

# THE AIR FORCE LAW REVIEW

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# THE AIR FORCE LAW REVIEW

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# Marching To The Beat of A Different Drummer: Is Military Law and Mental Health Out-of-Step after *Jaffee v. Redmond*?

MAJOR BARBARA J. ZANOTTI, USAF\* CAPTAIN RICK A. BECKER, USAFR /\*/

## I. INTRODUCTION

For years the issue of whether there should be a federal psychotherapist-patient evidentiary privilege has been debated. The latest battle for recognition of this controversial privilege was won on 13 June 1996, when the United States Supreme Court recognized the privilege under Federal Rule of Evidence 501 in the case of *Jaffee v. Redmond*. /1/ The only jurisdiction remaining which has yet to address this privilege is the military, a federal jurisdiction with its own evidentiary rules. The military's initial reaction to the *Jaffee* decision has been negative. /2/

The military's separate justice system has been criticized for being out-of-step with civilian legal systems. Hence Cocteau's famous quip that "military justice is to justice what military music is to music." /3/ Despite such criticism, the law has recognized the military's need to maintain good order and discipline through its own unique justice system. /4/

Like the military justice system, military mental health care has long had its critics. Spoofs of military medicine exist in both print and film, with widely-known examples being Kurt Vonnegut, Jr.'s novel, *Catch 22* /5/ and the movie *M\*A\*S\*H*. /6/ The question *Jaffee* raises is whether it is time for the military to reconsider its opposition to psychotherapy confidentiality. This article will begin with a discussion of *Jaffee*, followed by a discussion of military case law touching on the privilege, and then an examination of military mental health care. Finally, this article will answer the question whether the military should continue to resist the privilege or adopt a solution recognizing the privilege in a way which accommodates the military's unique needs.

## II. THE JAFFEE DECISION

### A. The Trial

The Petitioner, Carrie Jaffee, filed suit on behalf of her deceased son, Ricky Allen, Sr., against Officer Mary Lu Redmond and her employer, the Village of Hoffman Estates, Illinois. The suit was brought in U.S. District Court for the Northern District of Illinois, Eastern Division, as a result of acts occurring on 27 June 1991. The Petitioner's claim was twofold. The first allegation was that Officer Redmond had violated her deceased son's constitutional rights by use of excessive force, /7/ and the second claim alleged wrongful death under Illinois law. /8/ On that day, Officer Redmond responded to a "fight in progress" call at the Grand Canyon Estates apartment complex in the Village of Hoffman Estates. When she arrived, she was met by two sisters of the deceased. While running to Officer Redmond's car, they shouted to her that someone had been stabbed in one of the apartments. The facts regarding what happened next were disputed at trial.

Redmond testified that she called for back-up and an ambulance and then walked towards the apartment building. Before she got there, though, several men ran out of the building, one waving a pipe. Redmond testified that the men ignored her order to get on the ground, and she drew her revolver. She then testified that two more men ran out of the building, one chasing the other with a butcher knife. The man with the knife also ignored her repeated orders to drop the weapon. Redmond testified that she shot the pursuing man just before he was about to plunge the knife into the back of the pursued man. /9/ That man, Ricky Allen, died at the scene. Redmond testified that people "'came pouring out of the buildings,' and a threatening confrontation between her and the crowd ensued." /10/ The facts as related in court portrayed a racially hostile environment between Redmond, a Caucasian police officer, and those involved, mostly all African Americans. /11/ At trial, petitioner called witnesses (relatives of

Allen's, /12/ including Allen's sisters who met Officer Redmond in the parking lot) /13/ who testified that Officer Redmond drew her weapon before getting out of her car and that Allen was not armed when he came out of the building. /14/

During discovery in the case, Petitioner learned that Officer Redmond received psychiatric counseling after the shooting. She had approximately 50 counseling sessions with Karen Beyer, a clinical social worker licensed by the State of Illinois, and an employee of the Village of Hoffman Estates. /15/ Respondents asserted a psychotherapist-patient privilege in response to Petitioner's requests for discovery of Beyer's notes. Although the district judge ordered the notes to be produced, respondents refused. /16/ Relying on the same privilege, Beyer and Redmond also refused to answer questions on the subject matter during depositions and while testifying at the trial. In response, the judge' initially fashioned a remedy providing that Officer Redmond could not testify as to her version of the facts." Upon reconsideration, he vacated his earlier decision and fashioned the remedy which was ultimately appealed: Officer Redmond could testify, but he would instruct the jury that they could draw an adverse inference against Respondents on the matter. /18/ The jury found for the Plaintiff on both claims, awarding \$45,000 on the federal claim and \$500,000 on the state claim. /19/

The respondents appealed the decision to the Seventh Circuit Court of Appeals /20/. On 6 April 1995, that circuit joined the Second /21/ and Sixth /22/ Circuits in their recognition of a psychotherapist-patient privilege under Fed. R. Evid. 501, and reversed the case. /23/ The Seventh Circuit stated that reason and experience compelled the decision in the case before it. The United States Supreme Court granted certiorari, /24/ and on 13 June 1996, affirmed the decision of the Seventh Circuit. /25/

## **B. The Controversy**

The issue of whether a psychotherapist-patient privilege should apply in Federal trial practice has been controversial. The Seventh Circuit noted that four other Circuits addressing the issue had declined to recognize such a privilege. /26/ Another controversial issue presented in Jaffee was, even assuming a privilege should apply, whether it should extend to social workers like Ms. Beyer. The overarching controversy was that "the public . . . has a right to every man's evidence" /27/ and that testimonial privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." /28/ On the other hand, Fed. R. Evid. 501 was drafted with flexibility in mind. /29/ The history of this rule is no less controversial than its application. Unable to reach consensus among and within the Judicial Conference Advisory Committee's nine specific rules of privilege, Congress fashioned Fed. R. Evid. 501 as a political compromise in order to get the rest of the rules passed. /30/ From there, debate spawned over Congressional intent: was it to freeze the law of privileges, or aggressively develop the law in that regard? /31/ What weight should be placed on Congress' rejection of the proposed rules? /32/ The Court's recognition of a psychotherapist-patient privilege settled much of this controversy.

## **C. The Supreme Court's Decision**

In Jaffee, the Court for the first time acknowledged that reason and experience dictated the recognition of a psychotherapist-patient privilege and that the privilege extends to social workers. In a 7-to-2 decision, Justice Stevens began his legal analysis by stating that "Rule 501 of the Federal Rules of Evidence authorizes federal courts to define new privileges by interpreting `common law principles . . . in the light of reason and experience.'" /33/ The Court also noted that Rule 501 did not freeze the law of privileges, but rather encouraged "the evolutionary development" of the law. /34/ With that foundation, Justice Stevens put forth the delicate balance required to be undertaken when considering testimonial privileges: the right to "every man's evidence" versus the greater public good advanced by the privilege, which supersedes society's search for the "truth." /35/ The issue was thus framed as whether "confidential communications between a psychotherapist and her patient `promotes sufficiently important interests to outweigh the need for probative evidence. . . ." /36/

The Court then embarked on a discussion of the important private interests at stake. Comparing the psychotherapist-patient relationship to the attorney-client and spousal privileges, the Court said that the relationship is "rooted in the imperative need for confidence and trust." /37/ The court distinguished the doctor-patient relationship in this regard, observing that a doctor can treat on the basis of objective information and tests, whereas he psychotherapy patient must be willing to make "frank and complete disclosure" /38/ on sensitive matters which may "cause embarrassment or disgrace." /39/

Turning to the necessary public benefit served by such a privilege, the Court, again drawing analogies to the attorney-client and spousal privileges, clearly stated that, "[t]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." /41/

The Court considered the possible loss of potential evidence in such cases to be modest . /42/ The Court reasoned that without such a privilege; communications of this nature would be chilled, in which case there would be no evidence to obtain. Consequently, the result on the justice process would be the same whether there exists a privilege or not. /43/

Having discussed the concept of "reason" as it applied to adoption of privileges, the Court next turned its attention to the "experience" of all 50 states and the District of Columbia. /44/ The Court observed that all have a psychotherapist-patient privilege in one way or another, and that it "[had] previously observed that the policy decisions of the states bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one." /45/ That the states' privileges were created legislatively did not trouble the Court, calling attention to a 1933 decision in which it had declared that "it is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both `reason' and `experience.'" /46/ Moreover, the Court pointed out, once legislation is passed, the opportunity for common-law development of the issue is lost, and an examination of the very privilege in Jaffee illustrated just that point. /47/ Finally, the Court noted that support for the privilege could be found in the fact that it had been proposed by the Judicial Conference Advisory Committee. /48/

Turning its attention to psychiatric treatment by social workers, the Court held that the psychotherapist-patient privilege would apply to licensed social workers in the course of psychotherapy. The Court said that "[d]rawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose. /49/

The Court declined to define the "full contours" of this new privilege." It did, however, reject the judicial balancing test created by the Seventh Circuit," stating that "the participants in the confidential conversation `must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. "' /52/

## **D. Applicability and Scope**

### **1. To Federal District Courts**

This new /53/ privilege will apply to confidential communications between psychotherapists and their patients which become an issue in federal claims being tried in the U. S. District Courts. /54/ The "split of authority" between federal trial practice and state claim litigation in the federal courts alluded to by the Supreme Court in footnote 15 has been resolved. /55/ In such cases, the Court noted that you could have a state law providing a privilege which would be controlling even in U. S. District Courts, but still not have a "federal" privilege. Now, in cases like Jaffee, where state and federal claims are tried together, there will be a privilege, at least to the extent the state recognizes one. /56/ As a result, in cases where the Department of Defense (DOD) is a litigant, such as in cases arising under the Federal Tort Claims Act, 57 HIV cases /58/ and drug and alcohol

cases,<sup>/59/</sup> the privilege will apply. However, a new "split of authority" exists for DOD because mental health practitioners have no privilege of confidentiality. /60/ So, although there is a federal privilege, there may be no "confidences" to which a rule of privilege will apply.

As an illustration, let's take the Jaffee facts and apply them to a hypothetical Air Force Security Police Officer. If the officer had gone to the Mental Health Clinic at any Air Force or Army installation, those communications would not be completely confidential." Anyone in the member's chain of command with a "need-to-know" would have access to those records, effectively destroying the confidential nature of the communication. In the military, investigators and legal personnel can readily access those records as well. /62/ Non-confidential communications are not likely to be considered privileged under any circumstance. In litigation, it is questionable whether the communications would be protected given that one codefendant (the United States, through commanders, law enforcement personnel, etc.) had unlimited access to the records of another codefendant, deeming them non-confidential, yet claiming that the communications are confidential insofar as anyone else is concerned. Rather, it's likely the United States would be estopped from determining when such a rule would be used as a shield and when it would be used as a sword. /63/ This split of authority exists solely because of the lack of confidential communications with mental health practitioners in DOD. If this situation remains unchanged, DOD is needlessly playing on an uneven field where a plaintiff may claim a valid privilege, but DOD will be unable to.

## 2. To Military Courts

The impact of Jaffee on military court-martial practice is unclear. Military courts have their own rules of evidence. /64/ The rules were promulgated by Executive Order in 1980: /65/ On the one hand, Mil. R. Evid 501(a)(4) welcomes changes recognized under Federal Rule of Evidence 501, with some qualification. Mil. R. Evid. 501(a)(4) provides:

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

....

(4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules or this Manual. /66/

On the other hand, 501(d) states: "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." /67/ Which provision controls? Is a psychotherapist a "medical officer" as that term was intended? /68/ Is a psychotherapist-patient privilege "practicable" even if we answer the previous question in the negative? These are the issues this article will now address.

## III. PRIVILEGES UNDER THE MILITARY RULES OF EVIDENCE

### A. The Military's Resistance To A Psychotherapy Privilege

The Military Rules of Evidence became effective in 1980. /69/ The Drafters' Analysis discussing Mil. R. Evid. 501 states that with respect to privileges, it was necessary to enumerate those privileges which would be recognized, rather than to adopt the approach taken by Congress in codifying Fed. R. Evid. 501. /70/ The Drafters therefore provided the "certainty and stability necessary for military justice" /71/ by taking privileges from the then-present Manual /72/ and the non-controversial proposed Federal Rules of Evidence. /73/ The Drafters allowed for the flexibility afforded the Federal Courts, however, by adopting those privileges accepted

by the Federal Courts, with some limitations-insofar as the adoption is "practicable and not contrary to or inconsistent with the code, these rules, or this Manual." /74/ Among the privileges for individuals in the 1969 Manual were the confidential communications between husband and wife, client and attorney, and penitent and clergyman. /75/ The husband-wife and attorney-client privileges were part of the 1921 /76/, 1928 /77/ and 1951 /78/ Manuals for Courts-Martial as well.

The Drafters continued a bias against a doctor-patient privilege in Mil. R. Evid. 501(d), which was also explicitly stated in the 1969 MCM. /79/ That bias, too, can be traced back to previous Manuals" and the language that the maintenance of service members' health and fitness for duty overrode any privilege. /81/ Given this language, that there exists no doctor-patient privilege in the military is quite clear. Whether the language in Mil. R. Evid. 501(d) precludes the recognition of a military psychotherapist-patient privilege, however, is another question. /82/ After all, although the Drafters did not adopt the psychotherapist-patient privilege proposed by the Advisory Committee, /83/ they similarly didn't reject that specific privilege in Mil. R. Evid. 501(d). In fact, the Drafters' Analysis, provided for purposes of discerning the intent of the Drafters, /84/ merely stated: "Rule 501(d) prevents the application of a doctor-patient privilege. Such a privilege was considered to be -totally incompatible with the clear interest of the armed forces in ensuring the health and fitness for duty of personnel. See present Manual paragraph 151c." /85/ The omission is significant because while the Joint Service Committee drew a clear distinction between doctor-patient and psychotherapist-patient privileges, the Drafters of the Military Rules did not. /86/

Following the Supreme Court's decision in Jaffee, the Joint Service Committee on Military Justice (JSC) met to discuss the impact on military practice. A conclusion was reached that "Jaffee, and its recognition of a psychotherapist-patient privilege, is not applicable to the military justice system." /87/ In a letter to all judge advocates, The Judge Advocate General, Major General Bryan G. Hawley stated that an initial review of the Jaffee decision "suggests that the decision can be distinguished from military practice," explaining that "[i]n addition to being contrary to existing rules, such as MRE 501(d), military necessities and personnel readiness make the application of Jaffee to the armed forces, impractical." /88/ It is, against this backdrop of perceived resistance against a psychotherapist-patient privilege by the military that we turn to the military cases in this area.

## **B. Military Cases And The Psychotherapy Privilege**

There have been several military appellate cases in which the concept of a psychotherapist privilege under Mil. R. Evid. 501(d) has been commented upon. However, in not one of those cases did the court have before it the issue of whether a psychotherapist-patient privilege is recognized under Mil. R. Evid. 501. Military courts have, however, addressed issues close to the question of psychotherapist patient privilege. The issues that have been before the courts fall into two broad categories: Cases in which the real privilege under consideration by the court is that of attorney-client, and cases -having to do with the absence of Article 31,<sup>89/</sup> U.C.M.J. rights.

### **1. Attorney-Client Cases**

United States v. Toledo /90/ is the leading case in this area. In that case, the accused was virtually "caught in the act" of molesting his friend's five year old daughter. /91/ The girl's father walked into her room and found her on the bed, her nightgown around her chest and her panties about her knees. /92/ The accused quickly turned his back towards the girl's father, stood in the corner, and began buckling and zipping his pants. /93/ After being thrown out the house, the accused was observed walking towards the main gate. Several hours later, he was apprehended off base, his clothing was seized, and a large semen stain was discovered on his underwear through laboratory analysis. /94/ At trial, the accused attempted to explain the stain by claiming it occurred as a result of sexual intercourse with a woman in town that night. /95/

During the rebuttal case, trial counsel called an Air Force clinical psychologist. Defense counsel objected on the ground of privilege, citing Mil. R. Evid. 706. /96/ Counsel argued that he secured the services of the psychologist for purposes of



looking into the accused's mental competency. Trial counsel replied that he wouldn't get into sanity issues, but was calling the psychologist to rebut certain portions of the accused's testimony, and as a veracity witness. The military judge allowed him to testify on those two areas. /97/ The psychologist testified that the accused never mentioned having sexual intercourse with a woman in town on the evening in question during his 10-12 hour interview regarding the alleged offenses and sexual history. /98/ He also testified, ostensibly as a veracity witness, that the accused had been less than candid during the interview. /99/

The Court of Military Appeals concluded that the admission of the psychologist's rebuttal testimony was harmless. /100/ Although not a granted issue, the Court begins a discourse on potential applicable testimonial privileges by stating in a single sentence: "The Military Rules of Evidence recognize no doctor. patient (emphasis added) privilege per se" (emphasis in original). /101/ The dicta continues to discuss defense counsel's "sanity board privilege" argument in order to dispose of a potential Mil. R. Evid. 302 privilege. /102/ Finally, the court suggests the attorney-client privilege for the accused, /103/ only to reject it as well. /104/ The Court recognized that communication to psychologists can be brought within the scope of the attorney-client privilege if they are acting as a representative of the lawyer," /105/ but that in this case, the privilege was unavailable because the accused "bypass[ed] the proper appointing authorities." /106/

In *United States v. Turner*, /107/ the Court of Military Appeals found that a forensic toxicologist assigned to provide expert assistance to the defense was "the lawyer's representative" /108/ for purposes of the attorney-client privilege, and there was "no categorical physician-patient privilege" under the Military Rules of Evidence." That is the entire discussion of Mil. R. Evid 501(4); and in that case, the expert under discussion was not a psychotherapist.

*United States v. Mansfield* is an interesting decision where statements made to a psychiatrist, cloaked with the attorney client privilege, were disclosed as a result of the accused's appeal of his murder conviction. The planned defense at trial was lack of mental responsibility. /111/ During the court-martial, however, it was discovered that the accused had made damaging admissions to one of the defense psychiatrists, and in order to keep trial counsel from discovering the admission through cross-examination, the defense counsel abandoned that defense. /112/ On appeal, the accused alleged two inconsistent theories for relief, both alleging fault on the part of his trial defense counsel. His first theory challenged that his counsel were ineffective in abandonment of the mental responsibility defense. The second theory alleged that trial defense counsel had perpetrated a fraud against the court, because they sent to potential experts a "sanitized" version of the damaging admission." /113/ The Air Force Court of Military Review ordered a limited fact-finding hearing on both allegations. /114/ During that hearing, the military judge ordered the new defense counsel, over objection, to produce both the incriminating and sanitized versions of the admission. /115/ The military judge found that no fraud had occurred, and the accused abandoned that claim on appeal. The Air Force Court of Military Review concluded, however, that counsel had been ineffective in failing to develop the mental responsibility defense, and set aside the findings. /116/

In preparation of the insanity defense for the second court-martial, the new defense counsel provided the defense psychiatrists the statements. The government was permitted, over defense objection, to cross-examine the experts on the statements and their impact on their opinions. /117/ On the subsequent appeal, the accused claimed that this was error. /118/ *Mansfield* argued that his earlier, ineffective counsel caused him to disclose these admissions in order to get the opportunity to present his mental responsibility defense, but once he got that chance, it was diminished by trial counsel's use of the evidence, /119/ In other words, but for his ineffective counsel, the statement would have remained privileged under the attorney-client privilege. The court recognized that the accused's framing of the problem created an interesting issue, /120/ but the court rejected accused's argument and concluded that since the accused provided the statements to the experts, and then called them to testify on opinions which were developed in reliance upon those statements, the attorney-client privilege was waived. /121/ On the way to this holding, the court commented, again in a single sentence, that "[t]here is no physician-patient or psychotherapist-patient privilege in federal law, including military law." /122/ This single

sentence dictum was unnecessary to resolution of the issue involved. Indeed, had there been a psychotherapist patient privilege in the Military Rules of Evidence at the time, it too would have been waived for the same reasons as the attorney-client privilege was deemed to have been waived. An accused simply cannot use any privilege as both a sword (to mount a defense) and as a shield (to preclude cross-examination thereon). /123/

As the discussion of these three cases demonstrates, there was no psychotherapist-patient privilege issue before the courts. There is no indication that this potential privilege was raised at trial or briefed on appeal, and resolution of the issues involved in no way turned on whether such a privilege existed. Moreover, none of these cases concerned patients seeking psychotherapy for diagnosis or treatment of a mental problem or disclosure of confidences in order to get help. Rather, in Mansfield, the psychotherapist was brought into the case in order to develop a defense, as was the case in Toledo. Finally, the Turner case involved a forensic toxicologist rather than a psychotherapist. Another group of cases have similarly stated that no psychotherapist privilege exists. Those cases will be discussed next.

## 2. Article 31(b) Cases

This group of cases are ones which do involve psychotherapists, and in which the Court summarily states in dicta that Mil. R. Evid. 501(d) bars recognition of a psychotherapist-patient privilege. In all of these cases, the accused argued that statements made to professionals, under circumstances where it would not be unreasonable to provide a psychotherapist-patient privilege, were inadmissible because they were obtained without Article 31 /124/ warnings. However, in none of these cases was the psychotherapist-patient privilege squarely before the court. In *United States v. Moore*, /125/ the accused went to a military hospital seeking help for depression. A week before, the accused had been served charges for molesting his ten year old daughter, and just that morning had been present at his daughter's video deposition. The disclosure was made some two and half weeks earlier. He had been ordered to have no contact with his wife at the time charges were preferred. /126/ The psychiatric nurse who discussed the accused's problems with him ultimately admitted him to the hospital as a suicide risk. /127/ She did not advise him of his rights under Article 31 before questioning him. /128/ He argued that her duty to report suspected abuse /129/ coupled with her employment at a military hospital made her an agent of law enforcement for purposes of Article 31. /130/ The court found that her questions were legitimate medical questions, not for law enforcement purposes, and were clearly outside the scope of Article 31. /131/ Accordingly, the court held that the statements were admissible. The court added: "See also Mil. R. Evid. 501(d); *United States v. Corona*, 849 F.2d 562, 566-67 (11th Cir. 1988), cert. denied, 489 U.S. 1084, 109 S.Ct. 1542, 103 L.Ed. 2d 846 (1989)." /132/ No other discussion of privileges, psychotherapist-patient or other, was made in the case. Of interest, however, is the court's citation to one Federal Circuit rejecting a psychotherapist-patient privilege when, at that time, there had been another recognizing it. /133/

Just one year earlier, the Air Force Court of Military Review specified its own issue in *United States v. Franklin*, /134/ after raising a concern whether the judge properly admitted statements made to a mental health clinician without an Article 31 warning. That case came about when the accused was stopped at a random gate check, and several bottles of Bron were found in his car trunk. /135/ The accused admitted to the security police officers that he was using the substance to treat a bad cold. He was apprehended and taken to the security police building. He was interviewed there in the presence of his first sergeant and squadron section commander, but those statements were ruled inadmissible. /136/ However, after that interview, the section commander escorted the accused to the base hospital as a result of suicidal statements he made. He was seen in the emergency room, and a referral was made to a clinical psychologist. It was the accused's admission to her that he was using Bron four to five times a day for eight months that was the subject of a defense motion to suppress. The judge ruled the statements admissible under Mil. R. Evid. 803(4). /137/

The thrust of the psychologist's questions were to determine whether the accused needed to be hospitalized, and she communicated that to him sometime during the interview." /138/ The psychologist didn't advise him of his rights, although she knew he was suspected of drug offenses, /139/ and "she knew under those circumstances, the

information she gained from the [accused] would not be confidential." /140/ She testified that mental health personnel don't normally read people their rights, but that patients are given an information sheet describing what reports will be given to the squadron when there is a referral by the commander, and that Article 31 rights may apply. /141/ Finally, she testified that she and the accused talked about whether he was suicidal, his overall mental state, and some of his perceived problems. /142/ He was not hospitalized that day, but the next day he was, after obtaining an appointment with the mental health clinician he had been previously seeing." /143/

The court held that it was satisfied that the accused's statements were admissible without a rights advisement since the questions were for a medical, rather than a law-enforcement purpose. /144/ The court began by explaining that "[t]here is, of course, no doctor-patient privilege recognized under military law. Mil. R. Evid. 501(d)." /145/ The court then turned to a discussion of the issue before it-application of Article 31 warnings requirements in cases where information is being sought for medical diagnosis or treatment purposes, "at least in emergency situations." /146/

Once again, this case illustrates the point that dicta about a rule, which is only mentioned in passing on the way to discussion of the actual issue in a case, is not binding precedent. Yet, we see it again in 1992 in *United States v. Collier*. /147/ There, the accused was charged with, inter alia, attempted murder of his wife. The accused, a major, was an anesthetist and was accused of poisoning his wife by giving her an overdose of Tylenol. /148/ At some point Mrs. Collier regained consciousness, showing the "discomforting effects of the medication," and the accused went to his hospital to get an antidote. /149/ While he was gone, she called one of the accused's colleagues for help, and was taken to the same hospital where he worked. The accused learned that she'd been hospitalized when he returned home. He thereafter made five different statements to doctors, admitted at trial over his objection. He argued at trial and on appeal that the statements were inadmissible because they were unwarned interrogations. /150/ The Court discussed each one in turn.

When the accused arrived home, he found the wife of the doctor Mrs. Collier had called baby-sitting the Collier children. He called the hospital and spoke to that doctor (a captain), asking if "they know what's going on with [Mrs. Collier]?" The captain responded that they didn't, but that the accused's wife thought the accused had poisoned her, to which he replied: "I did. I gave her Tylenol." /151/ No warnings were given. The court held that none were required because this was not an investigation, and the captain had no law enforcement or disciplinary role. /152/

The second set of admissions were also considered by the court to be voluntary, spontaneous statements. /153/ The captain the accused spoke to thought the accused might be suicidal, and told the accused's supervisor, a colonel. The accused was found at his girlfriend's house, and the colonel went to pick him up. During the drive back to the hospital, the accused made unsolicited admissions of guilt. The colonel was concerned about the accused's suicidal state.

The third group of statements occurred when the accused and his supervisor arrived at the hospital. The colonel was still concerned that the accused was suicidal, so he asked security guards to watch the accused and not let him leave. The colonel went to check on having the accused admitted to the psychiatric ward, and to check on Mrs. Collier. Mrs. Collier was worried that the accused may have given her more poison than medical personnel were aware, and the colonel went directly to the accused to ask if he had. The colonel prefaced the question with "[y]ou don't have to answer this question, but [Mrs. Collier] is very concerned that you may have given her something else that's toxic that they haven't picked up." /154/ The Air Force Court of Military Review disagreed with the military judge that there was no custody, but agreed that the presumption that the colonel, the accused's superior, was acting in a law enforcement capacity had been rebutted. /155/ Consequently, there was no duty to provide warnings, and the accused's reply that he'd given her five grams of Tylenol was admissible. /156/

The next two groups of statements were made to psychiatrists, and thus present, factually at least, a setting for a psychotherapist-patient privilege to apply. The colonel summoned two psychiatrists (captains) to admit the accused for observation. They interviewed him "solely to make a psychiatric assessment incidental to the admission." "The first question was, 'What brings you here today?'" /157/ The accused admitted his attempt to

murder his wife; providing details. The court found only a medical purpose (the accused's medical condition) for these questions, and therefore, no warnings were required. /158/ As to these questions, however, the court observed that the psychiatrists' advice to the accused that there was no confidentiality was inadequate insofar as a rights warning is concerned. In making this observation, the court inserted a footnote in which it cited to Mil. R. Evid. 501 (d) and *United States v. Toledo*. /159/

A final group of statements occurred the next day during a clinical interview. This doctor was more successful at giving a complete rights warning. /160/ Nevertheless, the court thought the point immaterial; that warnings weren't required since the doctor's motivation was medical rather than disciplinary. /161/ Clearly, this case cannot be considered precedent on the absence of a psychotherapist-patient privilege. The issue was not raised at trial, nor on appeal, /162/ and the footnote is pure dictum.

The last case "raising" Mil. R. Evid. 501(d) in an Article 31 context is *United States v. Brown*.<sup>/163/</sup> This case is somewhat of a hybrid between *Franklin*<sup>/164/</sup> and *Collier*.<sup>/165/</sup> The accused, a sergeant, was a medical technician in a hospital. Throughout the morning, her supervisor observed that she was "visibly upset" and one of the doctors on the ward told the supervisor that the accused "appeared to be high as a kite." /166/ The two asked whether she had taken medication. She angrily denied it, blaming her condition on lack of sleep due to arguments with her husband the night before. After lunch, her condition worsened. She was unable to concentrate, was upset and crying, and was unable to attend to a patient during removal of stitches. This time, the supervisor and the ward doctor took the accused outside the hospital to talk. She again denied drug use, although her speech was slurred and she staggered. /167/

At 1600, the accused was taken in a wheelchair to the emergency room. The hospital commander was notified, and upon arriving there, decided to assign the head of the psychiatry department (a colonel) to care for the accused. The hospital commander told the psychiatrist of the accused's unusual behavior, that she was suspected of abusing drugs, and that there was an ongoing internal investigation into theft and use of Demerol. /168/ There was a discussion of whether and who should advise the accused of her rights. The psychiatrist told the commander that if rights were required, the commander needed to do it, because "it wasn't his position to advise her of her rights, and he `didn't really want to be caught in the conflict of being her attending physician on the one hand and being an investigative authority on the other.'" /169/ The psychiatrist admitted her to the psychiatric ward and did not advise her of her rights. Both the psychiatrist and a nurse on the ward asked the accused what drugs she had taken and the quantity. /170/ They testified that they asked her only those questions they viewed as medically necessary.

On appeal, the accused argued that her case was distinguishable from others before it in that her caregivers were not motivated solely by her medical needs, but, presumably, by law enforcement purposes on behalf of the hospital commander as well. The court disagreed, finding that there was clearly a medical purpose being advanced. The court noted that the psychiatrist went to great lengths to keep the situation a medical one by stopping her when her admissions went beyond what he needed medically, and refusing to allow the Office of Special Investigations agents to question her that evening. /171/

The accused also asked the Court of Military Review to create a "special physician-patient privilege rule to cover her situation `as an intoxicated, unwilling patient of the military medical system.'" /172/ The court said it was without authority to do so, that Congress entrusted the President with this power. /173/ While that is not altogether correct, /174/ her claim to be an "unwilling participant in the medical system" would appear, at least on these facts, to be somewhat inconsistent with the picture of a patient in need of mental help, baring her soul and disclosing confidences to get that help, such that a psychotherapist-patient privilege should even have been considered in the case.

There are two other cases similar in fact patterns to *Moore*,<sup>/175/</sup> which deserve discussion: *United States v. Moreno*<sup>/176/</sup> and *United States v. Raymond*. /177/ Although no mention of psychotherapist privilege was raised

in either case, they merit comment because there is a thread of concern over an inconsistency in reasoning, logically and legally. The inconsistency being that mental health/social services personnel are relieved of the requirement to advise those suspected of offenses of their rights because they are not acting on a law enforcement or disciplinary purpose<sup>/178/</sup> on one hand; versus the duty that mental health/social services personnel have to make reports and divulge confidences which arguably makes them agents of the military for purposes of rights advisements on the other.

In *Moreno*, the accused's 14 year old step-son disclosed to his mother that the accused had been sexually abusing him. The accused's wife reported the matter to the military police, and the accused was thereafter ordered to the barracks. That night, the accused attempted suicide. /179/ Several days later, the victim met with a State of Texas Department of Human Services (DHS) employee, Ms. Cirks. She then called the base Social Work Services office and asked them to schedule an appointment with the accused for her. Upon request of the accused, the place of the meeting was changed to her office rather than at the base. By this time, the Criminal Investigation Division's (CID) investigation was concluded and charges had been preferred against the accused. Ms. Cirks had not spoken with the prosecution or the CID agent. Ms. Cirks introduced herself as an employee of Texas DHS and stated she needed to talk with him about the boy's allegations of sexual abuse. /180/ She did not advise him of his rights, but did tell him that she could be compelled to testify. She stated that if he made good progress in a rehabilitation program, her office would recommend probation. She explained that they were usually influential in that regard, but that she was uncertain about military procedures. /181/ She urged the accused to admit his conduct as a "first step" to his recovery. /182/ On appeal, the accused alleged that his fifth and sixth amendment rights, and his rights under Article 31 were violated by Ms. Cirks' failure to advise him of his rights.

The Court readily disposed of the fifth amendment issue on the basis that he was not in custody and that Ms. Cirks made no threats, inducements or promises. /183/ As for the accused's Article 31 rights, the court ruled that Ms. Cirks was under no duty to advise, /184/ since she was not an agent of military investigators, nor did her investigation merge with that of a military investigation. /185/ The court reasoned that she was acting independently because she didn't communicate with the accused until after the CID investigation was closed; she did not coordinate her meeting with the military police or trial counsel; her actions were consistent with that of a social worker (assigning him to a counseling program, and becoming the family caseworker; and she was acting pursuant to her duties under Texas law. /186/

As to the Sixth Amendment issue, the court noted that only the "prosecutorial forces of organized society' and their minions . . . are barred from initiating contact" /187/ with the accused after the adversarial process has begun. Finding an absence of sixth amendment - cases on whether social workers fall within this definition, the court turned to two Texas decisions analyzing the issue under the fifth amendment, where the issue turned on whether the non-law enforcement person was functioning as part of the prosecution team. /188/ The court reasoned that if a person is not acting as part of the prosecution team for fifth amendment purposes, then he is not a member of prosecutorial forces of an organized society for sixth amendment purposes; thus, contact by such a person does not violate the sixth amendment. The court then concluded that, as Ms. Cirks was not an agent of the military for purposes of Article 31, she was not part of the prosecution team, so she in turn could not be a member of the prosecutorial forces of an organized society. Consequently, she did not violate the accused's sixth amendment rights.

Chief Judge Sullivan dissented, finding a violation of the accused's sixth amendment rights. He pointed out the court's earlier remand order in this case, where the court concluded that Ms. Cirks "actively solicited appellant's confession and subsequently reported it to trial counsel pursuant to an agreement between the State and the local command authorities." /189/ Judge Sullivan said: "This order clearly implies that Ms. Cirks was an agent of law enforcement because of her state agency's agreement to seek out and report information concerning possible child abuse on base to military authorities." /190/ He reasoned that she was a member of the prosecution team because the accused was interviewed by Ms. Cirks as part of a child abuse investigation initiated by the Army CID; their working relationship required the sharing of information; she was working in the interests of law enforcement as much as for protection of children; and she was not a

private citizen or disinterested state official, but rather a "state crimes investigator cooperating with military law enforcement agents in accordance with state statutes and prearranged agreement. /191/

In *Raymond*,<sup>/192/</sup> the persons involved were a civilian base psychiatric social worker, acting under an Army regulation<sup>/193/</sup> and the accused, under investigation for child molestation. The issue again was whether there was a duty to advise the accused of his rights under Article 31.<sup>/194/</sup> In this case, the accused was interviewed by a CID agent, SA Knor, and declined to make a statement. SA Knor suggested psychological counseling when she observed that he was withdrawn and subdued, and the accused agreed. Subsequently, SA Knor searched the accused's room, and finding a letter and a poem concerning suicide written by the accused, she went to the commander with her concerns about the accused's mental health. The commander expedited a referral and scheduled an appointment for the accused. /195/

However, the accused went to the hospital on his own without an appointment and was seen by Mr. Winston, who had no previous communications regarding the accused with anyone. Mr. Winston was unaware that the accused had been interviewed by CID and refused to make a statement, although he noticed that the accused was escorted to the clinic, the accused mentioned that he was facing charges and that either someone from the CID would be contacting him or he should contact someone at the CID. Mr. Winston testified he never had an intention to contact the CID.<sup>/196/</sup>

Against this backdrop, the court discussed the Army's Family Advocacy Program. /197/ The court reasoned that this was a personnel rather than a law enforcement regulation since it establishes a community service program. /198/ The court said the policy of the regulation is to prevent, identify, report, investigate and treat spouse and child abuse; mere recognition of a commander's authority to take disciplinary or administrative action is not an establishment of criminal investigative policy. Noted was an objective to treat all family members so the family can be restored to a healthy state and that the Family Advocacy Program Manager is required to be a social services professional.<sup>/199/</sup> Finally, the court said the regulation provides that every soldier is duty bound to report child abuse to an emergency room or to the military police, and that family advocates are no different than teachers and other health care professionals required to report abuse under state statutes. The court then held, as a matter of law, that Article 31 does not apply to health care professionals engaged in patient treatment, and Mr. Winston, in his capacity as a social worker under Army Regulation 608-18, was not acting as an investigative agent for law enforcement.<sup>/200/</sup>

Judge Wiss concurred in the result only. He found that SA Knor suggested counseling to the accused out of sincere concern for his well-being, and not as an investigative tool. Based on that, Judge Wiss disagreed with the court's broad holding, reasoning that it was

[u]nnecessary under these circumstances, to address the broad question flowing from *United States v. Moreno*, 36 M.J. 107 (CMA 1992), that touches upon whether a civilian Army employee/counselor should be viewed as a matter of law as a part of a criminal investigation. That question would arise under facts that suggest, more than those in this case do: 1) that the CID used the counselor in that sense or 2) either that the counselor knew he had a regulatory duty to report the substance of a patient's conversations with him or in fact did report the substance of that conversation pursuant to such a regulatory duty.<sup>/201/</sup>

Judge Wiss' examination of the facts allowed him to concur in the result because he found that the accused indicated to SA Knor that *he wanted* mental health counseling; although Mr. Winston assumed that the accused was command-referred and was told by the accused that he was facing charges, he never spoke to the command before or after his session with the accused; and he didn't talk to CID before he met with the accused and had no intention of calling CIID afterwards; and finally, when SA Knor called Mr. Winston about a week later, she didn't reveal that she had seen the accused and suggested the commander referral; she just asked what the accused said.<sup>/202/</sup>

He parted company with the majority because he was uncomfortable with the conclusion as a matter of law that the regulation in question was not a law enforcement regulation. Although recognizing that it isn't a purely law enforcement regulation because of its multi-disciplinary approach, Judge Wiss highlighted several "clear-cut law enforcement concerns and responsibilities throughout the provisions of this regulation." /203/ The troubling aspect

of whether these professionals are by virtue of the reporting requirement "adjuncts" of law enforcement is that the reporting requirement co-exists with the absence of an evidentiary privilege which can be a way to circumvent Article 31 when the person is a suspect and a patient.<sup>/204/</sup>

I must acknowledge, however, that I am troubled by the combination of a reporting requirement and the absence of an evidentiary privilege.... [I] believe it is entirely logical to argue under certain circumstances that the Government--through interaction of two provisions of law that are entirely within its power to effect--has improperly undermined Article 31. /205/

Chief Judge Sullivan dissented. He concluded as a matter of law that Mr. Winston was acting as an agent of law enforcement.<sup>/206/</sup> He reasoned that, unlike Moore,<sup>/207/</sup> there was in effect a regulation establishing an agency relationship at the time of the interview, directing him to report.<sup>/208/</sup> Unlike *Moreno*,<sup>/209/</sup> this employee was not a civilian acting pursuant to a state mandate, but was acting pursuant to an Army regulation.<sup>/210/</sup> Judge Sullivan noted that in *United States v. Quillen*,<sup>/211/</sup> the court found that a civilian detective's employment relationship to the military and her role in military investigations to be such that Article 31 warnings were required. Consequently, the holdings of *Moreno*, *Quillen*, and *Moore* caused him to dissent.<sup>/212/</sup>

These opinions are historically analogous to that of Judge Duncan's in *United States v. Johnson*,<sup>/213/</sup> Concurring with the majority in result only, Court of Military Appeals Judge Duncan was troubled by a similar compromising effect government rules had on the accused. His opinion and the presence of another federal law resolving the problem for civilian accuseds, were instrumental in bringing a change to the military rules of evidence.<sup>/214/</sup> In *Johnson*, the accused, charged with murder, sought the advice of a civilian psychiatrist to assist in the preparation and presentation of his insanity defense. Civilian expert assistance was desired because there was no provision for keeping statements made by a criminal accused to a sanity board confidential. In fact, advisement of Article 31 rights was required by the sanity board. /215/ Judge Duncan observed the two unsatisfactory alternatives from which an accused could choose: Pursuing a defense of insanity, and risking admission of statements made in the course of that pursuit on the one hand; or remaining silent and foregoing the exploration of the defense on the other.<sup>/216/</sup> In this case, the military judge fashioned a novel order. The substance of the statements made by the accused was not to be disclosed to trial counsel, and the court would "sanitize" the board's report, with only the "appropriate portions" given to the government.<sup>/217/</sup> Judge Duncan, while applauding the military judge's sensitivity on this issue, questioned the authority of the judge to issue such an order, and cautioned that such judicial discretion is uncertain. /218/ He observed that Congress solved this problem for litigants by statute<sup>/219/</sup> and "would hold that in order to comport with due process of law no statement made during such an examination shall be admitted in evidence against the accused concerning his guilt."<sup>/220/</sup> The Drafters of the Military Rules of Evidence corrected this dilemma with Military Rule of Evidence 302.<sup>/221/</sup>

That a criminal accused would be forced to make such choices seems unconscionable to military practitioners today. Will it be another 25 or so years before there is a change in the military rules of evidence on the issue of psychotherapist-patient privilege? Having discussed the cases which might be raised as a "bar" to the development of a psychotherapist-patient privilege under the military rules of evidence, we will now turn to cases which might open the door to the privilege, Military Rule of Evidence 501(a)(4).

## **IV. MILITARY RECOGNITION OF A PSYCHOTHERAPIST PRIVILEGE**

### **A. MRE 501(a)(4) and Recognition of *Jaffee***

Military Rule of Evidence 501(a) provides that privileges may not be claimed, except as required by or provided for in:

(4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to 501 of the Federal Rules of Evidence insofar as the application of such

principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules or this manual.<sup>/222/</sup>

Of course, a psychotherapist-privilege now exists under Federal Rule of Evidence 501 as a result of *Jaffee*. The Supreme Court was not at all troubled that the development of this privilege was not "at common law." Should that make a difference under the military rule? Clearly not. The drafters of the military rules of evidence intended Section V of the rules to be responsive to changes applicable in federal courts, and 501(a)(4) so provides. The language limiting *such* application was a carryover from the 1969 Manual.<sup>/223/</sup> We've already discussed that case law and the history of the rule do not appear to be such that recognition of a psychotherapist-patient privilege would be inconsistent with the code, the military rules of evidence or the Manual for Courts-Martial.<sup>/224/</sup>

The Court of Appeals for the Armed Forces has not had the issue calling for interpretation of Military Rule of Evidence 501(a)(4) squarely before them. In *United States v. Miller*,<sup>/225/</sup> a case factually similar to *Moore*,<sup>/226/</sup> *Moreno*,<sup>/227/</sup> and *Raymond*,<sup>/228/</sup> the Court of Military Appeals ruled on the basis of the accused's alternate theory (violation of Article 31), virtually ignoring the privilege claim the accused attempted to raise under Mil. R. Evid. 501(a)(4), most probably because the Navy-Marine Court of Military Review found the accused's statements to the state child protective services social worker and the state court-appointed psychologist to be harmless, and because the accused had no standing to claim such a privilege.<sup>/229/</sup> In *United States v. Smith*,<sup>/230/</sup> the Court of Military Appeals concurred with the trial judge's finding that the accused had waived any spousal confidential communication privilege claim she may have had when she testified about the matters contained in the purported confidential communication.<sup>/231/</sup> The court said that application of waiver principles made it unnecessary to decide the issue on the basis of the "crime-fraud" exception to the privilege, as the Air Force Court had, relying on Mil. R. Evid. 501(a)(4).<sup>/232/</sup> The Army and Air Force Courts of Military Review have relied on Mil. R. Evid. 501(a)(4) to bring into military practice federal privilege law. In each case, the question was whether Mil. R. Evid. 501(a)(4) could support the federal "crime-fraud" or "joint criminal venture" exception to the spousal privilege. The Army had the first opportunity to address the issue in *U.S. v. Martel*<sup>/233/</sup> In that case, the accused was charged with larceny of money from the noncommissioned officers' club, and housebreaking the same, which was done in order to commit the larceny. The issue of privilege arose because the accused told his wife of his scheme before he executed his plan and then made certain communicative "acts" immediately after accomplishing his mission.<sup>/234/</sup> The accused's wife accompanied him to the dumpster, where she threw away his clothes and tool bag, items he feared would evidence his crimes.<sup>/235/</sup> The court discussed the confidential communication privilege,<sup>/236/</sup> distinguishing confidences from acts, and between mere acts and "communicative" acts.<sup>/237/</sup> The court found that several of the accused's statements and acts fell within the confidential communication privilege. The critical issue in this case with respect to Mil. R. Evid. 501(a)(4) was the application of the joint criminal venture exception to the act of dumping the evidence.

