBCA are usually fairly well documented with citations to authority. Occasionally, the ASBCA has overturned default terminations without citing a single source of authority. See, *e.g.*, Contract Maintenance, Inc., ASBCA No. 19603, 75 BCA ¶ 11097 (5-page opinion); Contract Maintenance, Inc., ASBCA No. 18528, 75-1 BCA ¶ 11247 ($400,000 + contract termination overturned in a 12-page opinion).

[281] In 1973, William J. McGrath and Robert Bruce Schearer proposed a new default clause in Terminating the Breaching *Contractor/the* Problem *and* a Possible Solution, 7 Nat'l. Cont. Mgmt. J. Spring 1973, at 1, *photo* reprint 10 Yearbook of Procurement Articles 659 (1973)(hereinafter cited as McGrath & Schearer). McGrath and Schearer read the then-recent Court of Claims cases (Schlessinger v. United States, 390 F.2d 702 (Ct. Cl. 1968); Radiation Technology, Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966); DeVito v. United States, 413 F.2d 1147 (Ct. Cl. 1969); H.N. Bailey and Associates v. United States, 449 F.2d 376 (Ct. Cl. 1971); Schweigert, Inc. v. United States, 388 F.2d 697 (Ct. Cl. 1967)) and concluded that the default clause had been emasculated by judicial decisions to the point where, they believed, there was serious question as to the ability of the government to terminate contracts for default. They proposed a new default clause to solve this perceived problem.

The proposed clause is based on a belief that, in formally advertised contracts, the rules of contract administration should be as strict and predictable as the rules of contract formation. The goal of their proposed clause is predictability. McGrath & Shearer at 12. McGrath and Shearer proposed a total revision of the various default clauses; combining them into one clause entitled, "Election by the Government to Discontinue Performance by the Contractor." McGrath & Shearer at 3. While this proposed revision was designed to insure that the government had an enforceable right to terminate for default; it contained some weaknesses which might make termination more difficult. These weaknesses should be avoided in any future revision of the default clause.

One of the bases of this article is that there are fundamental differences in the nature of construction, supply, and service contracts. The proposed clause consciously combines all three types of contract under the term "work." [McGrath & Shearer at 3 n.26] Any default clause which fails to recognize these radical differences is doomed to attempts by contractors, the government, and judges to misapply rules, that make good sense in one situation, to a case where application of the same rule is ludicrous.

McGrath and Shearer style their clause as an "Election to Discontinue Performance by the Contractor." It is not a termination clause. They correctly point out that many features

without substantial change. The remainder of this section will consider the theoretical bases for this article's proposed revision of the default clause and will propose a draft modification of the default clause.

B. THEORETICAL BASES FOR REVISING THE DEFAULT CLAUSE

1. The Right to Default.

Essential to the successful exercise of a right to terminate for default is the existence of an objective, yet abstract, factor which has been called "a right to default." After the right to default comes into existence, it must be exercised in a timely fashion. Delay[282] or haste[283] in exercising

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of the contract continue on after "termination," *e.g.*, reprocurement, cost assessment, warranty responsibility, and possible reinstatement of the contract. McGrath & Shearer at 9 n. 26. As McGarvie has pointed out, there is a lack of clear and precise thought about the terminology relating to breach of contract and failure to perform. ***See*** *supra* note 86. Adding more terminology to the milieu is probably not desireable. The choice of the word "election," however, does seem to serve a useful purpose in focusing attention on the government's duties in contract administration. The concept of election is particularly helpful in keeping in mind that a course of action needs to be chosen and consistently followed. The current default clauses tend to encourage the perception that contract remedies may be exercised on a "pick and choose" basis; which practice has sometimes had disastrous results for the government's termination for default.