The court started its entire analysis by noting that Mil. R. Evid 501(a)(4) provides for application of federal law, provided its practicable and not inconsistent with military practice.<sup>/238/</sup> The court reasoned that this rule was necessary and created because the "law regarding the various privileges was unsettled"<sup>/239/</sup> when the military rules were enacted, and

Mil. R. Evid 501(a)(4) vests military courts with substantial authority to resolve inconsistencies and deficiencies in the rules of evidence pertaining to privileges by applying principles of common law. While this cannot be an aleatoric process, this Court clearly is empowered to apply one principle of federal common law to the exclusion of another. Accordingly, we will attempt to resolve any deficiencies or ambiguities found in M.R.E. 504(a) by interpreting and applying those federal common law principles which seem, in the light of our reason and experience, most compatible with the unique needs of military due process.<sup>/240/</sup>



The court never had need to make use of Mil. R. Evid. 501(a)(4). It resolved the issue against the accused based on the fact that 1) driving his wife to the dumpster was not privileged because it was not a communicative act; 2) his wife's dumping of the evidence was not privileged because it was not a communicative act; and 3) these "acts" were made publicly.<sup>/241/</sup> The court went on to find that the spouses had engaged in a joint criminal venture when they embarked on the trip to dispose of the evidence, and used that finding, unnecessarily, to conclude that the "joint participant" exception applies to the spousal privilege under military law.<sup>/242/</sup> The rationale of the court was that of "balancing the need for truth in criminal trials against the importance of the policy behind M.R.E. 504(b) [and] in light of reason and experience.. ."<sup>/243/</sup>

The same court criticized itself nine years later in *United States v. Archuleta*.<sup>/244/</sup> In that case, the accused and his wife were caught via video surveillance stealing compact discs, videos, and electronic equipment from the Base Exchange where the wife worked. She testified at trial that she was a lone thief, and the accused was unaware that she had not paid for things she gave him to take out of the store. She had made an earlier inconsistent statement when apprehended, though, in which she admitted that the accused had known of her misconduct, and that he replied: "it was OK just as long as [you don't] get caught."<sup>/245/</sup> The defense objected to the admission of this statement on the basis of privilege under Mil. R. Evid. 504(b); the judge overruled the objection, and the government used it to establish the accused's joint participation in the thefts. Government appellate counsel defended the judge's ruling, relying on *Martel*.<sup>/246/</sup> The Court readily pointed out that the holding in *Martel* was based on the nonconfidential nature of the acts, and went on to "question the validity of the dicta in *Martel* discussing the joint criminal venture exception to confidential marital communications."<sup>/247/</sup>

The *Archuleta* court continued its criticism of *Martel* by acknowledging that Mil. R. Evid. 501(a)(4) allows principles of federal law to support a *claim* of privilege, but not a federal common law exception to a "statutory" privilege.<sup>/248/</sup> The court found that analyzing spousal privileges in military practice is different than in federal practice, because the rules and exceptions are enumerated. The court said: "[T]here is no basis in the provisions of Mil. R. Evid. 504(b) or its listed exceptions to limit its applicability solely to confidential communications made during a marriage that are not part of a joint venture in illegal activity."<sup>/249/</sup>

As discussed above, the Air Force in *United States v. Smith*,<sup>/250/</sup> a decision before *Archuleta*, held that an accused's letter to her husband, in which she asks him to testify in support of her defense, was admissible as part of the "crime-fraud" exception to the confidential communication privilege. The Air Force court, relying on the "well-reasoned opinion"<sup>/251/</sup> in *Martel*, concluded that the federal exception was appropriate. The court's rationale in *Smith* was that communications in which a spouse engages in joint criminal misconduct to effect a fraud on the court should not be protected.<sup>/252/</sup> While the Court of Military Appeals side-stepped the issue, it was not overlooked by Senior Judge Everett, who disagreed with the Court.<sup>/253/</sup>

Senior Judge Everett's point was that common law exceptions to common law privileges (under the Federal rules) cannot be used to supersede the rule of privilege set out in the Manual.<sup>/254/</sup> His rationale was that a *claim* of privilege can be raised in reliance on the federal common law through Mil. R. Evid. 501(a)(4), and the drafters intended this flexibility in our rules as to claims of privilege. But the drafters did not intend such flexibility with respect to exceptions or limitations to the military privileges because to do so would be inconsistent with our rules, and Mil. R. Evid. 501(a)(4) limits application of federal law to those which are "not contrary to or inconsistent with ... these rules :..."<sup>/255/</sup>

Under this analysis, application of *Jaffee* under Mil. R. Evid. 501(a)(4) would be entirely appropriate. First, precedent, rather than dicta, has clearly been established in the Air Force for incorporation of federal privilege law into the military rules through Mil. R. Evid. 501(a)(4).<sup>/256/</sup> Secondly, the Air Force Court of Military Review has gone so far as to rely on Mil. R. Evid. 501(a)(4) to incorporate a rule clearly contrary to and inconsistent with an enumerated rule of privilege.<sup>/257/</sup> A military judge faced with the issue of whether to recognize a psychotherapist-patient privilege would have a solid basis when applying Mil. R. Evid. 501(a)(4) to incorporate that claim of privilege. Whether such an application is inconsistent with our rules, specifically Mil. R. Evid. 501(d), can be dismissed

in light of the earlier discussion that no modern precedent has been established interpreting Mil. R. Evid 501(4) that way; and in the absence of such interpretation, the Supreme Court's distinction between doctors and psychotherapists becomes an argument in support of a psychotherapist-patient privilege, rather than an argument against it. Finally, an argument that recognition of a psychotherapist-patient privilege is impracticable with military practice is not well-supported. As previously mentioned, such an argument is a policy argument at this point, and is mere persuasive authority, at best. Also, we can look at other areas of the law to *establish the practicability* and thus, the implementation of a psychotherapist-patient privilege.

## B. Military Privilege And "Quasi-Privilege" Rules

The support given other privileges in both the military rules of evidence and such "quasi-privileges" as can be found in various military regulations support the adoption of a psychotherapist-patient privilege in the military. That Congress and the military departments have seen fit to carve out exceptions concerning the information commanders may access in matters involving religion, alcohol and drug abuse, AIDS, and various other mental health issues, show that concerns such as privacy and encouragement of health can be more important than obtaining evidence in a criminal case. The fact that these "exceptions" exist without an impairment of military readiness demonstrates that there is room for an accommodation of both the military's legitimate "need to know" and the individual's need for confidentiality in psychotherapy. Several important concepts highlighted by the Supreme Court in *Jaffee* are evident in the privileges and quasi-privileges discussed below--the recognition that certain goals are more important than obtaining evidence, that confidentiality is essential to achieving these goals and that in each, the privilege has been fashioned to encourage the attainment of the desired goal, and no more.

### 1. Military Rule of Evidence 503

Military Rule of Evidence 503 provides that confidential communications made as either a formal act of religion or a matter of conscience to clergymen or their assistants are privileged.<sup>/258/</sup> Additional requirements for a claim of privilege to prevail under the rule are that the statements must have been made to a minister, priest, rabbi, chaplain or other similar functionary of a religious organization, or one reasonably believed by the penitent to be; and they must be intended to be 'confidential.'<sup>/259/</sup> Military Rule of Evidence 503 was taken from proposed Federal Rule of Evidence 506 /260/ but was first recognized in military practice in 1951. /261/ Encouraging individuals to communicate with their clergy has long been recognized as a publicly desirable goal, though it was not recognized under common law.<sup>/262/</sup> The religious privilege provided by NO. R. Evid. 503 "most closely resembles the intimate and personal relationship present in the psychotherapeutic relationship. Indeed, many clergy and their assistants act as secular quasi-psychotherapists part of the time in counseling soldiers. /263/ The leading case on this privilege is *United States v. Moreno*.<sup>/264/</sup>

In *Moreno*, the accused shot his girlfriend to death. About an hour later, he went to the chapel seeking a priest<sup>/265/</sup> Being advised that no priest was on duty that day, he went to the mental health clinic, asked to speak to a therapist, and was given an appointment for two days later. He then went to another chapel and spoke to Chaplain George, a Baptist minister. The first comment from the accused was that he thought he was having a nervous breakdown, and after being invited in, announced: "I've sinned. I've hurt somebody real bad. /266/ Upon confirming that the woman was dead, the Chaplain told the accused he would have to call the police, to which the accused consented. The accused declined to make a statement. The chaplain was interviewed and disclosed everything the accused had told him, without consent. These disclosures included the accused's admission that he was really mad before he shot the woman. The judge overruled the defense objection to testimony by the chaplain, finding that the accused had used the chaplain as a vehicle to surrender and, therefore, intended disclosure of the conversation.

The Army Court of Military Review set aside the accused's conviction, finding that all three elements of the clergy-penitent privilege had been met. /267/ The Court found that the accused's initial purpose in seeking a

chaplain was to receive spiritual consolation, and his later willingness to surrender was insufficient to indicate an intent on the accused's part to consent to disclosure of the confidences.<sup>/268/</sup>

The Court began its analysis with recognition that this privilege is a creature of statute, non-existent at common law; but that it had "received almost universal recognition . . . ." /269/ The court then recognized the balance that privileges impose upon the justice system in general, and in the case of this specific privilege, the "[a]ccommodation between the public's right to evidence and the individual's need to be able to speak with a spiritual counselor, in absolute confidence, [to] disclose the wrongs done or evils thought and receive spiritual absolution, consolation or guidance in return." /270/

In 1988, the Court of Appeals observed that:

[m]ilitary law is not insensitive to the needs of service members for chaplains and spiritual guidance . . . The Supreme Court has said the "privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return." /271/

The military recognized before the Advisory Committee the need to protect confidences given to a clergyman. The development of the military privilege is generally consistent with the development of state statutes on this privilege. /272/

## *2. Limited Use Regulations*

There are a number of military regulations which provide a limited form of confidentiality to those who, it is recognized, would otherwise not disclose certain information or not take advantage of programs designed to encourage certain types of behavior. The regulations are in effect to support military alcohol and drug abuse programs, HIV-positive and related public health threat programs, and certain mental health programs.

### *Alcohol and Drug Abuse Programs*

Air Force Instructions (hereinafter AFIs or AFI) provide that limited use may be made of a military member's voluntary, self-disclosure of drug use or possession.<sup>/273/</sup> Specifically, AFI 36-2701, paragraph 5.5.1.1.2, provides that voluntary disclosure may not be used against a military member in a Uniform Code of Military Justice action,<sup>/274/</sup> or to characterize the service of the member in an administrative discharge action.<sup>/275/</sup> Army Regulation (hereinafter AR) 600-85 provides the same protection to soldiers.<sup>/276/</sup> The Air Force requires a voluntary disclosure which specifically excludes self-referrals after apprehension, initiation of investigation for drug abuse, selection for urine testing, notice of administrative separation for drug abuse, or entry into a substance abuse rehabilitation program. /277/ The purpose of such programs has been to facilitate identification of substance abusers, and treatment and rehabilitation of those who desire it and demonstrate the potential for it.<sup>/278/</sup>

This limited use policy will not prevent disclosure of illegal acts to proper authorities where such acts "could have an adverse impact on the unit mission, national security or the health or welfare of others." /279/ It also does not give "immunity from present or future use, possession, or other illegal acts concerning drugs and alcohol." /280/ Finally, the program does not prevent psychological investigation of drug or alcohol use for security clearances.<sup>/281/</sup> This is because the grant of a security clearance is considered a privilege /282/ and those who do not wish to place their drug or alcohol treatment under *scrutiny* need not apply for a clearance. Those who do apply are asked to sign a release form allowing the particular hiring agency to obtain access to medical records, specifically including alcohol and drug abuse treatment records. These releases also allow military alcohol and drug counselors to talk to investigators about the individual's treatment.<sup>/283/</sup>

As a result of such policy decisions, admissibility of such evidence is limited in courts-martial.<sup>/284/</sup> The courts have guarded this "privilege." The first case to interpret this policy was *United States v. Fenyo*.<sup>/285/</sup> In that case, the court held that neither the drug abuse records nor testimony about their contents could be admitted, without the accused's permission, to rebut opinion evidence on the accused's potential for rehabilitation.<sup>/286/</sup> In *United States v. Cruzado Rodrigues*,<sup>/287/</sup> in an opinion issued three days before the Military Rules of Evidence were effective, the court observed that the then-current Air Force regulation<sup>/288/</sup> prohibited, as a matter of policy, military judges from ordering the production of drug and alcohol abuse records, although the statute<sup>/289/</sup> would permit it. The court found error where the military judge admitted a form discussing confidential information regarding the accused's drug abuse which was part of an Unfavorable Information File.<sup>/290/</sup> In *United States v. Cottle*,<sup>/291/</sup> a case tried three days before the Military Rules of Evidence were effective, the Air Force Court of Military Review held that a military judge had again committed error when he admitted a letter of reprimand which addressed the accused's participation in a drug rehabilitation program.<sup>/292/</sup>

Interestingly, though, was a footnote which observed that, "[s]ince 1 September 1980, privileges created by Air Force Regulation not stemming from sources enumerated in the four subparagraphs of Rule 501(a) are contrary to the intent of Executive Order 12198 and the corresponding Rules of the Court of Military Appeals." <sup>/293/</sup>

Nevertheless, in *United States v. Schmenk*,<sup>/294/</sup> the first reported case on the issue tried after the implementation of the Military Rules of Evidence, the Air Force Court of Military Review observed that the military judge had correctly rejected evidence of the accused's participation in a drug rehabilitation program in the court-martial, but it was proper for the convening authority to consider the information before acting on the accused's case.<sup>/295/</sup> Judge Miller dissented, disagreeing with the majority's interpretation of the regulation permitting the convening authority to have access to "confidential and privileged matters during his consideration of clemency appropriateness."<sup>/296/</sup> However, he stated that, effective 30 days from the date of his holding, he would not recognize a claim of privilege on the basis of the regulation, given that there is no support for this privilege under the new Military Rules of Evidence.<sup>/297/</sup> That was not done, and in *United States v. Jones*,<sup>/298/</sup> Judge Miller dissented again, this time in a case where the majority concluded that drug abuse information could be examined by the convening authority before making his decision on disposition of charges.<sup>/299/</sup> He argued that the government was estopped from denying the privilege, although it exists "in contravention of Rule 501 of the Military Rules of Evidence."<sup>/300/</sup>

Judge Miller wrote a concurring opinion in *United States v. Broady*,<sup>/301/</sup> in which he analyzed from an historical perspective the Department of Defense's Drug Identification and Treatment Program, Department of Defense Directives on this issue, and AFR 30-2.<sup>/302/</sup> He concluded that he would nullify the operative provision of the Air Force regulation which privileged the accused's admissions of drug use during the course of emergency medical treatment initiated and requested by the accused. The basis for his decision was because the regulation conflicted with the current Department of Defense Directives limiting the circumstances under which the accused is protected.<sup>/303/</sup>

The Army, in *United States v. Howes*,<sup>/304/</sup> set aside a sentence based on ineffective assistance of counsel in a guilty plea case of possession with intent to distribute marijuana. Trial counsel called the accused's company commander to testify that the accused had been enrolled in and successfully completed the Alcohol and Drug Abuse Prevention and Control Program (hereinafter ADAPCP) to rebut the accused's unsworn statement that he hadn't been in trouble before. Defense counsel did not object then, or to trial counsel's argument referencing the accused's participation in the ADAPCP program. The court discussed the statute and congressional intent which required confidentiality in drug abuse rehabilitation programs to combat a national drug program,<sup>/305/</sup> and observed that the Army regulation was developed pursuant to a Department of Defense directive to establish similar programs.<sup>/306/</sup> The court also observed that 42 U.S.C. §§ 290ee-3(a) has been held to create a doctor-patient privilege to enforce the confidentiality provisions,<sup>/307/</sup> but declined to decide whether section 290ee-3(a) is "[a]n Act of Congress applicable to trials by courts-martial."<sup>/308/</sup>

Evidently fearful that it opined greater protection in *Howes* than it was now prepared to *afford*, the Army Court of Military Review readily distinguished *Howes* in *United States v. Johnson*,<sup>/309/</sup> affirming a sentence where trial counsel called the accused's company commander to testify about the accused's failure in the ADAPCP. The court first pointed out that the "Limited Use Policy" was in effect at the time, whereas *Howes* was based on an earlier version of AR 600-85, "which prescribed the Department of the Army's exemption policy."<sup>/310/</sup> Secondly, the court observed that this testimony, relevant to the accused's potential for rehabilitation, complied with 42 U.S.C. sections 290dd-3 and 290ee-3, because it did not disclose the accused's patient records, and complied with AR 600-85 for the same reasons.<sup>/311/</sup> The court noted in footnote 1 that the protections of sections 290dd-3 and 290ee-3 don't apply "to the `interchange of records' within the Armed Forces."<sup>/312/</sup> The court failed to explain how the statute's protection against "disclosure of `records of the identity, diagnosis, prognosis, or treatment of any patient' in substance abuse programs"<sup>/313/</sup> was not violated here, because the commander was obviously detailing information he obtained from sources associated with the ADAPCP, and failure in the program certainly relates to identity, prognosis and treatment.

Meanwhile, the Air Force had begun to amend its regulations to allow for admissibility of drug and alcohol records in rebuttal.<sup>/314/</sup> The Court of Military Appeals has, consistent with those regulations, upheld admissibility of drug rehabilitation evidence in those circumstances?<sup>/315/</sup> While the Army and Air Force regulatory provisions may have limited the breadth of the privilege, it nonetheless still exists contrary to the Military Rules of Evidence.

### HIV Programs

To encourage individuals who test positive for HIV to obtain treatment and continue to be contributing members of the military, the military adopted an aggressive AIDS program soon after identification of the disease.<sup>/316/</sup> The military's program has been viewed as among the most successful public health measures ever mounted.<sup>/317/</sup> Nonetheless, the program's mandatory testing requirements for active duty service members<sup>/318/</sup> has caused some concern about the concomitant loss of privacy and autonomy.<sup>/319/</sup> In response to such concerns, Congress passed legislation in 1987 establishing a limited use policy for information concerning HIV-positive individuals, which specifically included confidentiality protection.<sup>/320/</sup> The DOD implemented that statute through a memorandum.<sup>/321/</sup>

AFI 48-135 establishes the Air Force's HIV Program<sup>/322/</sup> and sets forth its limited use restrictions.<sup>/323/</sup> Specifically, AFI 48-135, paragraph A10.2.1, provides that information obtained during, or as a result of, an epidemiologic assessment interview may not be used against a member in any adverse action. Such actions are set forth as including: court-martial, line of duty determinations, nonjudicial punishment, involuntary separation (other than for medical reasons), administrative or punitive reductions-in-grade, denial of promotion, unfavorable entry in a personnel record, denial of reenlistment, or any other action considered by the Secretary of the Air Force concerned to be an adverse personnel action.<sup>/324/</sup> The limitations specifically do not preclude use of the information for rebuttal or impeachment in actions taken against the member based on independently derived information,<sup>/325/</sup> nor do they bar introduction of evidence for impeachment or rebuttal purposes in any proceeding in which evidence about such matters were first introduced by the member.<sup>/326/</sup>

Air Force Instruction 48-135 does not provide the identified HIV-positive member with confidentiality. In fact, the AFI requires that the member's commander be immediately notified of a confirmed case of infection<sup>/327/</sup> so that a "safe sex" order can be issued.<sup>/328/</sup> However, the AFI requires the order to be "securely stored to protect the member's privacy and confidentiality."<sup>/329/</sup> Beyond the commander, the information is given to others only on a need-to-know basis.<sup>/330/</sup> If the member is reassigned, 'the order is sent in a sealed envelope to the new commander and when the member leaves the service, the order is destroyed.<sup>/331/</sup> Furthermore, release of the information outside the Air Force is prohibited without the

member's consent. /3<sup>32</sup>/ Finally, the usual protection of sensitive medical information through the provisions of the Privacy Act /3<sup>33</sup>/ apply.

The purpose of these limitations has been to facilitate identification and treatment of AIDS. In general, the program follows classic public health guidelines which have been adopted by states and other federal agencies. /3<sup>34</sup>/ Basically, the theory underlying the limitations on use of this information is that the public health goals of the program outweigh the loss of that information in the criminal process.

### *Mental Health Programs*

In response to Congressional hearings into alleged misuse of the military mental health system by commanders to punish "whistle blowers" or those perceived as "problem" soldiers, Congress passed legislation in 1993 aimed at controlling commanders' authority to order involuntary psychiatric evaluations. /3<sup>35</sup>/ The law directed the military to provide a specific list of due process rights to those service members ordered to undergo psychiatric evaluation by their commanders. As a result, the Department of Defense issued a directive /3<sup>36</sup>/ to the military departments requiring them to establish procedures incorporating the Congressionally mandated controls /3<sup>37</sup>/

In the Air Force, the new procedures require a two-day waiting period between the order and the evaluation, except in emergency situations. /3<sup>38</sup>/ Members ordered for evaluation must receive written notice which sets forth: the specific reasons for the referral; the name of the mental health provider consulted about the referral; positions and telephone numbers of those who can give assistance (i.e., Area Defense Counsel, Inspector General's Office, Congressional representatives); and a list of the member's rights regarding the referral. /3<sup>39</sup>/ Military mental health providers evaluating the member must explain the difference between their therapeutic and evaluative roles. They must also justify any commitment within two work days, and provide the member written notification of the reasons for continued hospitalization. /3<sup>40</sup>/ Finally, the installation commander is required to provide a neutral and detached review officer to review any involuntary admission and to direct appropriate investigation into any indication of inappropriate activity. /3<sup>41</sup>/ The reviewer is to analyze the admission using the "least restrictive alternative" theory commonly used by civilian courts reviewing cases of the involuntarily committed. /3<sup>42</sup>/ Finally, misuse of the evaluation process as a reprisal is punishable under the UCMJ. /3<sup>43</sup>/ This oversight policy does not apply to patient self-referrals; referrals which are the function of a routine diagnostic procedure and made by a provider not assigned to the service member's command; referrals to Family Advocacy programs; /3<sup>44</sup>/ referrals to drug and alcohol programs; /3<sup>45</sup>/ referrals to mental health professionals for routine evaluations required by other regulations such as administrative separations; /3<sup>46</sup>/ referrals for sanity boards in courts-martial; /3<sup>47</sup>/ and referrals for security clearances or personnel reliability programs, required for certain duties. /3<sup>49</sup>/

One Congressional goal for these new procedures in the military mental health evaluation process was to provide greater protection to the military member. This legislation demonstrates Congressional willingness to take action in those areas it feels military action is lacking. The lesson is obvious. Congressional scrutiny into the absence of a confidentiality provision in military mental health may result in legislation over which the military has little control. /3<sup>50</sup>/

## **C. Equal Protection Arguments**

The Equal Protection clause of the Fifth and Fourteenth Amendments of the United States Constitution prohibit governmental taking of a person's life, liberty or property without due process of law. /3<sup>50</sup>/ Exactly what liberty interests are protected has long been debated. /3<sup>51</sup>/ Nonetheless, arguments can be made for constitutional protection of both an individual liberty right and an individual privacy right covering medical decision making.

### *1. Liberty rights*

Control of one's body would appear to be one of the most basic of liberty rights. In fact, freedom from physical restraint was recognized as one of the defining aspects of our nation as expressed by our Constitution.<sup>352/</sup> From that beginning, the United States Supreme Court has expanded the concept of individual liberty to include not just freedom from restraint, but also many aspects of individual self-determination.<sup>353/</sup> The Supreme Court has recently recognized that a part of self-determination is the freedom to make personal medical decisions free from governmental interference.<sup>354/</sup> The expansion of the definition of liberty to include medical decision-making must be viewed as part of the logical evolution of the uniquely American concept of personal liberty which has historically been recognized and protected.<sup>355/</sup>

Unfortunately, the extent of protection for health care self-determination has not yet been clearly defined in US law. Despite numerous cases dealing with health care decisions,<sup>356/</sup> the Supreme Court has never declared such decisions to be a "fundamental"<sup>357/</sup> constitutional right and therefore deserving of strict judicial scrutiny.<sup>358/</sup> Examples of fundamental rights include procreation,<sup>359/</sup> marriage,<sup>360/</sup> contraception,<sup>361/</sup> speech,<sup>362/</sup> and travel.<sup>363/</sup> If health care decision making were to be declared a fundamental constitutional right,<sup>364/</sup> then governmental infringement on that right would have to pass strict judicial scrutiny to survive. Such a review gives little deference to the government's position, requiring the government to show its actions are based on "compelling" state needs.<sup>364/</sup> Also, in such cases, the government must show its infringing actions have been tailored as narrowly as possible to satisfy its interests and still respect the fundamental rights as much as possible.<sup>365/</sup>

If health care decision making were not deemed a fundamental right, the Supreme Court would utilize, the lowest level of judicial scrutiny, mere rationality.<sup>366/</sup> This level of review is very deferential to government actions, requiring only that some rational reason be given for the interference with non-fundamental rights.<sup>367/</sup> Only in the rarest of cases will the Court: invalidate governmental action when using the rational basis test.: As one constitutional law expert has explained, "as long as governmental action bears a reasonable relation to a legitimate state interest, the majoritarian process may trump the individual's freedom to make choices in nonfundamental areas of liberty."<sup>368/</sup>

In the military, active duty service members have historically had more limited liberty rights than the general public.<sup>369/</sup> This has been especially true with respect to health care issues. For example, active duty military members must undergo ordered medical care<sup>370/</sup> and, if wounded, accept medical care designed not for their best personal interests, but for quick return to fighting after treatment.<sup>371/</sup> Exactly how limited the military member's right is to basic health care decision-making has never been squarely addressed. However, the narrower issue of the military member's right to make medical treatment decisions was discussed in the recent case of *Doe v. Sullivan*.<sup>372/</sup>

In *Doe*, an anonymous soldier stationed in Saudi Arabia during Operation Desert Shield filed suit on January 11, 1991 in United States District Court, District of Columbia,<sup>373/</sup> in an attempt to enjoin the Department of Defense (hereinafter DOD) from using certain non-FDA approved drugs on troops taking part in the Gulf War without first obtaining the individual service member's informed consent.<sup>374/</sup> *Doe* presented three claims for relief that of his own, that of his wife's, and on behalf of members of the class of soldiers stationed in the Gulf states.

*Doe's* first argument was that the FDA had exceeded its authority under the Food, Drug and Cosmetic Act<sup>375/</sup> in promulgating Rule 23(d), a consent waiver rule which allowed the military to use the, non-approved drugs without informed consent.<sup>376/</sup> Next he argued DOD's use of the drugs without service member's consent violated informed consent directives in the 1995 Defense Authorization Act (DAA),<sup>377/</sup> codified at 10 U.S.C. Section 980.<sup>378/</sup> Finally, he argued the government's use of the drugs on non-consenting individuals constituted a substantial deprivation of liberty in violation of the due process clause of the Fifth Amendment.<sup>379/</sup>

### *a. Background*

Both the district and appellate courts provided a review of the history surrounding the controversy.<sup>/380/</sup> The crucial facts concerned Iraq's stockpiling of a variety of chemical and biological warfare agents for potential use against U.S. led coalition forces in the war. Iraq's willingness to use such weapons was never in doubt and the DOD had taken steps to prepare its troops by looking into the use of different preventive drugs as countermeasures. Immediately after the commitment of US troops to the Gulf War effort, the U.S. Army Medical Research and Development Command identified several potentially useful drugs. Two of the drugs were legally termed "investigational" and had not received FDA approval for the specific uses proposed by the DOD.<sup>/381/</sup>

The two unapproved drugs identified by the DOD were pyridostigmine bromide (Mestinon) tablets and pentavalent botulinum toxoid vaccine. The pyridostigmine bromide tablets were to be used prophylactically to hopefully prevent or at least lessen the effects of nerve gas.<sup>/382/</sup> The tablets were to be self-administered prior to anticipated exposure and were expected to increase the effectiveness of two FDA-approved drugs long used by the US military for post-exposure to nerve gas, atropine and pralidoxime chloride.<sup>/383/</sup> While pyridostigmine bromide and the pentavalent botulinum toxoid vaccine were not approved for the use DOD intended, the two drugs had been approved for other uses. Pyridostigmine bromide is used to treat the neuromuscular disease myasthenia gravis (MG).<sup>/384/</sup> Botulinum toxoid vaccine is used to vaccinate laboratory personnel who deal with botulism.<sup>/385/</sup>

The proposed use of these drugs for unapproved purposes required the DOD to ask for an exemption from usual FDA consent rules. Unfortunately, the exemption rules in place at the time would not allow for such a waiver, so the DOD requested the FDA to make a new waiver rule for the military.<sup>/386/</sup> DOD's basis for its proposed waiver rule was, "obtaining informed consent in the heat of imminent or ongoing combat would not be practicable."<sup>/387/</sup>

The FDA adopted the DOD's proposed rule and on December 21, 1990, Rule 23(d) was put into effect.<sup>/388/</sup> The new rule allowed the FDA Commissioner to issue waivers of consent of military personnel, thereby permitting investigational drug use when he determined that obtaining consent would not be feasible because of combat situations. Conditions precedent to such a determination included written justification for the waiver, and concurrence by an institutional peer review board. The waiver was applicable only to the specific operation for which the waiver application was being made.<sup>/389/</sup> The Commissioner is authorized to grant a waiver "when withholding treatment would be contrary to the best interests of military personnel and there is no available satisfactory alternative therapy."<sup>/390/</sup> Finally, the waivers are good only for one year, but may be renewed. They also may be terminated earlier by either the DOD or the FDA.<sup>/391/</sup> The FDA received DOD requests for waivers under the new rule for the pyridostigmine bromide and pentavalent botulinum toxoid vaccine on December 31, 1990 and January 8, 1991, respectively.

### *b. The District Court Decision*

Doe sought to enjoin the DOD from ordering members to take the waived investigational drugs.<sup>/392/</sup> The basis for his case was the investigational nature of the drugs and the unknown side effects and adverse consequences which might occur if used in the novel manner advocated by the DOD. Doe also pointed to adverse effects already well known in approved uses of the drugs.<sup>/393/</sup>

Judge Harris, United States District Court for the District of Columbia, dismissed the case on January 31, 1991, finding the matter of giving investigational drugs to service members to be "precisely the type of military decision that courts have repeatedly refused to second-guess."<sup>/394/</sup> He found the issues to be outside the court's review authority.<sup>/395/</sup> While Judge Harris found the issues Doe brought to his court inappropriate for review; he nonetheless, in dicta, addressed



each of Doe's arguments,- explaining that had the case been reviewable, he would have upheld the government's actions.<sup>/396/</sup>

Doe's first argument, that the FDA had exceeded its authority in adopting Rule 23(d), subverting its informed consent rules, was considered by Judge Harris to be without merit since such decisions are within the FDA's administrative authority.<sup>/397/</sup> He stated such a decision by a regulatory agency was appropriate as long as the agency's interpretation of its own rules was reasonable and not contrary to the statute.<sup>/398/</sup>

Doe's second argument, alleging the DOD's decision to use the two drugs without informed consent violated the FDA's "longstanding" rules requiring such consent as well as the DOD's own consent rules, was rejected by Judge Harris who said the rules were not applicable.<sup>/399/</sup> He explained that in his opinion, since the use of the drugs was for military operations, rather than scientific research, neither the FDA's nor the DOD's informed consent rules; written for research on human subjects, applied.<sup>/400/</sup>

Addressing Doe's final argument; that his individual liberty rights had been violated, Judge Harris applied the lowest level of judicial scrutiny,<sup>/401/</sup> asking whether the government's actions were "rationally related to a legitimate government purpose."<sup>/402/</sup> He reasoned that the government's stated goal of protection of service member's health and fitness was a reasonable one and concluded that the orders did not violate Doe's rights.<sup>/403/</sup>

### *c. The D. C Circuit Court of Appeals*

Doe appealed Judge Harris' decision to the D.C. Circuit Court of Appeals.<sup>/404/</sup> In July, 1991, a majority of that Court found the issues presented were justiciable despite the Army's policy change to use the drugs voluntarily and the end of the war.<sup>/405/</sup> The Court stated that since FDA Rule 23(d) remained in effect, similar situations could arise again. Writing for the majority, then Circuit Judge Ruth Bader Ginsburg stated the case presented proper subject matter for judicial review despite Judge Harris' finding that the case dealt with military issues better left to the military. Judge Ginsburg explained that Doe was not questioning military decision making authority, but rather whether the FDA had exceeded its authority to issue the consent waiver rule used by the military.<sup>/406/</sup> The Court did uphold all the findings of the lower court on the merits, holding the FDA acted well within its statutory authority and that the DAA did not apply to the FDA.<sup>/407/</sup> The appeals court also upheld Judge Harris' application of the rational relation test to Doe's equal protection liberty claim, and using that deferential standard, Justice Ginsburg easily found that the DOD's actions served legitimate governmental interests.<sup>/408/</sup>

The *Doe v. Sullivan* decision clearly highlights some of the problems facing those who would argue for a psychotherapist-patient privilege in the military based on fundamental liberty rights. Judge Ginsburg's acceptance of the low standard could bode ill for arguments for a fundamental liberty right regarding medical decision-making, especially in the military setting where the courts' ready acceptance of the government's reasoning for its actions follows a long established tradition against second guessing military decision making. The Court's application of a low judicial scrutiny standard raises an even greater problem. However, since the Appeals Court narrowed its review to the DAA and never addressed broader questions of military member's right to medical decision-making, it remains possible the Supreme Court could still find such a right to be fundamental.

## *2. Privacy Rights*

The right to privacy in medical settings has generated increasing interest in recent years. This can be explained by the increased pressures against privacy in the medical world. Examples include computerization of medical records,<sup>/409/</sup> increased sharing of medical information (both by government and business),<sup>/410/</sup> and expanding control of medical decisions under managed care.<sup>/411/</sup> The right to privacy is essential in the medical field since health "information is perhaps the most intimate, personal, and sensitive of any information

maintained about an individual." /<sup>412/</sup> The need for patients to feel secure in the confidentiality of the information they reveal to health care providers is viewed as necessary to the doctor-patient relationship, and essential for mental health providers and their patients. /<sup>413/</sup>

As has been noted in a vast array of privacy legal articles, /<sup>414/</sup> the Supreme Court has expanded privacy rights in medical decision making areas such as abortion /<sup>415/</sup> but limited those rights in other areas (such as government required reporting by physicians to state agencies of wounds from deadly weapons, sexually transmitted diseases and drug use). /<sup>416/</sup> Even so, a large number of lower courts have recognized a limited right to privacy in the medical decision-making area. /<sup>417/</sup> Some of the most strongly worded of these cases have concerned mental health treatment. /<sup>418/</sup>

There have not been a large number of military cases dealing directly with military infringement on medical privacy rights. However, one recent case, *Mayfield v. Dalton*, /<sup>419/</sup> which received great publicity, /<sup>420/</sup> did raise the issue. The case was an attempt by two Marines to refuse participation in the DOD's DNA identification program.

In *Mayfield*, two marines, John C. Mayfield and Joseph Vlacovsky, filed suit in the United States District Court in Hawaii requesting summary judgment on their claims that the military's orders to provide DNA samples were illegal. They presented three arguments: first, that the forced collection violated their privacy and due process rights; second, that the collection violated their enlistment contracts; and third, that the collection violated consent rules on human research. /<sup>421/</sup> The court found no merit in any of the arguments.

Addressing the constitutional claims first, the court narrowed the issue to a question of illegal search. /<sup>422/</sup> The court quickly found the taking of the DNA samples, while a "search," to be well within allowed parameters for legitimate searches, and far less of an infringement on their rights than those allowed in numerous other cases. /<sup>423/</sup> The court then held that the government had shown a compelling interest in its reasons for taking the samples, i.e., identification for internal accounting and for notification of next of kin. /<sup>424/</sup>

The court also found the other two arguments without merit, saying the claim of breach of contract ignored explicit language that changes could be made by the government /<sup>425/</sup> and that the consent rules for "research" were inapplicable since the samples were not going to be used for research. /<sup>426/</sup>

The plaintiffs also sought certification as a class of "all military personnel serving on active duty in the United States Navy and/or the United State Marine Corps who have been or may be compelled to provide blood and/or other tissue samples for DNA identification ...." /<sup>427/</sup> The court denied the motion, saying that plaintiffs had failed to show any other military members actually opposed the DNA program and even stating that it was certain there were those who "although compelled, do not oppose, and in fact approve of, the DOD DNA Registry program." /<sup>428/</sup>

In sum, *Mayfield* provides no support for a privacy basis for medical decision-making. Of course, provision of a tissue sample is not the same as baring one's soul such as is required in psychotherapy. Legal writers have commented on the resistance of military courts to provide greater privacy rights than those enumerated by the Supreme Court. /<sup>429/</sup> Therefore, one may look to that Court's decisions for an indication of the maximum possible support for a privacy argument.

In *Jaffee*, the Supreme Court stated that the privacy between a psychotherapist and patient is "rooted in the imperative need for confidence and trust." /<sup>430/</sup> The Court spoke at length about the absolute need for confidentiality in order that psychotherapy be effective, pointing out that "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." /<sup>431/</sup> Such unequivocal support for the concept of privacy in relation to mental health care surely can be viewed as an indicator of support that such a confidential relationship is a fundamental right.

If the Supreme Court's decision in *Jaffee* develops into a fundamental right, then a plaintiff attacking the military's anti-psychotherapy privilege position would have significant ammunition. As explained earlier, if such a right is deemed fundamental, the government must, in order to prevail, provide compelling reasons to overcome the fundamental right. The government's burden would be formidable; not since the World War II case of *Korematsu v. United States*<sup>/432/</sup> has there been a law subject to strict judicial scrutiny which has been upheld.<sup>/433/</sup>

While we may be a long way from the time when the Supreme Court determines whether confidentiality in the psychotherapeutic relationship is a fundamental right, the Supreme Court's willingness to embrace a new privilege essential to that relationship may be an indication of where we are heading.

## D. Ethical Arguments

Ethical analysis is particularly helpful in reviewing issues dealing with medical confidentiality. As one medical ethicist points out, the underpinning of confidentiality is "more a matter of professional ethics than of legal requirements."<sup>/434/</sup> Numerous ethical arguments can be made for the military's adoption of a psychotherapist-patient privilege. These include arguments based on principles of medical care ethics,<sup>/435/</sup> legal ethical theory,<sup>/436/</sup> and societal considerations or general humanistic ethical principles.<sup>/437/</sup> Despite the multitude of names, these approaches can be broken down into two general principles of morality: deontologic, that is, a duty driven analysis asking what is right under the principles of the profession; and utilitarian analysis, which asks whether the results of the action on others will be the morally right result for society.

### 1. Deontologic Principles

Care based ethics provide a conceptual framework for deciding why confidentiality is important to psychotherapy. This approach deals with the professional ethics of the care provided. In psychiatric care it deals with those principles of trust and mutual respect required for effective treatment.

Professional psychological associations filing amici brief in *Jaffee* advocated recognition of the privilege, agreeing on the importance of confidentiality to the effectiveness of therapy.<sup>/438/</sup> For psychotherapy to work, patients must be able to trust that the information revealed to their therapist will remain confidential. Citing the major psychological medical texts, these organizations showed beyond question that the absence of confidentiality impacts psychotherapeutic care.<sup>/439/</sup> Every major professional psychoanalytic organization also stated confidentiality is a basic part of the profession's ethics.<sup>/440/</sup>

The principle that confidentiality is essential to psychotherapy was accepted without reservation by the majority of the Supreme Court in *Jaffee*.<sup>/441/</sup> Indeed, the Court specifically rejected the Seventh Circuit's position of granting a privilege on a case-by-case basis. Explaining its rejection, the Court stated "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."<sup>/442/</sup>

There is a very real problem in requiring military psychological providers to act in direct contradiction of a major professional ethic. The lack of confidentiality hurts these providers' ability to do their jobs and places on them the strain of forced failure to live up to their profession's standards. Such a position only diminishes the care provided. In terms of loss of evidence, while the numbers will never be known, it can not be doubted that many military mental health professionals simply avoid the problem by not doing a thorough job in either delving into potentially criminal areas, or in failing to properly document patient care:<sup>/443/</sup> One military psychiatrist has titled such documentation actions "downgrading."<sup>/444/</sup> He provides three reasons for this characterization: "1. Military psychological doctrine embraces use of minimal diagnosis to return [military members] quickly to duty . . . 2. [It is] [n]onstigmatizing to the client, and 3. lack of confidentiality."<sup>/445/</sup>

## 2. Utilitarian and therapeutic legal principles

Utilitarian legal theory holds that legal actions should be reviewed for their usefulness to society as a whole.<sup>/446/</sup> Such an approach explores both the consequences an action produces in society as well as its moral underpinnings to determine if it should be adopted. Therapeutic jurisprudence principles follow the same approach. As explained by one commentator, these principles are used to analyze the "law's role as a therapeutic agent [using] social science . . . to assess the impact of law on the mental and physical health of the people it affects."<sup>/447/</sup>

As applied to the issue of psychotherapist-patient confidentiality, there is near universal agreement among psychological practitioners and legal experts that confidentiality in psychotherapy serves the important societal goal of encouraging people to seek mental health care.<sup>/448/</sup> Furthermore, by encouraging greater mental health care overall, mental health related societal problems will decrease. Finally, Professor Imwinkelreid has noted that the whole law of privileges is based on these moral values. Citing a letter by Professor Charles Black, written to the first House hearings on privileges under the Federal Rules of Evidence, he argues that American "society's ethical sense of 'decency' necessitates the recognition of privileges."<sup>/449/</sup> Specifically addressing the values which should be protected by Fed. R. Evid. 501, he emphasized the need for an enlightened society to zealously protect an individual's freedom to control personal decisions.<sup>/450/</sup>

The courts were persuaded by this theory in *Jaffee*. In its brief to the court in *Jaffee*, the Respondents highlighted the important societal interests a privilege would promote, arguing that the

inability to obtain effective psychotherapeutic treatment may preclude the enjoyment and exercise of many fundamental freedoms. Mental illness may prevent one from understanding religious and political ideas, or interfere with the ability to communicate ideas. Some level of mental health is necessary to be able to form belief and value systems and to engage in rational thought.<sup>/451/</sup>

Weighing the social costs of non-recognition of the privilege against possible loss of useful evidence with a privilege, most commentators have declared the balance falls overwhelmingly for recognition. This was acknowledged by the Supreme Court in *Jaffee* when it said, "[i]n contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the privilege is modest."<sup>/452/</sup> The Court also specifically accepted the utility of the psychotherapist-patient privilege to society, stating "[t]he psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem."<sup>/451/</sup>

It's not a difficult argument to make that military members have mental health problems and need mental health services as much as their civilian counterparts. In fact, it can probably be persuasively argued that military members experience even greater stress than the police officer in *Jaffee* and should receive the best mental health care possible. For these reasons, the utilitarian and the deontologic theories of medical ethics support adoption of the psychotherapist-patient privilege in the military.

## V. MILITARY MENTAL HEALTH CARE

In general, military mental health care is similar to that provided in the civilian sector. All of the same issues seen in small practices to large medical centers have their counterpart in the military. Where military practice differs from its civilian counterpart is in relation to administrative military duties<sup>/454/</sup> and the special challenges combat and combat related pressures create.<sup>/455/</sup> These special pressures include overseas tours, long time at sea, short and long term deployments and actual combat. Such pressures test the military provider in ways not usually, if ever, experienced by civilians.<sup>/456/</sup>

However, the military population shares with the civilian counterpart population the stigma associated with getting psychological care. Such stigma has a long history in American society.<sup>/457/</sup> Prior to the early 19th Century, Americans hid their mentally ill family members at home and provided whatever "care" they could. Later, private asylums became popular places to hide those with mental problems. From the 1850s to early in the 20<sup>th</sup> century, the mental health profession grew, but the stigma of being "crazy" continued.<sup>/458/</sup> During the 20<sup>th</sup> century, mental health institutions and the profession of psychiatry rapidly expanded, especially after World War I. Unfortunately, the stigma still hung on, driven now by the belief that "weak character" led to mental disease.<sup>/459/</sup>

In the 1950's there was a movement toward more scientific approaches to mental illness, especially in the area of alcohol and drug treatment. From then until the end of 1970's, there was a major shift from criminalization of alcohol and drug problems to public health measures, and some in-road was made in educating the general public about the emotional and behavioral underpinnings of mental health problems.<sup>/460/</sup> Despite the new emphasis on psychiatry as a science and a concerted effort to educate the public about mental health, the stigma remains and still interferes with people getting the care they need.

The sensitive nature of emotional problems, and potential stigmatization of persons seeking psychiatric care was noted by the court in *Jaffee*.<sup>/461/</sup> That it exists in the military cannot be denied.<sup>/462/</sup> Indeed, many feel it may be worse in the military's unique "macho warrior" culture. One military psychiatrist, Dr. Kutz, has noted that "[l]ike other minority cultures, the military places great stigma on mental illness "<sup>/463/</sup> He points out that it is well-known in the military psychiatric field that people shun care. He explains that commanders will often choose to avoid care, "for fear that his troops will view him as 'weak' and lose confidence in his leadership. "<sup>/464/</sup> The sad fact, however, is that no educated person in today's society would seriously question the widespread existence of mental illness in a wide cross-section of society. <sup>/465/</sup>

In an article written following the Supreme Court's grant of writ of certiorari in *Jaffee*, Professor Winick examined the issue of the influence a psychotherapist-patient privilege would have on whether individuals sought counseling.<sup>/466/</sup> He concluded that while "[t]he existing empirical literature is inconclusive concerning whether legal recognition of a psychotherapist-patient privilege is an important factor in whether people seek mental health treatment, "<sup>/467/</sup> it can be hypothesized from those same studies that an "adverse impact on patients' willingness to enter therapy . . . [will result] should the Supreme Court reject the privilege."<sup>/468/</sup> The author suggests that public awareness following the Supreme Court's *rejection* of a privilege "will have a predictably chilling effect on the willingness of individuals to enter or remain in therapy."<sup>/469/</sup> Finally, the author observes that the research supports a prediction that many patients who do undertake therapy will "inhibit their own disclosure to the therapist" upon understanding that there is no privilege. <sup>/470/</sup>

While not empirical support for the theory that absence of a privilege has a chilling effect on military members, discussion of a current phenomenon--suicides--does illustrate the relationship. The calendar years 1992-1995 saw the suicide rate in the Air Force rise from 11 per 100,000 people to 13 per 100,000 people.<sup>/471/</sup> General Ronald R. Fogleman, Air Force Chief of Staff, came into the office with a personal interest in this issue. While commander of Air Mobility Command in 1990, a military member took his life, leaving behind a note stating that he feared seeking help because he feared its impact on his career. General Fogleman began a campaign to make it known that getting help would not be career-ending. <sup>/472/</sup> As a result, Ready Eagle was developed at Air Mobility Command, a program aimed at identifying "members who are under the kinds of stress that could lead them to harm themselves or other. <sup>/473/</sup> Upon assuming the position of Chief of Staff in late 1994, General Fogleman requested a review of suicides Air Force wide. The conclusion was that "suicide was a problem that warranted considerable attention. . ." <sup>/474/</sup> Although the suicide prevention efforts increased, suicide rates remained unaffected. General Fogleman said the causes of these deaths were unclear, but could range from family stress, deployments, or financial problems.<sup>/475/</sup> In March, 1996, General Fogleman acknowledged that the perception still exists that seeking counseling would have a negative career impact. He urged commanders and first sergeants to look at seeking help as a sign of strength, rather than weakness. <sup>/476/</sup> General Fogleman observed that the approach taken by two major air

commands, which investigate suicides in the same manner as aircraft accidents, might be necessary Air Force-wide to explain the recent rise in the suicide rate. /477/

Following Admiral Mike Boorda's suicide in May 1996, questions were raised about the "mental health services available to military people and how comfortable military people are with seeking professional help when their problems become overpowering. With the 'zero defect' mentality toward careers, the stigma attached to mental-health counseling may be even greater. /478/ In a 10 June 1996 Air Force Times article, it was noted that chaplains, "[b]ecause they provide confidentiality... play a key role in crisis intervention and counseling on bases. /479/ Chaplain (Col) Cecil Richardson, executive director of the Armed Forces Chaplains Board, observed that "[c]onfidentiality is something the chaplain is known for.' People feel more comfortable going to chaplains. " /480/ A civilian counselor was quoted: "[M]any times, with the privacy issue, [military people] feel better served going off base. " /481/

Obviously, the Air Force's emphasis that seeking mental health help should be considered a positive step is a factor in removing the stigma associated with seeking help for mental health problems. /482/ But the stigma associated with getting *help* is not the only stigma. The fear that others will learn of the root problem probably keeps military personnel away from mental health clinics. When people seek chaplains for mental health problems without a formal act of religion or a matter of conscience, there is no privilege. Likewise, there is no privilege for off- base civilian mental health professionals in the military justice system. However, most probably are unaware of these legal nuances which leave them almost as unprotected as they would have been had they gone to a military mental health clinic. Almost, but not quite. Because a significant difference with chaplains is that they are not routinely contacted and are not expected to report about their consultations, even those consultations which don't qualify for the privilege. As for civilian mental health practitioners, no one necessarily knows a person is seeking professional help, and may never know. Seeking off-base mental health care, or consulting a chaplain for mental health problems without a religious cornerstone, are problem solving methods motivated by fear generated by the lack of confidentiality at military mental health facilities. These indirect and possibly inadequate attempts to obtain help are motivated by concerns in the unique military setting far beyond the social stigma associated with getting help seen in the general population.

Soon after the *Jaffee* decision was released, the Air Force Times reported that "service members may now be able to confide their darker secrets to military mental-health professionals without fear their commanders will find out." /483/ Just two weeks after publication of that article, a case at Elmendorf AFB, Alaska, thrust the absence of patient confidentiality in military mental health care into the national spotlight. There, a 21 year old dependent daughter, the alleged victim in a rape case, had her mental health records confiscated by investigators. /484/ The girl's mother tore up the records in an effort to conceal her daughter's confidences, but they were pieced back together. /485/ Both *Jaffee* and the Elmendorf case prompted a fair amount of activity at the highest levels of the Air Force concerning the issue of confidentiality in Air Force mental health care.

In a 31 July 1996 letter addressed to all Staff Judge Advocates, Chief Circuit Judges, and Chief Circuit Trial and Defense Counsel, the Air Force Judge Advocate General, Major General Bryan G. Hawley, reported that the Joint Service Committee on Military Justice (hereinafter JSC) met and determined that *Jaffee* is not applicable to the military justice system. Major General Hawley noted that "In addition to being contrary to existing rules, such as MRE 501(d), military necessities and personnel readiness make the application of *Jaffee* to the Armed Forces impractical. /486/ The general wrote that "[t]he JSC recognized this issue will ultimately be resolved by the appellate courts" /487/ and that the JSC tasked its working group to track decisions interpreting *Jaffee* and keep it informed of necessary changes to Mil. R Evid 501. /488/ A similar letter was sent by Lieutenant General Edgar R. Anderson, Jr., the Air Force Surgeon General, to medical and mental health personnel throughout the Air Force. That letter basically followed the same format as General Hawley's but with additional information speaking to the Elmendorf AFB case. In this letter, the tension between protecting a rape victim's privacy and the accused's right to a fair trial was explained in detail since the audience consisted of medical rather than legal professionals. The letter also explained the authority for allowing investigators to seize patient records. /489/

During this time, the American Psychiatric Association wrote a letter to the Department of Defense requesting; that the Military Rules of Evidence be amended to incorporate *Jaffee* insofar as military dependents are concerned.<sup>/490/</sup> The letter stated:

We recognize that our Armed Forces must weigh a number of conflicting priorities with regard to the physical and mental health of active-duty personnel and their dependents. In their vital role of protecting the nation's security, commanding officers need to be assured that their personnel are ready to carry out their mission. However, this priority does not apply to military dependents who are not themselves on active duty. In contrast, knowledge that their mental health records are discoverable by military courts is likely to interfere with the ability of military dependents to obtain needed mental health treatment. Those who of necessity do seek treatment are likely to withhold information that may be vital for proper diagnosis and recovery.

....

The morale of our active duty forces has an important impact on their mission readiness. Concerns about the mental well-being of loved ones can have [an] adverse impact on active military, particularly if these problems are not being addressed through proper health care.<sup>/491/</sup>

In a 9 September 1996 memorandum referring to the Elmendorf case, Dr. Stephen Joseph, Assistant Secretary of Defense for Health Affairs, urged the Department of Defense general counsel, "to take all measures, as early as possible, to amend the Military Rules of Evidence to create a privilege between non-active-duty patients and their health-care providers."<sup>/492/</sup> An information paper drafted by a Department of Defense medical ethicist attached to the memorandum noted the harmful effects the absence of a privilege would have,<sup>/493/</sup> observing that "lack of confidentiality and privilege causes our patients and mental health professionals grave concern."<sup>/494/</sup>

Finally, U. S. Representative Patricia Schroeder, serving on the National Security Committee, wrote in a 7 October 1996 issue of the Air Force Times that the Pentagon should adopt Dr. Joseph's recommendation to amend the rules to provide for a psychotherapist-patient privilege between non-active duty patients and psychotherapists "post haste. It's the right first step in a long-overdue reconsideration of how confidentiality of mental-health records will strengthen, rather than disserve, military personnel, their families and military readiness."<sup>/495/</sup>

In a somewhat prophetic article written in 1989, Major David L. Hayden predicted that two circumstances will have to occur before a psychotherapist-patient privilege will become part of military law: civilian and military psychotherapists will have to raise the need for the privilege; and "legislative, executive or regulatory creation of the psychotherapist-patient privilege will have to occur."<sup>/496/</sup> Of course, both of those things have since occurred. We have the benefit of judicial creation of such a privilege by the United States Supreme Court. And military and civilian psychotherapists have publicly raised the need for this privilege in response to a woman's unfortunate circumstance of enduring a rape by a man eligible to be tried by a court-martial process which has no judicial protection for her confidences generated by *the crime itself*. Moreover, if Professor Winick's observations are correct, the military public, aware now of the absence of a psychotherapist-patient privilege, will be chilled at a time when there is a heightened concern over people getting help. The time is right for consideration of this privilege for active duty and dependents alike.

As just stated, we are fortunate to have the benefit of *Jaffee* to rely upon. But that reliance makes it important to discuss Justice Scalia's dissenting opinion. His first argument with the majority is that it has departed from its previous restrictive approach to the law of privileges, which contravene the truth-seeking function courts are charged with, to create a privilege that is "new, vast, and ill-defined."<sup>/497/</sup> He took issue with the manner in which the majority framed the issue: "whether it is appropriate for federal courts to

recognize a `psychotherapist privilege, /498/ arguing that such an over-simplification of the issue leads to the foregone conclusion that there should be a "social worker-client privilege with regard to psychotherapeutic counseling." /499/ He observed that the court devoted the majority of its opinion to the general question of whether to recognize a psychotherapist privilege, devoting "less than a page of text" to the question of whether the privilege should extend to social workers. /500/ He added that the majority's approach to the issue "is in violation of our duty to proceed cautiously when erecting barriers between us and the truth. " /501/

The second general disagreement Justice Scalia had with the majority was with their ready adoption of a "psychotherapy" privilege. While he did not take issue with the premise that psychotherapy furthers important private and public interests by serving the mental health needs of our citizens, he did question the underlying importance ascribed to professional psychotherapy. He asked whether the mental health of the citizenry was *so* important, and psychotherapy's relationship to sound mental health *so* unique, and "normal evidentiary rules so destructive to [successful] -psychotherapy, as to *justify* making our federal courts occasional instruments of injustice. " /502/ For instance, Justice Scalia wondered when psychotherapists came to play *such* "an indispensable role in the maintenance of the citizenry's mental health. " /503/ After all, he reasoned, people have sought advice from "parents, siblings, best friends and bartenders" for years. /504/ Perhaps, but the growth of field demonstrates that as society has become increasingly more complex, those lay alternatives are unsatisfactory for any number of reasons. /505/ While *not* necessarily advocating that those with mental health problems can get the same` care from these groups as from professional psychotherapists, his point was that more would choose to get advice from their mothers, for instance, yet there is *no* parental communication privilege. While it may be true that people would prefer to get general advice on any number of issues from these people, generally speaking, it's also fair to say that people understand that they're not getting the *kind of care* they would receive from a professional, and they are also unlikely to make the *kinds of disclosures* as they would to a professional. /506/

Justice Scalia said the majority opinion left unanswered his question on the relationship between seeking treatment and being candid with one's therapist on the one hand, and an evidentiary rule of privilege on the other. He seemed skeptical that the absence of an evidentiary privilege would deter people from seeking help or being completely truthful with their therapist, and he was unpersuaded that the majority's undefined privilege would reduce that deterrent. /507/ He was equally skeptical that there is no harm to the judicial process , i.e., without a privilege, people wouldn't make the sort of admissions litigants would seek anyway. He explained his skepticism on the fact that "psychotherapy got to be a thriving practice before the `psychotherapist privilege' was invented" /508/ and he doubted whether many who seek counseling "have the worry of litigation in the back of their minds." /509/

These two points illustrate precisely why the military needs to have a rule of privilege. First, a military rule of evidence will provide both the certainty and the scope of the privilege necessary to resolve Justice Scalia's doubt about the majority's privilege reducing deterrence from seeking mental health care. A privilege in the military would probably go a long way in convincing military members to get help when they need it, more so than words from the chief of staff that seeking help won't be career harming, especially since such words also strongly illustrate the point that mental health care is hardly being used effectively. Moreover, as far as litigation, our military justice system provides military members with the opportunity to consult counsel immediately in the justice process. Prudent counsel advise their clients against discussing matters with psychotherapists, because there is no privilege. So, as to these points, we observe that it has been acknowledged that people are fearful of seeking help in the military; and once people are aware of the absence of a privilege, they don't talk.

Justice Scalia made one more observation about the psychotherapeutic relationship which deserves mention. He is uncertain as to whether it is unacceptable after all, to allow someone to both refuse to admit (or even deny) their act in court, yet benefit from psychotherapy by admitting it to a therapist who in turn cannot admit it in court. His argument is that if a person wants "the benefits of telling the truth, [they] must also accept the adverse consequences. " /510/ First; this argument assumes that if one testifies in court, he has



committed perjury. But even Justice Scalia admits that most often statements to therapists will have limited relevance (i.e. no perjury), and that one of the purposes of a psychotherapist-patient privilege (a purpose which he suggests, rather than the majority) is to "spare patients needless intrusion upon their privacy."<sup>511</sup> Secondly, assuming perjury, Justice Scalia's argument, taken to its logical conclusion, is that if one is so motivated to preserve liberty or property as to commit perjury, one should be denied the opportunity to at least internally admit the wrong committed and seek help to remedy it. For instance, assuming that Officer Redmond shot the decedent out of racial hatred and assuming that she lied about that hatred, she should be denied the opportunity to personally admit that racial hatred is wrong and seek help overcoming it. This argument is specious. Privileges are created because of the greater public policy they advance, and the opportunity to perjure one's self is no greater with a psychotherapist-patient privilege than with the husband-wife or attorney-client privileges. Furthermore, given even Justice Scalia's admission that "in most cases the statements to the psychotherapist will be only marginally relevant,"<sup>512/</sup> this remote argument should be given little weight in consideration of the issue.

Dovetailing with his second general argument, Justice Scalia's next argument is with application of a psychotherapist-patient privilege to social workers.<sup>513/</sup> He condemned the majority for its reliance on the Advisory Committee's proposed Federal Rule 504 as support for the privilege it adopted, when the proposed rule *excluded* social workers from the privilege; "which is to say that it recommended against the privilege at issue here..<sup>514</sup> Additionally, he observed that five states did not extend the psychotherapist-patient privilege to social workers.<sup>515/</sup> Justice Scalia attempted to support his argument against extending a privilege to social workers by raising differences in training and practice between psychiatrists and psychologists versus social workers.

Discussing training; he began by arguably conceding that a privilege should apply to psychiatrists and psychologists by drawing this distinction:

"A licensed psychiatrist or psychologist is an expert in psychotherapy and that may suffice ... to justify the use of extraordinary means to encourage counseling with him, as opposed to counseling with one's rabbi, minister, family or friends. One must presume that a social worker does not bring this greatly heightened degree of skill to bear, which is alone a reason for not encouraging that consultation as generously."<sup>516/</sup>

He illustrated this point by examining the Illinois statutes on the psychotherapist privilege and requirements for the licensing of social workers and clinical social workers.<sup>517/</sup> He concluded that, as the training is not comparable in its rigor or precision to the training of other experts (lawyers, psychologists and psychiatrists), and other states' requirements may be even less demanding, "[i]t seems . . . quite irresponsible to extend the so-called 'psychotherapist privilege' to all licensed social workers, nationwide, without exploring these issues."<sup>518/</sup>

Moving onto differences in practice, Justice Scalia observed that in practice, psychologists and psychiatrists do nothing but psychotherapy in their consultations with patients, but social workers "interview people for a multitude of reasons."<sup>519/</sup> Making use of the Illinois statute on the definition of social workers, he concluded:

Thus, in applying the "social worker" variant of the "psychotherapist" privilege, it will be necessary to determine whether the information provided to the social worker was provided to him in his capacity as a psychotherapist, or in his capacity as an administrator of social welfare, a community organizer, etc. Worse still, if the privilege is to have its desired effect (and is not to mislead the client) it will presumably be necessary for the social caseworker to advise, as the conversation with his welfare client proceeds, which portions are privileged and which are not.<sup>520/</sup>

However, for purposes of military psychotherapy, these differences between psychologists and psychiatrists and social workers are really without distinction because social workers perform counseling services in military mental health just the same as psychologists, and perhaps more than psychiatrists. It would be pointless in a military environment to draw distinctions between these professionals, when clients are unlikely to appreciate the difference in treatment between counselors they are unlikely to choose in the first place. Moreover, social workers in the military are not likely to engage in "social welfare, community organizer" types of duties and even if they did, a rule which prescribes the types of communications protected would solve the "problem" raised by Justice Scalia.<sup>/521/</sup>

We find nothing persuasive in Justice Scalia's dissent to support arguments against a psychotherapist-patient privilege in the military. Indeed, another problem he had with the majority opinion was that it was not based on common-law. <sup>/522/</sup> However, that point is also moot for our purposes since, after *Jaffee*, the psychotherapist-patient privilege is a principle of common law, (recognized in the trial of criminal cases in the United States district courts), pursuant to Rule 501 of the Federal Rules of Evidence. <sup>/523/</sup>

## VI. PROPOSAL

### A. Introduction

As discussed, there is room for adoption of a psychotherapist-patient privilege in the military rules of evidence. Military Rule of Evidence 501(d) is ambiguous with respect to psychotherapists. Scholars on the military rules have suggested that it does not apply to psychotherapists, <sup>/524/</sup> basically drawing the same distinction the Supreme Court drew between doctors and psychotherapists based on the need for confidentiality in the psychotherapeutic relationship. Moreover, the drafters of the Military Rules of Evidence intended our rules to be responsive to changes implemented in the federal circuits, and that intent is expressed in Military Rule of Evidence 501(a)(4). <sup>/525/</sup> Finally, the drafters expressed the clear requirement for certainty in the law of privileges under the military rules. For these reasons, it is time for the Military Rules of Evidence to be amended to provide the certainty that counsel, judges, and *patients* expect.

As mentioned earlier, following the Supreme Court's decision in *Jaffee*, the Joint Service Committee (JSC) on Military Justice decided to take a wait and watch approach. This is the least acceptable approach. A fair interpretation of its actions so far is that there is no desire on the part of the JSC to have a psychotherapist-patient privilege. But based on the law as discussed in this article, including *Jaffee*, and given the appropriate facts, a military judge might well conclude that a privilege does exist. Accordingly, in the absence of a clear cut rule of evidence on this issue, we are currently in a period of the very kind of *uncertainty* the drafters thought highly inappropriate. It is also the kind of uncertainty rejected by the Supreme Court. Moreover, as discussed earlier, failure to take action could lead to Congressional action as has happened previously with command directed mental health evaluations.

### B. Amendment to Military Rule of Evidence 501(d)

One course of action is to amend Military Rule of Evidence 501(d) to make clear that "medical officer" includes psychotherapists, effectively denying the existence of a psychotherapist-patient privilege in the military. As the Supreme Court in *Jaffee* observed, all fifty states have recognized a psychotherapist-patient privilege to some degree. <sup>/526/</sup> But as a jurisdiction with our own rules of evidence, the military is certainly empowered to reject such a privilege, on the grounds of "impracticability" or for any other reason. This would provide the certainty that the drafters sought to achieve. Although this isn't a recommended proposal for the reasons discussed below, it should be relatively safe from challenge. <sup>/527/</sup>

This is not the best proposal for several reasons. Most significantly, people in today's society from time to time in their lives, need the services psychotherapists offer, and military members and their dependents are no more immune from the stresses creating that need than the average citizen. In fact, an argument can be made that

the lifestyle of this class of people exposes them to increased risk of crisis. In *Jaffee* the Supreme Court noted the pressures police officers face. /528/ Who can doubt a military member and his family face equal or greater stressors while in service to our country: deployments, temporary duties away from family, permanent changes of station every few years, exercises, and actual combat, just to name the most obvious. Moreover, military members and dependents- often' experience these highly stressful circumstances without the benefit of traditional support systems, such as extended families and close ties with community.

While the military may have a "need to know" with respect to military members, and we will address the balancing of this interest below, what compelling reasons exist for the wholesale absence of confidentiality for military dependents? To the extent disclosures made by dependents reflect on the behaviors or attitudes of military members, perhaps disclosure is warranted under the military's "need to know" philosophy, but there are better ways to balance these interests.

### **C. A New Military Rule of Evidence**

Another alternative is to amend the military rules to provide for a psychotherapist-patient privilege. This would certainly acknowledge the need for confidentiality in the professional relationship, serving an important private interest. Similarly, the public is served when military members and their dependents obtain necessary professional help when they need it, rather than abstaining for fear of disclosure. Arguably, society's interest in ensuring military members' mental health needs are cared for is even greater than its same interest with respect to police officers. /529/ Ironically, it's the military's concern over it's members' mental health which may, in part, be responsible for the rejection of *Jaffee* by the JSC." /530/ The theory is that in order to ensure "personnel readiness," the command must know what factors impact that readiness.

Yet, the military doesn't grasp the reverse logic: that military members understand that theory, are therefore less likely to seek treatment, thereby resulting in command ignorance of a problem impacting readiness. The ultimate result-the military member is without treatment, and the military is still unaware of a potential problem impacting readiness. That is, of course, until the mental health problem manifests itself in behaviors requiring disciplinary measures. In any event, this is a lose-lose situation.

On the other hand, the military has recognized the importance of protecting confidences made under other circumstances. For instance, military members can pour out their souls to chaplains. As long as the confidences are made as a formal act of religion or a matter of conscience, the disclosures are protected. There are no limitations on the scope of this privilege. /531/ Another example is the limited use which can be made of self-disclosures of drug use or possession. While these disclosures are not without consequence, /532/ the purpose of the limited use policies demonstrates an understanding that without some protection, members will not seek help. It seems inconsistent for the military to protect confidences out of concern for its members' spiritual health and after life, but not their mental health; and it seems inconsistent to offer limited use protection to those who engage in criminal behavior which undoubtedly adversely impacts military readiness, but offer no protection for those who may seek mental health help for mental or behavioral problems having a tangential impact on mission readiness. /533/

The creation of a privilege would not have to be absolute. Just like any other jurisdiction, the military could -decide, by creating a rule rather than having it imposed judicially, those disclosures in which the public interest is so great that the privilege must yield. Matters having to do with national security and abuse of children come readily to mind.

Our proposal for a new military rule follows:

### **Communications to Psychotherapists**

**(a) General rule of privilege.** A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family. <sup>/534/</sup>

**(b) Who may claim the privilege.** The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The psychotherapist may claim the privilege on behalf of the patient, and authority to do so is presumed in the absence of evidence to the contrary. <sup>/535/</sup>

**(c) Exceptions.**

(1) National Security. There is no privilege with respect to disclosures revealing a compromise of national security or classified information.

(2) Abuse of children. There is no privilege with respect to disclosures revealing abuse of a child or children. Abuse includes physical, sexual, and emotional abuse and neglect.

(3) Sanity Boards. There is no privilege under this rule for mental examinations of an accused pursuant to R.C.M. 706.

(4) Crime or Fraud. There is no privilege with respect to communications clearly contemplating the future commission of a crime or fraud. <sup>536</sup>

(5) Condition an element of defense. There is no privilege with respect to communications relevant to an issue of the mental or emotional condition of the patient in a proceeding in which he relies upon the condition as an element of his defense. <sup>/537/</sup>

(6) Constitutionally required. There is no privilege with respect to communications determined by the military judge to be constitutionally required to preserve the accused's right to a fair trial. <sup>/538/</sup>

**(d) Definitions.**

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist. <sup>/539/</sup>

(2) A "psychotherapist" is

(A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of the patient's mental or emotional condition; <sup>/540/</sup>

(B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged; S41 or.

(C) a person licensed or certified as a clinical social worker under the laws of any state or nation, while similarly engaged. <sup>/542/</sup>

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family. <sup>/543/</sup>

(4) "National Security" means the national defense and foreign relations of the United States. <sup>/544/</sup>

- (5) "Classified Information" means any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulation to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in 42 U.S.C. §2014(y).<sup>545</sup>
- (e) Procedures. In any case in which a party seeks to use evidence which may be inadmissible under this rule, that party is required to:
  - (1) File a written motion at least 5 days before pleas are entered, describing the evidence and the purpose for which it is offered unless the court, for good cause requires a different time for filing; and
  - (2) Serve the motion on all parties and notify the alleged holder of the privilege or, when appropriate, the holder's guardian or representative.
  - (3) Before admitting evidence under this rule, the court shall conduct a hearing in camera and afford the parties and holder of the privilege a right to attend and be heard. The motion, related papers and the record of the hearing must be sealed and remain under seal unless the court orders otherwise. /546/

In order for this evidentiary privilege to exist, the instructions under which military psychotherapists operate would have to be amended to provide for confidentiality consistent with this rule. After all, if the disclosures are made with an understanding that commanders and law enforcement have ready access to the information, there can be no claim of privilege because there could be no intention of confidentiality. Moreover, it is through regulatory instructions that the respective military departments could define further the conditions and procedures psychotherapists are to follow when disclosures to command are required. Finally, regulatory instructions can be developed which further preserve the military's interest in the health of its members. For example, the Air Force could require all mental health diagnoses of military members to be forwarded to the flight surgeon, who would then make a determination as to whether the military should take further steps (such as restricting access to classified information). This would preserve the confidences, yet allow the military to undertake precautionary measures. By way of illustration, if the diagnosis is depression, the flight surgeon can determine whether there is an impact on duty, yet the member's privacy interests as to the causes of the depression are protected. The instruction could provide that the flight surgeon in this capacity acts as an extension of the treating psychotherapist, thereby being in the position to receive confidences, if necessary, without destroying the privilege; and that disclosure of diagnosis would not vitiate the privilege with respect to confidences. As this proposed rule protects confidences, disclosure of diagnosis of mental disorders to commanders would not violate it, in any event.

We recommend a new military rule of evidence recognizing a psychotherapist-patient privilege as outlined. The proposed rule is a good place to start; we don't claim to have solved every nuance such a rule would encounter. But we think this proposed rule strikes the proper balance between the need for confidentiality between psychotherapists and patients and the needs of the military. In other words, it allows such a rule to become practicable in a military environment. While this is somewhat of a radical departure from past practice, the military justice system has undergone radical changes in the past, /547/ and in fact is currently undergoing such a transition now. /548/ In any event, stresses trial practitioners, psychotherapists and commanders face during the transition period are not such that it is better to leave well enough alone. Even the Supreme Court observed:

the likely evidentiary benefit that would result from the denial of the privilege is modest.... Without a privilege, much of the desirable evidence to which litigants ... seek access ... is unlikely to come into being.... This unspoken evidence, will therefore serve no greater truth-seeking function than if it had been spoken and privileged.<sup>/549/</sup>

## VII. CONCLUSION

The time has come for the military to closely and critically examine the psychotherapist-patient privilege. While we do have a unique and important role in society, that important role is performed by individuals who are no different than their civilian counterparts. We should be exploring all possible alternatives to accommodate both individual needs and the needs of the military, rather than merely assuming that the needs of the individual must always yield to the needs of the military, especially when neglect of the individual may impact the military. A rule of privilege, rather than judicial experimentation on this issue, will allow the military to do as civilian jurisdictions have done—decide those matters which are of such import that individual needs must yield, but otherwise extend confidential protection to patients, which will advance both private and public interests. To say that the military, as an organization, has interests which are so great that individuals can have no expectation of privacy with respect to their mental health, is to be somewhat elitist. After all, civilian jurisdictions have important public interests to protect as well. Certainly, these jurisdictions don't believe that they are needlessly compromising their constituents when they determine that surgeons, politicians, teachers, airline pilots, firemen, and police officers have a right to keep their mental health confidences privileged.

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1 Carrie Jaffee, Special Administrator for Ricky Allen, Sr., Deceased, Petitioner v. Mary Lu Redmond, 64 U. S.L.W. 4490, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)

2 See *infra* notes 74-98 and accompanying text.

3 Jean Cocteau (1889-1963). This quote was used by Professor Sherrill as the title of his critical book cited by Justice Douglas in *Parisi v. Davidson*, 405 U.S. 34, 53 (1972) (Douglas, J., concurring). A good overview of common criticisms of the military justice system can be found in Jonathan Lurie, *Military Justice 50 Years After Nuremberg: Some Reflections on Appearance v. Reality*, 149 *Mil. L. Rev.* 189 (1995).

4 "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." *MANUAL FOR COURTS-MARTIAL*, United States, Preamble (1995 ed.) [hereinafter MCM]. "[T]he military constitutes a `specialized community governed by a separate discipline from that of the civilian,' and that in recognition of the special nature of the military community, Congress has created an autonomous military judicial system, pursuant to Article I, Section 8 of the Constitution." 405 U.S. at 41 (citations omitted).

5 The novel dealt directly with military psychiatry in combat.

There was only one catch and that was *Catch-22*, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions.... If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to....

JOSEPH HELLER, *CATCH 22*, 46 (1961).

6 Unlike the long-running television series of the same name, the movie involved a psychiatric problem—the potential suicide of a soldier. Thus, the theme song, "Suicide is Painless".

7 42 U.S.C.A. § 1983 (1994).

8 740 ILL. COMP. STAY 180/1 (West 1994).

9 51 F.3d 1346, 1348-49 (7th Cir. 1995).

10 116 S.Ct. at 1926.

11 51 F.3d at 1349-50.

12 Id. at 1349.

13 Id. at 1348 n.1.

14 116 S. Ct. at 1926.

15 Id.

<sup>16</sup> 51 F.3d at 1350-51.

17 Id.

18 The questionable instruction was:

You have heard evidence in this case that Karen Beyer, while an employee of the Village of Hoffman Estates, had numerous conversations with Mary Lu Redmond and made notes of those conversations. You have also heard testimony that Ms. Beyer's notes were the property of the Village of Hoffman Estates.

During the course of this lawsuit the Court-ordered the Village of Hoffman Estates to turn over all of Ms. Beyer's notes to plaintiff's attorneys. The Village was provided with numerous opportunities to obey the Court's order and refused to do so. During the course of this lawsuit Mary Lu Redmond also testified that she would not authorize or direct Ms. Beyer to turn over those notes to plaintiff's attorneys.

During Ms. Beyer's testimony she referred to herself as a "therapist," although she is not a psychiatrist or psychologist-she is a social worker. This Court has ruled that there is no legal justification in this lawsuit, based as it is on a federal constitutional claim, to refuse to produce Ms. Beyer's notes of her conversations with Mary Lu Redmond, and that such refusal was unjustified.

Under these circumstances, you are entitled to presume that the contents of the notes would be unfavorable to Mary Lu Redmond and the Village of Hoffman Estates.

Id. 1351 n.9.

19 116 S. Ct. at 1926.

20 Two issues were appealed: An instruction on the use of deadly force, and the instruction which permitted the jury to draw the adverse inference as a result of the court's refusal to recognize and apply a psychotherapist-patient privilege. 51 F.3d at 1352. The deadly force issue is not pertinent to the privilege issue and will not be discussed.

21 In re Doe, 964 F.2d 1325 (2d Cir. 1992).

22 In re Zuniga, 714 F.2d 632 (6th Cir. 1983) cert. denied, 464 U.S. 983, 104 S. Ct. 426, 78 L. Ed. 2d 361 (1983).

23 51 F.3d 1346.

24 Jaffee, Adm'r for Ricky Allen, Sr., v. Redmond, 51 F.3d 1346 (7<sup>th</sup> Cir. 1995), cert. granted, 516 U.S. - 116 S. Ct. 334, 133 L. Ed. 2d. 234 (1995).

25 Jaffee, Adm'r for Ricky Allen, Sr., v. Redmond, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996).

26 U. S. v. Burtrum, 17 F.3d 1299 (10th Cir. 1994) cert. denied, 63 U.S.L.W. 3262, 115 S. Ct. 176, 103 L. Ed. 2d 112 (1994) (no privilege in child sex abuse case); In re Grand Jury Proceedings, 867 F.2d 562 (9th Cir. 1989), cert. denied, 493 U.S. 906 (1989) (no privilege in grand jury proceedings); United States v. Corona, 849 F.2d 562 (11th Cir. 1988) cert. denied, 489 U.S. 1084, 109 S. Ct. 1542, 103 L. Ed. 2d 846 (1989) (criminal firearms case); United States v. Meagher, 531 F.2d 752 (5th Cir. 1976) cert. denied, 429 U.S. 853, 97 S. Ct. 146, 50 L. Ed. 2d 128 (1976) (bank robbery trial). Commentators have noted the 10<sup>th</sup> Circuit's Burtrum decision has limited applicability. Also, two other circuits had refused recognition of the privilege and three others had neither adopted nor refused recognition at that time. See Anne D. Lamkin, Should Psychotherapist-Patient Privilege Be Recognized? 18 Am. J. Trial Advoc. 721 (Spring 1995).

27 116 S. Ct. at 1928 (citing *United States v. Bryan*, 339 U.S. 323, 331, 70 S. Ct. 724, 94 L. Ed. 884 (1950) (quoting 8 J. WIGMORE, EVIDENCE 64 (3d ed. 1940)).

<sup>28</sup> 116 S. Ct. at 1933 (Scalia, J., dissenting) (citing *United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)).

29 The rule states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law.

Fed. R. Evid. 501.

30 David L. Hayden, Should There be a Psychotherapist Privilege in Military Courts Martial? 123 MIL. L. REV. 31, 44-50 (1989).

31 Edward J. Imwinkelried, An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis, 73 NEB. L. REV. 511 (1994) (excellent discussion of the argument on both sides).

32 Id

33 116 S. Ct. at 1927 (citing *Wolfe v. United States*, 291 U.S. 7, 12, 54 S. Ct. 279, 78 L. Ed. 617 (1934) and *Hawkins v. United States*, 358 U.S. 74, 79, 79 S. Ct. 136, 3 L. Ed. 2d 125 (1958)).

34 116 S. Ct. at 1927-28 (citing *Trammel v. United States*, 445 U.S. 40, 47, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980) and *University of Pennsylvania v. EEOC*, 493 U.S. 198, 110 S. Ct. 577, 107 L. Ed. 2d 571 (1990)).

35 116 S. Ct. at 1928.

36 Id.

37 Id.

38 Id.

39 Id.

40 Justice Stevens wrote, "Our cases make clear that an asserted privilege must also `serve public ends.'" 116 S. Ct. at 1929 (citing *Upjohn Co., v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)).

41 116 S. Ct. at 1929. In note ten, the Court discussed the stressful nature of police work and the risk to the communities police officers serve if they are unable to seek the treatment they need, either because trained and experienced professionals leave the force or because they remain and go untreated. Id. at n.10.

<sup>42</sup> 116 S. Ct. at 1929.

43 Id.

44 Id.

45 Id. at 1929-30 (citing *Trammel*, 445 U.S. at 43-50 and *United States v. Gillock*, 445 U.S. 360, 368 n.8, 100 S. Ct. 1185, 63 L. Ed. 2d 454 (1980)).

46 116 S. Ct. at 1930 (citing *Funk v. United States*, 290 U.S. 371, 376-381, 54 S. Ct. 212, 78 L. Ed. 369 (1933)).



47 The Court observed that in 1972, the Judicial Conference Advisory Committee noticed that the common law "had indicated a disposition to recognize a psychotherapist-patient privilege when legislatures began moving into the field." 116 S. Ct. at 1930 (citing Proposed Rules, 56 F.R.D. 243).

<sup>48</sup> The Court cited to its decision in *Gillock*, 445 U.S. at 367-368, which rejected the creation of a state legislative privilege based, in part, on the absence of such a proposed privilege by the Advisory Committee. 116 S. Ct. at 1930.

49 116 S. Ct. at 1932 (citing 7th Circuit, 51 F.3d. at 1358 n.19).

50 "A rule that authorizes the recognition of new privileges on a case-by-case basis makes it appropriate to define the details of new privileges in a like manner. . . . [It] is neither necessary nor feasible to delineate its full contours in a way that would govern all conceivable future questions in this area." 116 S. Ct. at 1932 (citing *Upjohn*, 449 U.S. at 386 n.19).

51 116 S. Ct. at 1932. The Seventh Circuit called for a balancing by the trial judge against the privilege whenever "in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests." 51 F.3d at 1357 (citing *In Re Doe*, 964 F.2d at 1328).

52 116 S. Ct. at 1932 (citing *Upjohn*, 449 U.S. at 393).

53 Professors Saltzburg, Martin and Capra note that "the Jaffee opinion is notable for its willingness to embrace a privilege that did not exist under common law. Indeed, Jaffee is the first opinion in which the Supreme Court [has] recognized a 'new' privilege." 2 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 3 (6th ed. Supp. 1995; 1996).

54 Fed. R. Evid. 501.

55 116 S. Ct. at 1931 n.15. Jaffee involved two claims, one federal, the other a state claim. Insofar as the state claim was concerned, the privilege afforded Officer Redmond by 740 ILL. COMP. STAT. 110/10 (West 1994) controlled, even in U.S. District Court. Fed. R. Evid. 501. As to the federal claim, there was no privilege. While the parties didn't raise this "split of authority" issue, it nevertheless caught the attention of the Supreme Court. 116 S. Ct. at 1931 n. 15

56 Given the Court's resolve to decide the privilege issue on the facts before it without speculating to all the possible permutations of such a privilege, (See 116 S. Ct. at 1932 n.19 and accompanying text) and the Court's taking notice of the variations of the privilege among the states, (See 116 S. Ct. at 1929-30 nn. 11-12 and accompanying text), and that one reason to find the privilege at the federal level was to avoid "frustrat[ing] the purposes of the state legislation" (116 S. Ct. at 1930), it is possible that the rule will be defined in terms of state law for all claims, just as it is now on civil state claims.

57 28 U.S.C.A. §§ 1346(b) (1976), 2402, 2671-2680 (1994).

<sup>58</sup> National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 705(c), 100 Stat. 3816 (1986).

59 42 U.S.C.A. § 290dd-3 (1991).

<sup>60</sup> A distinction should be made between "confidential" in the sense of privileged communications and information which is to be kept private by law or regulation. In military psychotherapy practice, private information is kept confidential because of express agreement with the patient not to disclose it without prior consent except for releases to: other health care providers; commanders and first sergeants with a need to know; anyone the patient authorizes in writing; third party payors (like insurance companies under 10 U.S.C.A. § 1095 (Supp. 1996)); or as required by law. Before being seen in an Air Force mental health facility, patients are informed of the limits on confidentiality. See e.g. AFI 41-210, Patient Administration Functions, Ch 1, (July 26, 1994) [hereinafter AFI 41-210]; AR 40-2, Army Medical Treatment Facility General Administration, Section 5 (March 3, 1978) (stating the term "private" will be used rather than confidential or privileged to avoid confusion. *Id.* at paragraph 3-18; AR 40-66, Medical Records Administration, paragraph 2-2, Protection of Confidentiality (July 20, 1992). In one highly publicized case, however, an Air Force psychiatrist has questioned the effectiveness of the Air Force's informed consent procedures, explaining that since the patients comes into the clinic "in emotional pain, he doesn't know if they fully comprehend the explanation." Ellen Joan Pollock, *Mother Fights to Keep Daughter's Records In Rape Case Secret*, WALL ST. J., Aug. 22 1996, at 1.

61 AFI 41-210, AR 40-2; AR 40-66 supra note 60.

62 As one former military psychiatrist, Dr. T. Pinckney McIlwain explained,

a lack of confidentiality is something a service member should reasonably expect. The military environment is a unique one that demands much from the individual soldier. Furthermore, military service is inherently hazardous. I believe this places a greater degree of

responsibility on the military to ensure that service members are fit for duty. The consequences of this responsibility is an increased "need to know" about a soldier's physical and emotional well-being. For the privilege of continuing to serve, service members on active duty sacrifice a degree of-confidentiality.

Regina Pedigo Galvin, Even Soldiers Get The Blues, THE ARMY TIMES, July 29, 1996, at 13.

<sup>63</sup> These records cannot be considered "confidential" in the sense of a privileged confidential communication since the limits on confidentiality do not allow for the required intent between the parties that the confidences not be disclosed to anyone else. AFI 41-210, supra note 60. Moreover, there is no "Government employer-employee privilege" which would create another layer of protection (i.e. a "privilege within a privilege," as when an accused discloses his lawyer's advice in a confidential communication with his spouse).

<sup>64</sup> MCM, supra note 4, Part III.

<sup>65</sup> Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980).

<sup>66</sup> MCM, supra note 4, Mil. R. Evid. 501(a)(4).

<sup>67</sup> MCM, supra note 4, Mil. R. Evid. 501(d).

<sup>68</sup> Despite one agency's assertion that military case law clearly shows this to be the case, this question remains unanswered.

<sup>69</sup> Supra, note 65.

<sup>70</sup> In contrast to the general acceptance of the proposed Federal Rules of Evidence by Congress, Congress did not accept the proposed privilege rules because a consensus as to the desirability of a number of specific privileges could not be achieved. In an effort to expedite the Federal Rules generally, Congress adopted a general rule, Rule 501, which basically provides for the continuation of common law in the privilege area. The Committee deemed the approach taken by Congress in the Federal Rules impracticable within the armed forces. . . . [T]he military criminal legal system is characterized by its dependence upon large numbers of laymen, temporary courts, and inherent geographical and personnel instability due to the worldwide deployment of military personnel. Consequently, military law requires far more stability than civilian law. This is particularly true because of the significant number of nonlawyers involved in the military criminal legal system. Commanders, convening authorities, non-lawyer investigating officers, summary court-martial officers, or law enforcement personnel need specific guidance as to what material is privileged and what is not.

MCM, supra note 4, Drafters' Analysis, at A22-36.

<sup>71</sup> Id.

<sup>72</sup> MANUAL FOR COURTS-MARTIAL, United States (1969 ed. Rev.) (hereinafter MCM 1969).

<sup>73</sup> MCM supra note 4, Drafters' Analysis, at A22-36.

<sup>74</sup> MCM, supra note 4, Mil. R. Evid. 501.

<sup>75</sup> MCM, supra note 72, Para. 151b(2).

<sup>76</sup> Manual, FOR COURTS-MARTIAL, United States, 227 (1921).

<sup>77</sup> MANUAL FOR COURTS-MARTIAL, United States, Para. 123 b. (1928).

<sup>78</sup> MANUAL FOR COURTS-MARTIAL, United States, Para. 151 b. (1951).

<sup>79</sup>

It is the duty of medical officers to supply medical services to members of the armed forces, to make periodical physical examinations as required by regulations, and to examine persons for appointment and enlistment, and medical officers may be specifically directed to observe, examine, or attend a member of the armed forces. This observation, examination, or attendance is official and the information thereby acquired is official. Although the ethics of the medical profession forbid medical officers and civilian physicians to disclose without authority information acquired when acting in a professional capacity, no privilege attaches to this information or to statements made to them by patients.

MCM 1969, supra note 72, Para. 151 c. (2).

80 The exclusion was worded in each manual as follows:

It is the duty of medical officers of the Army to attend officers and soldiers when sick, to make the annual physical examination of officers, and examine recruits for enlistment, and they may be specially directed to observe an officer or soldier or specially to examine or attend them; such observations, examination, or attendance would be official and the information acquired would be official. While the ethics of the medical profession forbid them to divulge to unauthorized persons the information thus obtained and the statements thus made to them, such information and statements do not possess the character of privileged communications.

MANUAL FOR COURTS-MARTIAL, United States, Para. 231 (1921).

It is the duty of medical officers of the Army to attend officers and soldiers when sick, to make the annual physical examination of officers, and examine recruits for enlistment, and they may be specially directed to observe an officer or soldier or specially to examine or attend them. Such observations, examination, or attendance would be official and the information acquired would be official. While the ethics of the medical profession forbid them to divulge to unauthorized persons the information thus obtained and the statements thus made to them, such information and statements do not possess the character of privileged communications. The communications between civilian physician and patient are not privileged.

MANUAL FOR COURTS-MARTIAL, United States, Para. 123 c. (1928).

It is the duty of medical officers of the Army to attend sick members of the armed forces, to make periodical physical examinations as required by regulations and to examine persons for enlistment, and medical officers may be specially directed to observe, examine, or attend a member of the armed forces. Such observation, examination, or attendance would be official and the information thereby acquired would be official. Although the ethics of the medical profession forbid medical officers and civilian physicians to disclose without authority information acquired when acting in a professional capacity, no privilege attaches to such information or to statements made to them by patients.

MANUAL FOR COURTS-MARTIAL, United States, Para. 151 c. (2) (1951).

As can be seen, throughout each manual, the substance of the doctor-patient exclusion remained unchanged.

81 See Hayden, supra, note 30.

82 Professors Saltzburg, Schinasi and Schlueter have opined that a narrower psychotherapist-patient privilege would not be barred by Mil. R. Evid. 501(d), "in light of the extraordinary need for confidentiality between psychotherapist and patient that is as important in military as in civilian life." STEPHEN A. SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE MANUAL, 537 (3d ed. 1991). In *United States v. Shaw*, 9 U.S.C.M.A. 267, 26 C.M.R. 47 (1958), the Court characterized an interview between the accused and a psychiatrist as one of "doctor-patient." The Court explicitly stated, though, that it was not holding that there was such a relationship, but would assume so for disposition of the case. *Id.* at 49, n.1. In *Shaw*, the issue arose when the defense offered expert evidence on the accused's mental condition to raise a "mental irresponsibility" defense. Trial counsel rebutted with his own psychiatrist who had interviewed the accused "to determine whether or not there was ... any mental derangement ... as to the disposition of the case." *Id.* at 50, n. 1. The accused's admissions were elicited. On appeal, the psychiatrist-patient privilege was raised as a basis for error; appellant defense counsel "urg[ing] [the Court] to disregard the Manual provision and the common-law rule as inconsistent with the requirements of justice and the provisions of 18 U.S.C. § 4245." *Id.* at 49. Declining to reach the substance of the argument, the Court reasoned that the accused waived the issue by first presenting the evidence of the accused's mental condition. *Id.* at 50. Nevertheless, the Court did recognize that the "ordinary relationship protected by the privilege may not be present" in this case, given that the accused was not seeking diagnosis or treatment. *Id.* at 50 n. 1.

83 Proposed Fed. R. Evid. 504 read as follows:

Rule 504. Psychotherapist-Patient Privilege

(a) Definitions.

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

(2) A "psychotherapist" is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the

diagnosis or treatment of a mental or emotional condition; including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family:

(b) General Rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Who may claim the privilege. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority so to do is presumed in the absence of evidence to the contrary.

(d) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) Examination by order of judge. If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise:

(3) Condition an element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

3 SALTZBURG, *supra* note 53, at 1824-25.

<sup>84</sup> MCM *supra* note 4, Drafters' Analysis, at A22-1.

85 *Id.* at A22-37 (citing MCM 1969, *supra* note 72, 1 151c.). See *supra* note 79 for text.

86 This lack of distinction between regular physicians and psychotherapists is not unique to the military. Early reviews of Fed. R. Evid. 501 also failed to make any distinction.

See CHARLES MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 216 (1954). Later commentators did note early statutory moves to establish a psychotherapy distinction. See 8 J. WIGMORE, WIGMORE ON EVIDENCE § 22 (McNoughton Rev. 1961) (citing early state laws recognizing a psychotherapist-patient privilege, including Montana (1961), Georgia (1954) and Arkansas (1957)).

87 Memorandum from Bryan G. Hawley, Major General, USAF, The Judge Advocate General, for All Staff Judge Advocates, Chief Circuit Judges and Chief Circuit Trial and Defense Counsel, Release of Medical Records in Criminal Proceedings (July 31, 1996) (discussing the conclusion reached by the Joint Service Committee) (on file with authors).

88 *Id.*

<sup>89</sup> Art. 31, U.C.M.J., 10 U.S.C.A. § 831 (1983). Article 31 provides:

Art. 31. Compulsory self-incrimination prohibited

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding

the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial:

<sup>90</sup>United States v. Toldeo, 25 M.J. 270 (C.M.A. 1987) on reconsideration 26 M.J. 104 (C.M.A. 1988), cert. denied, 488 U.S. 889, 109 S. Ct. 220, 102 L. Ed. 2d 211 (1988).

91 Id. at 272.

92 Id. at 273.

93 Id. at 272.

94 Id.

95 Id. at 273.

96 Id. at 274. In note 2, the Court provided the complete rule, which is one speaking to Court appointed experts. The Court noted that Article 46 and R.C.M 703 cover the rules on production of witnesses and evidence, and neither 'speaks to privileges. Defense counsel's argument raised the privilege under Mil. R Evid. 302, which is a privilege against self-incrimination in compelled sanity board proceedings. Id. at n.2. See SALTzBuRG, supra note 82, at 139.

97 25 M.J. at 274. The ruling is at n.3.

<sup>98</sup> 25 M.J. at 274.

<sup>99</sup> Id. at 276.

<sup>100</sup> Id. at 275.

101 Id. There is no discussion, just a complete reiteration of Mil. R.. Evid. 501(d) and a citation to the Drafters'Analysis. See, MCM supra note 4, Drafters'Analysis, at A22-31.

102 The Court rejected the argument because the accused was not ordered to undergo the sanity board procedure under Rule for Court Martial 706; rather, the defense secretly sought the advice of the psychologist on the issue in order to avoid disclosing a trial strategy.

103 25 M.J. at 275-76. At 276, the court claimed that the accused had not raised this privilege at trial or on appeal. In its opinion on reconsideration, it corrected that assertion, but concluded that it made no difference. Id. at 276. See United States v. Toledo, 26 M.J. 104, 105 (C.M.A. 1988), cert. denied, 488 U.S. 889, 109 S. Ct. 220, 102 L. Ed. 2d 211 (1988).

104 Rejected because the accused cannot "simply annex government officials into the attorney-client relationship, but must obtain them through proper channels." 26 M.J. at 105.