The McGrath-Shearer clause makes cure notice provisions applicable only to "collateral provisions. . . which do not deal with time of delivery." McGrath & Shearer at 7. The clause automatically cancels the contract if the contracting officer does not receive the contractor's answer to the notice. It also creates a provision for an express election to continue the performance. McGrath & Shearer at 6. These rules, and others like them, in the proposed default clause try to take away some of the uncertainty of contract administration by creating more "artificial" deadlines, notices, automatic waivers and presumptions based on answers on the lack there of, and the like. The existing, relatively simple, ten-day cure notice has spawned reams of litigation. How much more would result from a clause many times more complex?

Perhaps the clause's best feature is its express treatment of reservation of remedies upon government election of a remedy. McGrath & Shearer at 5-6. Reservations of this type have been held to overcome the inconsistent pursuit of remedies, which the ASBCA has found objectionable. **See** *supra* text accompanying notes 212-230. The government and the contractor may expressly agree, for example, that the government may take deductions for defective performance and terminate the contract for the same failures of performance. Such express reservations of remedies appear to be important in preserving for the government a full range of options in the event of failures of performance.

McGrath and Shearer approached the bewildering number of cases which deal with termination of default and have tried to draft a clause which covers all of the principle problem areas in government contract termination. The weaknesses, however, of the proposed clause is its attempt to create a mechanism, to deal with all of the known pitfalls of the termination process. What will happen when a new decision creates a new problem area? Such a structure will inevitably be out of date within a short period of time. It is too complex and too specific to be used in contracts which are performed by mere mortals and not legal scholars. Technically, McGrath and Shearer have done an excellent job in identifying the weaknesses of the present default clause. Yet, their solution tries to do too many things, and probably creates more problems than it resolves.

[282] DeVito v. United States, 413 F.2d 1147 (Ct. C1.1969).

[283] *E.g.*, Cervetto Bldg. Maintenance Co., 2 Ct. Cl. 299 (1983); B&C Janitorial Serv., ASBCA No. 11084, 66-1 BCA j 5355.

the right to default may well destroy it. Absent a currently valid right to default there can be termination.[284] The concept of a right to default exists in the abstract. It can even exist without the governments knowledge. So long as "a right to default" exists at the time a contract is in fact terminated for default, the default will be sustained, even if the government was unaware of the existence of right at the time of the termination.[285]

The unilateral right to default in government contracts is created by the contract default clause. Subparagraph a(i) of that clause is based on the common law concept of failure to perform services within the time specified in the contract, or any extension thereof. This right to terminate is immediate and requires no cure notice or cure period.[286] Similarly, an anticipatory repudiation is a breach of contract which allows termination without cure notice or cure period.[287] In these two situations, the time when the right to terminate arises is quite clear, *i.e.*, in the former the date for performance is set forth in the contract; in the latter, the date is established by the contractor's unequivocal expression not to perform the contract.

In matters involving failure to make progress so as to endanger the completion of the contract and violation of other provisions of the contract, the procedural mechanism of the ten-day cure notice historically has fixed the date on which the right to terminate arises.[288] In a sense, the cure notice is an amendment to the contract which requires the contractor to perform certain tasks; failure to do so will subject the contractor to termination for default. After the date for cure has passed, the right to terminate arises and the termination can, at this point, be without further notice.[289]

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[284] The Aircraftsmen Co., ASBCA Nos. 3592, 3965, 58-1 BCA ¶ 1667 (In this case a statutory request for relief held the right to terminate for default in suspension until the decision was made on the request for relief. During this period of suspension the government did not possess the right to terminate for default.). *See also* Prestex, Inc., ASBCA Nos. 21284, 21372, 21453, 21467 & 23184, 81-1 BCA ¶ 14882 (A right to terminate for default comes into being with each missed incremental delivery. Waiver of one or more delivery dates does not prospectively destroy future rights to terminate.).

[285] Joseph Morton Co., 3 Cl. Ct. 120, 122 (1983) (citing College Point Boat Co. v. United States, 267 U.S. 12, 15-16 (1925); Pots Unlimited, Ltd. 600 F.2d 790, 793 (Ct. C1.1970)).