105 25 M.J. at 275-76. "The psychiatrist's (psychotherapist's) place on the defense team to `conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense' of insanity is now established beyond cavil." citing Ake v. Oklahoma, 470 U.S. 78, 83, 105 S. Ct. 1087, 1097, 84 L. Ed. 2d 53 (1985).

<sup>106</sup> 25 M.J. at 276.

107 United States v. Turner, 28 M.J. 487 (C.M.A. 1989).

108 Id. at 489.

<sup>109</sup> Id. at 488 (citing Mil. R. Evid. 501 (d) and Toledo, 25 M.J. 270, 275).

110 United States v. Mansfield, 38 M.J. 415 (C.M.A. 1993), cert. denied, 62 U.S.L.W. 3705, 114 S. Ct. 1610, 128 L. Ed. 2d 338 (1994).

111 Id. at 416.

112 Id. at 416-417.

<sup>113</sup> Id at 417. The inconsistency between the two theories is that fraud was the result of manipulating evidence and experts, thereby "creating" a defense of mental responsibility where there otherwise was none.

114 Id. (citing *United States v. Dubay*, 17 U.S.C.M.A. 147, 37 C.M.R 411 (1967)). 24 M.J. 611 (A.F.C.M.R. 1987).

<sup>115</sup> 38 M.J. at 417.

116 Id (reh g granted 24 M.J. 611, 618 (A.F.C.M.R. 1987).

117 38 M.J. at 416. In note 2, the court found that the defense counsel brought up the statements on direct examination. It isn't clear, but it appears that the military judge ruled that trial counsel could use the statements in an Article 39a -UCMJ hearing (Art. 39(a), 10 U.S.C.A § 839(a) (1983), causing the defense counsel to "ease the sting" by first bringing them up. Id. at 417 n.2. The issue on appeal was whether the accused was denied a fair retrial as a result of the government's access to and probable use of attorney-client privileged information. Id. at 416 For defense counsel to bring up the arguably privileged matter first, and then claim that the government could not cross examine thereon would almost certainly bring up another ineffective assistance of counsel claim since counsel would have obviously waived the privilege, then; but it's possible that the events unfolded that way, as well.

118 Id. at 416.

119 Id. at 418.

120 Id. n.3.

121 38 M.J. at 418. The court recognized that statements made to psychiatrists can fall within the attorney-client privilege.

122 Id. (citing MCM, supra note 4, Mil. R. Evid 501(d), and Drafters' Analysis, at A22-34-35). However, a psychotherapist-patient privilege had been recognized, although not applied; in both the Second Circuit (*In re Doe*, 964 F.2d 1325 (2d Cir. 1992)) and Sixth Circuit (*In re Zuniga*, 714 F.2d 632 (6<sup>th</sup> Cir. 1983) cert. denied, 464 U.S. 983, 104 S. Ct. 426, 78 L. Ed. 2d 361 (1983).

123 See MCM, supra note 4, Mil. R Evid. 301(d), (e); 302(b)(1); 510.

124 Art. 31, U.C.M.J., 10 U.S.C.A. § 831 (1983). See supra note 89, for text of Art. 31.

125 *United States v. Moore*, 32 M.J. 56 (C.M.A. 1991).

126 Id. at 58.

127 Id.

128 This issue was raised for the first time on appeal. Id. at 60.

129 By way of Army Regulation [hereinafter ARI 608-18, The Family Advocacy Program, (Sept. 18, 1987)] offered by counsel for the first time at oral argument on the appeal. The court observed that it was not in effect at the time the accused discussed his depression with the psychiatric nurse.

130 32 M.J. at 60.

131 Id.

132 Id at 61.

133 *In re Zuniga*, 714 F.2d 632 (6<sup>th</sup> Cir. 1983), cert. denied, 464 U.S. 983, 104 S. Ct. 426, 78 L. Ed. 2d 361 (1983).

134 *United States v. Franklin*, ACM No. S28054, 1990 C.M.R. LEXIS 1487 (A.F.C.M.R. 1990).

135 Id., at \*2.. Bron is a cough syrup which could be purchased over the counter in Japan, but which is a Schedule V controlled substance. Id. n. 1. Thus, its use is punishable.

136 Id at \*2. The court just comments that the reason therefore was not pertinent to this analysis.

137 Id at \*8. Mil. R. Evid. 803(4) is a hearsay exception for statements made to medical personnel for purposes of medical diagnosis or treatment. Why the military judge thought he had to reach to a hearsay exception when Mil. R. Evid. 801(d)(2)(A), statement by party opponent, would have been a far easier theory of admissibility, is unexplained. Suffice it to say that the court did find that the questions were for medical purposes.

138 Id at \*6.

139 Id at \*5.

140 Id.

<sup>141</sup> The form provides in part:

Active duty members referred by their squadrons should be aware that a report will be returned with our recommendations. In this situation, the clinic is being asked by a third party what to do for, with, or about another person. Your Article 31 rights against self-incrimination may apply, and these will be explained to you by your therapist if you wish.

Id. at \*6.

142 Id.

143 Id. at \*7. Evidently, it is the earlier consultations which enabled him to sign the clinic information form.

144 Id. at \*7-8 (citing *United States v. Loukas*, 29 M.J. 385, 387 (C.M.A. 1990), petition denied, 32 M.J. 194 (C.M.A. 1990).

145 Id. at \*7.

146 Id. at \* 1, 7.

147 *United States v. Collier*, 36 M.J. 501 (A.F.C.M.R. 1992).

148 Id. at 503.

149 Id. at 504. 150 Id.

151 Id.

152 Id. at 505.

153 *Id.*

154 Id

155 Id. at 506.

156 Id. (citing *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990), petition denied, 32 M.J. 194 (C.M.A. 1990); *United States v. Fisher*, 21 U.S.C.M.A. 223, 44 C.M.R. 277 (1972).

157 36 M.J. at 506.

158 *Id.*

159 Id. n.10.

160 Id. at 506. The court notes that the argument is unclear, but seems to concede adequate warnings were given. Id.

<sup>161</sup> Id. at 507.

162 Does this matter? The opinion goes on to assess for error, in case it was incorrect in its analysis, taking on the "beyond a reasonable doubt" standard given the constitutional nature of the issues. The court found the statements harmless beyond a reasonable doubt, since the same admissions were provided by his girlfriend. Therefore, assuming there had been a psychotherapist-patient privilege, waiver of that privilege certainly would have been found. This is just an example of how dicta, being an aside in the case, remains undeveloped.

163 United States v. Brown, 38 M.J. 696 (A.F.C.M.R. 1993).

164 United States v. Franklin, ACM No. 528054, 1990 C.M.R. LEXIS 1487 (A.F.C.M.R. 1990).

165 United States v. Collier, 36 M.J. 501 (A.F.C.M.R. 1992).

166 38 M.J. at 697.

167 Id. at 697-98.

168 Id. at 698. Whether the investigation focused on the accused before that time is unclear.

169 Id.

170 Id. They observed that she was intoxicated. They needed to know what drugs she had taken in order to properly treat her during withdrawal. After learning she'd taken Demerol, they needed to know the quantity, because the medical literature indicated that some patients can die during withdrawal. Id.

171 Id. at 699. She was under a suicide observation.

172 Id. at 699. The accused conceded the absence of a physician-patient privilege. The court cited to Mil. R. Evid. 501(d) in a footnote. Id. n.6.

173 38 M.J. at 699.

174 MCM, supra note 4, Mil. R. Evid. 501(a)(4), 1102.

175 United States v. Moore, 32 M.J. 56 (C.M.A. 1991).

176 United States v. Moreno, 36 M.J. 107 (C.M.A. 1992).

177 United States v. Raymond, 38 M.J. 136 (C.M.A. 1993).

178 United States v. Loukas, 29 M.J. 385 (C.M.A. 1990), petition denied, 32 M.J. 194 (C.M.A. 1990).

179 36 M.J. at 109.

180 Id

181 Id at 115.

182 Id.

183 Id at 112. The court did recognize the compromising position the accused was in-accept Ms. Cirk's offer of help and risk disclosure of the statements to military authorities, or decline to cooperate with DHS and risk the consequences of court action without DHS help along with an increased risk that he would lose his family. The court dismissed this as a concern, however, since it was a dilemma of the accused's causing. Id.

184 Id at 117.

185 Id at 113, 115.

186 Id. at 115-16. The court noted that had there been evidence that Ms. Cirks was a "conduit for military authorities or had there appeared to be some sort of tacit understanding designed to subvert the purposes of Article 31, we would have had little difficulty in reaching a very different conclusion." Id. at 117. The court reasoned that to extend Article 31 rights to all civilian agencies having



their own official interest in service members' conduct would "create a vast statutory exclusionary rule that could never have been imagined by the drafters of Article 31." *Id.*

187 *Id.* at 118.

188 *Id.* at 120 (discussing *Paez v. State*, 781 S. W.2d 34 (Tex. Cr. App. 1984) and *Cates v. State*, 776 S.W.2d 170 (Tex.Cr.App. 1989)).

189 36 M.J. at 120 (citing *Maine v. Moulton*, 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985)).

190 36 M.J. at 122.

191 *Id.* (citations omitted). The court issued its decision in *United States v. Miller*, 36 M.J. 124 (C.M.A. 1992) on the same day as *Moreno*. The facts were very similar to those in *Moreno*, in that statements were made to a civilian Child Protective Services social worker assigned to a case resulting from the accused's daughter's sexual abuse complaints, and a court-appointed psychiatrist assigned as part of the local custody hearings. The judge found that the questioners were not pursuing the information for law enforcement purposes. He also found them to have little relevance and consequently, did not consider them to be adverse. The Navy-Marine Corps Court of Military Review affirmed, *United States v. Miller*, 32 M.J. 843 (N.M.C.M.R. 1991), agreeing with the judge that there was no duty to advise, and finding that even if there was error, it was harmless. The Court of Military Appeals affirmed on the basis of the other evidence in the case and the judge's view of the weight of the accused's statements. However, in a footnote, the Court recognized that anything more substantive about the admissibility of the statements would be *dicta*. 36 M.J. at 128 n.5. The court noted that these facts raised the same concepts as discussed in *Moreno* and noted the dilemma the military member is in when sandwiched between two jurisdictions, military and civilian, observing that in this case, the accused was not recommended for reunification because he did not confess. *Id.* The court said:

This is an area where trial defense counsel can provide their clients with a real service by making sure that they understand the risks involved and by getting all the parties talking to each other. A social services program aimed at salvaging a family is not going to be effective if the military authorities exploit those efforts for prosecutorial purposes.

36 M.J. at 128 n.5 (emphasis added).

192 *United States v. Raymond*, 38 M.J. 136 (C.M.A. 1993).

193 *Id.* at 137. AR 608-18, *supra* note 129.

194 38 M.J. at 137.

195 *Id.* at 137-38.

196 *Id.* at 138.

197 AR 608-18, *supra* note 129.

198 38 M.J. at 138.

199 *Id.*

<sup>200</sup> *Id.* at 137, 139-140.

201 *Id.* at 140.

202 *Id.* at 141.

203 *Id.* at 142.

204 *Id.* at 143-44:

205 *Id.* at 144. Of course, there again is the assumption of no evidentiary privilege.

206 *Id.* at 147.

<sup>207</sup> United States v. Moore, 32 M.J. 56 (C.M.A. 1991).

208 38 M.J. at 147.

209 United States v. Moreno, 36 M.J. 107 (C.M.A. 1992).

210 38 M.J. at 146.

211 United States v. Quillen, 27 M.J. 312 (C.M.A. 1988).

212 Chief Judge Sullivan concurred in the result in *United States v. Bowerman*, 39 M.J. 219 (C.M.A. 1994), a case where the supervising pediatrician of the accused's son's case questioned the accused without Article 31 rights. The pediatrician was also the medical advisor to the Family Advocate Case Management Team (FACMT). This team is responsible for identification, evaluation, and treatment of maltreatment and includes medical, investigative and other base agency personnel. See Air Force Instruction [hereinafter AFI] 40-301, Family Advocacy, Para. 2.2.3 (July 22, 1994). The accused alleged that the doctor questioned him with an investigatory purpose consistent with her role as FACMT member. The evidence as developed indicated that the child was nearly dead, and the doctor didn't suspect him initially of any criminal behavior. The doctor stopped questioning him when she became suspicious by the accused's answers to her questions. The court concluded that the doctor was questioning the accused for medical purposes, and ruled the statements admissible under that theory, citing *United States v. Fisher*, 21 USCMA 223, 225, 44 C.M.R. 277, 279 (1972), *United States v. Moore*, 32 M.J. 56, 60 (C.M.A. 1991), and *United States v. Loukas* 29 M.J. 385, 387, 389 (C.M.A. 1990). Chief Judge Sullivan concurred based on Loukas and Moore but went on to say: "As for my dissent in Raymond, . . . I simply note that it has not yet persuaded a majority of this Court." *Bowerman*, at 222 (Sullivan, C.J., concurring).

213 *United States v. Johnson*, 22 U.S. C.M.A. 424, 47 C.M.R. 405 (1973).

214 MCM, *supra* note 4, Drafters' Analysis, at A22-7.

215 47 C.M.R. 407 (Duncan, J., concurring).

216<sub>id</sub>

<sup>217</sup> *Id.* at 404.

<sup>218</sup> *Id.* at 408 (Duncan, J., concurring).

219 18 U.S.C.A. § 4244 (1970).

220 47 C.M.R. 408 (Duncan, J., concurring).

221 MCM *supra* note 4, Drafters' Analysis, at A 22-7-9.

222 MCM *supra* note 4, Mil. R Evid 501(a)(4).

223 MCM *supra* note 4, Drafters' Analysis, at A 22-37, citing 1969 MANUAL FOR COURTS-MARTIAL Para. 137.

224 Practicality is a matter of policy. A judge asked to rule on this slim reed is being asked to balance competing interests as a matter of policy. Such balances tend to be case-specific and unpredictable. The Jaffee court recognized this problem when it rejected the balancing test created by the Seventh Circuit. The drafters of the military rules recognized that Fed. R Evid. 501, without any specificity, was itself "impracticable" for the military. Their response was to provide enumerated privileges to provide the "stability" needed for military practitioners. Of course, the president may say that a psychotherapist-patient privilege is impracticable, and if he did so, it would eliminate the balancing and unpredictability others have recognized to be problematic. In any event, it should be recognized that a counsel arguing against application of the psychotherapist-patient privilege on the basis of "impracticability" is advancing a mere policy argument.

225 *United States v. Miller*, 32 M.J. 843 (N.M.C.M.R. 1991), 36 M.J. 124 (C.M.A. 1992).

226 *United States v. Moore*, 32 M.J. 56 (C.M.A. 1991).

227 *United States v. Moreno*, 36 M.J. 107 (C.M.A. 1992).

228 *United States v. Raymond*, 38 M.J. 136 (C.M.A. 1993).

229 32 M.J. at 847. The Navy-Marine Court of Military Review said it could find no prior decision in which Mil. R. Evid 501(a)(4) had been applied to a "claim of privilege derived entirely from state statute. Before embarking on such uncharted waters, we note that the privilege in issue here belongs to public social service agencies of the State of California, not to appellant." *Id.* However, the accused was arguing application of the privilege by way of *In re Hampers*, 651 F.2d 19 (1st Cir. 1981), the application of which the government conceded, arguing instead that the exception providing for disclosure applied. 32 M.J. at 846-47. Therefore, it would seem that the claim was based on more than state statute. Even more interesting was the Navy-Marine Court's ruling on standing. The court first said that the privilege applied to the state agency, rather than appellant. It went on to say that even if the judge erred in failing to recognize the privilege, one who is not the holder of the privilege cannot object to evidence offered contrary to it. After a single sentence citation, the court contradicts itself by stating that the accused "may have standing to assert the privilege in regard to his own communications to the holder of the privilege," but not to the communications made by his daughter; statements to which the accused did not object under a privilege theory. *Id.* More peculiar yet is the Court of Appeals' observation of the state social-worker's "futile effort at the court-martial to exercise her qualified California privilege not to reveal the contents of her interview with appellant. . . ." (*United States v. Miller*, 36 M.J. 125, 128 n.5), a fact apparently overlooked by the Navy-Marine Court when it determined that the privilege belonged to the state agency. 32 M.J. at 847.

230 *United States v. Smith*, 30 M.J. 1022 (A.F.C.M.R. 1990), *affd* on other grounds, 33 M.J. 114 (C.M.A. 1991).

231 The accused had written a letter to her imprisoned husband from her own jail cell, asking him to testify to certain facts in support of her defense, and that if he did so, she would not divorce him. 33 M.J. at 116.

232 *Id.* at 117-118. The Air Force Court of Military Review had to rely on Mil. R. Evid. 501(a)(4) to reach the "crime-fraud" exception to spousal privileges, because such an exception, recognized in some federal courts, is not an enumerated exception under Mil. R. Evid 504. In the Air Force opinion, the court found that application of a federal exception to a military evidentiary privilege is acceptable, "insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual." 30 M.J. at 1025-26 (quoting Mil. R. Evid. 501(a)(4)).

233 *United States v. Martel*, 19 M.J. 917 (A.C.M.R. 1985).

234 The accused told his wife, "I want to show you something." He then tossed aside the linens on their bed, revealing his ill-gotten gains. *Id.* at 923. The Court said this act intended to communicate that he was successful in his endeavor. *Id.* at 927.

235 *Id.* at 923-924.

236 MCM, *supra* note 4, Mil. R. Evid. 504(b):

237 19 M.J. at 925-928.

238 *Id.* at 925.

239 *id.*

240 *Id.*

241 *Id.* at 928.

242 *Id.*

243 *Id.*

244 *United States v. Archuleta*, 40 M.J. 505 (A.C.M.R. 1994).

245 *Id.* at 506.

246 *Id.* (citing *United States v. Martel*, 19 M.J. 917 (A.C.M.R. 1985)).

247 40 M.J. at 506.

248 *Id.* at 506-07.

249 *Id.* at 507 (citing *United States v. Smith*, 33 M.J. 114, 119-20 (C.M.A. 1991) (Everett S.J., concurring)).

250 *United States v. Smith*, 30 M.J. 1022 (A.F.C.M.R. 1990), *affd* on other grounds, 33 M.J. 114 (C.M.A. 1991).

251 30 M.J. at 1025.

252 *Id.*

253 33 M.J. at 119 (Everett, S.J., concurring in part).

254 *Id.*

255 *Id.* at 120 (quoting MCM, *supra* note 4, Mil. R. Evid. 501(a)(4)).

256 30 M.J. at 1022.

257 *Id.*

258 MCM, *supra* note 4, Mil. R. Evid. 503. The rule provides:

#### Rule 503. Communication to Clergy

(a) General Rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.

(b) Definitions. As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.

(2) A communication is "confidential" if made to a clergyman in the clergyman's capacity as a spiritual adviser or to a clergyman's assistant in the assistant's official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.

(c) Who may claim the privilege. The privilege may be claimed by the person, by the guardian or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman's assistant to do so is presumed in the absence of evidence to the contrary.

259 *Id.*

260 SALTZBURG ET AL., *supra* note 53, at 556 (citing to 2 S. SALTZBURG & M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 601-02 (5th ed. 1990)).

261 MCM, *supra* note 78, Para. 151 b2. It provides: "Also privileged are communications between a person subject to military law and a chaplain, priest, or clergyman of any denomination made in the relationship of penitent and chaplain, priest or clergyman, either as a formal act of religion or concerning a matter of conscience."

262 Hayden, *supra* note 30, at 75.

263 *Id.* See also Galvin, *supra* note 62.

264 *United States v. Moreno*, 20 M.J. 623 (A.C.M.R. 1985).

265 *Id.* at 624. The accused was Catholic.

266 *Id.* at 625.

267 *Id.* at 626.

268 *Id.* at 627.

269 *Id.* at 625-26. See also *Mullen v. United States*, 263 F.2d 275 (D.C. Cir. 1958) (history of clergy-penitent privilege).

270 20 M.J. at 626.

271 *United States v. Coleman*, 26 M.J. 407 (C.M.A. 1988) (quoting *Trammel v. United States*, 445 U.S. 40, 51, 100 S. Ct. 906, 913, 63 L. Ed. 2d. 186 (1980)).

272 263 F.2d at 278 n.4.

273 AFI 36-2701, Social Actions Program Para. 5.5.1.1 (Aug. 15, 1996); AFI 51-201, Administration of Military Justice Para. 8.3 (July 28, 1994).

274 Trial by court-martial or Article 15, UCMJ, nonjudicial punishment, 10 U.S.C.A. § 815 (1983).

275 AM 36-2701 Para. 5.5.1.1.2., *supra* note 273.

276 AR 600-85, Alcohol and Drug Abuse Prevention and Control Program, §§ 6-3 to 6-5 (Oct. 1988).

277 AFI 36-2701 Para. 5.5.1.2., *supra* note 273.

278 AR 600-85 Para. 6-3, *supra* note 276.

279 Carroll J. Diebold, Military Administrative Psychiatry, in *THE PRACTICE AND PRINCIPLES OF MILITARY FORENSIC PSYCHIATRY* (Lande & Armitage eds., forthcoming 1997) (manuscript at 24, on file with authors).

280 *Id.*

281 DOD Regulation 5200.2-R, DOD Personnel Security Regulation (Dec. 20, 1979).

282 Exec. Order No. 10450, Security Requirements for Government Employment (April 27, 1953).

283 AFI 31-501, Personnel Security Program Management (May 2, 1994); AR 380-67, Personnel Security Program (Sep. 9, 1988).

284 AFI 51-201 Para. 8.3, *supra* note 273, AFI 36-2071 Para. 5.5.1.1.2., *supra* note 273, AR 600-85, 6-4, *supra* note 276.

285 *United States v. Fenyo*, 6 M.J. 933 (A.F.C.M.R. 1979), petition denied, 7 M.J. 161 (C.M.R. 1979).

286 *Id.* at 934. The Court was interpreting the predecessors to the current instructions. Specifically, Section 408 of the Drug-Abuse Office and Treatment Act of 1972, 21 U.S.C. § 1175, implemented by Air Force Manual 111-1, Military Justice Guide, Para. 5-14 (Aug. 25, 1975). However, the military was exempt from this statute. Air Force Manual 111-1 preceded Air Force Instruction 51-201.

<sup>287</sup> *United States v. Cruzado-Rodriguez*, 9 M.J. 908 (A.F.C.M.R. 1980), *aff'd* 14 M.J. 124 (C.M.A. 1982).

288 Air Force Regulation [hereinafter AFR] 30-2, Social Actions, was the predecessor to AFI 36-2701. AFR 30-2, Figure 4-6, Para. IIb (Nov., 8 1976).

289 21 U.S.C. 1175(b)(2)(C).

290 9 M.J. at 909.

291 *United States v. Cottle*, 11 M.J. 572 (A.F.C.M.R. 1981), *aff'd* 14 M.J. 260 (C.M.A. 1982).

292 *Id.* at 575.

293 *Id.* n.8. The court seems to imply that this "privilege" wouldn't be recognized in cases tried after 1 Sep 80.

294 *United States v. Schmenk*, 11 M.J. 803 (A.F.C.M.R. 1981), petition denied, 12 M.J. 188 (C.M. A. 1981).

295 *Id.* at 803-4.

296 Id. at 805 (Miller, J., dissenting).

297 Id. at 810.

298 *United States v. Jones*, 11 M.J. 817 (A.F.C.M.R. 1981), petition denied, 12 M.J. 304 (C.M.A. 1981).

<sup>299</sup>The majority relied on an exemption to its confidentiality policy in AFR 30-2 which would allow commanders in the accused's chain of command to review such files. AFR 30-2 supra note 288, Figure 4-6, Para. IIa(5) (Nov. 8, 1976).

300<sup>11</sup> M.J. at 818 n.\* (Miller, J., dissenting).

301 *United States v. Broady*, 12 M.J. 963, 965 (A.F.C.M.R. 1982) (Miller, J., concurring in result).

302 Id. at 966-75.

303 Id. at 976.

304 *United States v. Howes*, 22 M.J. 704 (A.C.M.R. 1986).

305 Id at 706 (discussing 21 U.S.C. § 1175, transferred to 42 U.S.C. § 290ee-3(a) by Pub.L. 98-24 § 2(b)(16)(B), 97 Stat. 182 (April 26, 1983), and H.Rep. No. 775, 92d Congress, reprinted in 1972 U.S. Code Cong. & Ad. News 2045, 2067-72).

306 22 M.J. at 706 n.3.

307 Id at 707 n.5 (citing *United States v. Banks*, 520 F.2d 627, 632 n.7 (7th Cir. 1975) (doctor prohibited from testifying because of privileged information) and *United States v. Hopper*, 440 F.Supp. 1208, 1209 (N.D.Ill. 1977) (same, with respect to 21 U.S.C. § 1175)).

308 MCM supra note 4, Mil. R. Evid. 501(a)(2).

309 *United States v. Johnson*, 25 M.J. 517 (A.C.M.R. 1987).

310 Id. at 519.

<sup>311</sup> Id. at 518.

312 Id. n. 1.

313 Id.

314 *United States v. Evans*, 20 M.J. 504, 505 (A.F.C.M.R. 1985) aff'd, 22 M.J. 192 (C.M.A. 1986) (citing AFR 111-1, Military Justice Guide, Para. 5-5(d) (Aug. 1, 1984)); *United States v. Carter*, 26 M.J. 1002, 1004 (A.F.C.M.R. 1988) petition denied 27 M.J. 469 (C.M.A. 1988) (discussing AFR 30-2, Social Actions Program, Para. 4-3 (April 1986)).

315 *United States v. Gunter*, 29 M.J. 140 (C.M.A. 1989) (Head of Air Force base drug rehabilitation program allowed to testify that accused's potential for rehabilitation was poor in wrongful use of cocaine case). See also, *United States v. Hanks*, 29 M.J. 907 (A.C.M.R. 1989) petition denied 31 M.J. 489 (C.M.A. 1990) (accused's alcohol rehabilitation failure admissible to rebut good rehabilitation potential evidence in drug case).

316 An excellent history of the program's early development can be found in Colonel John A. Anderson et.al., AIDS Issues in the Military, 32 A.F.L. Rev. 353 (1990).

317 Peter MacPherson, The Military's Assault on AIDS, Hospitals and Health Networks 38 (July 5, 1996).

318 The main rationale given for required testing, the potential threat of contamination of wartime blood supplies by undetected infected members, was seen as inapplicable to the military's civilian work force. So although routine civilian employee testing has not been adopted, testing of civilian employees is conducted where the laws of a foreign country in which the employee is assigned require it. See AFI 48-135, Human Immunodeficiency Virus Program, Atch. 6, (June 22, 1994).

319 Anderson, supra note 316, at 353.

320 Restriction on Use of Information Obtained During Certain Epidemiologic Assessment Interviews, Pub. L. No. 99-661, Title VII, § 705(c), 100 Stat. 3904 (Nov. 14, 1986).

321 Ass't Secretary of Defense (Readiness Support) Memorandum, Policy on Identification, Surveillance, and Administration of Personnel Identified with Human Immunodeficiency Virus (HIV)-Action Memorandum, Para. B.7.d (Nov. 23, 1988).

322 The AFI implements directives from 10 U.S.C. §§ 1201-1221 and DOD Directive 6485.1 (Mar 19, 1991) both of which are derived from Pub. L. No. 99-661. - See Restriction on Use of Information Obtained During Certain Epidemiologic Assessment Interviews, Pub. L. No. 99-661, Title VII, § 705(c), 100 Stat. 3904 (Nov. 14, 1986).

323 AFI 48-135, supra note 318, Atch 10. See also, AR 600-110, Ch. 7, Identification, Surveillance and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV) (Apr. 22, 1994).

324 Nonadverse personnel actions are determined on a case-by-case basis and include: reassignment; disqualification (temporary or permanent) from a personnel reliability program; denial, suspension, or revocation of a security clearance; suspension or termination of access to classified information; and removal (temporary or permanent) from flight status or other duties requiring a high degree of stability or alertness, including explosive ordnance disposal or deep-sea diving. Id. at Para. A10.2.3:

325 Id. at Para. A10.2.2.

326 Id.

327 Id. at Para. A7.1.

328 Id. Although challenged, safe sex orders continue to be upheld by the courts. Anderson, supra note 316 at 352. See also United States v. Dumford, 30 M.J. 137 (C.M.A. 1990) Cert. denied, 498 U.S. 854, 111 S. Ct. 150, 112 L. Ed. 2d 116 (military has legitimate interest in limiting HIV positive service member's contact with others, including civilians, in order to prevent spread of disease. Safe sex order to that effect did not unduly restrict service member's personal rights) and United States v. Womack, 29 M.J. 88 (C.M.A. 1989) (safe sex order issued by commander did not interfere with any constitutionally protected privacy interests of service member and had valid military purpose),

329 AFI 48-135, supra note 318, Para. A7.1.

330 Id. Commanders are advised not to inform an infected member's First Sergeant and/or supervisor unless a thorough determination is made that these individuals truly have a need for the information. Commanders are advised to discuss any such expansion of release with the Director of Base Medical Services. THE MILITARY COMMANDER AND THE LAW, 172 (3rd ed. 1996). Army Regulation 600-110, provides that "[m]edical and command personnel will take necessary steps to ensure that test results are not disclosed except as required for medical, administrative, or legal purposes on a 'need to know' basis for the performance of official duties." AR 600-110, supra note 323, 12-6(c).

331 Id.

332 Assistant Secretary Air Force Memorandum, Policy on Identification, Surveillance and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV) (May 16, 1989).

333 5 U. S. C. A; § 552a (1996).

334 Anderson, supra note 316.

335 Mental Health Evaluations of Members of Armed Forces, Pub. L. No. 101-510, Title V, 554 (Nov. 5, 1990) as amended Pub. L. No. 102-484, Title V, § 546(a)-(h), 106 Stat. 2416 (Oct. 23, 1992). See Diebold, supra note 279 (manuscript at 14).

336 DOD Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces (Sept. 14, 1993).

337 AFI 44-109, Mental Health and Military Law, (Aug. 1, 1996). US Army MSG DTG 141300Z (Nov. 1995) & MSG DTG 080700Z (Mar. 1996), Mental Health Evaluations.

338 Emergency situations exist when a military member is viewed as incapable of taking care of himself or is a danger to himself or others due to a mental disorder. In such cases the emergency must be documented in writing, and immediate involuntary

commitment may be made. AFI 44-109, *supra* note 337 Para. 1.3. See also Joseph A. Procaccino, Jr., *Tort Claims and Litigation*, *The Reporter*, March 1996, at 21-22.

339 DOD Directive 6490.1, *supra* note 336. The rights a referred member must receive includes the right to: consult with a defense lawyer; complain to an Inspector General or the DOD Inspector General; request an additional mental health evaluation by a provider of the member's choice; make lawful communications to an Inspector General, attorney, Member of Congress or others; the two workday waiting period before the evaluation; and the most appropriate therapeutic treatment available. *Id.*

340 *Id.*

341 *Id.* at Paras. 2.c(2) and (3), encl. 3.

342 Diebold, *supra* note 279 (manuscript at 14 & 16).

343 Article 92, U.C.M.J., 10 U.S.C.A. § 892 (1983).

344 AFI 40-301; *supra* note 235; DOD Directive 6400.1, Family Advocacy Program (March 21, 1992).

345 42 U.S.C.A. § 290dd-3 (1991).

346 AFI 51-602, Boards of Officers (Mar. 2, 1994); AFI 36-3208, Administrative Separation . of Airmen (Oct. 14, 1994).

347 MCM, *supra* note 4, Rule for Courts-Martial 706 and Mil. R. Evid. 302.

348 See *supra* notes 281-283 and accompanying text.

349 Legislation could be somewhat deferential by directing the military departments to develop a confidentiality provision compatible with the military's mission, or not at all deferential, as would be the case if it passed legislation, applicable in trials by courts-martial, creating a psychotherapist-patient privilege. Operation of Mil. R Evid. 501(a)(2) would automatically incorporate such legislation into our privilege rules. MCM, *supra* note 4, Mil. R. Evid. 501(a)(2).

350 U.S. CONST. Amend. V and XIV, § 1.

351 Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 *Vill. L. Rev.* 1705, 1715-1740 (1992).

352 *Id.* at 1715.

353 *Id.* at 1718-21.

354 *Id.* at 1733-35. See also Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View*, 50 *U. Miami L. Rev.* 249 (1996) (citing *Riggins v. Nevada*, 504 U.S. 127, 137, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992) (recognizing a constitutional liberty right in refusing antipsychotic medication); *Washington v Harper*, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990) (same); and *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990) (finding a constitutional liberty right to refuse medical care)).

355 *Wick*, *supra* note 351, at 1733.

356 *Id.*

357

Under constitutional theory, only "fundamental" constitutional rights are entitled to the protection of strict judicial scrutiny. Only those liberties so deeply rooted in our history and tradition that they are deemed to require special safeguarding by the judiciary against intrusion by the political branches of government will be given this extraordinary measure of constitutional protection. Otherwise, the Supreme Court, the members of which are insulated from political pressures by life tenure, would usurp the essential role of the legislature in a democracy. This role envisions that the legislature, as the representatives of the people, should shape social and economic policy for the society. Strict judicial scrutiny of the actions of the political branches of government must accordingly be reserved for special situations, such as the protection of minority rights against majoritarian influences and those fundamental liberties that the Constitution insulates from interference from the political process:



Id. at 1738 (footnotes omitted). See also JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL Law 378-79 (4th ed. 1991).

358 Equal protection judicial review can utilize one of three levels of scrutiny, ranging from the lowest amount "mere rationality," to intermediate review to the highest amount "strict scrutiny." NowAK & ROTUNDA, supra note 387, at 588-604.

359 *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); *Thornburgh v. Amer. College of Obstetricians & Gynecologists*, 476 U.S. 747, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986).

360 *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978).

361 *Eisenstadt* 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349(1972); *Giswold v. Conn*, 365 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

362 *Procunier v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974).

363 *Williams v. Fears*, 179 U.S. 270, 21 S. Ct. 128, 45 L. Ed. 186 (1900); *Aptheker v. Secretary of State*, 378 U.S. 500, 21 S. Ct. 128, 45 L. Ed. 2d. 186 (1964).

364 *Plyer v. Doe*, 457 U.S. 202, 2316-17, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982), reh g denied, 458 U.S. 1131, 103 S. Ct. 14, 73 L. Ed. 2d 1401 (1982).

365 Id at 457 U.S. 216-17 (1982). The government's actions cannot create "undue burdens" which either purposefully or even inadvertently place substantial obstacles in the way of a person's attempt to exercise a fundamental right. See *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 2820, 120 L. Ed. 2d 674 (1992).

366 Courts will usually apply the lowest level of scrutiny in cases dealing with military matters, unless they touch a constitutional issue. See infra note 401. While it is possible the Court could utilize an intermediate level of review, such is unlikely. See NowAK & ROTUNDA, supra note 357, at 588-604.

367 *United States v. Carolene Prods. Co.*, 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938). In fact, even when the government fails to give a good reason, courts will provide one for them. See e.g. *Railway Express Agency Inc. v. New York*, 336 U.S. 106, 110, 69 S. Ct. 463, 93 L. Ed. 533 (1949) (where the Court upheld the questioned regulation by providing several possible reasons for the government's actions even though the government had never presented such reasons).

368 *Wick*, supra note 381, at 1740.

369 *Parker v. Levy*, 471 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974); *Etheridge v. Haid*, 56 F.3d 1324 (11<sup>th</sup> Cir. 1995) (free speech can be limited in military contexts.); *Blameuser v. Andrews*, 630 F.2d 38 (7<sup>th</sup> Cir. 1980) (freedom to associate with American Nazi Party members can be limited by military); *Goldman v. Weinberger*, 475 U.S. 503, 106 S. Ct. 1310, 89 L. Ed. 2d (1986) (freedom of religion can be limited by military). But see *Hartman v. Stone*, 68 F.3d 973 (6<sup>th</sup> Cir. 1995) (Army regulation prohibiting religious activity at post child care center violated freedom of religion as it had no discernible link to combat mission).

370 See e.g. AR 600-20, Command Aspects of Medical Care, 15-4 (Mar. 30, 1988), which states:

a. Necessary medical care. A soldier on active duty or active duty for training will usually be required to submit to medical care considered necessary to preserve his or her life, alleviate undue suffering, or protect or maintain the health of others. Commanders may order the examination of any soldier in their command when warranted. The medical treatment facility commander will determine if hospitalization of the soldier is appropriate....

(2) Immunizations required by AR 40-562 or other legal directive (subject to any limitation stated in these directives) may be given.

(a) The policy of authorizing forcible immunization is intended to protect the health and overall effectiveness of the command as well as the health of the soldier. Soldiers do not have an option as to whether they will be immunized except as prescribed in AR 40-562, paragraph 9, and paragraph 5-6 of this regulation.

Cited exceptions are for medical adverse reactions and, interestingly enough, religious accommodation.

371 EMERGENCY WAR SURGERY, (T.E. Bowen, ed. 1988); R. F. Bellemy, *Conserve the Fighting Force*, 153 Mil. Med. 185 (1988); D. A. Rubenstein, *Health Service Support and The Principles of War*, 153 Military Medicine 145 (1988). The ethical

dilemma of the conflict between doing what is best for the individual patient versus doing what is best for the command has long been debated. Edmund Howe, *Ethical Issues Regarding Mixed Agency of Military Physicians*, 23 *Soc. Sci. Med.* 80 (1986).

372 *Doe v. Sullivan*, 756 F.Supp. 12 (D.D.C.) *aff'd*, 938 F.2d 1370 (D.C. Cir. 1991).

373 938 F.2d at 1374.

374 756 F. Supp. at 12.

375 21 U. S.C.A. § 355(1) (1972).

376 938 F. 2d at 1374.

377 10 U.S.C.A. § 980 (Supp. 1996).

378 938 F.Supp. at 1374-75.

379 *Id.* at 1375.

380 756 F.Supp. at 13-14, 938 F.2d at 1371-75.

381 738 F.2d at 1371-72. Research and development of medical treatment countermeasures for chemical and biological weapons is part of the mission of the U.S. Army Medical Research and Development Command at Fort Detrick, MD. See Gregory P. Berezuk & Garland E. McCarty, *Investigative Drugs and Vaccines Fielded in Support of Operation Desert Storm*, 157 *Mil. Med.* 404-406 (1992).

382 The actual efficacy of the drug could not be determined beforehand since to get a definitive answer would require exposing humans to the drug along with nerve gas. Such experimentation is illegal and contrary to accepted post-Nuremberg medical ethics. For an excellent introduction to the ethics of human research, particularly in the governmental setting, see Advisory Committee on Human Radiation Experiments, *Research Ethics and the Medical Profession*, 276 *JAMA* 403 (August 7, 1996). See also, BEREZUK & MCCARTY, *supra* note 381, at 404; *THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION*, (George Annas & M. A. Grodin, eds. 1992); *AGAINST THE CRIME OF SILENCE/PROCEEDINGS OF THE INTERNATIONAL WAR CRIMES TRIBUNAL*, (J. Duffet, ed. 1968).

383 938 F.2d at 1372 n. 1 (citing information provided by Dr. Edward D. Martin, Deputy Ass't Secretary of Defense. Interestingly, the leading military physicians involved with the drugs state in their article on the drugs' use that they "were designed to treat patients who were already injured or otherwise incapacitated, thus the consequences of a decision not to receive the product pertained solely to the individual patient." Berezuk & McCarty *supra* note 381 at 405.

384 MG is characterized by the loss of muscle control, which occurs due to a blocking of nerve impulses to the muscles. While MG occurs naturally as the result of autoimmune disease, nerve agent weapons produce the same result. *MERCK MANUAL* Ch. 13, at 1524 (Robert Berkow, ed., 16th ed. 1992) See also *EMERGENCY WAR SURGERY*, *supra* note 371, at 90-93.

385 938 F.2d at 1372, n. 1. Berezuk & McCarty, *supra* note 381 at 405. Botulism is related to MG and also destroys muscle nerves by way of the toxin the botulism spores produce. *MERCK MANUAL* *supra* note 384, at 1524.

386 938 F.2d at 1372-73.

387 *Id.* at 1373. The DOD stated that in "all peace time applications, we believe strongly in informed consent and its ethical foundations ... but military combat is different." George Annas, *Changing The Consent Rules For Desert Storm*, 326 *New Eng. J. Med.* 770 (March 12, 1992).

388 938 F.2d at 1373.

<sup>389</sup> *Id.* "Peer review committees protect patients by reviewing proposed therapies in advance to determine whether the risk to the patient is outweighed by the potential rewards." Elliott Schudhardt, *Walking a Thin Line: Distinguishing Between Research and Practice During Operation Desert Storm*, 26 *Colum. J.L. & Soc. Probs.* 77, 112 (1992). Professor Schudhardt concludes in his article that independent peer review is impossible in the military because of what he views as overwhelming command influence. He cites previous breaches of medical ethics such as the CIA's LSD experiments as proof that the government cannot be expected to police itself. He also finds the fact that the FDA may keep its military waiver decisions secret, "disturbing". *Id.* Unfortunately,

he does not provide an alternative to secrecy in combat situations, where secrecy can mean the saving of numerous lives, much less the difference between winning or losing.

390 938 F.2d at 1374. In reaching a decision whether a waiver would be in service members' best interests, the Commissioner is to consider: the extent and strength of safety and efficacy data; the context in which the product will be used (i.e., hospital versus battlefield); the nature of the condition being treated or prevented; and, the nature of information to be provided to recipients concerning benefits and risks of taking or not taking the product.

BEREZUK & McCARTY, supra note 381, at 405.

391 938 F.2d at 1374.

392 Commanders could order ingestion of the tablets based on their belief that chemical attack was imminent. Annas, supra note 318418; at 771-772, The Gulf War was not the first time commanders were given such power. During WWII General Slim, in command of the Fourteenth Army, ordered his troops to take daily the malaria suppressant Atabrine. He had the troops randomly checked and if less than 95% of the members tested positive for the drug, he fired the immediate commanding officer. Edmund Howe, supra note 371; at 81 n.5.

393 938 F.2d at 1372 n. 1.

394 756 F. Supp. at 15.

395 Id.

396 Id. at 15.

397 Id. at 16.

398 Id. Such deference to regulatory interpretation is well established law. See *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417, 112 S. Ct. 1394, 118 L. Ed. 2d 52 (1992) (where the Court said "the interpretation of the agency administering the statute is entitled to great deference."). See also *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43; 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

399 756 F.Supp. at 15-16.

400 Id.

401 Id (citing *Nebbia v. New York*, 291 U.S. 502, 54 S. Ct. 505; 78 L. Ed. 940 (1934); *Goldman v. Weinberger*, 475 U.S. 503, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986)). Judge Harris found the low level of review appropriate because of the military context of the case. Id. at 17 n.6.

402 Id. at 17.

403 Id.

404 938 F.2d. at 1370.

405 Id. at 1381.

406 Id.

407. Id. at 1382-83. As pointed out, by Professor Schuchardt, Judge Ginsburg's review failed to address whether the DOD violated its own rules on human subject consent. Nevertheless, in his own review, he found the DOD's actions not to be "research" and therefore not violative of those rules. Schuchardt, supra note 389, at 115.

408 938 F. 2d. at 1383.

<sup>409</sup> See Lawrence Gostin, *Health Information Privacy*, Cornell L. Rev. 451 (1995). Professor Gostin's article provides excellent insight into the expanding debate over "the development of a national health information infrastructure which [he] define[s] as the basic underlying framework of electronic information collection, storage, use and transmission that support[s] all of the essential functions of health care system[s]." Id at 456. See also B. Woodward, *The Computer-Based Patient Record and Confidentiality*, 21 New Eng. J. Med. 1420 (November 23, 1995).

410 See Gostin, *supra* note 409. See also Woodward, *supra* note 409, at 1420-21.

411 *Id* See also Ezekial J. Emmanuel & Nancy N. Dubler, Preserving the Physician-Patient Relationship in the Era of Managed Care, 273 JAMA 323 (1995); James E. Sabin, Caring About Money: The American Psychiatric Association Code of Ethics Meets Managed Care, 12 Behva. Sci. & L. 317 (1994).

412 Gostin, *supra* note 409, at 454.

413 See As Dr. Harold Eist, president of the American Psychiatric Association explains, "[t]he therapeutic relationship is poisoned from the outset when either the doctor or the patient fears eventual disclosure of confidential communications." News, US Court Rules on Confidentiality, 312 Brit. Med. J. 1630 (29 June 1996).

414 See Hayden, *supra* note 30 at 56-61. See also Gostin, *supra* note 409.

415 *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, (1973) reh g denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973); *Doe v. Bolton*, 410 US 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1972).

416 See *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977).

417 See Gostin, *supra* note 409. at 495-98. See also Havden. *supra* note 30. at 56-61.

418 See Elizabeth Loftus et. al., Patient-Psychologist Privilege: Access to Clinical Records in the Tangled Web of Repressed Memory Litigation, 30 U. Rich. L. Rev. 109, 134-37 (1996). See also Hayden, *supra* note 30, at 58.

419 *Mayfield v. Dalton*, 901 F.Supp. 300 (1995).

420 See e.g. Dean Chadwin, The DNA War: How Two Marines Fought the Military's Genetic Roundup, THE VILLAGE VOICE, May 14, 1996.

421 901 F.Supp. at 303-305.

422 *Id.* at 303. The court does not really explain its decision to ignore the privacy issue except to say the plaintiffs, papers and arguments concentrated on the search aspects and so the court did so as well.

423 *Id* (citing *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989)).

424 901 F.Supp. at 304.

425 The court cited the language: "Laws and regulations that govern military personnel may change without notice to me. Such changes may affect my status . . . and responsibilities as a member of the Armed Forces regardless of the provisions of this enlistment/reenlistment, document." *Id.* (emphasis in original).

426 *Id.*

427 *Id.* at 305.

428 *Id.*

429 Hayden, *supra* note 30, at 56-59, and Anderson et. al., *supra* note 316, at 363-68.

430 116 S. Ct. at 1928 (quoting *Trammel v. United States*, 445 U.S. 40, 51, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980)).

431 *Id.*

432 *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L. Ed. 194 (1944). 433

The case involved the forced internment of all Japanese Americans living on the west coast during WWII for fear of spying and terrorist activities. The rationale for upholding *Korematsu* was the emergency nature of the war. One commentator has called the court's decision in the case a "constitutional disaster." See Eugene Rostow, The Japanese American Cases--A Disaster, 54 Yale L.J. 489 (1945). More recent commentators have pointed to the need for caution in accepting claims of national emergency as grounds for

allowing infringements on fundamental rights. See Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 *UCLA L. Rev.* 499, 568 (1991).

434 See S. A. Green, *The Ethical Limits of Confidentiality in the Therapeutic Relationship*, 17 *Gen. Hosp. Psychiatry* 80 (1995).

435 *Id.* Dr. Green refers to a "care based ethic" or an "ethic of care" which is basically an issue of professional medical ethics. *Id.* at 82.

436 See Imwinkelried, *supra* note 30; Winick, *supra* note 354; Hayden, *supra* note 30. Major (now Lt. Colonel) Hayden notes this approach has also been called "pragmatic," "instrumental," and "traditional." *Id.* at 35 n.24.

437 See Green, *supra* note 434, at 81. Dr. Green notes that "[c]ertain relationships have a special moral significance that convey obligations of positive beneficence." *Id.* See also Imwinkelried, *supra* note 31, at 543-44. An offshoot of the idea that legal principles should take into account ethical considerations is the growing "power" analysis legal theory, which reviews laws and their judicial interpretations from the context of power relationships among those making and enforcing the laws. "The very foundation of legal thought is composed of and contaminated by the human bias of cultural belonging and supremacy." Anthony R. Chase, *Race, Culture, And Contract Law: From the Cottonfield to the Courtroom*, 28 *Conn L. Rev.* 1, 54 (1995). The method employed in this approach is the examination of laws for their effect not just on society as a whole, but on discrete, powerless groups which may be effected in negative ways which the majority may not have considered. Legal commentators have noted the power theory as a basis for examining privileges, observing that their existence reflects the current political power in our society. See Hayden, *supra* note 30, at 38-39. While there has been a marked increase in the use of power theory to analyze laws in America, its use has been mostly in relation to traditional minorities such as women and people of color (especially with respect to health care issues). For further exploration into this theory, see also J. JONES, *BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT* (1981); SUSAN SHERWIN, *NO LONGER PATIENT: FEMINIST ETHICS & HEALTH CARE* (1992); PHILIP R. REILLY, *THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES* (1992); Sarah Gill, *Discrimination, Historical Abuse, and the New Norplant Problem*, 16 *Women's Rts. L. Rep.* 43 (1994); Abby Lippman, *Mother Matters: A Fresh Look at Prenatal Genetic Screening*, 5 *Issues in Reproductive & Genetic Engineering* 141 (1992).

438 See Brief of Amici Curiae George R. Ceasar, M.D., Joseph E. Lifschutz, M.D. and San Francisco Psychoanalytic Institute and Society in Support of Respondents (No. 95-266); Brief of Amici Curiae American Psychoanalytic Association, Division of Psychoanalysis of the American Psychological Association, The National Membership Committee on Psychoanalysis in Clinical Social Work, and the American Academy of Psychoanalysis in Support of Respondents (No. 95-266); Brief of Amici Curiae of the American Association of State Social Work Boards in Support of Respondents (No. 95-266).

439 *Id.*

440 See Loftus *supra* note 418, at 127 n.82. 441 116 S. Ct. at 1928-29.

442 *Id.* at 1932. This "qualified privilege" approach was first recommended by the ABA Commission on the Improvement of the Law of Evidence in 1938. The Commission recommended states adopt a clause in any doctor-patient confidentiality statute allowing a judge to determine when confidentiality should be overcome for the proper administration of justice. CHARLES T. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* 224 (1954).

443 This problem was first documented by Major Hayden in 1988. His survey of Army psychiatrists revealed one in four had been negatively impacted by the lack of confidentiality. See Hayden, *supra* note 30, at 86-90. An informal survey by Captain Becker of Army and Air Force providers revealed that these results appear to continue. The fact that the title of the July 29, 1996 *ARMY TIMES* was 'The Stigma of Seeking Psychological Help, and the generally negative comments in the accompanying article suggests a concomitant negative impact on the general military population, both among active duty and civilian dependents and retirees. See Galvin, *supra* note 62:

444 David L. Kutz, *Military Psychiatry: A Cross-Cultural Perspective*, 161 *Mil. Med.* 78, 79 (1996).

445 *Id.*

446 See Imwinkelried, *supra* note 31, at 12.

447 *Id.*

448 *Id.* Also, empirical research has established that "confidentiality increases the likelihood that people will report psychological symptoms, encourages people to seek help, and generally promotes more frequent and intimate self-disclosure." See Loftus *et. al.*, *supra* note 418 at 126.

449 Imwinkelried supra note 37, at 544.

450 Id

451 Respondent's Brief at \*65 (citing *In re Zuniga*, 714 F.2d 632, 639 (6<sup>th</sup> Cir. 1983) cert. denied 464 U.S. 983 (1983).  
452 116 S. Ct. at 1929.

453 Id

454 Such duties include: "performing mental status exams for administrative separations, investigations into suspected suicides of service members, psychiatric evaluations as part of security clearance assessments, and clinical review of positive urine drug screens." Diebold, supra note 279 (manuscript at 1).

455 One military psychiatrist has pointed out the military is a "distinct culture" and the "values of the U.S. military sometimes puts the psychiatrist at odds with the values of the dominant [civilian] culture." Kutz, supra note 444, at 79.

456 As one military provider has stated (very much in the tradition of *Catch 22*): The lightly wounded may not be greatly enthusiastic about returning to duty and the medical officer's commitment may have to extend beyond considerations of what is best for his patient. . . . The act of sending a wounded soldier back to combat and to possible death has no civilian equivalent. Anyone who thinks that to do so is equivalent to ... sending a factory worker back to his job after a minor industrial accident is naive.  
Bellamy, supra note 317, 187.

457 The stigma associated with psychological care has existed in most societies around the world. The first view of mental illness considered the individuals to be possessed by Gods or evil spirits, often viewed as signs of divine punishment. This led in 18<sup>th</sup> Century England to the locking up of lunatics (which came from the belief these persons were affected by and often screamed at the moon) in the infamous Bellevue. LYNN GAMWELL & NANCY TOMES, *MADNESS IN AMERICA: CULTURAL & MEDICAL PERCEPTIONS OF MENTAL ILLNESS BEFORE 1914* (1995). In a 1975 JAMA article, psychiatry was described as "the battered child of medicine ... born in witchcraft and demonical possession, feared by the public, often scorned by the family of medical specialists, and dependent for much of its existence upon handouts from public agencies." Comment, 329 *New Eng. J. Med.* 633, 635 (1993).

458 GERALD N. GROB, *MENTAL ILLNESS AND AMERICAN SOCIETY, 1875-1940* (1983); LYNN GAMWELL & NANCY TOMES, supra note 457.

459 GERALD N. GROB, *FROM ASYLUM TO COMMUNITY: MENTAL HEALTH POLICY IN MODERN AMERICA* (1991).

460 Id. See also Peter Finn, *Decriminalization of Public Drunkenness: Response of the Health Care System*, 46 *J. Stud. On Alcohol* 7 (June 26, 1995).

461 116 S. Ct. at 1928.

462 See Galvin, supra note 62.

<sup>463</sup>Kutz, supra note 444, at 80.

464 Id. at 79.

465 Ronald C. Kessler et. al., *Lifetime and 12 Month Prevalence of DSM-II-R Psychiatric Disorders in the United States: Results From the National Comorbidity Survey*, 51 *Arch. Gen. Psych.* 8 (1994).

466 Winick, supra note 354.

467 Id at 254.

468 Id. at 257.

469 Id. at 258-59. 470 Id at 259.

471 Jason Gertzen, Broader suicide probes are urged, AIR FORCE TIMES, Mar. 4, 1996, at 3.

472 Bryant Jordan, Major Commands are told to Target Stress, AIR FORCE TIMES, June 10, 1996, at 17.

473 id

474 Id.

475 Gertzen, supra note 471.

476 Id.

477 Id.

<sup>478</sup> Karen Jowers, What the other services are doing, AIR FORCE TIMES, June 10, 1996, at 14.

479 id.

480 Id See also, T.L Counsellor, Divine Intervention, THE ARMY TIMES, July 29, 1996 at 14.

<sup>481</sup> Jowers, supra note 478.

<sup>482</sup>"Officials could offer no explanation for the lower rate so far this year [as of May 1996], but an increased emphasis on getting help could be a factor." Jordan, supra note 472.

483 Nick Adde, Court Ruling Prompts new look at confidentiality, AIR FORCE TIMES, Aug. 8, 1996, at 14.

<sup>484</sup> Pollock, supra note 60.

485 id

486 M.G. Hawley, supra note 87.

487 Id.

488 Id.

489 Memorandum from Edgar R. Anderson, Jr., Lieutenant General, USAF, Surgeon General, to ALMAJCOM/SC, HQ AFRES/SG, ANGRC/SG, HQ AFIA/SC, HQ USAF/REM, 1100 N ED SQ, HQ AFPC/DPAM, HQ USAFA/SG; HQ AFMSA/SGS, Release of Medical Records in Criminal Proceedings (July 31, 1996) (on file with authors). This letter also suggests that Mil. R. Evid. 506 can provide protection against disclosure of records in cases such as that at Elmendorf. But that rule applies to government information, the release of which would be detrimental to the public interest. (MCM, supra note 71, Drafter's analysis, A22-40-41). It is inapplicable to a patient's mental health records.

490 Karen Jowers, Curbs on Psychiatrist Raise Questions, AIR FORCE TIMES, Sept. 23, 1996, at 25.

491 Letter from Melvin Sabshin, M.D., Medical Director, American Psychiatric Association to Colonel Thomas G. Becker, USAF, Associate Deputy General Counsel, Office of the General Counsel (undated) (on file with authors). Logically, we don't see how the same persuasive arguments in this letter do not apply to active duty personnel. They do. Granted, there is no way to provide unqualified confidentiality to military members' mental health records. But knowledge that records are discoverable is likely to interfere with military members obtaining needed mental health treatment; fear of exposure and humiliation is just as likely to dissuade military members from seeking such treatment; and if they do seek treatment, they're just as likely to withhold necessary information. Military members' morale is certainly affected if military members feel they cannot get necessary medical care, thereby having an impact of mission readiness just the same.

492 Karen Jowers, Case Highlights Family member confidentiality rules, AIR FORCE TIMES, Sept. 23, 1996, at 25.

493 Id. The harmful effects listed are: Patient's dignity harmed because psychotherapists are forced to violate confidentiality; ability to build trusting relationship with a psychotherapist impaired; military family members are subjected to different standards than their civilian counterparts; psychotherapists morale is harmed because they are forced to choose between military and clinical loyalties;

active duty members are hurt when their family members, mental health worsens as a result of the absence of a privilege, most obvious when patients commit violent acts or attempt suicide; the reputation of military medicine in the civilian medical community and society at large is harmed.

494 Id.

495 Patricia Schroeder, The Battle over Confidentiality: All Patients are Entitled to Privacy, AIR FORCE TIMES, Oct 7, 1996, at 37.

496 Hayden, *supra* note 30, at 81:

497 116 S. Ct. at 1933 (Scalia, J., dissenting).

498 Id. (quoting the majority opinion at 1925).

499 Id Justice Scalia characterized the majority's logic thusly, "[a]t this point, to conclude against the [psychotherapist] privilege one must subscribe to the difficult proposition, `Yes, there is a psychotherapist privilege, but not if the psychotherapist is a social worker. '"

500 *id.*

501 Id at 1934.

502 *id.*

503 Id.

504 Id.

504 Amici Curiae Brief of the American Psychoanalytic Association, et al., in support of Respondents observed:

The past century of rapid economic and social change has subjected many Americans to "unprecedented psychic demands" at the same time as it has isolated them from the kinship, religious and other ties that might, in an earlier era, have offered them support. (citing to R. BELLAH, ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 119-21 (1985)). During this same period, the number of Americans utilizing the mental health professions has increased steadily, more than tripling between 1965 and 1985 alone.

*Supra* note 438, at \*6.

506 "'The ... patient confides more utterly than anyone else in the World.... He lays bare his entire self, his dreams, his fantasies, his sins, and his shame.'" Id. (citing Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955) (quoting M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 272 (1952)).

507 116 S. Ct. at 1934 (Scalia, J., dissenting). But see Winick, *supra* note 354.

508 Id. at 1935.

509 *Id.*

510 116 S. Ct. at 1935 (Scalia, J., dissenting).

511 Id. He suggests that sparing patients intrusions into their privacy, and "psychotherapists needless expenditure of their time in deposition and trial.... can be achieved by means short of excluding ... evidence that is of the most direct and conclusive effect." Yet, he doesn't describe how. Id.

512 Id. at 1935.

513 Id at 1933-34.

514 Id at 1934.



515 Id at 1936.

516 Id. at 1937.

517 Id. at 1937-38.

518 Id. at 1938.

519 Id. at 1938

520 Id.

521 Our proposal protects intended confidential communications for diagnosis and/or treatment of a mental health problem. See *infra*, Section VI This language can be made as comprehensive or restrictive as the President sees best. ;For this reason, we don't discuss Justice Scalia's issue over the variations in state statutes governing the privilege for psychologists and psychiatrists, (Id. at 1935-36) or social workers, (Id. at 1938-40). However, Justice Scalia did conclude that the variation among the states "demonstrate most convincingly that adoption of a social worker psychotherapist privilege is a job for Congress." (Id. at 1940). As to this point, it should be noted that our rules are created by executive order as a result of a rule-making process by the Joint Service Committee on Military Justice. This is as "legislative" as our rule-making process gets. However, it does seem odd that Justice Scalia would make such a suggestion, after taking issue with the fact that states' rules were creatures of statute which,

"at worst ...suggests that the privilege commends itself only to decision making bodies in which reason is tempered, so to speak, by political pressure from organized interest groups (such as psychologists and social workers), and decision making bodies that are not overwhelmingly concerned (as courts of law are and should be) with justice."

116 S. Ct. at 1936.

522 Id. at 1935-36.

523 Id at 1931 and MCM, *supra* note 4, Mil. R. Evid. 501(a)(4).

524 SALTZBURG, *supra* note 82.

525 MCM, *supra* note 4, Drafters'Analysis, at A22-36-37.

526 116 S. Ct. at 1929.

527 See Michael J. Frevola, *Damn the Torpedoes, Full Speed Ahead: The Argument for Total Sex Integration in the Armed Services*, 28 CONN L. REV. 621, 658-663 (discussing judicial deference to military decisions). Short of the issue being deemed a fundamental constitutional right, it would be safe from challenge. See *supra*, notes 350-433, and accompanying text.

528 116 S. Ct. at 1929 n.10 (discussing that either qualified police officers will leave the force, or untreated police officers will remain).

529 *Id.*

530 M.G. Hawley, *supra* note 87.

531 Qualifications include that the disclosure be made as a formal act of religion or as a matter of conscience, intended to be confidential, and that the clergyman be a priest, rabbi, chaplain, or other similar functionary of a religious organization or reasonably believed to be. MCM, *supra* note 4, Mil. R. Evid. 503.

532 The military member may be discharged, but the characterization of the discharge cannot be based upon evidence obtained by way of the self-disclosure. See *supra*, note 275 and accompanying text.

533 To be sure, we recognize that mental disorders which- manifest themselves through criminal acts, or even behavioral problems, do adversely impact good order and discipline, which in turn impacts military readiness. But whether one is abusive at home, for instance, has no direct impact on whether one can perform his military duties as ordered, unlike the situation where one abuses a mind-altering controlled substance.

534 Adapted from the proposed federal rule 504(b).

535 Id.

536 Taken from Mil. R. Evid. 502(d)(1). MCM, supra note 4.

537 Adapted from the proposed federal rule 504(d)(3).

538 This is from Mil. R. Evid. 412(b)(1)(C), the "rape shield" rule. It is placed here, as the drafters intended with 412(b)(1)(C), to protect the rule from constitutional challenge. See SALTZBURG, supra note 82, at 522. This is not the same balancing developed by the Seventh Circuit and rejected by the Supreme Court. The Seventh Circuit's balancing test would call on the judge to make an "assessment of whether, in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests." 51 F.3d at 31 (citing *In re Doe*, 964 F.2d at 1328). That test requires the judge to balance competing interests in every case, on an evidentiary level, and in such case-by-case determinations, there could be little certainty. Such is not the case with respect to balancing done on a constitutional level. This exception is not problematic. For one reason, there can be no rule which arbitrarily or disproportionately infringes the accused's constitutional right to a fair trial. *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). Therefore, this balancing would need to be performed even without having a rule explicitly requiring it. "Any limitation on a constitutional right would be disregarded whether or not such a Rule existed." SALTZBURG, ET. AL., supra note 82, at 522. Secondly, it's not the same test. This test balances the accused's constitutional right to a fair trial against the privilege, whereas the Seventh Circuit would provide for confidences to be disclosed if one party had an evidentiary need for them which, in the judge's discretion, was greater than the patient's privacy interest. Third, although the Supreme Court rejected the Seventh Circuit balancing test, the court noted that it was appropriate to define the parameters of the new rule in future cases. 116 S. Ct. at 1932. No doubt this would be such a boundary. Finally, we have experience with constitutional balancing under Mil. R. Evid. 412. *United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983).

539 Adapted from the proposed federal rule 504(a)(1).

540 Adapted from the proposed federal rule 504(a)(2)(A).

541 Adapted from the proposed federal rule 504(a)(2)(B).

542 Licensed clinical social workers are included given the military's dependence upon them in mental health clinics.

543 Adapted from the proposed federal rule 504(a)(3).

544 Taken from Mil. R. Evid. 505(b)(2). MCM, supra note 4.

545 Taken from Mil. R. Evid. 505(b)(1). MCM supra note 4.

546 Taken from Mil. R. Evid. 412(c). MCM supra note 4.

547 Mil. R. Evid. 412 is such an example. See also, Mil. R. Evid. 302. MCM, supra, note 4.

548 Mil. R. Evid. 413 and 414 radically altered the rules of admissibility of an accused's prior acts of child molestation and sexual assaults in trials by courts-martial. This rule was implemented through Mil. R. Evid. 1102, which automatically incorporates amendments to the Federal Rules of Evidence into the Military Rules of Evidence, after Congress passed Federal Rules of Evidence 413, 414 and 415 as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 329035, 108 Stat. 1796-2151 (1994). Fed. R. Evid. 415 addresses admissibility of an accused's prior child molestations or sexual assaults in civil actions, and thus has no relevance in the Military Rules of Evidence. MCM, supra note 4, Mil. R. Evid. 413-414.

<sup>549</sup> 116 S. Ct. at 1929.

## **Clean Air Act General Conformity Determinations and the Air Force**

MAJOR SUSAN M. FALL, USAF / \* /

### **I. INTRODUCTION**

The modern Clean Air Act is the product of nearly a dozen separate Acts of Congress over the course of the last forty years. /1/ The Act, as it is

structured today, was adopted in 1970, <sup>/2/</sup> and is the primary federal statute regulating air quality and emissions of pollutants into the air. It is comprised of several different titles, each providing different types of limitations on pollutant emissions. <sup>/3/</sup>

The 1970 Clean Air Act (the Act) required the Federal Government to establish air quality goals by (inter alia) giving authority to the Administrator of the Environmental Protection Agency (EPA) to prescribe national ambient air quality standards (NAAQS). <sup>/4/</sup> In 1970, the United States was growing rapidly, with only a four percent unemployment rate and a two percent inflation rate <sup>/5/</sup> Optimism encouraged Congress to enact "an ambitious law" when it sought to refine air pollution regulation. <sup>/6/</sup> It became clear by 1977, however, that changes were necessary if the goals of the Clean Air Act were to be achieved. <sup>/7/</sup>

The 1977 amendments to the Clean Air Act included, for the first time, the concept of "conformity." Conformity is the "mechanism intended to ensure that departments, agencies, or instrumentalities of the Federal Government do not take, approve, or support actions that are in any way inconsistent with a state's plan to attain and maintain the national ambient air quality standards." <sup>/8/</sup> Conformity applies only to federal actions, not to the entire regulated community. As such, it particularly affects the Department of Defense (DOD) and has been called "[p]robably the most significant single environmental obstacle to [military] base conversion." <sup>/9/</sup> This article will explore the concept of general conformity, how general conformity can affect base closure and recent conformity litigation that is likely to affect DOD's activities now and in the future.

## II. HISTORICAL BACKGROUND OF THE CLEAN AIR ACT'S CONFORMITY PROVISION

### A. The Clean Air Act Before Conformity

Before 1970, state and federal officials could use their discretion in balancing environmental goals with other concerns when implementing the Clean Air Act. <sup>/10/</sup> After the 1970 version of the Act was implemented, clean air was to be achieved by removing discretionary application of the Act and directing federal and state officials to take action. <sup>/11/</sup> By creating the NAAQS, the Clean Air Act Amendments of 1970 established a method by which federal and state authorities were required to work hand in hand to create and implement air quality regulation.

The purpose of the 1970 Clean Air Act was to "speed up, expand, and intensify the war against air pollution." <sup>/12/</sup> Not a whisper of the word "conformity" appears in the Act. Rather, the 1970 Clean Air Act merely enabled state implementation plans (SIPS) to include land use and transportation controls as part of the many options for air pollution control. <sup>/13/</sup> At the same time, the Federal Aid Highway Act of 1970 <sup>/14/</sup> required that highway projects be "consistent" with air quality plans adopted by states. Because during this period states rarely developed serious transportation control plans and the Department of Transportation (DOT) never required air quality reviews of regional transportation plans, the sought after "consistency" never occurred. <sup>/15/</sup> It became clear that there had to be some better way to deal with transportation-generated air

pollution, which accounted for forty-two percent (by weight) of the United States' air pollution. /16/

## B. The Legislative History Behind Conformity §176(c)

In 1977, Congress added the conformity requirement to the Clean Air Act in an effort to deal with transportation-generated air pollution as a cause for air quality nonattainment. The requirement applied to all federal and federally assisted activities. No department, agency, or instrumentality of the Federal Government was permitted to finance, license, permit, or approve any activity that did not conform to an EPA-approved SIP. /17/ The 1977 Clean Air Act Amendments did not specifically define "conformity," /18/ so it was taken to mean nothing more than conforming to the transportation control measures (TCMs) contained in a SIP.

After several years of unsuccessful attempts at revamping the Clean Air Act, Congress was finally able to enact a major overhaul of federal air pollution control law during the Bush administration. There are several reasons why the timing was right in 1990 for a Clean Air Act overhaul. Regulators had discovered that many Clean Air Act provisions were not effective in reducing pollutants, new research began to reveal the causes of acid rain and stratospheric ozone depletion, and the general public was becoming more acutely aware of environmental issues. /19/ Additionally, "the desire of several key representatives and senators to enhance their reputations by steering a major bill through Congress" /20/ as well as active support and participation by the Bush Administration, made it possible for the administration to propose a bill to amend the Clean Air Act of 1990. /21/ Although Congress made numerous changes and fleshed out details in various areas, the bill's basic structure and goals remained intact. The bill was based in part on ideas considered by the previous Congress, resulting in a finished product that was "a nearly equal amalgam of administration and congressional proposals. /22/ Congress spent several months debating the amendments, but the final version passed by wide margins in both houses of Congress - a 401 to 25 vote in the House and an 89-10 vote in the Senate. President Bush signed the amendments into law on November 15, 1990, ending a thirteen year legislative battle over clean air. /24/

The passage of the 1990 Clean Air Act Amendments made sweeping changes in air pollution control efforts in the United States. It focused on air problems which remained unresolved despite twenty years of local, state, and federal efforts. Title I of the Clean Air Act deals with reduction of urban ozone and carbon monoxide pollution. In 1990, Title I, which contains the conformity requirement, shifted its focus from simple reliance on state control plans to implementation of an air quality classification system based on severity of pollution and imposition of specific control measures within each category.

Significantly, in 1990 Congress added "an extensive clarification" regarding conformity to the Clean Air Act. /26/ The 1990 amendments specified that "conformity" means a plan or project must conform to a SIP's purpose of eliminating or reducing NAAQS violations and achieving expeditious attainment of such standards. The conformity requirement

continued to mandate that the DOT and metropolitan planning organizations (MPOs) determine whether projects within their purview conform.

Congress also required EPA to promulgate, by November 15, 1991, new rules establishing specific criteria and procedures that must be used in "determining conformity." /<sup>27</sup>/ The EPA failed to issue any conformity rules by the statutory deadline, prompting the Environmental Defense Fund (EDF) and the Sierra Club to file suit under 42 U.S.C. § 7604(a)(2) to compel promulgation of such rules. /<sup>28</sup>/ After settlement discussions, the parties entered into a stipulated consent decree requiring EPA to issue final conformity criteria and procedures by October 15, 1993. /<sup>29</sup>/ On November 24 and November 30, 1993, respectively, EPA published conformity rules for (1) transportation plans and projects (known as the "Transportation Conformity Rule") /<sup>30</sup>/ and (2) other federally funded or supported projects (known as the "General Conformity Rule"). /<sup>31</sup>/ These final rules provided criteria and procedures for determining conformity in areas deemed "nonattainment" or "maintenance" areas. /<sup>32</sup>/ The EPA expressly declined, however, to issue a rule on criteria and procedures for "attainment" or "unclassifiable" areas.

The 1990 Clean Air Act amendments to § 176 thus created two distinct programs - general conformity and transportation conformity. Although associated, the two provisions differ in focus. Transportation conformity applies to transportation plans, programs, and projects funded or approved by the Federal Highway Administration (FHWA) or the Federal Transit Administration (FTA) or recipients of funds from these organizations. General conformity applies to all other federal actions in nonattainment areas.

Section § 176(c)(2) of the Clean Air Act is known as the "transportation conformity" provision. Although an in-depth discussion of transportation conformity is beyond the scope of this article, a brief explanation is appropriate to enable the reader to differentiate transportation conformity from general conformity.

The EPA issued final rules establishing criteria and procedures for transportation conformity on November 15, 1993. /<sup>34</sup>/ They were codified in Part 51, Subpart T, of the Code of Federal Regulations. /<sup>35</sup>/ Transportation conformity has been described as "a quantitative test intended to prevent uncontrolled increases in vehicle emissions that undermine the strategy established in the SIP and impede attainment and maintenance of clean air." /<sup>36</sup>/

The 1990 Clean Air Act Amendments to § 176(c)(2) increased the contributions that transportation plans, programs and projects must make toward air quality improvements in nonattainment areas. Transportation conformity under the federal rule applies to the long-range Regional Transportation Plan, the shorter-term Transportation Improvement Program (TIP), all transportation projects that receive funding or require approval from the FHWA or the FTA, and regionally significant nonfederal transportation projects that are sponsored by a recipient or federal highway or transit funds, regardless of whether federal funds were actually used for the project. Expected emissions from transportation plans and TIPs must be consistent with the implementation plan's motor vehicle emission estimates and required emissions reductions. Transportation

activities must actually contribute to attainment and maintenance of health-based air quality standards. /38/

Section § 176(c)(1) of the Clean Air Act has come to be known as the "general conformity" provision. It prohibits the Federal Government from funding, licensing, permitting, approving, or otherwise supporting activities which do not conform to an approved SIP. <sup>/39/</sup> If the federal activity does not conform, it will not be approved nor allowed to proceed. /40/ A project can come to a screeching halt while it is still in the planning stage, if it does not conform and cannot otherwise offset or mitigate its emissions. In this respect, the conformity rule is unlike the National Environmental Policy Act (NEPA), which merely requires "consideration" of environmental impacts and allows federal projects which will result in adverse environmental impacts to proceed so long as all procedural hurdles are met. The conformity rule, on the other hand, is a "comply or die" requirement. Without a conformity finding, the federal project will not survive.

General conformity is intended to hold those with responsibility for a project accountable for the project's resulting emissions. The ultimate goal is to prevent actions that are supported by the Federal Government from undermining efforts to achieve and maintain clean air in a cost effective manner. /41/ General conformity is based on the principle that the agency that sponsors or supports an activity is in the best position to limit the adverse air quality impacts of that activity. /42/ It is the belief of conformity proponents that "if such steps to avoid pollution are not taken, the result will be degraded air quality, adverse public health consequences, and an increased burden on regulatory agencies, and ultimately the public, to compensate for the additional air pollution by imposing more rigorous controls on another sector of society. " /43/

### **III. GENERAL CONFORMITY AND THE BASE CLOSURE PROCESS**

#### **A. The Base Closure/Conformity Quagmire**

In August 1995, the Air Force issued its guidance to the field on general conformity. /44/ Conformity can be a particularly burdensome requirement where base closure is concerned. It "reaches far beyond the scope of normal air pollution permitting," /45/ and gathers together emissions sources that are usually regulated under completely separate Clean Air Act programs, i.e., mobile sources, stationary sources, and aircraft emissions.

The conformity requirement can land the base closure process in an unfortunate quagmire in that it hinges on the timing of approval of (and the assumptions made in) the applicable SIP. <sup>/46/</sup> If the SIP's baseline was premised on emissions from the period when an installation was fully operational and emitting its peak level of pollutants, it will have taken those emissions into account in making its emission reduction plans. This scenario allows new civilian activities to emit up to that baseline level before adversely affecting the SIP. If, however, the SIP baseline emissions were measured during a period when the installation was closed and inactive, civilian reuse can be severely hampered because civilian emissions created by reuse of the base will have to be subtracted elsewhere

in the air district to ensure there will be no net increase in overall emissions. /47/

A second base closure problem associated with DOD's conformity determinations is the nature of the preliminary development plans obtained by military installations from the local community at the start of the NEPA environmental impact statement (EIS) process. /48/ The community, sometimes overstates its estimation of future air pollution and DOD relies upon the overstatement in making conformity determinations associated with base closure, necessitating a later revisiting of the conformity decision to ensure accuracy. /49/ This is not the only manner in which NEPA and conformity interrelate, at least according to the First Circuit.

## **B. Conservation Law Foundation, Inc. v. Department of the Air Force /50/**

Until the summer of 1994, federal facilities operated under the assumption that for federal projects, NEPA /51/ procedural requirements and Clean Air Act § 176(c) conformity requirements were, at best, distant cousins. Both had to be done, it was thought, but not necessarily in concert. A federal district court judge in the state of New Hampshire substantially changed that view in August 1994.

The 1988 Base Closure and Realignment Act /52/ required the Secretary of Defense to close or realign all military installations recommended for such action by a twelve-person Commission on Base Realignment and Closure established by the Secretary of Defense in May 1988. /53/ The 1988 Act specifically exempted many of the actions of the Commission and Secretary of Defense from the requirements of NEPA. /54/ It provided, however, that NEPA would apply after the Secretary had made the decision to close, or realign a particular military installation. The focus of NEPA analysis was limited to "the specific environmental impacts upon the gaining and losing locations, and the mitigating measures available to the Secretary." /55/ A civil action seeking judicial review was required to be brought within sixty days of the date of the challenged action. /56/

In December 1988, the Commission on Base Realignment and Closure recommended to the Secretary of Defense that eighty-six military installations be closed and that fifty-nine be partially closed or realigned. /57/ One of the bases recommended for closure was Pease Air Force Base (AFB), near Portsmouth and Newington, New Hampshire. The Secretary accepted that recommendation on January 5, 1989. /58/ The recommended closures and realignments were allowed to begin between January 1990 and September 1991. /59/ Pease AFB was closed on March 31, 1991; /60/ and the Air Force began preparing an EIS to evaluate several proposals for the development and reuse of the base.

The Air Force prepared a draft EIS in February 1991 and a final EIS in June 1991 analyzing the impacts of the transfer and redevelopment of the base, /62/ The final EIS evaluated the air quality impact of the transfer and redevelopment of Pease AFB and concluded that such activity would not result in the violation of the NAAQS or any state air quality standards. It attributed the region's existing ozone nonattainment status to the densely populated areas lying to the south of the base, but concluded that the

proposed action would impact the state's ability to achieve the ozone precursor reductions required by the 1990 Clean Air Act Amendments. <sup>/63/</sup> The Air Force issued an initial Record of Decision (ROD) in August 1991 and a supplemental ROD in April 1992. <sup>/64/</sup>

In March 1992, the Conservation Law Foundation (CLF) filed a citizen's suit pursuant to Clean Air Act § 304 challenging the actions of EPA and the United States Air Force in connection with the disposal and reuse of Pease AFB.

Specifically, CLF alleged violations of NEPA and the Clean Air Act. The Pease Development Authority (PDA) - a special purpose subdivision of the State of New Hampshire and the transferee of the Pease AFB property - moved to intervene as a defendant in this case in April 1992. <sup>/65/</sup>

The town of Newington then filed a separate lawsuit against the Air Force, PDA, and EPA in June 1992, <sup>/66/</sup> alleging violations of NEPA, the Clean Air Act, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). <sup>/67/</sup> (The federal defendants will hereafter be collectively referred to as "the Air Force.") The cases were consolidated during the course of litigation. <sup>/68/</sup>

Briefly stated, CLF alleged that the Air Force violated the Clean Air Act's conformity provision by: (a) Supporting a project that failed to conform to the purpose of the New Hampshire SIP; (b) Supporting a project that failed to conform to the purpose of the Maine SIP; (c) Supporting a project that violated the purpose of the New Hampshire SIP through an increase in the severity and frequency of violations of the carbon monoxide standard; (d) Proposing mitigation measures that, in essence, would "exempt" the Air Force from compliance with the Clean Air Act and put the compliance burden on the state instead; (e) Conducting an inadequate air analysis to form the basis for the conformity determination; and (f) Having an inadequate basis for making a conformity determination. <sup>/69/</sup>

According to one commentator, the crux of CLF's argument was really that Clean Air Act § 176(c) created a "substantive EIS." <sup>/70/</sup> A normal NEPA EIS is procedural, in that it does not require a specific result - it merely requires that the environmental impacts of a proposed action be communicated to the federal agency's decision maker. Conversely, the conformity rule absolutely prohibits federal agencies from making decisions that adversely impact air pollution efforts. The CLF believed the two had to work in tandem - the agency could not make a procedural decision to go forward under NEPA without doing its substantive conformity determination first. <sup>/71/</sup>

With respect to the Clean Air Act claims in this case, the Air Force and PDA joined in defending against CLF's allegations. <sup>/72/</sup> They argued that CLF's Clean Air Act claims against the Air Force should be dismissed in light of a prior ruling by the court' and because the court lacked subject matter jurisdiction. The Air Force and PDA also argued that the defendants were entitled to summary judgment on CLF's Clean Air Act claims. This assertion was subdivided into several individual arguments that: (a) a conformity determination was not required with respect to Maine's SIP; (b) the Air Force's approval of the Pease redevelopment fully complied with the conformity provision; (c) EPA complied with the conformity provision. They argued that the Air Force's approval of the Pease redevelopment fully



complied with the conformity provision because (a) the Air Force conformity determination was not untimely; (b) The Air Force reasonably concluded that the project conformed to the purpose of the New Hampshire SIP; and (c) the Air Force reasonably concluded that the project would not increase the frequency or severity of any existing violation of the ozone NAAQS for the relevant period; (d) the Air Force reasonably concluded that the project would not delay attainment of the interim emission reduction requirements or the ozone NAAQS; and (e) the Air Force reasonably concluded that the project would not cause or contribute to a new violation of the carbon monoxide NAAQS. Finally, the Air Force and PDA argued that because the administrative record left no genuine dispute as to any material fact and established that neither EPA nor the Air Force violated § 176(c)(1) of the Clean Air Act, the court must grant summary judgment to the defendants on CLF's Clean Air Act claims. /75/

The Air Force's brief responded to CLF's NEPA and CERCLA allegations made by CLF, arguing: (a) CLF was precluded from maintaining its NEPA action because Congress strictly limited judicial review or agency action in the base closure and realignment process; /76/ (b) the federal defendants fully complied with the requirements of NEPA; /77/ (c) ministerial acts do not require NEPA compliance; /78/ the Air Force's leasing of the base to the PDA fully complied with CERCLA § 120(h); /79/ and (e) CLF did not satisfy the prerequisites for obtaining the extraordinary relief of preliminary injunctive relief. /80/

The court found that the procedures followed by the Air Force in issuing its conformity determination satisfied the procedural requirements of the Clean Air Act. /81/ On the substantive issues, the court found that the Air Force properly determined conformity with respect to the New Hampshire SIP and was not required to consider conformity with respect to Maine's SIP. /82/ The court also found that the timing of the conformity determination complied with Clean Air Act § 176(c). /83/ Although it would seem from the court's decision on the Clean Air Act allegations that the Air Force "did everything right" with respect to conformity, the NEPA portion of the court's decision provided a surprise for the Air Force.

The CLF complaint alleged the Air Force violated NEPA in that the final EIS's air quality analysis was inadequate in several respects. Specifically, it was alleged to be inadequate because: (a) it failed to address the full scope of environmental costs and benefits relative to ozone precursor emissions; (b) it violated NEPA's public disclosure requirements by failing to include a discussion of a July 30, 1991 carbon monoxide study; (c) it failed to adequately address the ozone impact on the State of Maine; and (d) it failed to adequately discuss air mitigation measures. /84/

The CLF also claimed that the failure of the Air Force and EPA to circulate a Memorandum of Understanding (MOU) /85/ - entered into by EPA, the state, and the PDA - constituted a violation of the NEPA public disclosure requirements because the MOU contained discussion of issues which underlay the EIS decision. 16 Finally, the CLF alleged the Air Force's decision not to issue a supplemental EIS was unreasonable under the circumstances. /87/

The court began its NEPA analysis by deciding that the 1988 Base Closure and Realignment Act did not bar the CLF's NEPA claims as alleged by the Air Force. It held that the sixty day limit on NEPA judicial challenges to acts or omissions by the Secretary of Defense "was established to frustrate attempts to use NEPA as a means to delay base closures, not to prohibit challenges to environmental decisions made subsequent to the closure and realignment of a base." /88/ Thus, matters arising after the decision to close or realign and relating to the disposal or reuse of an installation are not subject to the sixty day limit. Because the CLF was not challenging the closure of the base but rather the development plans following the closure decision, the time limit was deemed inapplicable.

With respect to the CLF's other NEPA issues, the court noted that while it had found that the Air Force had satisfied the conformity provision of the Clean Air Act, the issue before it at this juncture was "whether that conformity determination satisfied the procedural requirements of NEPA." /89/ The court held that in several respects it did not. The court held that the Air Force violated NEPA by failing to prepare a supplemental EIS after conducting a conformity analysis and developing conformity information after issuing the final EIS. The court decided that "[t]he methods by which the [Air Force] chose to conform to the Clean Air Act should have been the subject of a [s]upplemental EIS." /90/ This was so, it decided, because the CEQ's NEPA regulations specifically provide for the issuance of a supplemental EIS "where significant new circumstances arise or new information becomes available," /91/ and because NEPA's public disclosure requirements mandate that an EIS must detail all relevant environmental information prior to a decision. /92/

The "new information" in this case was data concerning conformity. "The decisions made regarding the conformity of the project to the Clean Air Act amendments followed the EIS process and thus were never subject to the [sic] public comment," noted the court. /93/ The Air Force had ultimately decided in finding that the Pease project conformed to the New Hampshire SIP that the project would not prevent the state from meeting mandated interim hydrocarbon emission reductions. During the EIS process, however, it appeared that the opposite was true.

The CLF submitted comments to the draft EIS specifically addressing Clean Air Act compliance and asking the Air Force to address air quality issues in the final EIS. /94/ Comments submitted by EPA to the draft and final EISs were "highly critical" of the Air Force's air quality analysis. /95/ The EPA did not believe the project would conform. Indeed, the Air Force's final EIS concluded that while the project was not expected to generate any NAAQS violations, the "proposed action will impact the [s]tate's plans to achieve federally mandated reductions of ozone precursor pollutant reductions" mandated by the 1990 Clean Air Act Amendments. /96/ In other words, the project did not conform.

Following the EIS process, EPA's air quality concerns were placated by an August 1991 PDA/EPA/state Memorandum of Understanding (MOU) which contained mitigation measures - including carbon monoxide monitoring and an assurance that hydrocarbon emissions would not exceed 3.3 tons per day - designed to bring the Pease project into Clean Air Act compliance. /97/ Had it not been for the addition of the MOU's mitigation measures, it is doubtful the project - as it stood- would have conformed. The EPA suggested

the MOU be appended to the project's Record of Decision (ROD) to ensure the mitigation measures would be implemented. The Air Force agreed to do so, "thereby alleviating the Clean Air Act conformity concerns." /<sup>98</sup>/ The initial ROD was issued on August 20, 1991. /<sup>99</sup>/ The EPA had noted in its August 14, 1991 comments to the final EIS, however, that while incorporating the MOU would resolve the Clean Air Act issues, it would not satisfy the Air Force's obligation under NEPA to disclose for public review in the EIS all "critical and relevant information on impacts and mitigation," /100/ namely, the conformity determination information.

On March 20, 1992, the Air Force issued a Memorandum for the Record (MFR) to update the conformity determination in the ROD with newly obtained information - a letter of assurance from the state governor and a "certification" from the New Hampshire Department of Environmental Services (NHDES) Commissioner attesting that the Pease project did indeed conform to the state SIP.' /101/ The MFR "referred to the MOU as the basis of the conformity determination in the ROD," cited the MOD's requirements, and stated that those requirements would control emissions until the state issued a revised EPA-approved SIP. /102/

In sum, the final EIS's conclusion regarding air quality impacts (and hence, conformity) differed substantially from the information contained in the ROD and its appended MOU. The Air Force did not issue a supplemental EIS in connection with this changed information despite EPA's opinion that NEPA required it. This ill-timed and somewhat convoluted series of events led the court to conclude that NEPA had been violated as it was unreasonable for the Air Force to rely on information received subsequent to the preparation of the EIS in making a conformity determination and it was unreasonable for the Air Force to fail to include the new information it received subsequent to issuing the final EIS or in a supplemental EIS.

The court also found that the final EIS was inadequate in that it failed to address the air quality impacts of the project on the State of Maine. Despite finding that the Air Force was not required to consider air quality impacts upon states other than New Hampshire when making its conformity determination under Clean Air Act § 176(c), the court decided that the Council for Environment Quality (CEQ) regulations describing the scope of an EIS required that the Air Force address such impacts on the State of Maine. Specifically, the court found that NEPA requires that acts significantly affecting the environment must be analyzed "in several contexts such as society as a whole (human, national), the affected region, and affected interests and the locality:" /103/ According to the court, the "affected region" for the Pease redevelopment project included the State of Maine:

The fact that the area affected by the Pease development extends beyond the boundaries of New Hampshire is not reason to ignore the air quality implications in the final EIS. Both the plain language of the statute and CEQ regulations mandate broader analysis than was contained in the [final] EIS. /104/

The court also found the final EIS was inadequate in failing to analyze air quality mitigation measures related to the reuse and redevelopment of Pease AFB. The court agreed with CLF's contention that while NEPA does not require the adoption of mitigation measures, it does require an adequate

examination of various mitigation alternatives in the final EIS, whether or not such measures are ultimately adopted. <sup>/105/</sup> The Air Force argued that (1) the final EIS was designed to address the environmental impact of the disposal of the base, (2) that most of the environmental effects would result from its ultimate reuse, not because of the transfer itself and, (3) it was sufficient that the final EIS merely identify the air quality mitigation measures and leave their implementation to future owners of the base property. <sup>/106/</sup> The court disagreed with the Air Force's view that its role "as a transferor precludes further scrutiny of the project after its transfer." <sup>/107/</sup> Instead, the Air Force should have addressed the environmental impact of development and reuse of the base.

The court based this finding, at least in part, on the holding in *Conservation Law Foundation, Inc. v. General Services Administration*. <sup>/108/</sup> In that case, the First Circuit held that the environmental consequences surrounding the disposal of land by the General Services Administration (GSA) was a proper subject of an EIS, and the fact that the property was scheduled for transfer and redevelopment by a nonfederal party did not relieve the GSA of responsibility under NEPA. Just as in the GSA case, said the court, the Air Force was not relieved of the responsibility for addressing the environmental impacts of post-transfer development and reuse. As such, its final EIS inadequately dealt with this issue by failing to analyze the various mitigation measures relative to the base's development and reuse. <sup>/109/</sup>

In the spring of 1995, CLF and the town of Newington appealed portions of the district court's August 1994 decision in *Conservation Law Foundation, Inc. v. Department of the Air Force*. They asked the court of appeals to do the following: (a) order injunctive relief, including nullification of prior federal approvals and leases; (b) prohibition of future land transfers and development until a "lawful" supplemental EIS is completed; (c) order new federal approvals and conformity determinations informed by a lawful environmental analysis and in compliance with the Clean Air Act and applicable EPA conformity regulations; (d) require the Air Force and the Federal Aviation Administration (FAA) to prepare an adequate supplemental EIS; <sup>/110/</sup> and (e) hold that the Air Force and the FAA violated NEPA by issuing Pease approvals based upon an inadequate EIS. <sup>/111/</sup>

The CLF and the town of Newington asked for sweeping injunctive relief which would both nullify decisions made by the Air Force and the FAA in 1991-92 concerning the reuse of land on Pease AFB and oust the PDA and its sublessees from portions of the base that PDA began leasing from the Air Force in April 1992. <sup>/112/</sup>

The government did not appeal the NEPA or Clean Air Act portions of the district court's decision. <sup>/113/</sup> In its response to the CLF appeal, the government sought primarily to preserve the denial of injunctive relief in favor of CLF and to ensure upholding of the district court's finding that the Air Force complied with the Clean Air Act's conformity provision. <sup>/114/</sup> It was particularly important to the Air Force that the Clean Air Act portion of the district court's decision be upheld. This was so because it was the *first* and to date, the only judicial finding that the Air Force is correctly implementing Clean Air Act Sec. 176(c). Such a holding could become critical to the Air Force's general conformity compliance program if

recent challenges to EPA's general conformity regulation, discussed in the next section of this article, are successful. The holding would serve as a justifiable basis for continuing to do conformity determinations in the same manner as at Pease. Oral arguments on the appeal in the case, now styled *Conservation Law Foundation, Inc. v. FAA*, were heard during the early summer of 1995.

In April 1996, the U.S. Court of Appeals for the First Circuit held that the federal agencies in this case did not act arbitrarily or capriciously in making the determination that the plan to convert Pease AFB to civilian use conformed to the New Hampshire SIP. <sup>/115/</sup> This was so because (1) completing a satisfactory air quality analysis under NEPA was not a prerequisite to making a viable conformity determination, <sup>/116/</sup> and (2) the Air Force, FAA, and EPA made conformity determinations that complied with the statutory conformity requirements. <sup>/117/</sup> Additionally, the court refused to overturn the district court's denial of injunctive relief on the plaintiffs' NEPA claim, <sup>/118/</sup> and reversed the lower court's finding that the federal defendants had violated CERCLA. <sup>/119/</sup>

In short, the First Circuit's decision represented a victory for the Air Force and the other federal agencies, as well as validation that they were approaching conformity determinations in a way that made sense and was reasonable.