[286] *E.g.*, Chemitron Corp. v. United States, 1 Cl. Ct. 747 (1983); Pride Unlimited, Inc. ASBCA No. 17778, 75 BCA ¶ 11436; Hedlund Lumber Sales, ASBCA No. 14815, 71-1 BCA ¶ 8782; Machelor Maintenance & Supply Corp., ASBCA No. 7789, 1962 BCA ¶ 3411.

[287] Fairfield Scientific Corp., ASBCA No. 21151, 78-1 BCA ¶ 13082.

[288] *See id.*

[289] *Cf.* Bailey Specialized Bldg., Inc. v. United States, 404 F.2d 355, 360 (Ct. Cl. 1968).

2. No Right to a Cure Period.

There is no common law right to a ten-day cure notice or cure period.[290] Absent a contractual provision for a cure notice there is no requirement that a government contract contain a cure notice provision. This principle is apparent in the construction default clause which contains no cure notice requirement.[291] Accordingly, there is no compelling reason why a service contract must contain a cure notice provision, particularly a provision that can be construed by contractors and boards of contract appeals as requiring repeated cure notices in the face of continual, but varying, nonperformance.

3. *Express Terms of Contract Control.*

Express terms of a contract creating cumulative rights to terminate for default and allowing reduction of the contract price for the same failure of performance are enforceable.[292] Such express agreements will overcome otherwise inconsistent exercises of government remedies. Accordingy, if the parties to a contract agree that there will be only a limited right to a cure period or no cure period at all, these provisions should be enforced.

4. Cure Period of Little Use.

Some service contracts require performance that cannot be corrected by reperformance. In a situation where the contractor was both failing to perform services in a timely manner and performing them defectively, the ASBCA allowed a "cure time to be extended indefinitely."[293] In that case the contractor's performance was repetitively sporadic, on some days tasks were done incorrectly or half done, and on the next day different tasks were left undone or done incorrectly. The contract called for a specific set of services on a cyclic basis (twice a week refuse pickups). The ASBCA found that the "failure of timely performance of all the services called for by the contract could not be cured by their performance on a subsequent date."[294] Accordingly, the contract could be terminated for default without notice, "without reaching any of the parties contentions about subparagraph a(ii)."[295] The *L.M. Copeland* decision allowed a default termination to stand where the government did not precisely track each failure to perform with a cure notice and a cure peri-

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[290] Gossette Contract Furnishers, GSBCA No. 6758, 83-2 BCA ¶ 16590.
[291] FAR § 52.249-10; DAR § 7-602.5.
[292] Cervetto Bldg. Maintenance Co. v. United States, 2 Ct. Cl. 299 (1983); Orlando Williams, ASBCA Nos. 26099 & 26872, 84-1 BCA ¶ 16983. *But* see *supra* note 216.
[293] L.M. Copeland, ASBCA No. 13646, 69-1 BCA ¶ 7586 (sometimes known as L.M. Copeland d/b/a Riteway Sanitation Servs.).
[294] *Id. See also* Porter Const., Inc., ASBCA No. 16178, 72-1 BCA ¶ 9372.
[295] L.M. Copeland, ASBCA No. 13646, 69-1 BCA ¶ 7586.

od. The ASBCA found that a generalized indefinite cure was sufficient to advise the contractor of the government's dissatisfaction with the contractor's performance.[296] Additionally, the noncorrectable nature of the services severely limits the usefulness of a cure notice and cure period. Why should a cure notice and a cure period be required if no cure is possible?