#### **IV. THE FUTURE OF CONFORMITY**

##### **A. Litigation Challenging the General Conformity Rule**

The enactment of complex environmental laws frequently brings litigation as the regulated community seeks to limit or, at a minimum, more clearly define the scope of its new responsibilities. Conformity has been no different in this regard, even though its regulated community, the Federal Government, is somewhat smaller than those who are typically affected by changes in air pollution control laws. Two recent lawsuits brought by environmental groups against EPA seek to broaden the 'scope of general conformity applicability by adding the conformity requirement to attainment and PSD areas and eliminating the various exemptions EPA included in the final general conformity regulation.

##### **B. *Environmental Defense Fund v. Browner*: Conformity Requirements for Attainment and PSD Areas?**

In the EPA General Conformity Final Rule, EPA interpreted the conformity requirement as being mandatory only for nonattainment areas, although it noted that "EPA continues to believe that the statute is ambiguous and that it provides EPA discretionary authority to apply these general conformity procedures to both attainment and nonattainment areas." <sup>/120/</sup> The Environmental Defense Fund (EDF) and the Sierra Club, among others, disagreed with EPA on this point and brought a citizen suit against the agency in the Federal District Court for the Northern District of California. <sup>/121/</sup>

The plaintiffs sought to compel EPA to promulgate conformity regulations for attainment and unclassifiable areas - areas not covered by the General Conformity Rule. /122/ According to the plaintiffs, the language of § 176(c)(1) "unambiguously means that attainment areas should be subject to conformity analysis." /123/ This is so, they argued to the court, because § 176(c)(1)(B)(i) defines conforming activities as those which will not "cause or contribute to any new violation of any standard in any area." /124/ The plain reading of "in any area" must necessarily include attainment and unclassifiable areas, according to the plaintiffs. Moreover, a "new violation," by definition, can only refer to a violation of NAAQS in an area designated as being in attainment for a particular pollutant. /125/ This must be the case, the plaintiffs argued, because "[I]f an area is already designated nonattainment for any one pollutant, a worsening of pollutant levels would not constitute a `new' violation." /126/

The EPA argued that the meaning of § 176(c) is ambiguous because of its placement within Subpart 1, "Nonattainment Areas in General" of Part D, "Plan Requirements for Nonattainment Areas," rather than within Part C, "Prevention of Deterioration of Air Quality," of the Clean Air Act. /127/ EPA argued that because of the ambiguity involved, the court should look to a series of cases decided by the Supreme Court which "recognized that titles can be useful aids in resolving ambiguity and discerning congressional intent." /128/ Additionally, said EPA, other portions of § 176 refer specifically to nonattainment areas, and therefore illustrate the range of the entire section. /129/ In other words, where Congress meant to include nonattainment and/or unclassifiable areas, it did so specifically, according to EPA.

Judge Thelton E. Henderson of the U.S. District Court for the Northern District of California sided with the plaintiffs. "In this case, the language of §176(c) plainly embraces all geographic areas, including attainment and unclassifiable areas, as well as nonattainment and maintenance areas," held the court. /130/ The court believed that the legislative history behind § 176(c) "suggests that all areas should be subject to conformity analysis." /131/ He also held that Congress, in effect, ratified an earlier EPA interpretation of § 176(c) - in which the conformity requirement applied everywhere there was a SIP - by reenacting that provision without change. /132/ The judge, therefore, ordered EPA to promulgate final regulations containing criteria and procedures by which the conformity of federally supported activities other than transportation plans, programs and projects will be determined in every area subject to an implementation plan that is not covered by the final General Conformity Rule published on November 30, 1993. /133/

### ***C. Environmental Defense Fund, Inc v U.S. EPA: Challenging the Underpinnings of the General Conformity Rule***

In January 1994, the EDF, the Sierra Club, the Natural Resources Defense Council, Inc. (NRDC), the CLF, the Oregon Environmental Council, the Delaware Valley Citizen's Council for Clean Air, the Institute for Transportation and the Environment, and the South Coast Air Quality Management District filed citizen suits in the District of Columbia Court of Appeals against EPA and its Administrator, Carol Browner, and DOT and its Secretary, Frederico Pena, challenging the Transportation Conformity

Rule and the General Conformity Rule promulgated by EPA under Clean Air Act § 176(c). /134/

The environmental petitioners (hereinafter collectively referred to as "EDF") alleged EPA acted unlawfully, or arbitrarily and capriciously, in:

1. Substituting compliance with NEPA for compliance with the substantive air quality requirements of Clean Air Act § 176(c).
2. Allowing approvals to be granted to actions that fail to conform to the SIP, simply because they used to conform at some earlier time.
3. Prohibiting pollution-reducing transportation control measures whose implementation is required by the Clean Air Act, while allowing implementation of pollution-neutral projects whose implementation is optional.
4. Allowing approval of transportation plans and programs that provide for implementation of transportation control measures (TCMs) on schedules that violate the implementation deadlines set forth in the SIP.
5. Failing to provide for timely implementation of TCMs that are not federally fundable.
6. Failing to require transportation plans and programs to contribute to emission reductions during the interim period.
7. Exempting nitrogen oxides from the transportation conformity rule.
8. Exempting statewide transportation plans and programs from conformity requirements.
9. Exempting the emissions associated with non-highway and non-transit projects from the emissions analysis conducted for transportation programs and projects.
10. Exempting non-highway and non-transit projects such as air, water and rail from conformity requirements.
11. Allowing federal agencies to grant approvals they know will foreseeably cause new pollution violations and prolong existing one, under the pretext that the agency has no "continuing program responsibility" over the violations.
12. Exempting certain actions from the General Conformity Rule on de minimis grounds, even though no such exemption is authorized by the Clean Air Act and even though EPA has failed to demonstrate that the impact on air quality of the exempted actions - either individually or cumulatively - is trivial.
13. Allowing agencies to approve actions that fail to conform to the SIP under the pretext that the state has promised to revise the <sub>plan.</sub> /135/

The general conformity issues raised by EDF can be broken down into discrete areas - (1) the definition of when (and if) conformity

determinations must be made under the new rule, (2) exemptions for de minimis levels of pollution and "presumed to conform" categories, (3) federal approval of actions with emissions over which the agency will have no "continuing program responsibility," and (4) approval of actions that fail to conform solely because a state has agreed to revise the SIP in the future to achieve conformity. They will be discussed in turn.

The EDF objects to the grandfathering provisions of the General Conformity Rule, as well as to EPA's decision on the timing of conformity determinations. The transitional or "grandfather" provisions to which EDF objects are those that allow approvals of actions where NEPA documentation was completed by January 31, 1994. EDF alleges this grandfathering "allow[s] past agency derelictions to be further prolonged, and compliance with Congress's mandates to be postponed yet again." /136/ The EDF argues that Clean Air Act § 176(c) expressly mandates comprehensive coverage of all federal actions, and that "EPA is not free to narrow that coverage by administrative fiat." /137/ This is especially true, says EDF, where Congress explicitly "built a limited grandfather exemption into § 176(c)(3)(B)(i) <sup>/138/</sup> for certain transportation projects. The EPA may not supplement that statutory exemption with others of its own making." /139/

The EDF also suggests that the grandfather provisions violate NEPA § 104, which provides that "[n]othing in §§4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency... to comply with criteria or standards of environmental quality." /140/ According to EDF, "[i]t would be difficult to imagine a clearer transgression of this language than [40 C.F.R.] § 51.850(c)(1), which grants an exemption from [statutory] conformity requirements based solely on compliance with NEPA § 102 (i.e., 42 U.S.C. § 4332)," <sup>/141/</sup>

The EDF also argues that where federal support of actions had not yet occurred as of the promulgation date of the General Conformity Rule, such actions would have to meet the new rule rather than the old standard - even where NEPA analysis had already been completed. Hence, no project can be caught in "mid-stream" and no retroactivity problem exists. /142/

Further to bolster its contentions, EDF argues that the use of the present tense language in § 76(c) (i.e., prohibiting any federal action that "does not" conform) means that conformity status cannot be determined until the federal action actually occurs. /143/ In EDF's view, this should preclude the legal ability of any federal action to conform until the final federal step is taken.

In its responding brief, DOJ counters EDF's allegation in a number of ways. First, EPA alleges that, regarding NEPA, EDF "has confused two distinct issues: (1) whether the federal action must comply with the statutory requirement of conformity and (2) whether compliance must be assessed in terms of the particular criteria and procedures established by this new regulation. /144/ The EPA notes that 40 C.F.R. § 51.850(c)(1) must be read together with § 51.850(b). Read in concert, they state:

(b) A Federal agency must make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart before the action is taken.



(c) Paragraph (b) of this section does not include Federal actions where either:

(1) A [NEPA] analysis was completed as evidenced by a final [EA], a final [EISI or a finding of no significant impact (FONSI) that was prepared prior to January 31, 1994. /145/

The regulation, argues the government, establishes completion of the NEPA process as the factor for determining whether the newly-promulgated conformity procedures and requirements, as opposed to the prior legal standards, should be used to assess conformity, argues EPA. /146/ When the conformity rule was promulgated, "it was inevitable that . . . many projects dependent on federal actions were well underway or even nearing completion. Some of these projects might not prove viable under the new criteria, even though they satisfied the prior [conformity] standards." /147/ Therefore, EPA decided that a transition or grandfathering provision - promulgated as § 51.850(c) - was needed because the General Conformity Rule was an "abrupt departure" from prior practice. /148/

Because the pre-1990 Clean Air Act did not define or really explain conformity, the government argues that federal agencies were accustomed to evaluating conformity in the context of NEPA, and relied on there being no specific procedural requirements beyond NEPA. /149/ The General Conformity Rule established a "very structured process that goes far beyond the analysis done in conjunction with NEPA," argues EPA. /150/ Forcing ongoing projects to meet the new rule's substantive conformity requirements would create uncertainty that could not have been anticipated beforehand. Such uncertainty "could threaten the viability of projects where considerable resources already have been invested." /151/

If the General Conformity Rule were applied as EDF suggests, asserts EPA, it "would automatically invalidate all analysis conducted under previous legal standards." /152/ The EDF argument that retroactivity is not an issue is "implausible" because the "status of federal actions or projects dependent on federal approval could be changed from conforming to nonconforming simply by promulgation of the rule." /153/

The EPA responds to EDF's "verb tense" argument by asserting that the EDF's proposed statutory construction:

would produce an absurd result. EDF would leave all conformity determinations - whether done under previous standards or the conformity rules at issue here - open to constant reevaluation... If the standard for conformity, the SIP, or any factor relative to a conformity determination changed, the project could not receive the next approval unless it was modified so as to conform under the new facts. For a complicated project, this process would be repeated numerous times. Even after years of progress, a project could suddenly be shut down because of a change in the conformity standard shortly before completion, thereby wasting the resources invested. /154/

The EPA noted that the suggestion that Congress intended to create such a scenario was rejected by the First Circuit in Conservation Law Foundation

v. Federal Highway Administration, a case which held that the 1990 Clean Air Act Amendments did not invalidate preexisting project conformity determinations by requiring new ones. /<sup>155</sup>/ According to the First Circuit, CLF's position would have resulted in "a complete halt of all ongoing projects regardless of how close to completion those projects have become. We see no evidence in the Clean Air Act that Congress intended such a result." /156/

The EPA also argues EDF has incorrectly characterized the timing portion of the conformity regulations as creating "exemptions" from the statutory requirement to conform." Rather, EPA asserts, the provision merely establishes a "grace period" for projects that had not had a conformity determination at the time the 1990 amendments were enacted. "It does not establish an exemption for the requirement of conformity, but instead define the standard that will be used for assessing conformity." /158/

The EDF also challenged the General Conformity Rule's de minimis thresholds and its EPA-specified categories of activities that are presumed to conform. EDF argues that carving out these exemptions violates the Clean Air Act because it allows some activities to proceed "no matter how large emissions from each individual action may actually be, or how many such actions may occur in a given polluted area."<sup>59</sup> Just as individual components of the same action can combine to produce air quality standards, EDF argues, air quality impacts of many small actions can do so as well. "[T]he public's lungs," the state, "will not care whether the pollution emanates from many small sources or a few big ones." /160/

The EDF calls EPA's decision to create these exemptions a impermissible interpreting of general conformity by applying it to "major sources" only. Congress, EDF argues, knew exactly how to limit the applicability of a Clean Air Act requirement to "major sources" if it wished to do so, and it did not in § 176(c)(1). /161/

The purpose of § 176(c), says EPA, is to make certain that activities of the Federal Government do not prevent attainment of the NAAQS by failing to conform to the applicable SIP. This purpose can be achieved without applying the General Conformity Rule's burdensome procedural requirements activities that involve little or no emissions of air pollutants. /162/ Prohibiting de minimis exemptions would violate the principle of statutory construction that provisions are construed to avoid absurd results, says EPA and it would be absurd to require conformity determinations for activities it believes are obviously not harmful to air quality, such as advisory and consultative activities such as legal counseling, or granting deposit or account insurance to banking customers. /163/

EPA asserts that the authority to establish de minimis exceptions is part of: the Agency's usual responsibility in carrying out a statutory scheme. /164/ The de minimis doctrine is a means of interpreting the statutory language, not judicially or administratively amending it, EPA adds. /<sup>165</sup>/ Finally, EPA argues that the EDF's challenge to its de minimis exemption fails under the familiar two-prong test of Chevron U.S.A., Inc. v. Natural Resources Defense Council /166/ because the scope of federal actions subject to conformity procedures under § 176(c) is ambiguous, and EPA's de minimis exemption is reasonable. /167/ With respect to the creation of tonnage thresholds, EPA argues that they were the most

reasonable choice EPA could make in order to avoid the absurd result of requiring conformity determinations for every federal action, no matter how inconsequential. /168/

The EDF did not contest the first portion of the § 51.852 definition of "indirect emissions" - i.e., that the General Conformity Rule covers emissions that "f [a]re caused by the Federal action, but may occur later in time and/or may be farther removed in distance from the action itself but are still reasonably foreseeable." /169/ The EDF did challenge the remainder of that definition - exempting emissions from conformity review unless the federal agency can "practicably control" them and will maintain control over them due to a "continuing program responsibility" of the federal agency. To EDF this is another "impermissible" rewriting of the broad language of § 176(c)(1). /170/

In deciding how to define "indirect emissions," EPA concluded that "if the federal agency has no continuing program responsibility for a project, then under the agency's authorizing statute, it has no means of controlling future emissions associated with the project and no means of enforcing any required mitigation measures." /171/ Including mitigation measures in SIPS, EPA argued, "would disrupt the balance between state and federal agencies with respect to air quality established by the [Clean Air Act]." /172/

The EDF argues that the regulatory provision allowing nonconforming federal actions to go forward solely because a state promises to revise its SIP in the future to accommodate the action "violates the categorical mandate of § 176(c)(1) that conformity must be measured using 'an implementation plan after it has been approved or promulgated under § 7410 of this title'" /173/ The EPA's approach, they argue, "creates a risk that the promised SIP revision will be delayed past the time when the 'budget-busting' federally supported action begins polluting - or that the revision will not be submitted at all, or will be submitted in an inadequate, non-approvable form." /174/

In other words, EDF argues a promise cannot substitute for conformity.

On this point, EPA argues against EDF on both procedural and substantive grounds. Procedurally, EPA asserts that EDF is precluded from raising this argument before the court because it failed to do so at any earlier point in the administrative record of the case. /175/

Substantively, EPA argues that even if the court reaches this issue, EDF is wrong because a state's commitment to revise a SIP to accommodate a project is fully enforceable by EPA, which has authority to impose sanctions under § 179. /176/ This provision was intended to account for the time delay inherent in a SIP revision, says EPA. It would make little sense to require conformity to a SIP undergoing revision when it will be revised before the emissions from the proposed federal action will actually occur. /177/

The EPA points out that a state's SIP revision commitment must satisfy several specific requirements, including, among others, requirements to identify (1) a specific schedule for adoption and submittal of the SIP revision and (2) specific measures to be incorporated into the SIP to reduce area emissions below the SIP's emissions budgets. /178/ The Agency believes it wields an effective hammer to ensure the state's commitment to revise the SIP is fully carried out.

On April 19, 1996, the United States Court of Appeals for the District of Columbia decided *Environmental Defense Fund, Inca v. Environmental Protection Agency*. /179/ Although the court noted that in some instances the environmental groups' interpretation of the conformity provisions was reasonable, it upheld EPA's general and transportation conformity regulations. The court held that the EPA, as the agency authorized to interpret and enforce the Clean Air Act, acted reasonably in interpreting the ambiguous statutory language of section 176(c)(1). /180/

Regarding the various conformity issues raised by the environmental groups, the court held that the grandfather clauses included in the EPA's regulations were reasonable because the Clean Air vests in EPA the discretion to set the appropriate frequency for conformity determinations. So long as, the frequency is not longer than every three years, EPA's regulation could not be said to have been unreasonable. /181/ Although the terms of the Clean Air Act prohibit the Federal Government from engaging in "any activity" that is not in conformity, the court held that Congress was not so rigid as to mean literally "any" activity. Rather, the court held it was reasonable for EPA to interpret this provision to mean any activity that is likely to interfere with the attainment goals of a SIP - i.e., major federal actions and lesser actions that could still produce a regionally significant level of emissions. /182/ Because agencies should to consider both direct and indirect emissions in making their conformity determinations, the court had to decide whether EPA had reasonably defined "indirect emissions." Section 176(c)(1) prohibits the Federal Government from supporting in any way activities that do not conform. The court held that support is an elastic term, and that EPA acted reasonably when it focused on the extent to which federal agencies have continuing program responsibilities and whether they can practicably control emissions from their own and other parties' activities. /183/ Finally, the court recognized that if the literal terms of the statute were imposed upon agencies, no federal action would be able to proceed until a full-fledged SIP revision could be developed, submitted and approved. The result of such an interpretation would stymie the process of state and federal cooperation envisioned by the 'Clean Air Act's conformity provisions and the integrated planning process for which they were designed. /184/

## V. CONCLUSION

Conformity creates a completely new Clean Air Act compliance scenario for DOD and other federal agencies. It brings together mobile and stationary source emissions, and for good measure, tosses in sources not generally regulated by EPA or states, such as aircraft emissions. The litigation described in this article may change the playing field considerably, and until the inevitable appeals are resolved, it will be unclear to what extent general conformity will decide how DOD and other federal agencies do business.

Combining NEPA and conformity as the court did in *Conservation Law Foundation, Inc. v. Department of the Air Force* seems an unnecessary step, as both processes will have to be completed correctly in any event. Indeed, melding the two could cause analytical difficulty, because NEPA analysis is much more a "worst case scenario" approach than is conformity analysis. Creation of the so-called "substantive EIS" may serve to do little more

than muddy the NEPA waters and cause confusion over what is and is not "mandatory" under NEPA.

Arguing for application of the General Conformity Rule to attainment and PSD areas is perhaps the most reasonable of the various environmental groups' arguments against the current version of the regulation. Certainly it is reasonable to assume that new development at the edges of nonattainment areas is likely to increase their size, causing more and more encroachment into attainment and PSD areas. The statute's language indicates federal agencies may not undertake actions that cause or contribute to any new violation of any standard in any area. The EPA believes this language is "ambiguous" as to whether conformity applies only in nonattainment areas, /185/ but the court in *Environmental Defense Fund v. Browner* held otherwise. Compare this with the court's opinion in *Conservation Law Foundation, Inc. v. Department of the Air Force* in which the judge noted "the language in § 176(c) is ambiguous at best. At the time the USAF was formulating its conformity determination, there were no EPA conformity regulations available for guidance. Accordingly, the USAF was guided solely by the statutory language." /186/ With one federal court decision squarely requiring conformity in attainment and PSD areas, and another indicating in dicta that § 176(c) is indeed ambiguous, more decisions will be likely be forthcoming as the circuits choose sides on this issue - that is, unless a legislative rewording of the "ambiguity" makes clear Congress' true intent.

Strict constructionists are likely to agree with environmental groups who charge that EPA should have adopted the "inclusive" definition of indirect emissions - one that would exclude the language "and which the Federal agency has and will continue to maintain some authority to control." This is the basis for one of the EDF's strongest arguments in *Environmental Defense Fund, Inc. v. EPA*. /187/ Undeniably, there is logic to EDF's position, but had EDF's arguments on this point prevail in that case, we are likely to see Byzantine scenarios which will burden both federal agencies and private entities in a variety of ways. /188/

Litigation over application of the conformity rule to a project would assuredly follow any expansion of its current coverage. Many public and private projects could be significantly delayed, and many may never go forward even where their air quality impacts are insignificant. /189/ Without the EPA-imposed "reasonableness" approach, now blessed by the D.C. Circuit as appropriate, the General Conformity Rule could reach out and adversely affect a vast array of projects which have little or no air pollution effects. While such projects may ultimately result in a positive conformity finding, many might never get that far simply because expending the resources to do a conformity determination would be more expensive and troublesome than the project would be worth to its initiator.

For example, currently EPA believes that participation by military aircraft in air shows and fly-overs is an example of de minimis action not requiring a conformity determination under the regulation. /190/ Air shows draw thousands of community members to military installations each year during open houses. They are a particularly popular public relations tool used, among other things, to engender good will between the base and its civilian neighbors. Fly-overs are similarly popular, and are sometimes included in ceremonial activities such as building and memorial

dedications, change of command ceremonies, and military funerals. Neither activity is a source of more than negligible emissions. If the de minimis exemption is removed, as a result of litigation or legislation, each time a military installation wished to have an air show or perform a fly-over, it would have to undergo a costly and time-consuming conformity determination. The unfortunate outcome of such a requirement would likely be many fewer such events at military installations each year.

A literal reading of the definition of "federal action" suggests that almost every activity in which the military routinely engages - aircraft and ground equipment operation, emergency deployment and mobilization, or even procurement actions, for example - might raise independent and repetitive conformity determination responsibilities in the absence of a regulation limiting the scope of applicability. A federal action, says § 176(c), is "any activity engaged in by a department. . .of the Federal Government. . .other than activities related to transportation plans, programs and projects. . . ." /191/ The scope of the term "any activity" is not further defined in the statute, leaving one to assume that in the absence of EPA's specific exemptions and presumptions of conformity, almost every action that has a potential effect on air emissions, no matter how minimal, must undergo a complete conformity determination before it can proceed. In an age of dwindling defense dollars, such a result would be a poor allocation of money better spent on more effective environmental remediation efforts. The D.C. Circuit recognized in *Environmental Defense Fund v. Environmental Protection Agency* that such unfortunate and incongruous results would follow a literal interpretation of "any activity" and wisely accorded EPA the deference to interpret this language reasonably. Whether other circuits will follow remains to be seen.

Unless one assumes that the actual goal of § 176(c) is simply to bring all activities that emit any criteria pollutants to a grinding halt, EPA's position that it is unreasonable to conclude that a federal agency "supports" an activity by third persons over whom the agency has no practicable control (or the emissions they generate) is the only workable way in which to implement general conformity. Where federal control over resulting emissions is minor or nonexistent, state and local agencies must step forward to control the non-federal sources that are the cause of the problem. /192/

It is unclear whether the current Congressional push to weaken federal environmental laws will ultimately affect general conformity and its application to DOD and other federal agencies. It is not unreasonable to expect that if the environmental groups win on the litigation battlefield, many private projects which require federal permits or other federal approvals will grind to a halt if they cannot achieve a positive conformity determination. When this happens often enough, members of Congress will begin hearing the angry objections of private business - perhaps the only influence they will feel obliged to respond to on this issue if they wish to remain in office.

No matter what form the general conformity requirement eventually takes, DOD can minimize delays and cost by good strategic planning when designing and implementing a project. Effective incorporation of emission reduction technology can help an installation qualify for a de minimis exemption, should that exemption survive the current EDF legal challenge.

Innovative thinking by those responsible for making the conformity analyses will be invaluable, although perhaps potentially hard to find until DOD becomes more familiar with conformity and all it requires.

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<sup>1</sup> See Air Pollution Control Act of 1955, No. Pub. L. 84-145, 69 Stat. 322; Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392; Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, 79 Stat. 992; Clean Air Act Amendments of 1966, Pub. L. No. 89-675, 80 Stat. 954; Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485; Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676; Comprehensive Health Manpower Training Act of 1971, Pub. L. No. 92-157, 85 Stat. 431; Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246; Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 686; Steel Industry Compliance Extension Act of 1981, Pub. L. No. 97-23, 95 Stat. 139; Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2399.

<sup>2</sup> President Richard M. Nixon signed the Clean Air Act Amendments of 1970 on Dec. 31, 1970. Pub. L. No. 91-604, 84 Stat. 1676.

<sup>3</sup> Title I of the 1970 Clean Air Act regulates stationary sources; Title II regulates mobile sources; Title III contains the "general provisions" of the Act, including its administration and implementation, as well as judicial review and citizen suit provisions; Title VI contains the Act's acid rain provisions; Title V sets forth the operating permit program; and Title VI addresses stratospheric ozone protection.

<sup>4</sup> Clean Air Act § 109 directed EPA to establish national primary and secondary ambient air quality standards for certain pollutants with established criteria. Primary standards define levels of air quality that are necessary, with an adequate margin of safety to protect the public welfare. Secondary standards were to be set to protect the public welfare from any known or anticipated adverse effects associated with an air pollutant. 42 U.S.C. § 7409. Currently there are six pollutants for which EPA has established NAAQS. These pollutants are carbon monoxide, nitrogen oxide, lead, sulfur dioxide, ozone, and particulate matter. 40 C.F.R. § 50. See ARNOLD W. REITZE, JR., Air Pollution Control, 32 (1994); Catherine V. Greco, State Implementation Plans Under the 1990 Clean Air Act: Can New York Conform? 11 PACE ENVTL. L. REV. 869, 873 (1994).

<sup>5</sup> Address by Senator Pete Domenici, reprinted in 19 Nat. Resources J. 475, 476 (July 1979).

<sup>6</sup> REITZE, *supra* note 4, at 37.

<sup>7</sup> *Id.*

As 1977 approached, not a single steel mill was in full compliance with the [Clean Air Act]. Nearly 50 percent of the refineries, pulp mills, and large commercial boilers were also not meeting [Clean Air Act] requirements. The program to protect areas already having clean air was bogged down by EPA's failure to implement the Prevention of Significant Deterioration (PSD) program. At the same time, unemployment had grown to nine percent, there was double digit inflation, and the nation was struggling with the aftermath of the 1973 Arab oil embargo. *Id.*

<sup>8</sup> TRANSPORTATION AND GENERAL CONFORMITY UNDER THE CLEAN AIR ACT: MODEL RULES FOR STATE AND LOCAL AGENCIES, State and Territorial Air Pollution Administrators/Association of Local Air Pollution Control Officials (STAPPA/ALAPCO), June 1994, at 5 [hereinafter STAPPA/ALAPCO].

<sup>9</sup> Raymond Takashi Swenson, *Blowin' in the Wind: The Impact of Air Pollution Regulation on Redevelopment of Closed military Bases*, FED. FACILITIES ENVTL. J. 331, 333 (Autumn 1993) [hereinafter Swenson].

<sup>10</sup> David Schoenbrod, *Goals Statutes or Rules Statutes: The Case for the Clean Air Act*, 30 UCLA L. REV. 740, 745 (1983).

<sup>11</sup> *Id.* at 742.

<sup>12</sup> Pub. L. No. 91-604, 1970 U.S.C.C.A.N. (84 Stat.) at 5356.

<sup>13</sup> Clean Air Act § 110(a)(2)(B), 42 U.S.C. § 7410(a)(2)(B).

<sup>14</sup> Pub. L. No. 91-605, 84 Stat. 1713 (codified at 23 U.S.C. § 109(j) (1970)).

<sup>15</sup> ARNOLD W. REITZE, JR., *Air Pollution Control Law II*, at 2 (1995) [hereinafter REITZE], citing Yuhunke, *Clean Air in Our Times? The Amendments to Reform Transportation Planning in the Clean Air Act Amendments of 1990*, TRB Legal Workshop (July 23, 1991) [hereinafter Reitze II].

<sup>16</sup> Reitze 11, *supra* note 15, at 2, citing Environmental Quality, THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 62 (1970). The rate of transportation-generated air pollution was thought by some to have been as high as 60 % in 1970. See, e.g., Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 1970 U.S.C.C.A.N. (84 Stat.) 5361.

<sup>17</sup> These requirements have been continued in the 1990 Clean Air Act Amendments.

<sup>18</sup> BUREAU OF NATIONAL AFFAIRS, *THE CLEAN AIR ACT AMENDMENTS: BNA'S COMPREHENSIVE ANALYSIS OF THE NEW LAW*, 48 (1991)[hereinafter BNA].

<sup>19</sup> *Id.* at 1.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1-2.

<sup>23</sup> *Id.* at 2.

<sup>24</sup> *Id.* Pub.L. 101-549. See also President's Signature on Clean Air Act Starts New Era of Pollution Control, Says EDF, U.S. NEWSWIRE, Nov. 15, 1990, at B5.

<sup>25</sup> The Act has been called a "sweeping collection of programs that dwarfs previous environmental laws. Any one of the 1990 Amendments' five major titles would ordinarily be an act in itself." The Honorable Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1724 (1991). The purpose of the 1990 Clean Air Act is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1).

<sup>26</sup> BNA, *supra* note 18, at 48.

<sup>27</sup> 42 U.S.C. § 7506(c)(4)(A).

<sup>28</sup> See *Environmental Defense Fund, Inc. v. Carol M. Browner*, D.C. N.Calif, No. C-92-1636, U.S. Dist. LEXIS 2616 (Feb. 10, 1995) at 2 [hereinafter EDF v. Browner].

<sup>29</sup> On EPA's motion, the deadline was extended until Nov. 15, 1993. *Id.*

<sup>30</sup> 58 Fed. Reg. 62188 (Nov. 16, 1993); 40 C.F.R. pt. 51, subpart T.

<sup>31</sup> *Determining Conformity of General Federal Actions to State or Federal Implementation Plans; Final Rule*, 58 Fed. Reg. 63214 (Nov. 30, 1994) [hereinafter Final Rule].

<sup>32</sup> "Nonattainment" areas are those where the NAAQS have been violated for a particular criteria pollutant. 42 U.S.C. § 7407(d)(1). "Maintenance" areas, on the other hand, are



those areas that were designated nonattainment after the 1990 Clean Air Act amendments, but subsequently determined to be in compliance with NAAQS and thus in "attainment." 40 C.F.R. § 51.392; 51 Fed. Reg. 62217.

33 "Attainment areas" already meet ambient air quality standards and "unclassifiable areas" cannot be categorized as attainment or nonattainment on the basis of available information. 42 U.S.C. § 7407(d)(1). EPA noted in the final conformity rule that it intended "in the near future" to issue a supplemental notice of proposed rulemaking to deal with conformity requirements for transportation related projects in a limited category of attainment areas. See Final Rule, *supra* note 31, at 63214.

34 58 Fed. Reg. 62188.

35 40 C.F.R. pt. 51.

36 BNA, *supra* note 18, at 12.

37 *Id.* at 13.

<sup>38</sup> *Id.* at 12.

39 Clean Air Act § 176(c)(1), 42 U.S.C. § 7506(c)(1).

40 "A Federal agency must make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart before the action is taken." 40 C.F.R. § 93.150(b).

41 STAPPA/ALAPCO, *supra* note 8, at 141.

42 *Id.*

43 *Id.*

<sup>44</sup> U.S. AIR FORCE CONFORMITY GUIDE, Directorate of Environmental Quality, HQ USAF/CEV, Washington D.C. (Aug. 1995).

45 Swenson, *supra* note 9, at 333-34.

46 *Id.* at 334.

47 *Id.* This commentator noted that subtracting emissions elsewhere in the air district can be quite expensive in areas that do not have emission reduction credit (ERC) systems. In such areas, "base developers may need to locate compensating emission sources that can be shut down, pay for that shutdown, and apply for special concurrence by the air district's governing body that there will be no net increase in emissions." *Id.*

48 *Id.*

49 *Id.*

50 864 F.Supp. 265 (D. New Hamp. 1995)[hereinafter CLF].

51 National Environmental Policy Act 1969, Pub. L. No. 90-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321-47 (1970)). A brief discussion of NEPA is appropriate to assist the reader in understanding the court's holding in this case. Enacted on January 1, 1970, NEPA was a watershed event in environmental law. As the first modern environmental statute, it was enacted to ensure that federal agencies consider the effect their decisions will have on the environment. See *Calvert Cliffs Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109, 1113 (D.C. Cir. 1971). NEPA does not require an agency to come to a specific (or even an environmentally sound) decision. It does not impose substantive environmental obligations upon federal agencies. See, e.g., *Chelsea Neighborhood Ass'n v. United States Postal Service*, 516 F.2d 378, 384 (2d Cir. 1975) and *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). Insofar as federal agency compliance efforts are concerned, the most important provision of NEPA is certainly §102(2)(c), NEPA's "action-forcing" provision, which requires that a "detailed statement" known as an Environmental Impact Statement (EIS) be included in "every recommendation or report on proposals for legislation and other major Federal actions significantly

affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). An EIS must contain a detailed written statement concerning the environmental impact of the proposed action. *Id.* Two purposes underlie the responsibility to complete an EIS. First, it ensures the agency will put detailed information on environmental impacts before the decision maker when he or she decides what action to take. *Robertson*, 490 U.S. at 349. Second, it ensures adequate public review and participation in the decision-making process. *Id.* See also *Boston v. Volpe*, 464 F.2d 254, 257, (1st Cir. 1972). The NEPA process begins when the federal agency decides its proposal qualifies as a "major" federal action under the Act. The agency has three options - it may prepare an environmental assessment (EA) to decide (1) whether an EIS must be done or (2) whether a Finding of No Significant Impact (FONSI) can be made; it may simply go ahead and prepare an EIS if the need for one is clear; or it may make a categorical exclusion (CATEX) determination if the proposed action will not individually or cumulatively have a significant effect on the human environment. Courts review federal agency EISs to determine whether they are "adequate" under NEPA. They conduct a "substantial inquiry" into the agency decision to decide whether the agency took the requisite "hard look" at the environmental issues. See, e.g., *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), *Sierra Club v. United States Department of Transportation*, 753 F.2d 120 (D.C. Cir. 1985). The reviewing court is not empowered to substitute its judgment for that of the agency. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). So long as the agency has fulfilled its procedural duties under NEPA and has taken the requisite "hard look" at the potential environmental consequences of its proposed action, substantial deference is due the agency's decisions. See, e.g., *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 97 (1983); *DiVosta Rentals, Inc. v. Lee*, 488 F.2d 674, 678 (5th Cir. 1973); *Grazing Field Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980). The agency is not required to "elevate environmental concerns over other appropriate requirements." *Strycker's Bay Neighborhood Council Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980). Only when there has been a "clear error of judgment" by the agency that deprives the agency's decision of a rational basis will a court overturn the decision. *National Wildlife Federation v. Marsh*, 568 F.Supp. 985, 999 (D.D.C.1983).

52 Pub. L. No. 100-526.

<sup>53</sup> *Id.* §§ 201(1), 201(2).

54 *Id.* §§ 204(c)(1)(A), 204(c)(1)(B). Exempted actions of the Commission included selecting bases for closure or realignment; recommending bases to receive functions from a military installation being closed or realigned; and making its report to the Secretary of Defense or the Congressional Committees. Exempted actions of the Secretary of Defense included setting up the Commission, deciding on the Commission's recommendations, selecting bases to receive functions from an installation being closed or realigned, or transmitting the report to the Congressional Committees. *Id.* In creating these exemptions, "[f] he conferees recognize[d] that the National Environmental Policy Act has been used in some cases to delay and ultimately frustrate base closures, and support the narrowing of its applicability for closures and realignments under this act." H.R.CONG.REP. No. 101-1071, 100th Cong., 2d Sess. 23 (1988), reprinted in 1988 U. S. C. C.A.N. 3395 at 3403.

55 *Id.* §§ 204(c)(2) and (c)(3); H.R.CONG.REP. No. 1071, 100th Cong., 2d Sess. 23 (1988), reprinted in 1988 U.S.C.C.A.N. 3395, 3403.

56 *Id.*

57 Memorandum of the Federal Defendants in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motions for Summary Judgment, Conservation Law Foundation, Inc. v. Dep't of the Air Force, No. C-92-156-L (U.S. Dist. Ct. NH 1994) at 1 [hereinafter Federal Defendants].

58 *Id.*

59 *Id.*

60 CLF, *supra* note 50, at 265.

61 *Id.*

62 *Id.*

63 *Id.* at 270-71.

64 Id. at 271.

65 Id. at 272-73.

66 Id.

67 Id.

68 Id.

<sup>69</sup>Id. at 275. CLF also maintained one conformity allegation against EPA, alleging it failed to make an independent conformity determination as required by 42 U.S.C. § 7506(c)(1). The court granted summary judgment in favor of EPA on this count, noting that there was "ample evidence in the record to support [the]... contention that the EPA in fact did make conformity findings." Id. at 276.

70 Swenson, *supra* note 9, at 334.

<sup>71</sup> Id.

72 See Memorandum of Defendant Pease Development Authority in Support of Motions for Summary Judgment and to Dismiss and in Opposition to Motions of Conservation Law Foundation, Inc. and Town of Newington for Summary Judgment (Clean Air Act Claims), *Conservation Law Foundation, Inc. v. Dep't of the Air Force, et al.*, Civil Action No. 1:92-CV-156-L (Consolidated) [hereinafter PDA Memorandum]. PDA unsuccessfully argued that the CLF's Clean Air Act claims against the Air Force should be dismissed because CLF failed to state a claim and the court lacked subject matter jurisdiction. PDA Memorandum at 4-9.

73 On Apr. 4, 1994, the court ruled that CLF had failed to state a claim for relief against EPA under Clean Air Act § 304(a)(1), because CLF failed to allege "a specific requirement or provision of either the New Hampshire or Maine [SIPs] which would be violated by the EPA's support of the project." Id. at 4-5.

74 Id. at 4-9. On Apr. 4, 1994, the court ruled that it did have subject matter jurisdiction over Clean Air Act claims against EPA under Clean Air Act § 304(a)(2), which provides that a citizen suit may be filed against the Administrator of EPA "where there is alleged to be a failure of the Administrator to perform any nondiscretionary act or duty under the Act."

75 PDA Memorandum, *supra* note 72, at 4-38.

<sup>76</sup>This argument concerns the 60-day limit on lawsuits challenging federal actions taken during closure or realignment. Draft Memorandum of the Federal Defendants in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motions for Summary Judgment, *Conservation Law Foundation, Inc. v. Dep't of the Air Force*, Civil Action No. C-92-156-L (Consolidated) [hereinafter Federal Defendants' Draft Memorandum] at 47-55.

77 Id. at 55-81.

78 Id. at 81-88.

<sup>79</sup> Id. at 88-94.

<sup>80</sup> Id. at 94-98. In the First Circuit there are four prerequisites, according to the Air Force brief. (1) plaintiffs will suffer irreparable injury if the injunction is not granted; (2) such injury outweighs any harm which granting injunctive relief would inflict on the defendant; (3) plaintiff has exhibited a likelihood of success on the merits; and (4) the public interest will not be adversely affected by the granting of the injunction. See *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981); see also *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Associated Builders and Contractors, Inc. v. MWRA*, 935 F.2d 345, 350 (1st Cir. 1991); *LeBeau v. Soirito*, 703 F.2d 639, 642 (1st Cir. 1983).

81 Id. at 22.

82 Id. at 23, 30. CLF brought the Maine SIP into this case by arguing that prohibiting violations of "any standard in any area" meant that the Air Force was required to make conformity findings for any area affected by the Pease AFB project, including the state of Maine. At the time the Air Force was formulating its conformity determination, there were no EPA conformity regulations available for guidance. This left the Air Force with only the statutory language to guide it. PDA argued (and the court agreed) that the conformity provision does not define what is meant by "any standard in any area" and that the Air Force was correct in construing that language to apply solely to the SIP of the state in which the project was located, i.e., New Hampshire. Id. at 19-20.

83 Id. at 30.

<sup>84</sup> Id. at 39-48.

<sup>85</sup> EPA, PDA and the New Hampshire Department of Environmental Services (NHDES) entered into an MOU in Aug. 1991. The MOU addressed EPA's air quality concerns by requiring a surface transportation study, a traffic model, a master transportation plan and a carbon monoxide analysis. The MOU required that the PDA not undertake further development beyond the level anticipated to generate 3.3 tons per day of hydrocarbon emissions until EPA approved a revised SIP for New Hampshire. EPA believed the MOU provided a framework within which the Pease AFB project could proceed in compliance with the Clean Air Act. Id. at 4.

86 Id. at 48.

87 Id. The town of Newington additionally alleged that the discussion in the final EIS of the impact of the Pease Development on the surrounding wetlands was inadequate. Id. at 51. This issue, as well as the CERCLA aspect of the decision, is beyond the scope of this article and will not be discussed further.

88 Id. at 37.

<sup>89</sup>Id. at 39. The court also held it was "obligated to consider the entire administrative record and not only the D[raft] EIS, F[inal] EIS and the accompanying documents." Id.

90 Id. at 41.

91 Id.

92 Id. at 40.

93 Id.

94 Id. at 41. The Air Force asserted that in response to CLF's comments it conducted further air quality analysis and included the information in the final EIS. Id.

95 Id at 39.

<sup>96</sup> Id. at 40-41.

97 See *infra* note 109 and accompanying text.

98 CLF, *supra* note 50, at 284.

<sup>99</sup> Id. at 271. A supplemental ROD was issued on Apr. 13, 1992, to address issues regarding transfer of certain parcels of land. Id. at 277.

100 *id*

101 Id. at 272.

102 Id. The MFR also discussed the rationale for the Air Force's belief that the Pease redevelopment project would not violate either the existing or future SIPs. Id.

<sup>103</sup> Id. at 286, citing 40 C.F.R. § 1508.27(a).

104 Id.

105 Id at 287.

106 Id.

107 Id

108 707 F.2d 626, 633 (1st Cir. 1983).

109 CLF, *supra* note 50, at 289. To give effect to its NEPA ruling, the court ordered the Air Force to augment its June 1991 final EIS to provide (1) additional analysis of how redevelopment will affect wetlands on and around the base and air quality in Maine, and of measures that could be taken to mitigate environmental impacts, and (2) notice to the public of post-final EIS developments, including the Aug. 1991 MOU limiting air emissions from Pease redevelopment and the decision to give PDA immediate access to portions of the base under a long term lease and contract of conveyance. This information was to be made public in a supplemental EIS to be completed by Aug. 29, 1995. The court refused to enter a broader injunction stopping PDA's redevelopment activity, holding that it was "not convinced under the circumstances that the plaintiffs [had] demonstrated the irreparable harm necessary for granting a preliminary injunction." Id.

110 This is an odd and seemingly unnecessary allegation, in that the Air Force was already preparing a supplemental EIS in compliance with the district court's order.

111 Original Brief for Petitioner-Appellant Conservation Law Foundation, Inc. at 17-48, Mar. 15, 1995.

112 Response Brief for Federal Appellees-Respondents/Cross-Appellants at 1, May 1995 [hereinafter Government Response Brief] CLF and the Town of Newington also asserts that the district court abused its discretion when it declined to impose an injunction halting future transfers and redevelopment efforts at Pease after finding that the Air Force had violated CERCLA § 120(h)(3) and NEPA § 102(2)(C). They also contend that the Air Force and EPA violated Clean Air Act § 176(c)(1), and that the FAA did so as well when it approved the PDA's plan for establishment of a civilian airport on the former base. Id. at 1-2.

113 Opening Brief for the Federal Appellees-Respondents/Cross-appellants at 3, Mar. 1995.

114 Government Response Brief, *supra* note 76, at 24-46. The CERCLA portions of the government's response to this appeal will not be discussed herein.

115 Conservation Law Foundation, Inc., v. James Busey, Administrator, Federal Aviation Administration, et. al, 42 ERC 1385 (1st Cir. Apr.4,1996) at 1393-1400 [hereinafter CLF Appeal].

116 *Id* at 1393-94. The court held that had the federal agencies relied entirely on the information in the final EIS as the basis for their conformity determinations, and if these analyses had been found by the district court to be deficient under NEPA on substantive grounds which affected the conformity analysis required by the CAA, the conformity analysis would also likely have been deficient. The agencies, however, relied for their conformity determination on information and analyses which had not been included for public comment in either the final EIS or a supplemental EIS. While this failure was a NEPA violation; "[b]ecause such public review and comment are not required under the conformity provision of the CAA, the NEPA violation did not affect the merits of the conformity determination. . ." according to the court. *Id.* at 1394.

117 *Id.* at 1395-1400. The court noted that no regulations interpreting 42 U.S.C. § 7506(c)(1) had been promulgated when the agencies made the conformity determinations at issue, having "only the words of the statute to guide them." *Id.* at 1395. Also, because "a conformity determination is inherently fact-intensive. . . what constitutes conformity is a function of the unique characteristics of the project being approved." *Id.* According to the First Circuit,

Section 7506(c)(1) sets forth its own standards for evaluating conformity. Noting in that section or elsewhere in the CAA requires the information on which a conformity determination is based to have been subject to review, analysis, or public comment pursuant to NEPA. Moreover, regulations issued by the EPA in 1993 prescribing procedures and criteria for conformity determinations suggest no connection between NEPA and CAA compliance.

*Id.* at 1393.

118 *Id.* at 1403. Plaintiffs argued that failure to grant injunctive relief would result in irreparable harm due to the continuing development of Pease AFB for civilian use. The court decided that the plaintiffs had simply waited too long to make this argument, because significant commitments were made to the Pease project by the time CLF and the Town of Newington moved to amend their complaint to reflect a request for injunction in addition to the substantive claims made. "If harm was done, it largely had been done, not by the court's denial of injunctive relief, but by the plaintiffs' failure to timely seek it," the First Circuit held. *Id.*

119 *Id.* at 1400-01. As noted above, the CERCLA aspects of this case are not addressed in this article.

120 Final Rule, *supra* note 31, at 63214.

121 Environmental Defense Fund v. Browner, No. C-92-1636, 1995 U.S. Dist. LEXIS 2616 (D.C. N.Calif. Feb. 10, 1995).

122 *Id.* at 2. The suit was brought pursuant to 42 U.S.C. § 7604(a)(2).

123 *Id.* at 7.

124 *Id.*, citing 42 U.S.C. § 7506(c)(1)(B)(i) (emphasis added).

125 *Id.* at 7-8.

126 *Id.* at 8. Indeed, "to cause a location or region to exceed a standard more often or to cause a violation at a greater concentration that previously existed and/or would otherwise exist during the future period in question" is explicitly defined as increasing the "frequency or severity" of a violation in the Final Rule, noted the court. *Id.*

127 *Id.* at 10.