5. Equity Does Not Demand a Cure Period.

The doctrine that substantial completion bars a summary termination for default has little or no place in the area of service contracts. The ASBCA questioned how often the doctrine of substantial performance ought to be applied in construction and supply contracts: "However . . . we emphasize . . . that the term refers to the 'equitable doctrine' that guards against forfeiture in situations where a party's performance departs in minor respects from that which had been promised."[297] This analysis applies to the forfeiture doctrine in service contracts. As pointed out in *Gossette Contract Furnishers* there is little risk of forfeiture in service contracts: "[W]here a contractor has been paid . . . for all work properly performed or corrected there is less liklihood that a showing of forfeiture may be made so as to call for the application of the doctrine of substantial performance and upset an otherwise termination for default."[298] The *Radiation Technology* rule that a contractor is entitled to a cure period to fix minor defects in timely delivered supplies also flows from the idea of preventing forfeiture. In a supply contract, if the government was not required to give the contractor some period of time in which to correct minor defects after timely delivery, the contractor would have a product on its hands for which the government probably would not pay. This is the type of forfeiture that substantial performance is designed to prevent. The forfeiture rationale is very weak if the contractor has been paid either the contract price or the reduced value of services defectively performed.[299] Accordingly, the application of the doctrine of substantial partial performance to service contracts should be limited to situations where the government misled a contractor into thinking its performance was acceptable or where the government knew that a contractor was on the verge of a major expenditure to complete the service and similar situations. Beyond these limited situations, the concepts of substantial compliance and substantial performance should not be used in analyzing service contractor performance. Moreover, they should not be used to support a requirement for cure notices in service contracts. In applying these conclusions the requirement

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[296] *Id.*
[297] Gen. Ship & Engine Works, Inc., ASBCA No. 19243, 79-1 BCA ¶ 13657.
[298] *Id.*
[299] Gossette Contract Furnishers, GSBCA No. 6758, 83-2 BCA ¶ 16590.

outlined in *Schlessinger*[300] remains. The contracting officer must exercise discretion in making the decision to terminate for default. The absence of a rigid cure notice requirement does not allow the government to take arbitrary action to terminate a contract for default.

C. Proposal to Revise the Service Default Clause

Hopefully, this article has persuaded the reader of the following points:

1. That there are fundamental differences in the nature of supply, service, and construction contracts.

2. That the key to a successful termination for default in a government contract is the timely identification and consistent exercise of the government's contractual remedies, including the right to default.

3. That the right to default is defined by the contract's terms and that the expressed intent of the parties to a contract will be enforced. And,

4. That the existing cure notice procedure, which serves to establish the right to default in service contract is unnecessary, or at least is more susceptible to manipulation than it need be.

There are few practitioners of government contract law who have not wrestled with the problems of how to terminate a service contract. It is proposed that the following revision of the default clause will make life easier for those confronted with this problem.

> 52.249-8 Default (Service Contracts)
> DEFAULT (1985 August)
>
> (a) The contracting officer may, by written notice to the contractor without any further notice of any kind, terminate the whole or any part of this contract. The contracting officer shall not terminate this contract if the cause of the contractor's failure to perform the required services arises from unforeseeable causes beyond the control and without the fault or negligence of the contractor. The government shall have the right to default if:
>
> (i) there has been failure to perform the required services in accordance with frequencies required by the Schedule or the Specifications of this contract;
>
> (ii) there has been repetitive failure to perform the same or similar services, as required by the contract, or failure to

[300] Schlessinger v. United States, 390 F.2d 702 (Ct. C1.1968).

perform the required services in compliance with the specifications of this contract:

(iii) there has been failure to take the corrective action required by the Inspection of Services Clause of this contract or failure to take corrective action directed by the contracting officer.

(iv) there has been failure to perform any other provision of this contract.

(b) Services or tasks which are required to be performed on a daily basis are defined as being not correctable by reperformance at a later date. Repetitive failure to perform such services or similar services or to perform them in accordance with the specifications shall be considered a basis for default under paragraph a(i), above.

(c) In the event of failures described under paragraphs a(i) and (b) above, the government shall have the right to terminate without further notice to the contractor.

(d) In the event of failures described in paragraphs a(ii), a(iii) and a(iv) the contracting officer shall give written notice to the contractor of the nature and scope of the deficiencies. This notice shall provide the contractor one period at least ten days long in which to cure the deficiencies in performance. At the end of the ten-day cure period the government may terminate the contract without further notice within a period of **45** calendar days.

(e) The remedies granted to the government under the various clauses of this contract are cumulative. The exercise of any one or more remedies by the government shall not preclude the government's right to exercise any other remedy. Specifically, the government shall possess the right to terminate this contract in addition to the exercise of any other remedy granted to it under this contract or by law.

(f) If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services. However, the Contractor shall continue the work not terminated.

(g) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include **(1)** acts of God or of the public enemy, **(2)** acts of the Government in either its sovereign or contractual capacity, **(3)** fires, **(4)** floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

(h) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

(i) If this contract is terminated for default, the Government may require the Contractor to transfer title and deliver to the Government, as directed by the Contracting Officer, any **(1)** completed supplies, and **(2)** partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (collectively referred to as "manufacturing materials'' in this clause) that the Contractor has specifically produced or acquired for the terminated portion of this contract. Upon direction of the Contracting Officer, the Contractor shall also protect and preserve property in its possession in which the Government has an interest.

(j) The Government shall pay contract price for completed supplies delivered and accepted. The Contractor and Contracting Officer shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under the Disputes clause. The Government may withhold from these amounts any sum the Contracting Officer determines to be necessary to protect the Government against loss because of outstanding liens or claims of former lien holders.

> **(k)** If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

This clause recognizes the fact that there are a great many ways in which to fail to perform a service contract. It recognizes the needs of the government to be able to immediately terminate a contract when the failure is total, when the services cannot be reperformed, or when repetitive failures frustrate the essential purpose of having the contract.

Because of the low risks of a forfeiture and the limited usefulness of cure notices in contracts for daily repetitive services, the use of cure notices is specifically limited. In the leading cases which support the immediate right to terminate, prior notice was in fact given to the contractor and there was clear documentation of the government's dissatisfaction with the contractor's performance. To remain consistent with the theoretical underpinning that these cases provide, and to prevent impetuous terminations for default by the government, the cure notice in limited form has been retained.

The goal of the proposed clause is to streamline the ability of the government to terminate contracts when the contractor is not performing the contract, particularly where reperformance is not a meaningful remedy. This is, after all, why there is a default clause in the contract. This proposed clause provides for adequate definition of the right to terminate and allows the government flexibility in choosing alternative courses of action. It is designed to avoid placing greater importance on procedural requirements than the substance of contract performance.

V. CONCLUSION

This article has analyzed the operation of the existing default clause in service contracts. Through a misapplication of the decisions of various boards of contract appeals, it has become generally accepted that the rules governing this clause, cure notices, and the application of the principles of substantial compliance and election of remedies substantially limit the government's ability to swiftly terminate service contracts for default.

It is submitted that this general perception is wrong. There is long standing and consistent board of contract appeals case authority, and a solid rationale, for the proposition that contractors who fail to perform the essential requirements of the contract or whose pattern of nonperformance of tasks becomes the rule rather than the exception should be

terminated for default without a long series of cure notices.[301] The government should not be shackled to procedural devices which do not make sense.[302]

The cure notice scheme to advise contractors of government dissatisfaction with performance is designed to achieve two major purposes: first, to get the contractor to reperform or correct the defective service so the government gets the benefit of its bargain and, second, to advise the contractor of the potential of an impending default so that surprise is avoided and its losses may be limited and forfeiture avoided. In situations where there can be no effective reperformance of services or in situations where there is no great risk of forfeiture, there is no compelling reason for a cure notice.

The perceived substantial compliance objection to termination for default because the contractor was performing, albeit poorly, is equally without merit. When parties enter into a contract, they do so to obtain performance. There is an enforceable obligation to perform as promised, when promised. This has been recognized at common law for generation.[303] While a termination for default clearly has adverse effects on a contractor, imposition of reprocurement costs, loss of future business, and damage to reputation, cure notice provisions are not designed to protect contractors against such losses. If cure notices had the function of protecting these contractor interests, cure notices would be required for all types of termination for default, not just under subparagraphs a(ii) and a(iii) of the supplyhervice clause. The construction default clause and subparagraph a(i) of the supplyhervice default clause have both operated for years without cure provisions. Accordingly, the equitable goal of prohibiting a forfeiture, as outlined in *Radiation Technology* and *Franklin E. Penny*, must be considered the major rationale for cure notice requirements. In the absence of an equitable or contractual basis to a right to cure, there is no reason why defective performance generates a right to a cure period, and no reason why cure notice requirements should encumber the process of termination for default.