128 Id. at 11, citing *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989), which in turn cited *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385-388-89 (1959).

129 Id. at 9. EPA cited to 42 U.S.C. §§ 7506(c)(2)(D), (c)(3)(A)(iii), and (c)(3)(B)(iii) in support of this argument.

130 *Environmental Defense Fund v. Browner*, 1995 U.S. LEXIS 2616 at \*26.

131 Id. The legislative history to which the court refers is a congressional reference to a 1975 EPA policy statement contained in its "Guidelines for Analysis of Consistency Between Transportation and Air Quality Plans and Programs" [hereinafter Guidelines]. The Guidelines were issued jointly by EPA with the FHWA to help carry out the requirement of § 109(j) of the Federal Aid Highway Act, 23 U.S.C. § 109(j), that highways be "consistent with any state implementation plan. The Guidelines required "consistency" even for areas with no NAAQS violations. In congressional debate about the 1990 Clean Air Act amendments, Senator Baucus, the sponsor and manager of the Senate bill that became the basis of the 1990 conformity amendments and the chair of the subcommittee that reported the bill, explained his understanding of the 1977 amendments to the Senate. He commented that the "intent of the 'conformity' provision added to the Clean Air Act in 1977 was to give clear legislative authority for the application of air quality criteria to the review and approval of transportation plans and well as projects in accordance with the DOT/EPA joint 1975 guidance." 135 LONG. REC. S 16972, cot. 2 (daily ed. Oct. 27, 1990). Judge Henderson indicated in his decision that this language in the legislative history shows that "Congress acknowledged it drew on the Guidelines - which required consistency even for areas with no NAAQS violations - in crafting section (c)(1)(B)'s conformity tests. It is especially telling that Congress chose to follow the language of the Guidelines' consistency criteria so closely," the court noted. Id. at 21.

132 Id. at 26. The judge apparently agreed with the plaintiffs that EPA had originally interpreted the conformity requirement as being applicable in attainment areas. He noted that the initial EPA statement of policy applying the conformity requirement to attainment areas came in the form of the 1975 Guidelines, and that EPA reiterated this position in a 1988 letter to the Administrator of the FHWA, saying that if plans or projects "cause or contribute to existing or new standard violations, or delay attainment, they should not be found in conformity. EPA's definition of conformity is basically the same definition as that contained in the Consistency Guidelines of 1975..... Id. at 22. Additionally, the court noted that in 1980, EPA had issued an advance notice of proposed rulemaking, published at 45 Fed. Reg. 21590 (Apr. 1, 1980), in which EPA "flatly asserts that 'EPA believes that the Congressional intent of § 176(c) was that federal actions should not be allowed to cause delay in the attainment of maintenance of the NAAQS in any state or violation of PSD requirements in areas with air cleaner than the NAAQS.'" Id. at 23. Because the court decided it was clear that "Congress was aware of the Guidelines when it developed the conformity criteria of § 176(c)," but did not change the language significantly when transforming the Guidelines into the §176(c) conformity requirement, it held that Congress essentially ratified EPA's original definition. This is so, the court held, because where "an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter the interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned," (citing *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551,556 n.20 (1979)). Id. at 18-25.

133 Id. at 29-30. The judge gave EPA 270 days from the date of his order (until Nov. 1995) to promulgate the new regulation, and reminded EPA to give the public 60 days to comment on the proposed new regulation. Id.

134 Joint Brief of Environmental Petitioners, *Environmental Defense Fund, Inc. et al. v. United States Environmental Protection Agency*, No. 92-1003 and consolidated cases 94-1047,94-1062, U.S. Ct. of App. (D.C. Cir.), Feb. 27, 1995 at 1 [hereinafter EDF Joint Brief], and the Brief of Government Respondents, *Environmental Defense Fund, Inc., v. United States Environmental Protection Agency, et al.*, No. 94-1044 and consolidated cases, U.S. Ct. of App. (D.C. Cir. 1995) at i [hereinafter EPA Brief]. During the early stages of the case, the American Trucking Association and the American Road and Transportation Builders Association joined in these suits as intervenors. EPA Brief at i.

135 Id at 1-2. Clearly, a number of EDF's allegations involve transportation conformity rather than general conformity. This article will discuss the arguments relating only to general conformity issues.

136 EDF Joint Brief, *supra* note 134, at 16.

137 Id. at 17. In making this argument, EDF cited a number of cases it believes supports the theory that EPA cannot carve out certain exemptions to a statute where no statutory language exists to permit it. For example, in *Hercules Inc. v. U.S. Environmental Protection Agency*, 938 F.2d 276, 280 (D.C. Cir. 1991) a governing statute required federal agencies selling real property to notify the purchaser if hazardous waste had been stored on the property. In that case, the court held that EPA erred by limiting the notification obligation to situations where the hazardous waste was stored during the time the property was owned by the United States. The court stated, "We reject the EPA's action because it reads into the statute a drastic limitation that nowhere appears in the words Congress chose and that, in fact, directly contradicts the unrestricted character of those words." Id. In *Sierra Club v. U.S. Environmental Protection Agency*, 992 F.2d 337, 343-45 (D.C. Cir. 1993), a statute required groundwater monitoring by facilities potentially receiving certain enumerated wastes. The court determined that EPA acted improperly when it required monitoring only at larger facilities receiving such wastes. It held: "Nothing in the statute diminishes or qualifies the generality of these two key words - equipment and facility. Nothing in the statute states that only certain kinds of equipment of facilities need to be regulated." Id.

<sup>138</sup> Clean Air Act § 176(c)(3)(B)(i) states that until a SIP revision is approved, conformity of transportation plans, programs and projects will be demonstrated if transportation projects "come from a conforming transportation plan as defined in [§ 176(c)(3)(A)] or for 12 months after Nov. 15, 1990, from a transportation program found to conform within three years prior to Nov. 15, 1990."

139 EDF Joint Brief, *supra* note 134, at 18. EDF cites as support *Sierra Club v. U.S. Environmental Protection Agency*, 719 F.2d 436, 453 (D.C. Cir. 1983), in which the court held "where a statute lists several specific exceptions to the general purpose, others should not be implied."

140 42 U.S.C. § 4334.

141 EDF Joint Brief, *supra* note 134, at 18.

142 EDF argues that EPA's rationale for including the grandfather provision (i.e., that to do otherwise would unfairly cause some projects which had complied with the law to halt in mid-stream upon adoption of the General Conformity Rule) is "fallacious." EDF asserts that the four-part test upon which the grandfather exemption was based was unnecessary because no retroactivity problem exists with conformity situations. The four-part test as enumerated by EPA in the Final Rule was: (1) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law; (2) the extent to which the party against whom the new rule is applied relied on the former rule; (3) the degree of burden which immediate application of a rule imposes on a party, and (4) the statutory interest in applying a new rule despite the reliance of a party on the old standard. 58 Fed. Reg. at 63216. EDF claims that there should be no retroactivity problem because the operative actions for purposes of § 176(c)(1) occur when an agency engages in, supports in any way, provides assistance for, licenses or permits, or approves an activity.

143 Id at 20. According to EDF, "the statute is crystal-clear about the point in time at which conformity must exist: it must exist... on the date when the agency 'engage[s] in,, support[s], in any way or provide[s] financial assistance for, license[s] and permit[s], or approve[s]' the activity. . . ." Id.

<sup>144</sup> EPA Brief, *supra* note 134, at 18.

145 40 C.F.R. § 51.850(b) and (c)(1).

146 EPA Brief, *supra* note 134, at 18.

147 Id. at 19.



148 Id. at 22. EPA noted in its brief that although Clean Air Act §176 was established by the 1977 Clean Air Act Amendments, it did not call for EPA or any other agency to adopt regulations to implement the conformity requirement. Additionally, the only specific non-transportation conformity regulation existing at that time, 40 C.F.R. §6.303, applied only to EPA actions, not to those of other federal agencies. Id.

149 Id. at 22, citing 58 Fed. Reg. at 63216.

150 Id at 22.

151 Id

152 Id. at 25.

153 Id. EPA disagrees with EDF's contention that concerns about retroactivity are not implicated unless the entire transaction is completely in the past. Such a view, the Agency asserts, is contrary to the court's decision in *NRDC v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988), cert. denied, 488 U.S. 901 (1988), where NRDC challenged EPA's decision to exempt certain facilities that had increased facilities' stack height from the requirement that they demonstrate that the increase was necessary to avoid specific adverse consequences, in order to receive emissions limitation credits. The court held that retroactivity was involved in the case simply because enforcement of the demonstration requirement might impinge unfairly on source owners that made investments or other commitments in reasonable reliance on prior understandings . . . Clearly the issue entails a balancing of the interest in prompt and complete fulfillment of statutory goals against the inequity of enforcing a new rule against persons that justifiably made investment decisions in reliance on a past rule or practice.  
Id. at 1244.

154 EPA Brief, supra note 134, at 31.

155 *Conservation Law Foundation v. FHWA*, 24 F.3d 1465 (1st Cir. 1994). The case dealt with a project in which a highway was being constructed across the island of Jamestown, Rhode Island, to connect two bridges. Final federal environmental approval to proceed was given in 1988; the state acquired the necessary land by 1990; and the final FHWA approval and permit from the Army Corps of Engineers were issued in 1992. Id. at 1467, 1480 n.9.

156 Id at 1480. For its part, EDF dismisses the First Circuit's decision in the CLF case because it "ignores the plain language of the Act." EDF Joint Brief, supra note 134, at 22.

157 Id. at 33-34.

158 Id

159 EDF Joint Brief, supra note 134, at 60.

<sup>160</sup> Id. at 62.

161 Id at 59-60, citing Clean Air Act § 172(c)(5), in which SIPS in nonattainment areas must require permits for "major stationary sources."

162 EPA Brief, supra note 134, at 69.

The statutory language and legislative history [of § 176(c)] disclose that Congress paid extremely little attention to the matter of conformity of non-transportation federal actions. It is inconceivable that Congress intended to require agencies to expend the enormous resources that would be necessary to make individualized conformity determinations for all federal actions - without exception - given that the statutory language and legislative history fail to reflect that such a requirement was even debated.

Id. at 74.

163 Id at 73-74.

164 Id. at 70. It cites case law to support the argument that there is "virtually a presumption in its favor," *Public Citizen v. Young*, 831 F.2d 1108, 1112 (D.C. Cir. 1987), and that de minimis exceptions should be inferred "save in the face of the most unambiguous demonstration of congressional intent to foreclose them." *Alabama Power Co. v. Costle*, 636 F.2d 332, 357 (D.C. Cir. 1979). The EPA also cites to *Pacific Gas & Electric Co. v. FERC*, 720 F.2d 78, 89-90 (D.C. Cir. 1983) ("most ... statutory provisions ... must incorporate some common sense limits.") Id.

165 EDF Joint Brief, *supra* note 134, at 70.

166 467 U.S. 837 (1984). The Chevron test requires the court to decide whether Congress has directly spoken to the precise question at issue, and, if the statute is silent or ambiguous, to decide whether the agency's interpretation is based on a permissible construction of the statute. Id. at 842-44.

167 EPA Brief, *supra* note 134, at 70-71.

168 Id. at 82.

169 EDIT Joint Brief, *supra* note 134, at 52.

170 Id. Indeed, says EDF, the "stark inconsistency between the plain language of § 176(c)(1) and EPA's rule fully suffices to require reversal. . . ." Id. at 53. The EDF points to two other provisions of the Clean Air Act as "additional confirmation" that the exemption included by EPA in the definition of "indirect emissions" shouldn't be there. First, says EDF, in § 176(c)(2)(A), Congress directed that transportation conformity determinations must include within their scope not just emissions from constructing a highway, but also emissions from motor vehicles using the highway. "Congress mandated this result even though USDOT has no 'continuing program responsibility' over how many cars are allowed to use the highway." Id. Second, EDF argues that Clean Air Act § 316, which governs air pollution requirements in connection with EPA grants for construction of sewage treatment plants, requires consideration of the emissions foreseeably resulting from the commercial and residential development of additional sewage treatment capacity, not just from construction of the plant itself, as part of the conformity review. Id. at 54. See Clean Air Act § 316(b)(3), 42 U.S.C. § 7616(b)(3). These two provisions, according to EDF, "reinforce the conclusion ... [that] the import of conformity is to make air pollution control part of the 'continuing program responsibility' of each agency, and to give each agency power to 'control' non-conforming pollution by simply withholding its participation." EDF Joint Brief, *supra* note 134, at 55. EDF also believes that "continuing control" could be easily exercised by including mitigation measures in the SIP. Id. at 57-58. "Use of the SIP avoids the need for the approving agency itself to have the authority to impose mitigation measures, or to have enforcement authority separate from the SIP." Id.

171 EPA Brief, *supra* note 134, at 62-63. As an example, EPA describes the circumstances surrounding sale of land by a federal agency. Under EDF's theory that the federal agency should remain responsible even after the sale, the agency would be responsible for ensuring that the emissions from future use of the land would conform to the SIP. When the sale is complete, EPA argues, "the federal agency has no control over the use of the property and so no means of compelling compliance with any mitigation measures or even ensuring that actual use is consistent with that planned at the time of the sale." Id. at 63.

172 Id. at 64. There was no indication that Congress intended to impose as burdensome a requirement on federal agencies performing their statutory functions as would result if the "inclusive" definition of "indirect emissions" was adopted, according to EPA. Id. at 67. Additionally, because the language of § 176(c)(1) is so "terse as to be ambiguous about how compliance ... should be met or measured," EPA's interpretation of the statute is entitled to the deference recognized as appropriate under the second prong of the Chevron test. Id. at 61.

173 EDF Joint Brief, *supra* note 134, at 64 (emphasis added by EDF).

<sup>174</sup> Id. at 65.

175". . . [T]he law is clear that unless an issue was raised during the administrative process, it cannot be raised for the first time on appeal" citing *Natural Defense*

Resources Council v. Environmental Protection Agency, 25 F.3d 1063, 1073-74 (D.C. Cir. 1994).

176 EPA Brief, *supra* note 134, at 88-89. Clean Air Act § 179 enables EPA to sanction violations by prohibiting approval of highway projects and construction grants. 42 U.S.C. § 7509.

177 *Id.* at 90.

178 *Id.* at 89-90.

<sup>179</sup> CA DC, No. 94-1044, Apr. 19, 1996. See *Env't Rep.* (BNA) Vol. 26, No. 50, Apr. 26, 1996, 2419.

<sup>180</sup> *Id.*

181 *Id.*

182 *Id.* at 2420.

183 *Id.*

184 *Id.*

185 Final Rule, *supra* note 31, at 63227.

186 CLF, *supra* note 50, at 277.

187 *Supra* note 134 and accompanying text.

<sup>188</sup> For example, the Clean Water Act § 404 dredge and fill permits issued by the Army Corps of Engineers (COE) are often limited to small portions of otherwise sizable projects, such as a single river crossing for a 500 mile gas pipeline. The COE estimated in its comments to the proposed general conformity regulation that 65,000 of its regulatory actions would have required a conformity review in 1992 under the inclusive definition of indirect emissions. *Id.* EPA noted in its Final Rule, *supra* note 31, at 63219, that the inclusive definition of indirect emissions "could be interpreted to include virtually all Federal activities, since all Federal activities could be argued to give rise to, at least in some remote way, an action that ultimately emits pollution." EPA also noted,

This broadest interpretation of the statute could impose an unreasonable burden on the Federal agencies and private entities that would have been affected by that definition. For example, since the Federal Government issues license for any export activities, an inclusive definition approach could go so far as to require the manufacture of the export material and the transportation of the same material to be subject to a conformity review. Such an approach, however, is very burdensome due to the large number of export activities, the fact that the licensing process is not a factor in any SIP, and that the vast majority of these manufacturing and transportation activities may have little to no impact on air quality.  
*Id.*

189 Public comments received by the EPA in response to its proposed general conformity regulation noted several examples of federal activities that are "not normally considered in SIPs but could not clearly be said to have absolutely no ties to actions that result in emissions of pollutants." Final Rule, *supra* note 31, at 63219. These included COE permits actions, sale of federal land, National Pollutant Discharge Elimination System (NPDES) permit issuance, transmission of electrical power, export license actions, bank failures, and mortgage insurance. *Id.*

190 Final Rule, *supra* note 31, at 63229.

<sup>191</sup> 40 C.F.R. § 93.152 (emphasis added).

192 EPA notes in the Final Rule that "a solution may be impossible unless it is directed at all the contributing sources. This role is given to the State and local agencies by Congress and should not be interpreted as the Federal agencies' role under section 176(c)." Final Rule, *supra* note 31, at 63220.

## Planetary Defense:

### The Legality of Global Survival

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If you were standing on Kosrae Island off the New Guinea coast on February 1, 1994, you would have seen a blast in the sky as bright as the Sun. This was caused by a small meteor entering Earth's atmosphere at 15 kilometers per second (roughly 33,500

miles per hour). Fortunately for you and everyone else nearby, the meteor exploded at high altitude, over a sparsely populated region; the blast had the force of 11 kilotons of TNT. /1/

This was not your first near-death experience. On March 23, 1989, an asteroid about 800 meters in diameter narrowly missed the Earth (by about 6 hours' difference in relative position). If this asteroid had struck the Earth, the impact would have released energy equivalent to about 40,000 megatons of TNT, or 2,000 standard-size hydrogen bombs. <sup>/2/</sup> On an even larger scale, on December 8, 1992, a large asteroid named Toutatis missed hitting this planet by only two lunar distances. This was a very lucky day for everyone on Earth, because Toutatis is nearly 4 kilometers in diameter. /3/ If it had hit us, the force of the collision would have generated more energy than all the nuclear weapons in existence combined—approximately 9 million megatons of TNT. <sup>/4/</sup>

Is there anything that can be done about these monumental hazards, other than worry? Recently, there has been some discussion about taking positive steps to protect the Earth. Planetary defense is the shorthand term for an interrelated cluster of possible missions devoted to the detection, tracking, and generation of possible responses to an external threat to this planet, similar to or much greater than the ones just described. Such threats include asteroids, /5/ comets, /6/ and meteors /7/ that may collide with or otherwise affect the Earth. /8/

The purpose of this article is to evaluate the legality of planetary defense, including related legal issues. We will trace the nature and magnitude of external threats to Earth, briefly discuss possible means of accomplishing the mission of planetary defense, and then examine in detail the attendant legal ramifications.

## II. THE THREAT

The prospect of large exogenous objects crashing into Earth is, quite unfortunately, not science fiction. As hinted at by the near-misses previously described, it has happened many times during our planet's known history, and there is every reason to believe that it will happen again.

Clear scientific evidence currently exists of approximately 140 "hypervelocity impact craters" on Earth, and this number is increasing by about 3 to 5 new craters each year. /9/ As indicated in the Table in the appendix to this article, these craters are found in virtually every part of the globe, with many located within areas in the United States and Western Europe that are now heavily populated. It is reasonable to presume that a large number of impacts remain undiscovered, because these impacts would have occurred in oceans and seas or in relatively inaccessible terrestrial areas such as Siberia or the interior of Greenland or Alaska. Given that a great preponderance of the Earth's surface is covered by water, there is no reason to believe that these regions have received any less than their proportionate share of impacts. In many cases of an ocean strike from space, the only evidence we would be likely to have would be an otherwise unexplained tsunami or tidal wave.

For most of the known impact craters, we can only estimate the nature of the collision from what remains of the crater after erosion, human activity, and other factors have taken their toll. The size of these impact craters ranges up to 200

kilometers in diameter or more; it is likely that many of these were once much larger. /10/ Moreover, some extremely destructive incidents may not have involved actual contact with the Earth; a space object may explode in the atmosphere prior to "landing," with nonetheless devastating effects on the planet from the shock wave and collateral phenomena. /11/

It is difficult to estimate with much confidence the frequency with which Earth has been struck. The problem is partially due to the probability of many impacts occurring in water and remote land regions, or prematurely terminating in mid-air explosion. Also, the obscuring effects of erosion and other processes may render many small craters unrecognizable over time. There is an ongoing debate within the scientific community on several key points: (1) the rate at which this planet has been hit; (2) whether that rate has increased in more recent times; and (3) whether there have been periods of greatly intensified impact activity. /12/

Irrespective of the ultimate resolution of these controversies, it is beyond dispute that planet Earth has experienced hundreds of collisions with large objects from space. Moreover, there is no reason to presume that these events are forever relegated exclusively to the distant past. Comparatively small-scale, yet still phenomenally destructive strikes have occurred quite recently.

For example, on June 8, 1908, a pale blue fireball appeared in the Siberian sky, moving rapidly northward. The object exploded about 6 kilometers above the forest, creating a column of flame and smoke more than 20 kilometers high." Although no crater was formed, the blast caused the destruction of more than 2,000 square kilometers of Siberian forest in the Tunguska region. This immense area was flattened and burned by the superheated air and the shock wave that literally was felt around the world. It is believed that the source of this devastation was a stony asteroid about 80 meters in diameter, hurtling toward Earth at Mach 45. When it entered the atmosphere at this incredible velocity, it created a shock wave in front of it, which resulted in a pressure gradient that eventually blew the asteroid apart. 'a With this recent, relatively minor incident in mind, the probable consequences of more major collisions will be explored.

Currently, astronomers estimate that at least 200 asteroids are in orbits that cross the Earth's orbit, and the number of such known asteroids is rapidly increasing as detection methods

improve." Most of these asteroids are larger than 500 meters in diameter (several times larger than the Tunguska asteroid) and would cause massive damage if they were to collide with this planet. In addition, long-period comets, 16 although less numerous than asteroids, pose a significant threat due to their greater velocities relative to Earth."

The history of life on Earth includes several devastating periods of mass extinction" during which the vast majority of species then in existence became extinct within a relatively short span of time. <sup>/19/</sup> The best known of these mass extinctions found the dinosaurs tumbling all the way from their throne as the kings of all living things to the bone pile of archeological history. <sup>/20/</sup> No less significant, however, were the extinction spasms that wiped out approximately 70 and 90 percent of marine species, respectively. <sup>/21/</sup> Even the species that survived often experienced catastrophic reductions in their populations.

Several scientific studies have linked mass extinctions to collisions between Earth and large objects from space. The hypothesis that these extinction spasms were caused by these collisions and their aftermaths

is supported (1) by the discovery of the now well-documented large impact event at the [Cretaceous/Tertiary] boundary...; (2) by calculations relating to the catastrophic nature of the environmental effects in the aftermath of large impacts; (3) by the discovery of several additional layers of impact debris or possible impact material at, or close to, geologic boundary/extinction events; (4) by evidence that a number of extinctions were abrupt and perhaps catastrophic; and (5) by the accumulation of data on impact craters and astronomical data on comets and asteroids that provide estimates of collision rates of such large bodies with the Earth on long time scales. <sup>/22/</sup>

There are at least six mass extinctions that have been linked with large impacts on Earth from space. <sup>/23/</sup> But how and why did these impacts have such a profoundly devastating effect on such a vast spectrum of living things?

Some scientists maintain that the greatest natural disasters on Earth have been caused' by impacts of large asteroids and comets. Although rare compared to "ordinary" floods and earthquakes, they are infinitely more dangerous to life. There are several reasons for this.

Initially, of course, a giant object hitting the Earth at spectacular, hypersonic velocity would utterly destroy the local area around the impact. An explosive release of kinetic energy as the object disintegrates in the atmosphere and then strikes the Earth generates a powerful blast wave. The local atmosphere can be literally blown away. If the impact falls on ocean territory, it may create a massive tidal wave or tsunami, with far-reaching effects. /24/

When tsunamis strike land, their immense speed decreases, but their height increases. It has been suggested that tsunamis may be the most devastating form of damage produced by relatively small asteroids, i.e., those with diameters between 200 meters and 1 kilometer. "An impact anywhere in the Atlantic Ocean by an asteroid more than 400 meters in diameter would devastate the coasts on both sides of the ocean with tsunami wave runups of over 60 meters high. /25/

Horrific as such phenomena are, they are dwarfed by a potentially far greater hazard. The impact of a sufficiently large object on land may cause

a blackout scenario in which dust raised by the impact prevents sunlight from reaching the surface [of the Earth] for several months. Lack of sunlight terminates photosynthesis, prevents creatures from foraging for food, and leads to precipitous temperature declines.... Obviously even much smaller impacts would have the potential to seriously damage human civilization, perhaps irreparably."

In addition to the dust raised from the initial impact, smoke and particulate matter from vast, uncontrollable fires may greatly exacerbate this blackout effect. A large space object generates tremendous heat, regardless of whether it is destroyed in the atmosphere or physically hits the surface of the Earth. /27/ These fires can reach far beyond the impact area, due to atmospheric phenomena associated with the entry of a huge, ultra-high speed object. /28/

A huge mass of dust, smoke, and soot lofted into Earth's atmosphere could lead to effects similar to those associated with the "nuclear winter" theory, /29/ but on a much larger, much more deadly scale. Such effects are now widely believed to have been a major factor contributing to the mass extinction spasms. /30/

These cataclysmic effects may have been worsened still further by other collateral phenomena associated with the impact. For example, acid rain, pronounced depletion of the ozone layer, and massive injections of water vapor into the upper atmosphere



may be indirect effects, each with its own negative consequences for life on Earth. /31/

It is true that destructive impacts of gigantic asteroids and comets are extremely rare and infrequent when compared with most other dangers humans face, with the

intervals between even the smallest of such events amounting to many human generations.... No one alive today, therefore, has ever witnessed such an event, and indeed there are no credible historical records of human casualties from impacts in the past millennium. Consequently, it is easy to dismiss the hazard as negligible or to ridicule those who suggest that it be treated seriously. /32/

On the other hand, as has been explained, when such impacts do occur, they are

capable of producing destruction and casualties on a scale that far exceeds any other natural disasters; the results of impact by an object the size of a small mountain exceed the imagined holocaust of a full-scale nuclear war.... Even the worst storms or floods or earthquakes inflict only local damage; while a large enough impact could have global consequences and place all of society at risk.... Impacts are, at once, the least likely but the most dreadful of known natural catastrophes. /33/

What is the most prudent course of action when one is confronted with an extremely rare yet enormously destructive risk? Some may be tempted to do nothing, in essence gambling on the odds. But because the consequences of guessing wrong may be so severe as to mean the end of virtually all life on planet Earth, the wiser course of action would be to take reasonable steps to confront the problem. Ultimately, rare though these space strikes are, there is no doubt that they will happen again, sooner or later. To do nothing is to abdicate our duty to defend the United States, and indeed the entire world, and place our very survival in the uncertain hands of the false god of probabilities. Thus, the mission of planetary defense might be considered by the United States at some point in time, perhaps with a role played by the military, including the United States Air Force.

### III. POSSIBLE METHODS OF PLANETARY DEFENSE

A rigorous examination of the technological means of planetary defense is beyond the scope of this article; such matters are the province of highly sophisticated technical analysis. However, it is important to understand at least in outline the probable instruments of accomplishing that mission, because the legality of various options depends in large part on the specific methods employed, e.g., nuclear versus non-nuclear devices.

There are two general, basic aspects of planetary defense: the surveillance of space for potential threats, and the mitigation of a threat once it is detected. Each will be examined in turn.

The mission of planetary defense requires as a fundamental prerequisite the surveillance of space to allow the detection of threats, with sufficient efficiency, precision, and promptness to enable a meaningful response. Given that the type of objects of greatest concern (large asteroids, meteors, and comets) would approach Earth from space at very high speeds from very great distances, the tools of detection and tracking tend to fall into the already established fields of astronomy and to a limited extent, early warning/air defense, although the latter is currently focused on the detection of missiles and would require significant modification in order to be of use against objects from outer space.

Detection addresses the need to identify potential threats early; once an object is detected, it is necessary to track the progress of the threatening object, and to predict accurately the likely time and place of impact. /34/ Additionally, it is important to characterize the object, i.e., to estimate its composition and chemical properties so as to prepare an appropriate response. These activities could be pursued in part from Earth through use of sophisticated telescopes, in conjunction with radar. However, these remote-sensing methods can only perform preliminary, limited characterization. In order to ensure the most comprehensive, most precise, early-warning coverage, as devoid of blind-spots and interference as possible, it may be necessary to employ some space-based methods. /35/ Perhaps an array of orbiting monitoring stations, equipped with telescopes and other monitoring devices, could provide this type of coverage. Such a space-based sentinel system would be a highly useful if not absolutely essential complement to similar components on Earth, because it would be free from the interference effects associated with "looking" through Earth's atmosphere. /36/

Evaluation of information from the sentinel system or systems would require state-of-the-art analytical techniques. The data would be processed to yield estimates of impact time and place and the probable consequences. Undoubtedly, computer models would play a role in this phase of the mission, taking into account the variables that might affect the outcome. Ideally, the evaluation process would also provide insight into the optimal methods and means of response to the threat.

Mitigation, or response, could take several forms, depending in part on the nature and magnitude of a given threat, once it has been detected and evaluated. One possible response would be evacuation of the impact zone, to minimize loss of life. A closely related response is preparation to minimize the resultant damage due to fires, tidal waves, earthquakes, acid rain, and other after-effects, and to provide medical care to the victims.

These forms of response, though important, would be grossly inadequate when dealing with a truly massive threat such as those discussed previously. In the event of a massive strike from space, the resultant apocalyptic disasters would render such efforts as fruitless as rearranging the deck chairs while the Titanic sinks. The only meaningful response to a massive strike is some form of direct intervention.

Direct intervention may entail deflection or destruction of the approaching space object to prevent or mitigate any impact with Earth. The means for achieving this fall partially within the realm of existing military capabilities, and partially within the ambit of technologies superficially similar to some proposed/experimental aspects of the Strategic Defense Initiative (SDI).

Depending on the physical size and other attributes of the threatening object, a variety of countermeasures might be effective in diverting or destroying it. Earth-based nuclear devices such as Intercontinental Ballistic Missiles (ICBMs) or their submarine-launched counterparts might suffice. Non-nuclear options conceivably would work, including kinetic energy or laser systems such as were explored under SDI. Some of these may require space-basing to be effective, while others may work in an Earth-based mode.

A truly effective planetary defense system would probably employ multiple, redundant layers of techniques. To compensate

for the shortcomings of any one component in any given area of the mission, the system should have an array of methods, each relying on an independent technological foundation. Most likely, a combination of space-based and Earth-based components would be necessary. Taken together, the full panoply of technologies would synergistically present more complete detection and protection than any subset of components could provide in isolation. This concept of defense-in-depth is warranted by the unacceptability of a failure; the Earth may not get a second chance to get it right.

With this brief overview of the possible means and methods of conducting a planetary defense mission, this article will now focus on the legal issues. Depending on the specific forms of response used, the legal ramifications would vary.

#### **IV. LEGAL ISSUES**

Because of the nature of the threat, and the need to respond in space, the legality of planetary defense measures would fall within the area of public international law and its very new sub-category, space law. These branches of law are largely creatures of custom, treaty, and other forms of international agreement. Therefore, this section will deal in turn with the treaties and agreements most apt to have some bearing on planetary defense.

##### **A. The Outer Space Treaty**

The Outer Space Treaty /37/ is most directly applicable to planetary defense as a whole, taking into account all of its probable components. The Outer Space Treaty was signed in 1967 by the United States and more than 100 other nations (including the Soviet Union), under United Nations sponsorship. Basically, this Treaty seeks to ensure that space remains free for use and exploration by all nations and not subject to appropriation, as well as to restrict military activities in space and to preserve the use of space for peaceful purposes. Article IV is most on point for purposes of planetary defense. It provides:

States Parties to the Treaty 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.

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

/38/

The ambiguities in Article IV are readily apparent. On the most basic level, it is important to know what is meant by "outer space." The term is not defined in the Treaty. There is some support for the proposition the "space powers" have created a rule of customary international law that satellites are considered to be in outer space, and thus national airspace cannot extend beyond the altitude of the orbit of the lowest satellites, which is about 100-110 kilometers above sea level, /39/ although the fact that there is no legal demarcation between outer space and air space has been a matter of debate in the United Nations Committee for the Peaceful Uses of Outer Space (UNCOPUS) for some thirty years. Under this interpretation, outer space could be considered to begin at or near this elevation.

The meaning of "weapons of mass destruction" has typically been defined as weapons that are intended to have indiscriminate effect upon large populations and large geographical areas. /40/ The definition excludes conventional artillery munitions, but includes nuclear, as well as biological- and chemical weapons; this rather narrow focus reflects the concerns of the era in which the Treaty was negotiated. Then, nations were considering placing nuclear bombs in orbit over other nations, which would be released upon commencement of hostilities. The use of the term "weapons of mass destruction" was thus designed to preclude only this type of orbiting, space-based nuclear or other mass-destruction offensive weapons.

Further evidence that the drafters only intended this paragraph to ban orbiting nuclear-type weapons is the drafters' agreement that the Treaty does not prohibit the stationing of land-based ICBMs, even though their flight trajectory would take them through outer space. /41/ Thus, so long as the weapon itself is not based in space, the fact that the weapon may travel through space when used (as with a land-based ICBM) does not cause the weapon to run afoul of the Treaty. If the

opposite interpretation were correct, the Treaty would ban all land-based ICBMs, but the Parties have never suggested that it does.

A key point and another serious ambiguity deals with "peaceful purposes" language in the Treaty. There is a total absence of any such language in the first paragraph of Article IV restricting activities in outer space to "peaceful purposes." However, this "peaceful purposes" language does appear in the second paragraph, which does not refer to outer space but rather to the moon and other celestial bodies. This issue sparked much debate as to whether some military activities were therefore permitted in outer space. The United States' position has long been that "peaceful purposes" does not exclude all military purposes, but only aggressive military uses. /42/

Under this view, the two paragraphs of Article IV, when read together, only mandate a partial demilitarization, in which outer space is treated differently from the moon and other celestial bodies. The partial demilitarization view holds that outer space is only partially demilitarized, while the moon and other celestial bodies are totally demilitarized. /43/ In contrast, another view is that "peaceful" means totally non-military and that the Treaty as a whole demands this result, whether in outer space or on celestial bodies. This theory focuses on the more general articles of the Treaty to conclude that its overriding purpose is to ensure that outer space is used only for peaceful purposes and for the benefit of all mankind, to the exclusion of military purposes. /44/

The partial demilitarization, or "Western" view, maintains that "use for peaceful purposes" should be interpreted as use for non-aggressive /45/ purposes, and that military use of outer space is allowed so long as it is non-aggressive. This interpretation, which seems to be the more widely held view, permits a much wider scope for military activity in outer space than the alternative. Supporters of this view argue that if "peaceful" is synonymous with utterly non-military, then the second paragraph of Article IV is a meaningless redundancy. /47/ They point out that if the Treaty's drafters had intended to apply the "peaceful" limitation to outer space, they would have explicitly done so, as they did in the second paragraph of that same article in reference to the moon and other celestial bodies. There, in addition to the "peaceful purposes" language, the drafters placed specific limitations on military bases, installations, fortifications, military maneuvers, and the use of

military personnel on the moon and other celestial bodies . /48/  
None of these limitations are present in the first paragraph of Article IV.

Supporters of the partial demilitarization or "Western" view also make reference to paragraph 4 of Article II of the United Nations Charter, according to which member nations must refrain from "the threat or use of force against the territorial integrity or political independence of any state. " /49/ When this is read in conjunction with paragraph 3 of that same Article, which requires member nations to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered," /50/ the implication is that only aggressive military activity is banned. The requirement to employ "peaceful means" to settle disputes is consistent with the prohibition against the use of force "against the territorial integrity or political independence" of other nations. On the other hand, non-aggressive uses of force, as in self-defense, are harmonious with the mandate for "peaceful means." Similarly, in the context of outer space, both "peaceful" and "non-aggressive military" uses of outer space are allowed. /51/

The Western view of the "peaceful purposes" language holds that the "exclusively peaceful" use of celestial bodies clause mirrors the Outer Space Treaty's reference in Article III to conduct in accordance with the United Nations Charter. /52/ Because the U.N. Charter itself permits States to take action in self-defense, the term "peaceful purposes" must also permit those actions, and only ban aggressive, offensive acts (which are also forbidden by the U.N. Charter). /53/

This position is further strengthened by the customary international law of the seas. The drafters of the Outer Space Treaty incorporated the customary international law of the seas through Article III, which incorporates all applicable international laws. /54/ The law of the seas recognizes the right of armed vessels to patrol international waters to promote the U.N. Charter's commitment to maintaining international peace and security. /55/ Clearly, those armed vessels, with their weapons and military staffs, are intended to and allowed to use force to keep the peace and conduct defensive operations against military threats. Thus, under this interpretation, the Outer Space Treaty's application of the U.N. Charter to outer space and celestial bodies must create the same right in outer space /56/ and, a fortiori,

allow for defense against inanimate forces of nature such as comets, asteroids, or meteors.

The well-established rule that "peaceful purposes" includes the right of a State to self-defense was highlighted by then-Senator Al Gore 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 laws /57/

Supporters of this Western or partial demilitarization theory rely on a fundamental axiom of international law: "If an act is not specifically prohibited, then international law permits it." /58/ It should be noted that traditionally, the law of treaty interpretation was based on customary international law principles. /59/ However, in 1980 the Vienna Convention on the Law of Treaties /60/ came into force; it is accepted by many non-parties, including the United States, as the definitive word on the rules of treaty interpretation. When the provisions of the Vienna Convention are applied to the "peaceful purposes" language in the Outer Space Treaty, they add further support to the partial demilitarization view.

For example, Article 26 of the Vienna Convention requires States to perform treaty obligations in good faith, while Article 31 sets forth the specific rules of treaty interpretation. Treaty terms are to be interpreted in accordance with their ordinary meaning given the terms in context, and in light of the treaty's object and purpose. /61/ Context includes the following: any other agreement made by the States regarding the conclusion of a treaty, and any instrument made by a party in connection with the conclusion of the treaty accepted by the other party or parties; any subsequent practice in its application which establishes the agreement of the parties regarding its interpretation; and any rule of international law applicable to the relations between the parties. Also, a "special meaning" (different from the ordinary) will be given a term if it is established that the parties so intended. /62/ Finally, Article 32 permits reference to supplemental means of interpretation when, after using the means set forth in Article 31, the treaty's meaning



remains ambiguous, obscure, or leads to a result which is manifestly absurd or unreasonable. A treaty's preparatory history and the circumstances of its conclusion are permissible supplemental means under Article 32. /63/

Looking at the Vienna Convention more closely, Article 31, paragraph 3 provides that in the process of treaty interpretation, "any subsequent practice in the application of the treaty" shall be considered, particularly among those States "specially affected. " /64/ In the area of space, States "specially affected" essentially means the United States and the former Soviet Union; the practice of either nation has substantial legal effect, especially when supported by the common practice of several other countries with developing space capabilities. One commentator applied this provision to the Outer Space Treaty as follows:

Given the ambiguity of the term "peaceful" as used in the [Outer Space Treaty], as well as the overt and covert practice of [the Soviet Union and the United States] in outer space, the conclusion is inescapable that all military uses other than those prohibited by treaty were—since the beginning of space exploration and still today—lawful as long as they do not Violate any of the principles and rules of general international law (e.g., uses that represent the threat or employment of force). /65/

Moreover, it is a well-established rule of international law that in order to prevent a particular interpretation of a conventional rule from becoming controlling, dissatisfied States must signify their disagreement formally, either through diplomatic channels or through public statements of authoritative government officials. /66/ No State has ever formally protested the United States' interpretation of "peaceful purposes" in the context of outer space activities. /67/ In fact, the practice of the United States and the Soviet Union resulted in their respective military presence in space growing so rapidly that soon after adoption of the Outer Space Treaty, outer space achieved the "dubious distinction of being the most heavily militarized environment accessible to humans (based on the number of military and civilian payloads launched into orbit)." /68/

Application of these principles of treaty interpretation to Article IV of the Outer Space Treaty is not a panacea for its ambiguity. A strict interpretation of its "peaceful purposes" language, giving the terms their ordinary meaning in context, would leave little doubt that it was intended to apply only to

the moon and other celestial bodies, and not to outer space. On the other hand, when the object and purpose of the Treaty are considered, issues arise as to what is "for the benefit and in the interests of all mankind and all countries," and "in accordance with international law, including the U.N. Charter." /69/ These questions have been analyzed by various commentators, with widely divergent conclusions. /70/ This split of opinion brings us briefly to the second interpretation of the meaning of "peaceful purposes."

Does any and all military activity in space violate "international law, including the U.N. Charter"? The term "peaceful" occurs in virtually all United Nations documents relating to space. /71/ However, there is a general consensus within the United Nations that "peaceful" means "non-aggressive" rather than totally non-military. /72/ As demonstrated above, the main space powers have tacitly agreed through their actions that all military activities in outer space are permissible unless specifically forbidden. /73/ Yet, this was not always the case.

Originally, the Soviet position was that "peaceful purposes" meant non-military, the Soviets officially claimed that their seemingly militaristic uses of outer space were all "peaceful" and "scientific." /74/ In contrast, from the beginning of the Space Age the United States always took the position that only "aggressive" purposes were banned; defensive systems were allowed. /75/

Historically, all nations have generally agreed that activities in space should be confined to "peaceful purposes," whatever that might mean. United States policy, as contained in official statements and legislation since 1958; has been consistent with this view. For example, in 1958 President Eisenhower declared to Congress, on the occasion of the founding of the National Aeronautical and Space Administration (NASA), "the concern of our nation that outer space be devoted to peaceful and scientific purposes." /77/ Similarly, the Aeronautics and Space Act of 1958 stated that "it is the policy of the United States that activities in space shall be devoted to peaceful purposes for the benefit of all mankind. /78/ Significantly, this same Act, in the same section, also provided for the military departments to conduct space activities related to "the development of weapon systems, military operations, or the defense of the United States." This is clear evidence that, at least as of 1958, the United States

never intended "peaceful purposes" to exclude the use of outer space for some (at least non-aggressive) military missions. <sup>/79/</sup>

These military missions have long included surveillance, communications, navigation, and detection of nuclear explosions. When the Outer Space Treaty was drafted, according to a former Legal Advisor in the U.S. Department of State, the "language of Article IV was carefully chosen to ensure that general principle of 'peaceful uses' would not interfere with the testing" of weapons such as nuclear ballistic missiles." <sup>/80/</sup> In fact, during the drafting of the Treaty, several delegations attempted to bring about a complete demilitarization of outer space and questioned the propriety of excluding outer space from the coverage of the second paragraph of Article IV, <sup>/81/</sup> but their proposals were rejected by both the United States and the Soviet Union. <sup>/82/</sup> This is powerful evidence against the total demilitarization view. As one commentator has stated,

Treaty provisions may simply be a declaration of existing customary international law or, if there is not such a declaration, treaty provisions may become so with the passage of time through general acceptance by other states. The consensus is that the Outer Space Treaty, rather than creating new law, merely amounted to a codification of existing principles of customary international law applicable to outer space, which had already been expressed in U.N. General Assembly resolutions and which had already gained acceptance internationally. Thus, in the opinion of many scholars, the inclusion in the Outer Space Treaty of the concept of "peaceful purposes" was merely a restatement of then existing customary international law. <sup>/83/</sup>

This customary international law, as well as the subsequent practice of the Parties, strongly supports the partial demilitarization view. If this view is indeed accepted, then planetary defense activities would be allowed under Article IV of the Outer Space Treaty, because they are defensive and non-aggressive in nature.

However, for purposes of planetary defense, which position prevails (the partial or total demilitarization view) may not finally be dispositive. If, as part of a planetary defense system, telescopes, sensors, and even some type of projectiles are established in orbit around Earth, or installed or tested on the moon or other "celestial bodies," it can be effectively argued that these are not weapons and are not military devices, because their

sole purpose is to detect and defend against threatening natural objects from space. If this argument is accepted, then the first paragraph of Article IV of the Outer Space Treaty would clearly permit planetary defense in outer space; because no weapons would be involved. Likewise, the restrictions on weapons and military activities in the second paragraph would not apply, and planetary defense would be permissible on the moon or other celestial bodies:

The asteroids, comets, and meteors that would be targeted are non-living, completely natural objects with no aspects of human input or control in their genesis or direction. Such objects are very different from humans and their manmade or man-directed products (such as buildings, bridges, and military equipment) that are the targets of weapons and military devices. Clearly, given the potential disasters a strike of a large natural space object could spawn, the detection and mitigation of these horrors is a classic, if not the ultimate example of "peaceful," i.e., non-aggressive action "for the benefit and in the interests of all countries." /84/ But can it be established that the planetary defense components would not, as a threshold matter, even qualify as "weapons" within the meaning of the Outer Space Treaty?

As previously discussed, the Vienna Convention provides that "Treaty terms are to be interpreted in accordance with their ordinary meaning given the terms in context, and in light of the treaty's object and purpose." /85/ The object and purpose of the Outer Space Treaty are essentially to further "the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes" and "to contribute to broad international co-operation in the scientific as well as the legal aspects of the exploration and use of outer space for peaceful purposes." /86/ There is no indication in the Outer Space Treaty that the drafters intended "weapon" to have any special meaning. /87/ Thus; it is proper to look at standard dictionary definitions, two sets of which follow: "1. An instrument of any kind used for fighting. 2. Any organ (of an animal or plant) so used. 3. Any means of attack or defense; as, his best weapon was silence" /88/ or "1. any instrument or device for attack or defense in a fight. 2. anything used against an opponent, adversary, or victim: the weapon of satire. 3. Zool. any part or organ serving for attack or defense, as claws, horns, teeth, stings, etc:" /89/

The plain meaning of "weapon" is something used for attack or defense against a living enemy or an instrument hereof. As these various dictionary meanings of "weapon" illustrate, one does not "fight," or engage in "fighting," "attack," or

"defense" with a force of nature except in a metaphorical sense, such as in term the planetary defense itself. One does not shoot weapons at bad weather, or an earthquake, or a tidal wave; we may use detection measures or take shelter or implement precautions, but we do not use weapons in the ordinary sense of the word. On the contrary, one fights, attacks, or defends against a living enemy, or something used by a living enemy, such as a tank or a missile or a battleship.