The objections to termination for default after administrative exercise of other contract administration options, *e.g.*, reductions in contract price, waivers of specifications and the like, based on an election of in-

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[301] *See* Milmark Servs., Inc., 2 Cl. Ct. 116 (1983), *aff'd*, 731 F.2d 855 (Fed. Cir. 1984); Cervetto Bldg. Maintenance Co. v. United States, 2 Cl. Ct. 299 (1983); Sentry Corp., ASBCA No. 29308, 84-3 BCA ¶ 17601; Riteway Sanitation Servs., ASBCA 14304, 70-2 BCA ¶ 8553; L.M. Copeland, ASBCA No. 13646, 69-1 BCA ¶ 7586; Acme of Colorado, ASBCA 7974, 1963 BCA ¶ 3914.

[302] *See, e.g.*, Lee Maintenance Co., PSBCA No. 522, 79-2 BCA ¶ 14067.

[303] 11 S. Williston, A Treatise on the Law of Contract § 1290 (W. Jaeger ed., 3d ed. 1968).

consistent remedies argument can also easily be resolved. Parties to a contract may govern how they will behave in the event of certain contingences; these expressions of intent are enforceable.[304] There is no reason why a clear expression of a government right to exercise inconsistent remedies, to include termination for default, should not be enforced. Such a provision is necessary to allow the government the flexibility it needs to respond to differing failures to perform and the impact of those failures on the discharge of the government's responsibilities.

The proposed revision of the default clause for service contracts creates a clear contractual basis to terminate the contract for default if there is a failure, or repetitive failure, to perform the contract correctly. This termination may be without notice or opportunity cure. Contracting officers will still be held to the *Schlessinger* requirement to use sound judgement in terminating contracts for default. The major advantage of this clause over the existing clause, and its interpretive case law, is that there is a clear contractual right to summarily terminate the contract in the event of repetitive failures to perform. The cumbersome cure notice procedure which, arguably requires a matching of performance failure to cure notice provision is removed. The language of the clause will support a summary termination if there is a major failure to perform or a series of minor failures. The authority is created by the clause; the decision to exercise that authority remains vested in the contracting officer. It is impossible to draft a precise formula to measure the severity of the failure and when that failure will support a default termination. Of necessity, these are judgmental decisions. The objective of this revision of the default clause is to provide a clear contractual basis for the exercise of that discretion.

The cure notice has not been eliminated totally in the proposed revision. It is retained for those situations where the failure is not directly related to performance or failure to take corrective action. However, the obligation on the government to issue a cure notice is limited to a one time requirement. These provisions are included because it is considered appropriate to give the contractor notice and an opportunity to cure where such a requirement does not prevent termination by creating an endless requirement to identify defects in performance and provide an opportunity to cure. The revision prevents the cure notice requirement from being repetitively used as a shield for failure to perform the contract, and allows a swift termination for default if the contracting officer determines such to be in the best interests of the government.

In light of the current misperceptions and conflicting case law concerning terminating service contracts for default, a new default clause

[304] *See, e.g.*, Cervetto Bldg. Maint. Co. v. United States, 2 Cl. Ct. 299 (1983).

has been proposed. This clause has been drafted in the belief that service contracts are unique and that the provisions for termination for default ought to be tailored to reflect this fact. The proposed revision of the default clause addresses the erroneous perceptions and clarifies the obligations and rights of the parties to the contract. Finally, it provides a clear, appropriate mechanism to allow a wide range of swift responses in the event of a contractor failure to perform service contracts without requiring either the contractor or the contracting officer to guess at what procedure will be followed to either continue the contract or terminate it for default.

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