A weapon is not something used solely against inanimate, natural entities devoid of intelligent, sentient control or origin. Rather than a weapon, such a device is more properly termed a tool <sup>/90/</sup> or an implement, thereby accurately connoting its intended use against non-living, natural things, much like a shovel is a tool used to move soil or a chisel is an implement used to carve stone. A shovel or a chisel could be used as a weapon, but that is not their ordinarily intended purpose, and thus, they are not properly classified as weapons until and unless they are so used. <sup>/91/</sup> In every dictionary definition of weapon, it is a living being or an instrumentality thereof that is the weapon's target. We use weapons against people and against animals. We use weapons against human creations, such as aircraft, ships, tanks, missiles, buildings, shelters, bridges, roads, dams, factories, and landing strips. Taking the extreme case, a natural object can even be used as a weapon, as when the biblical David killed Goliath with a rock he hurled from a sling, but a rock only becomes a weapon when it is so used by a human being or perhaps by an intelligent animal. An ordinary rock of whatever size, whether lying motionless on the ground or shooting through outer space, is neither a weapon nor a possible target of a weapon unless it is at some point under intelligent direction; use, or control. Thus, a planetary defense system, having as its only target entirely naturalistic forces of nature utterly devoid of human genesis or control, is not a weapon and is not prohibited by the Outer Space Treaty. A planetary defense system, having as its only target entirely naturalistic forces of nature utterly devoid of human genesis or control, is not a weapon and is not prohibited by the Outer Space Treaty. As with other non-weapons such as a shovel or chisel, some of the components of a planetary defense system; particularly those that could deflect or destroy an asteroid, have a peaceful purpose. However, they are also capable of use as an aggressive weapon against humans and human creations. Hence, it is important to examine the issue of "purpose" versus "use" in gauging the legality of these portions of the system.

It has been argued that by employing the word "purpose" in Article IV, the drafters meant to convey "the notions of both intent

and of consequences; the activity must not be designed to terminate in some use of force contrary to international law. "<sup>92</sup> Inasmuch as there is no indication that the drafters wanted the term "purpose" to have any "special meaning," it should be given its ordinary meaning, in accordance with the rules of treaty interpretation in the Vienna Convention.

"Purpose" is generally defined as "something that one sets before himself as an object to be attained; an end or aim to be kept in view in any plan, measure, exertion or operation; design. " /93/ Indeed, subsequent practice in the aftermath of the entry into effect of the Outer Space Treaty seems to confirm that "use" was meant to be distinguished from the intended "purpose" of whatever system is under consideration. For example, in the SDI program, it is conceivable that portions of the system could have been used in a hostile or aggressive manner. However, the stated purpose of SDI was always to defend the United States - a "peaceful purpose" of self-defense. Proponents of SDI used this to argue that it did not violate the Outer Space Treaty. <sup>/94/</sup>

It is reasonable to presume that the drafters of the Outer Space Treaty knew the difference between "use" and "purpose," and very deliberately chose the latter, thereby incorporating a "rightful intent" test into the Treaty. Therefore, one must look to the intent of the proponents of a system to determine whether it meets the "peaceful purpose" test. /95/

In building the case for the legality of a planetary defense system, it would be important to emphasize its peaceful purpose and world-saving intent at every opportunity. In press releases, in public pronouncements, in internal staff meetings and briefings, in technical manuals, and in documentation of every type, the consistent message must be that the system has one purpose and one purpose only: planetary defense against asteroids, comets, meteors, and other natural /96/ space objects. Any indications to the contrary, including the possibility of a dual purpose, would undermine the legality of the system.

Additionally, where feasible the components of the system should be made as different as possible from SDI-type /97/ or offensive systems without sacrificing functionality. The system should be designed in every practicable aspect to reflect its peaceful intent as a non-weapon.

Article I of the Outer Space Treaty, although broadly written, is worthy of note as a general statement of the purpose of the Treaty. The first paragraph provides: "[t]he 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." <sup>/98/</sup> It is difficult to conceive of a mission more in tune with this purpose than planetary defense:

One of the legal arguments against SDI has been that it is not "peaceful" because it: allegedly would not act for the benefit of all countries, but only for the benefit of the nation possessing it. <sup>/99/</sup> Even within the context--of SDI this was a highly debatable point. <sup>/100/</sup> In the case of planetary defense, this argument is clearly inapplicable, because the entire planet would directly benefit from its operation in preventing a potential global catastrophe. A fair reading of the Outer Space Treaty finds that it would not prohibit any of the likely components (detection, tracking or mitigation) of an operational planetary defense system. Because even non-aggressive military uses of outer space are legal, a forfiori a non-weapon, world-saving, peaceful-purpose system such as planetary defense is legal. As always, there is room for a contrary argument (in line with the total demilitarization interpretation of "peaceful purposes," or a nontraditional definition of "weapon" that includes devices intended solely to defend against inanimate forces of nature), but the better view is in favor of legality. However, there remains the question of testing the components prior to deployment and use.

Article IV of the Outer Space Treaty provides, "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." <sup>/101/</sup> This clearly prohibits the testing of "weapons" on the moon or other celestial bodies. It does not ban the testing of weapons in outer space (as opposed to on the moon or other celestial bodies), and therefore does not ban the testing of non-weapons such as a planetary defense system in outer space either. But an effective test of a device sufficiently-powerful to divert or destroy a huge natural space object would likely require a target much more massive than any manmade entity. It may be necessary to use an asteroid or meteor or some other "celestial body" as a target for such a test.

If this is in fact required to ensure a reasonable level of confidence in the efficacy of a planetary defense system, the argument that such -a system is not a weapon would bear the burden of establishing the test's legality. This is the case because Article IV specifically prohibits the testing of any type of "weapons" on celestial bodies, irrespective of the peaceful, non-aggressive, purely defensive purpose of those weapons. Therefore, tests on a celestial body would only be permissible under this Treaty if the planetary defense system is not considered a weapon.

Would military participation in such tests render them impermissible? If planetary defense is a peaceful purpose; the proponents of the planetary defense system would draw support from the language in the second part of Article IV that states, "The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. /102/ Thus, the military could participate in the testing of the system; because the system is not a weapon but rather an instrument for peaceful purposes.

One final aspect of the Outer Space Treaty deserves mention: the question of legal liability for launching objects into space. Article VII provides:

Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the moon and other celestial bodies,, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or, its component parts on the Earth, in air space or in outer space, including the moon and other celestial bodies. <sup>/103/</sup>

Therefore, if the United States launches missiles or other objects into space in an attempt to deflect or destroy an approaching meteor, comet, or asteroid, or in testing such a capability, and this causes damage, the United States would be absolutely, liable to pay compensation to the injured persons. This provision does not employ a negligence standard; the only issue is causation. /104/ Thus it would be no defense that the launch was well-intentioned or done with all reasonable care. Such concerns; of course, pale in comparison to issues of global survival, but they are matters to keep in mind nonetheless. /105/

## **B. The Nuclear Test Ban Treaty**



Another challenge to one aspect of planetary defense, insofar as it may involve nuclear detonations in space, comes from the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water (Nuclear Test Ban Treaty).'' Article I of this treaty provides:

1. 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:

(a) in the atmosphere; beyond its limits, including outer space; or under water, including territorial waters or high seas; or

(b) in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted. It is understood in this connection that the provisions of this subparagraph are without prejudice to the conclusion of a treaty resulting in the permanent banning of all nuclear test explosions, including all such explosions underground, the conclusion of which, as the Parties have stated in the Preamble to this Treaty, they seek to achieve.

2. Each of the Parties to this Treaty undertakes furthermore to refrain from causing, encouraging, or in any way participating in, the carrying out of any nuclear weapon test explosion, or any other nuclear explosion, anywhere which would take place in any of the environments described, or have the effect referred to, in paragraph 1 of this Article.

/107/

The United States is a party to this Treaty and thus is bound to abide by it. Although the title of the Treaty implies that it only bans nuclear weapon tests, Article I broadens this to "any nuclear weapon test explosion, or any other nuclear explosion" in what amounts to any place (except underground) /108/ and under any circumstances. On its face, then, the Nuclear Test Ban Treaty appears to ban all nuclear explosions in space, irrespective of their peaceful purposes. Unlike the Outer Space Treaty, the Nuclear Test Ban Treaty is not by its terms limited to "weapons" or to the furtherance of "peaceful purposes'," and thus the argument that planetary defense tools are not weapons, would not seem at first glance to be dispositive.

However, the ordinary meaning of the Treaty's terms may properly be interpreted in context and in light of the Treaty's

object and purpose, under the Vienna Convention. <sup>/109/</sup> The object and purpose of the Nuclear Test Ban Treaty are set forth in the Preamble, which states the "principal aim" of the Parties to

the speediest possible achievement of an agreement on general and complete disarmament under strict international control in accordance with the objectives of the United Nations which would put an end to the armaments race and eliminate the incentive to the production and testing of all kinds of weapons, including nuclear weapons,...

The Preamble concludes by stating the intent of the Parties in entering into this Treaty is to seek "to achieve the discontinuance of all test explosions of nuclear' weapons for all time" and a desire "to put an end to the contamination of man's environment by radioactive substances."

When read in conjunction with this language from the Preamble, the meaning of the prohibitions in Article I takes on a different slant. The object and purpose of the Treaty are focused on "disarmament" and the elimination of production and testing of "all kinds of weapons, including nuclear weapons."

The Parties to the Treaty indicated their intent "to achieve the discontinuance of all test explosions of nuclear weapons." /110/ These repeated and consistent references to weapons and disarmament indicate that the drafters intended the Treaty to apply to weapons, and not to non-weapons such as components of a planetary defense system.

This interpretation makes sense within the historical context. At the time the Nuclear Test Ban Treaty went into effect, in 1963, the Cuban missile crisis was still vividly fresh in the minds of the world's leaders. There was a great deal of concern about the "missile gap" between the United States and the Soviet Union, and about the arms race between the two nuclear superpowers. In the United States, the citizenry was still worried about Nikita Khrushchev's bold threat, "We will bury you!" The focus everywhere was on the very real possibility of World War III beginning at any time, complete with use of nuclear weapons. /111/

In 1963, any potential peaceful use of nuclear explosions was totally overshadowed by this specter of nuclear war. The Preamble of the Nuclear Test Ban Treaty underscores the fears then in the minds of the drafters, and indeed of people everywhere. These fears of nuclear war explain the multiple references therein to nuclear "weapons" and the need for "disarmament."

Why, then, does the actual text of Article I refer not only to nuclear weapon test explosions but also; to "any other nuclear explosion"? The clear intent of the drafters, as set forth in the Preamble, was to ban nuclear weapon tests. In this light, the reference to "any other nuclear explosion" was meant to cover the precursors to nuclear weapons, or their component parts, which, although not constituting an actual nuclear weapon, would be only a short step removed from that stage. This interpretation is consistent with the Treaty's focus on weapons and armaments. The broad, all-inclusive language in Article I was an effort to circumvent any end-runs around a ban on nuclear weapons; but for this expansive language, some States may have tried to play games with the Treaty by detonating only precursors to or sub-components of nuclear weapons. Literally speaking, such devices might not have constituted nuclear weapons, but they certainly would have offended the Treaty's purpose of disarmament and elimination of nuclear weapon tests. Therefore, the drafters wrote the text of Article I to preclude such explosions as well as those of mature "weapons."

In fact, it was this fear that led to the insertion of the words "or any other nuclear explosion." An earlier draft of the Treaty, proposed by the United States and the United Kingdom, contained a special provision on "explosions for peaceful purposes" which would have explicitly authorized otherwise prohibited explosions of nuclear devices for peaceful purposes, under some circumstances. /112/ The Soviet Union objected to this provision, and as a result it was deleted. In its stead, the "or any other nuclear explosion" language was inserted. /113/

The Soviets insisted on this point because of their concerns regarding the United States' "Plowshare" program. /114/ That program was intended to use nuclear explosions for peaceful projects such as excavation, mining, recovery of oil and gas, development of water resources, digging canals and harbors, and creating passes through mountains. /115/ According to the State Department Legal Advisor, the Soviets were worried about

the difficulty of distinguishing peaceful purpose explosions from weapons tests.... [I]f Article I had remained confined to "nuclear weapon test explosions"...a party might have conducted explosions revealing valuable military data or even weapon tests on the pretense that they were in fact peaceful purposes explosions and not "nuclear weapon test explosions." In order to close this

loophole, the phrase "any other nuclear explosion" was inserted in Article I at the appropriate points. Its purpose is to prevent, in the specified environments, peacetime nuclear explosions that are not weapons tests. That is its only significance. /116/

The Treaty's narrow focus on restricting testing of new nuclear weapons is underscored by a key gap in its coverage. Despite the apparently plain language of the text, the consensus of the parties and other nuclear powers is that the Treaty does not prohibit use of nuclear weapons in wartime. Although the expansive language "or any other nuclear explosion" would on its face unambiguously ban nuclear explosions during war, even in self-defense or in a retaliatory strike, this has never been accepted as the meaning or legal effect of the Nuclear Test Ban Treaty. As noted by one commentator, "If it had been intended to prohibit the use of nuclear weapons in wartime, some mention of that important purpose would certainly be found in the title and in the Preamble." /117/ Instead, the title and the Preamble focus only on nuclear weapon tests.

Significantly for our purposes, then-Secretary of State Dean Rusk told the Senate that the Treaty does not affect the United States' ability to defend itself. He said 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." /118/

Moreover, in the years following the signing of the Treaty, even the Soviet Union moved away from its opposition to peaceful nuclear explosions. This shift was summarized by one Soviet scholar as follows:

The possibilities of using nuclear explosions for civil purposes have been studied mainly in the United States and the Soviet Union. Both countries have been examining the feasibility of using nuclear explosions for exploiting oil and gas deposits, for opening up ore fields, for building water reservoirs in arid regions, for earth-moving operations in canal construction, and so on. In the United States the Plowshare Program was established to implement a number of such projects; the Soviet counterpart is "The Programme of use of commercial underground nuclear explosions." Such studies have so far been largely theoretical, and although much useful data has been obtained from test explosions, none of the projects under

investigation has yet reached the stage of wide and practical application.... It is concluded that, at present, peaceful nuclear explosions are advisable only for exceptionally urgent problems which cannot otherwise be solved." /119/

It is clear that the object and purpose of the Treaty, as well as the subsequent practice of its signatories, have modified the meaning of the text. The intent of the drafters was to place limits on the testing of nuclear weapons, and the drafters took care to guard against weapons testing under the subterfuge of a peaceful purpose. But the Soviet Union eventually came to share the United States' position that certain legitimately peaceful purposes of nuclear explosions may indeed be desirable, given appropriate safeguards. And both superpowers understood from the beginning that, despite the text's seemingly sweeping prohibition on nuclear explosions in the atmosphere, in outer space, and underwater, the use of nuclear explosions in wartime was not forbidden.

Viewed within this context, nuclear explosions in space caused by a planetary defense system would be permissible under the Nuclear Test Ban Treaty. As previously discussed, a planetary defense device is not a weapon. Furthermore, consistent with the above quotes representing both the United States and Soviet viewpoints, planetary defense devices would be used in "self-defense," and "only for exceptionally urgent problems which cannot otherwise be solved." Therefore the better position, considering all relevant circumstances, is that neither the testing nor the actual use of a planetary defense nuclear device in space would be precluded by this Treaty.

In any event, because the Nuclear Test Ban Treaty is limited to nuclear explosions, it only applies to the aspects (if any) of a planetary defense system that would entail nuclear explosions. Thus, the Treaty would not govern any radars, sensors, or telescopes used to detect and monitor objects in space. In the category of mitigation, any tool that does not involve nuclear explosions would be clearly permissible. Lasers or kinetic energy implements would be allowed under the Treaty, because they fall outside the threshold definition of the type of items the Treaty covers.

Returning to the possible use of nuclear explosion devices to deflect or destroy threatening objects from space, even if the view is not accepted that the Treaty only applies to

nuclear weapons and their precursors or components (and thus does not proscribe planetary defense detonations), there are still two escape hatches. One is for the United States to withdraw from the Treaty.

The Nuclear Test Ban Treaty provides for any party to withdraw from the treaty if it determines that "extraordinary events" related to the subject matter of the treaty have jeopardized that party's supreme interests. Such withdrawal is to be preceded by three months notice.

In many, if not all cases in which Earth is threatened by a major collision, there should be sufficient warning to permit the United States to serve the requisite notice of withdrawal from the Treaty. Certainly the type of gigantic meteor or asteroid strike envisioned would constitute an "extraordinary event" that jeopardizes not only the United States' "supreme interests," i.e., survival, but those of every other nation on Earth as well. Assuming the evidence of the impending Earth strike were clear and unequivocal, it is unlikely that any notification of intent to withdraw from this Treaty would meet with much international opposition. Indeed, it may be that other nations would actively attempt to persuade the United States to take action to prevent the threatened cataclysm.

The other option is to amend the Treaty to allow for the limited exception of planetary defense nuclear detonations in space, including tests. Article II provides:

1. Any Party may propose amendments to this Treaty. The text of any proposed amendment shall be submitted to the Depositary Governments which shall circulate it to all Parties to this Treaty. Thereafter, if requested to do so by one-third or more of the Parties, the Depositary Governments shall convene a conference, to which they shall invite all the Parties, to consider such amendment.
2. Any amendment to this Treaty must be approved by a majority of the votes of all the Parties to this Treaty, including the Votes of all of the Original Parties. The amendment shall enter into force for all Parties upon the deposit of instruments of ratification by a majority of all the Parties, including the instruments of ratification of all of the Original Parties.

This amendment process could be pursued now, during the planning and early developmental phases of a planetary defense system. Such an amendment would not be strictly necessary, but it would serve to make absolutely clear that planetary defense nuclear explosions are allowed. Appropriate safeguards,

prerequisite criteria, and consultation requirements could be included, to allay fears that these planetary defense devices might be a Trojan horse for surreptitiously conducting nuclear weapon tests and deployments.

### **C. The Anti-Ballistic Missile Treaty**

The United States and the Soviet Union entered into the Treaty on the Limitation of Anti-Ballistic Missile (ABM) Systems <sup>/120/</sup> in 1972. The Parties' intent is set forth in the Preamble: "[E]ffective measures to limit anti-ballistic missile systems would be a substantial factor in curbing the race in strategic offensive arms and would lead to a decrease in the risk of outbreak of war involving nuclear weapons . . . . . /121/ The Treaty is meant to prohibit the research, development, testing, and deployment /122/ of ABM systems other than the very limited exceptions specifically provided for in Article III of the Treaty; Article III prohibits deployment of all other ABM systems. <sup>/123/</sup> Finally, Article V indicates the Parties' intention "not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based." /124/

The key to determining the applicability of this Treaty to portions of a planetary defense system lies in the definition of the term "ABM system." This is defined in Article II:

1. For the purpose of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of
  - (a) ABM interceptor missiles, which are interceptor missiles constructed and deployed for an ABM role, or of a type tested in an ABM mode;
  - (b) ABM launchers, which are launchers constructed and deployed for launching ABM interceptor missiles; and
  - (c) ABM radars, which are radars constructed and deployed for an ABM role, or of a type tested in an ABM mode.
  
2. The ABM system components listed in paragraph 1 of this Article include those which are:
  - (a) operational;
  - (b) under construction;
  - (c) undergoing testing;
  - (d) undergoing overhaul, repair or conversion; or
  - (e) mothballed. /125/

The controversy over applicability of the ABM Treaty to SDI centered for the most part on the meaning of the comma preceding the "currently consisting of language.

The Reagan Administration argued. that the comma had the effect of limiting the definition of an ABM system to the components then in existence. Under this view, an ABM system had to both meet the elements of the basic definition to the left of the comma and fit within the definition of one of the examples to the right. <sup>/126/</sup> The Soviets disagreed, arguing that the comma merely separated the basic definition from an illustrative but not limiting list of examples that happened to exist at the time the treaty was signed. <sup>/127/</sup> This dispute was never fully resolved, but it consumed years in the process. The ABM Treaty was a major obstacle to certain important aspects of SDI. <sup>/128/</sup>

On the most basic level, the Article III prohibitions in ABM Treaty should not apply to any portions of a planetary defense system, because, unlike SDI, a planetary defense system is not "a system to counter strategic ballistic missiles or their elements in flight trajectory." Rather, it is a system to counter meteors, comets, and asteroids in flight- trajectory. Because this threshold definitional issue takes a planetary defense system outside the reach of the Article III, there should in theory be no need for further analysis insofar as that Article is concerned. However, some may argue that much of the same technology and equipment could be used for either planetary defense or for ABM defense, based on the superficial similarities between the act of detecting, tracking, and destroying incoming ballistic missiles and doing the same for asteroids, comets, or meteors.

Similar to the analysis of "peaceful purpose" under the Outer Space Treaty, the issue of "rightful intent" should be of assistance on this point. The definitional language of Article II of the ABM Treaty clearly implies that intent is important, in that it defines ABM interceptor missiles, launchers, and radars as those "constructed and deployed for an ABM role." <sup>/129/</sup> Therefore, if any of these components were constructed and deployed for a role other than ABM, e.g., for a planetary defense role, the Article III prohibition in the ABM Treaty would be inapplicable to them. In this regard, the stated role of a planetary defense system would not be to counter strategic ballistic missiles or their elements in flight trajectory, but rather to divert or destroy asteroids, meteors, or comets threatening the Earth from space. To be persuasive,



this stated role must be buttressed with consistent evidence in every feasible aspect of the system's design, and by all documents and statements concerning the system's purpose and function. This evidence could then be taken to the Geneva-based Standing Consultative Commission for possible resolution, if need be. /130/

It is impossible to stress this point too strongly. Every discussion of the planetary defense system, in every forum, must clearly and unambiguously emphasize the sole purpose for the system. Because of the parallels between the SDI and planetary defense technologies; it is absolutely essential to draw distinctions between the two at every opportunity. Any blurring of the lines that separate these missions could threaten to bring planetary defense within the prohibitions of the ABM Treaty. If that happens, this mission might face the same political controversies, legal battles, and protracted delays that so persistently plagued SDI.

One other portion of the ABM Treaty deserves analysis. Article VI states:

To enhance assurance of the effectiveness of the limitations on ABM systems and their components provided by the Treaty, each Party undertakes:

- (a) not to give missiles, launchers, or radars, other than ABM interceptor missiles, ABM launchers, or ABM radars, capabilities to counter strategic ballistic missiles or their elements in flight trajectory, and not to test them in an ABM mode; and
- (b) not to deploy in the future radars for early warning of strategic ballistic missile attack except at locations along the periphery of its national territory and oriented outward.

Unlike the Article III prohibitions, Article VI does not depend on the intended purpose of the missiles, launchers, or radars. Rather, it focuses on the capability of such systems to "counter strategic ballistic missiles or their elements in flight." Other than the very limited exceptions provided for in Article III, the Parties are bound not to give this capability to "missiles, launchers, or radars." This issue of "contaminating" otherwise authorized systems by giving them ABM capability deals with potential for use, not with intended use. How, then, does Article VI mesh with the probable components of a planetary defense system?

The key question is whether planetary defense "missiles, launchers, or radars" would have the capability to "counter strategic ballistic missiles or their elements in flight." At this stage, it is impossible to answer this question definitively,

because it deals with the very practical, real-world capabilities of systems-characteristics of systems that can only be addressed on a case by case basis. Because we do not now know exactly what devices might comprise a planetary defense system, we lack the data to make this determination conclusively. However, we can explore the probable capabilities of a workable planetary defense system and compare these with the capabilities required of an effective ABM system.

As a threshold matter, the targets of the two systems are very different. To be a worthwhile target for a planetary defense system, an approaching asteroid, comet, or meteor would have to be much more massive than even the largest ICBMs. The more significant space objects would often be on the order of a kilometer in diameter, or even larger, while ICBMs are at most only a few meters across. As potential targets, such a space object could be likened to the proverbial "broad side of a barn," while the comparatively tiny ICBM would be a "needle in a haystack." Certainly, far less precision would be required of the planetary defense system than of the ABM.

The origin of the targets presents another enormous difference. Threatening space objects would begin a course of intercept with the Earth from literally millions of miles away.

In contrast, ICBMs originate on Earth itself, and possess a trajectory that barely even enters outer space. The ICBMs' flight path is infinitesimal compared to that of space objects. This means that a planetary defense system has the luxury of much more time-perhaps several months-to detect, track, characterize, and destroy its target. An ABM system, on the other hand, must be able to perform all of these functions within a time span of only a few minutes, particularly in the case of missiles launched from submarines near the coast of the target nation. Again, a planetary defense system would face far less daunting technological challenges than would an ABM system.

Therefore, both on the basis of the relative size of the targets and the available response time, it is highly unlikely that a planetary defense system would have the capability to counter strategic ballistic missiles or their elements in flight trajectory. An ABM system would require much more rigorous technology in both respects. For reasons of economy alone it is reasonable to presume that a planetary defense system would be designed, tested, and built to meet the challenges, formidable in their own right, presented by its intended targets, and not targets that are much smaller and

that allow for much shorter reaction time. Thus, such a planetary defense system would not violate Article VI of the ABM Treaty:

For much the same reasons, it is improbable that the components of a planetary defense system would be tested "in an ABM mode." /131/ Even the most envelope-stretching tests of a planetary defense system would not require a target remotely resembling an ICBM. Again, the vast differences in target size and response time would call for very different testing from that required for an ABM system. Therefore, the Article VI prohibition on testing of systems in an ABM mode would not be violated by planetary defense testing.

In the immediate aftermath of the dissolution of the Soviet Union, the continuing viability of the ABM Treaty may have been thought in doubt by virtue of the fact that one of its two signatories, the Soviet Union, no longer exists. However, the Vienna Convention on Succession of States in Respect of Treaties /132/ would operate to transplant the new Commonwealth of Independent States into the position previously occupied by the Soviet Union. As a result, the ABM Treaty is still in effect.

The Treaty does not prohibit a planetary defense system, whether under Article III or Article VI. But even if, contrary to this analysis, it is deemed to apply to a system dedicated solely to planetary defense, there are the escape options by amendment or withdrawal.

Article XIV of the ABM Treaty allows for amendment, which obviously would require the agreement of both the United States and the Commonwealth of Independent States. As stated by Paul H. Nitze, special advisor to President Reagan on arms control, the drafters of the ABM Treaty "envisaged a living accord—that is, one that would make allowance for and adapt to future circumstances." /133/

Article XV permits withdrawal from the Treaty upon six months notice if a party decides in good faith that "extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests." /134/ A large-scale impact from space would definitely qualify; the only question would be whether we would know about the projected impact early enough to make the six-month advance notification of withdrawal.

As a practical matter, the options of amendment or withdrawal could face formidable political obstacles. Because these escape hatches would involve issues of vital importance to both the United States and the Commonwealth of Independent States, the process can be expected to be difficult and emotionally charged. Absent a very clear, large-scale threat to Earth, the same concerns that strained relations between the United States and the Soviet Union over SDI would probably flare up again. And even within the United States, there could be a great deal of disagreement between the President and Congress over the most appropriate course of action.

There has been some recent Congressional activity concerning the ABM Treaty that illustrates this point, albeit not in the area of planetary defense. A bill was introduced in the House of Representatives entitled the Defend America Act of 1995, /135/ which would require the President within 180 days after enactment to serve notice that the United States intends to withdraw from the ABM Treaty. This legislation is directed toward remedying the lack of defense against ballistic missile attack. /136/ Similarly, a section was inserted into the National Defense Authorization Act' for Fiscal Year 1996, entitled the Ballistic Missile Defense Act of 1995. /137/ This again deals with the threat to the United States from ballistic missiles," /138/ and it "urges" the President to pursue high-level discussions with the Russian Federation to amend the ABM Treaty. These proposed amendments would allow deployment of multiple ground-based ABM sites to provide effective defense of the United States against limited ballistic missile attack; unrestricted use of sensors based within the atmosphere and in space; and increased flexibility for development, testing, and deployment of follow-on national missile defense systems. /139/ While these legislative initiatives have not become law as of this writing, they are indicative of some sentiment within Congress to amend or withdraw from the ABM Treaty for reasons independent of planetary defense.

The Supreme Court has not resolved the issue of the President's right to withdraw from, terminate, or suspend a treaty without the involvement of the Senate. The President, acting alone, can probably take such actions, absent express provisions to the contrary in a given treaty or a legislative condition. /140/ However, this type of unilateral action by the President is best reserved for true emergencies because of the immense international political implications. <sup>/141/</sup> In any event, if the legislative proposals discussed herein are reflective of the views of a majority of Congress, such unilateral Presidential action may be unnecessary.

## D. The Moon Agreement

The 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies <sup>/142/</sup> (the Moon Agreement) repeats, in Article III, much of the Outer Space Treaty's Article IV. Article III prohibits the threat or use of force or any other hostile act on the moon, and the use of the moon to commit such an act in relation to the Earth or to manufactured space objects. Depending on the exact means and methods employed in a planetary defense system, the Moon Agreement may have some relevance.

To some extent the Moon Agreement supplements the Outer Space Treaty, enlarging on some provisions concerning military activities on the moon and other celestial bodies. Article III provides:

1. The moon shall be used by all States Parties exclusively for peaceful purposes.
2. Any threat or use of force or any other hostile act or threat of hostile act on the moon is prohibited. It is likewise prohibited to use the moon in order to commit any such act or to engage in any such threat in relation to the earth, the moon, spacecraft, the personnel on spacecraft or man-made space objects.
3. States Parties shall not place in orbit around or other trajectory to or around the moon objects carrying nuclear weapons or any other kinds of weapons of mass destruction or place or use such weapons on or in the moon.
4. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on the moon 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 exploration and use of the moon shall also not be prohibited.

The United States' position on Article III is that it permits military activities that are not aggressive, i.e., those undertaken for "peaceful purposes." Once again, the reference to peaceful purposes in this Article does not add any clarification to the contradictory interpretations given to the term "peaceful purposes" in the Outer Space Treaty. /143/

The Moon Agreement adds little, if anything, to the provisions of the Outer Space Treaty in the realm of military space activities. Moreover, the fact that ten years after its adoption it had only been ratified by a handful of nations, and never by any space-launching power, makes it largely a non-factor for our purposes. /144/ Even if a planetary defense system happens to involve the moon to one extent or another, the provisions of the Moon Agreement should add no significant problems to those already in issue pursuant to the treaties discussed previously. The same arguments in support of the planetary defense system should prevail.

## V. CONCLUSION

Planetary defense is a very new concept in every respect, including the attendant legal issues. Until very recently, the notion that mere mortals might foretell and prevent "acts of God" such as a massive asteroid strike was pure science fiction. But myriad modern advancements in scientific and technological disciplines have brought the mission of planetary defense within the realm of human capability. Given that we can defend the Earth, the question of whether we may has now arisen for the first time.

For any non-lawyer blessed with even a modicum of common sense, it might seem ludicrous even to suggest that it could be illegal to defend the Earth from space-borne destruction. The prospect of averting potential global annihilation is so manifestly good and noble that there would seem to be no question that we should do all we can to develop, maintain, and if necessary use every means available in its support. As lawyers (with or without common sense) know, however, the law sometimes does operate counter-intuitively, and sometimes does cause unjust results in a given case.

Fortunately, in the case of planetary defense, the law is on the side of common sense. As has been demonstrated herein, all likely components of a planetary defense system, whether in the surveillance or the mitigation phase, can be supported under existing international and space law. Some tools are more clearly within the bounds of legality than others, but in every instance a strong argument can be made in support of legality.

It is vitally important that any questions as to the legality of planetary defense be resolved now. The defense-in-depth required to provide acceptable levels of protection from

catastrophic strikes from space will take years to design, test, and build. This is not something that can be created ex nihilo in a few weeks or months when a threat is actually discovered. It will be simultaneously one of the most challenging, and most potentially beneficial, enterprises ever undertaken by humankind.

This article has shown that there are no insurmountable legal obstacles to defending planet Earth.

The way is therefore clear for us to pursue the methods of doing so. This is very good news for every living thing on this planet, because someday, all life on Earth may owe its continued existence to an operational, and legal, planetary defense system.







Crater Name	Location	Latitude	Longitude	Diameter (Kilometers)	Age (Million Years)
Rochechouart	France	N45 50	E0 56	23	186
Roter Kamm	Namibia	S2746	E16 18	2.5	3.7
Rotmistrovka	Ukraine	N49 0	E32 0	2.7	140
Saaksjarvi	Finland	N61 23	E22 25	5	560
Saint Martin	Manitoba, Canada	N51 47	W98 32	40	219.5
Serpent Mound	Ohio, U.S.A.	N39 2	W83 24	8	<320
Serra da Can	Brazil	S85	W46 52	12	<300
Shunak	Kazakhstan	N47 12	E72 42	3.1	12
Sierra Madera	Texas, I U.S.A.	N30 36	W102 55	13	<100
Sikhote Alin	Russia	N46 7	E134 40	0.027	0
Siljan	Sweden	N61 2	E14 52	55	368
Slate Islands	Ontario, Canada	N48 40	W87 0	30	<350
Sobolev	Russia	N46 18	E138 52	0.053	<0.001
Soderfarden	Finland	N63 2	E21 35	6	550
Spider	Western Australia, Austral	S16 44	E126 5	13	>570
Steen River	Alberta, Canada	N59 31	W1 17 37	25	95
Steinheim	Germany	N48 40	E104	3.8	14.8
Strangways	Northern Territory, Austral	S1512	E13335	25	<470
Sudbury	Ontario, Canada	N46 36	W81 11	200	1850
Tabun-Khara-	Mongolia	N44 6	E109 36	1.3	3
Talemzane	Algeria	N33 19	E4 2	1.75	<3
Teague	Western Australia, Austral	S2552	E120 53	30	1685
Tenoumer	Mauritania	N22 55	W1024	1.9	2.5 -
Ternovka	Ukraine	N48 1	E33 5	12	280
Tin Bider	Algeria	N27 36	E5 7	6	<70
Tookoonooka	Queensland,	S270	E143 0	55	128
Tvaren	Sweden	N58 46	E17 25	2	455
Upheaval Dome	I Utah, U.S. A.	N38 26	W109 54	10	<65
Ust-Kara	Russia	N6918	E6518	25	73
Vargeao Dome	Brazil	S2650	W52 7	12	<70-
Veevers	Western Australia, Austral	S2258	E125 22	0.08	<1
V epriaj	Latvia	N55 6	E24:36	8	160
Vredefort	South Africa	S270	E27 30	140	1970
Wabar	Saudi Arabia	N21 30	E50 28	0.097	0.006
Wanapitei	Ontario, Canada	N46 45	W80 45	7.5	37
Wells Creek	Tennessee. U.S.A.	N36 23	W87 40	12	200
West Hawk Lake	Manitoba, Canada	N49 46	W95 11	2.44	100
Wolfe Creek	Western Australia, Austral	S19 18	E1 27 46	0.875	<0.3
Za adna a	Ukraine	N49 44	E29 0.18	4	115
Zelen Gai	Ukraine	N48 42	E32 54	2.5	120
Zhamanshin	Kazakhstan	N48 24	E60 58	13.5	0.9

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<sup>1</sup> Satellites Detect Record Meteor, SKY & TELESCOPE 11 (June 1994).

<sup>2</sup> The Threat of Large Earth-Orbit Crossing Asteroids: Hearings before the House Subcomm. on Space, on Results of Spaceguard Study, 103d Cong., 1st Sess. (1993) (statement of George E. Brown, Jr., Chairman, H.R. Comm. on Science, Space, and Technology).

3 Toutatis is sometimes termed a "minor planet." It was named after a Gaulish god, with the accompanying comment that "it is a good candidate to fall on our heads one of these days." See A. Whipple and P. Shclus, Long-Term Dynamical Evolution of the Minor Planet (4179) Toutatis 105 Icarus 408 (1993).

<sup>4</sup> C. Powell, Asteroid Hunters. SCIENTIFIC AMERICAN, 33-40 (Apr. 1993); C. Chapman and D. Morrison, Impacts on the Earth by Asteroids and Comets: Assessing the Hazard, NATURE 35 (Jan. 6, 1994). Recall that 1 megaton is equivalent to 1 million tons, so the force of Toutatis's impact would have been 9 million million, or 9 trillion tons of TNT.

<sup>5</sup> An asteroid is a type of space object, at least some of which are thought to be remnants of a planet that once existed between Mars and Jupiter. Others are considered left-over material from the creation of the other planets. Asteroids are grouped into three main categories: planet-crossing, main belt and extra-belt. The planet-crossing asteroids are of greatest concern, because they frequently cross Earth's orbit and thus have the greatest probability of an impact. JOHN DAMES, COSMIC INPACT 65-66 (St. Martin's Press 1986).

Source: R. Grieve and E. Shoemaker, "The Record of Past Impacts on Earth," in HAZARDS DUE TO COMETS & ASTEROIDS (T. Gehrels, editor), University of Arizona Press (1994).

6 A comet, unlike an asteroid, contains large quantities of various ices, including water, methane, ammonia, carbon dioxide, hydrogen, and nitrogen. The ices act as a glue that holds the other materials in the comet together; thus comets are often thought of as dirty snowballs containing a mixture of rock and metals held together in a frozen mass. As a comet orbits the Sun and the ices boil away and vaporize, the characteristic tail is created. The slow disintegration of comets may also produce "meteor showers." J. PORTER, COMETS AND METEOR STREAMS 8 (Chapman & Hall 1952).

7 Technically, a meteorite is the solid object that survives entry through the Earth's atmosphere. A meteoroid is the name of the same object while it is still in space, often thought of as a smaller version of an asteroid. A meteor is the collection of light, heat, and sound phenomena that accompanies the movement of a meteoroid through the atmosphere. See O. NORTON, ROCKS FROM SPACE 14 (Mountain Press 1994).

8 Such entities are sometimes collectively called Near Earth Objects (NEOs).

<sup>9</sup> R. Grieve and E. Shoemaker, The Record of Past Impacts on Earth, in HAZARDS DUE TO COMETS & ASTEROIDS 418 (T. Gehrels ed., University of Arizona Press 1994).

10 Id., at 428-433. For example, the crater at Gosses Bluff, Northern Territory, Australia is now 5 kilometers in diameter, but other geological and geophysical data suggest that the original diameter was 22 kilometers. The huge craters at Chicxulub, Yucatan, Mexico (now 180 kilometers) and at Vredefort, South Africa (now 140 across) may have initially been as large as 300 kilometers in diameter.

11 A 20th Century example is the Tunguska incident, discussed infra, in which more than 2,000 square kilometers of Siberian forest were destroyed by the mid-air explosion of an asteroid.

12 HAZARDS, supra note 9, at 435-447.

13 R. Gallant, Journey to Tunguska, SKY & TELESCOPE, Jun. 1994, at 38-43. This is commonly referred to as the "Tunguska" incident, after the name of the region in Siberia where it happened.

14 I. Warpole, This Battered Earth. DISCOVER, Jan. 1994, 32-34. Recent scientific evidence indicates that the celestial body that caused the Tunguska devastation was an asteroid (or perhaps a comet (weighing 15 million tons of TNT. Associated Press, "Scientists: Comet hit Siberia," Colorado Springs Gazette Telegraph (October 31, 1996), p. A2.

<sup>15</sup> Near-Earth asteroids are classified as Amors, Apollos, and Atens, depending on whether their orbits lie outside the Earth's, cross Earth's orbit with a period of greater than 1 year, or cross Earth's orbit with a period of less than 1 year, respectively. It is the latter two types, Apollos and Atens, that are of concern for our purposes. Recent research by mathematicians at the University of Pisa in Italy and the Observatory of the Cote d'Azur in France indicates that only about ten percent of the potential Earth-hitting asteroids have been detected.

Moreover, due to the complex and constantly changing gravitational interactions of the major planets with small solar system objects, the orbits of the smaller objects (such as asteroids) can be unstable and easily disturbed. As a result, some asteroids, such as 433 Eros, which are not classified as having Earth-intersecting orbits, have a significant probability of moving into such an orbit over time. If 433 Eros, which has a 14 mile diameter, were to strike the Earth, it would have about 10 times the destructive impact of the asteroid believed to have caused the Chicxulub crater, which has been linked to mass extinctions at the end of the Cretaceous period. Researchers believe that a hit by any asteroid 0.6 mile or larger in diameter would have devastating effects on terrestrial and marine life as well as human civilization. Although it is considered unlikely that 433 Eros will strike any time soon, the existence of so many other similar objects in our solar system makes the overall risk significantly larger. New York Times News Service, Asteroid might cause destruction on Earth... within million years, Colorado Springs Gazette Telegraph, April 26, 1996, at A9.

<sup>16</sup> Comets are classified as short-period if their cycle is less than 20 years, intermediate-period if between 20 and 200, and long-period if greater than 200 years.

17 D. Morrison, ed., The Spaceguard Survey: Report of the NASA International Near-Earth-Object Detection Workshop, Jet Propulsion Laboratory, California Institute of Technology, Pasadena. It is more difficult to estimate the number of Earth-crossing comets than it is for asteroids, because most of them remain unobservable for extended periods of time in the outermost regions of the solar system. However, about 700 long-period comets are known to have passed through the inner portion of our solar system during recorded history.

18 There may have been as many as a dozen mass extinctions, depending on how one analyzes the fossil record. See D. Jablonski, Mass Extinctions: New Answers, New Questions, in THE LAST EXTINCTION, 43-46 (L. Kaufman and K. Mallory, eds., 1986). See generally MASS EXTINCTIONS: PROCESSES AND EVIDENCE (S. Donovan, ed., 1989).

19 When dealing with geological and evolutionary time, "short" can easily run into the tens of thousands of years. But compared to the much slower rate of change typical of life on Earth, these extinction episodes are truly shocking in their rapidity.

20 S. STANLEY, EXTINCTION, 11-13 (1987).

21 M. Rampino and B. Haggerty, Extraterrestrial Impacts and Mass Extinctions of Life, in HAZARDS, supra note 9, 827-829.

22 Id., at 849. The link between the Cretaceous/Tertiary mass extinction and the impact at Chicxulub, Mexico, is analyzed in depth in J. Smit, Extinctions at the Cretaceous-Tertiary Boundary: The Link to the Chicxulub Impact, in HAZARDS, supra note 9, 859-878.

<sup>23</sup> M. Rampino and B. Haggerty, Extraterrestrial Impacts and Mass Extinctions of Life, in HAZARDS, supra note 9, at 833-835. For example, scientists from the University of Oregon recently reported evidence of an asteroid impact approximately 250 million years ago that was far more devastating than the one that probably wiped out the dinosaurs. This asteroid hit somewhere in the South Pacific near what is now Antarctica and southern Australia, and would have caused a crater 300 miles in diameter with vast quantities of dust thrown into the atmosphere. The scientists believe this asteroid strike may solve the mystery over why nearly 90 percent of all life forms disappeared from the Earth at that time, including entire classes of plants, reptiles, and shellfish. Paleobotanist Greg Rettallac, the head of the research team, said "It would be the end of humanity if a body that size hit today." Associated Press, Scientists say asteroid slammed into Earth 250 million years ago, Colorado Springs Gazette Telegraph, October 30, 1996 at A7.

24 O. Toon, K. Zahnle, R. Turco, and C. Covey, "Environmental Perturbations caused by Asteroid, Impacts," supra note 9, at 791-800.

<sup>25</sup> J. Hills, I. Nemchinov, S. Popov, and A. Terev, Tsunami Generated by Small Asteroid Objects, in HAZARDS, supra note 9, at 779-789.

26 O. Toon, et al, in HAZARDS, supra note 9, at 792, 800-809.

<sup>27</sup> The potential for fires is much greater in the case of a comet than an asteroid, because comets expend their energy higher in the atmosphere. This high altitude release of energy allows the resultant heat to affect a larger area on the Earth's surface. Depending on the height of the explosion, the shock wave from the space object can either extinguish the fire or cause it to spread. See J. Hills and M. Goda, The Fragmentation of Small Asteroids in the Atmosphere, 105 Astronomical J. 1134-1135 (Mar. 1993).

<sup>28</sup> O. Toon, et al, in HAZARDS, supra note 9, at 809-813.

29 See generally P. Crutzen and J. Birks, The Atmosphere After a Nuclear War: Twilight at Noon, 11 AMBIO 114-125 (1982); G. CARRIER, et al., THE EFFECTS ON THE ATMOSPHERE OF A MAJOR NUCLEAR EXCHANGE (National Academy Press) (1985).

30 V. Adushkin and I. Nemchinov, Consequences of Impacts of Cosmic Bodies on the Surface of the Earth, in HAZARDS, supra note 9, at 721-722.

31 O. Toon, et al, in HAZARDS, supra note 9, at 813-821. Acid rain may be produced from nitric oxide (NO), which is generated by strong shock waves in the air. During a major impact from space, NO is formed in shock waves as the object passes through or explodes in the atmosphere, as well as when the plume of materials caused by the impact shoots through the air at high speeds. A very serious consequence of the resultant nitrogen oxides is the tendency for NO to render Earth's ozone screen ineffective in filtering out ultraviolet radiation. Because almost all of the NO generated by an impact is put into the stratosphere and mesosphere, a large impact would probably be sufficient to cleave the ozone shield and expose all life on Earth to destructive radiation long-term. In addition, dust and smoke particles produced by the impact and the subsequent fires could further harm the ozone layer.

32 D. Morrison and E. Teller, *The Impact Hazard: Issues for the Future*, in *HAZARDS*, supra note 9, at 1135.

33 *Id.*, at 1136.

34 It is not necessary for a large space object literally to strike the Earth in order to cause significant harm. For example, even a near miss may generate tidal waves and severe weather disruptions. For sake of simplicity, however, this piece will focus on the worst-case scenario, an actual impact.

35 To obtain all necessary characterization information, it may be necessary to use an actual space mission physically to interface with the space object, and take samples and make measurements directly. Remote-sensing methods are useful for a first approximation, but would not suffice in and of themselves.

36 Modern technology has enhanced the capabilities of Earth-based systems, reducing the interference effects, but space-based systems will continue to offer the best possible results

37 "The Outer Space Treaty" is shorthand for the 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, 1967) [hereinafter *Outer Space Treaty*]. It has been called "the Magna Carta of space law." R. Morgan, *Military Use of Commercial Communications Satellites. A New Look at the Outer Space Treaty and "Peaceful Purposes"*, 60 *J. AIR L. & COM.* 296 (1994).

38 *Outer Space Treaty*, art. IV. Article IV has two paragraphs, as shown here, but they are not numbered in the text of the Treaty.

39 See Kopal, *Evolution of the Main Principles of Space Law in the Institutional Framework of the United Nations*, 12 *J. SPACE L.* 12, 21 (1984); Cheng, *The Legal Status of Outer Space and Related Issues: Demilitarization of Outer Space and Definition of Peaceful Use*, 11 *J. SPACE L.* 93-95 (1983); J. Parkerson, *International Legal Implications of the Strategic Defense Initiative*, 116 *MIL. L. REV.* 81 (1987). The position of the United States has always been that there is no present need for an official legal demarcation. For example, the NASA General Counsel stated in 1986 that "...it should be noted that there is no boundary between air space and outer space that has been endorsed by the world community." See *Legal Problems of Space Exploration*, A Symposium, Senate Committee on Aeronautical and Space Sciences (Mar. 1961), quoting *The Law of Outer Space*, Report to the National Aeronautics and Space Administration, 786-787.

40 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).

41 G. Gallagher, *Legal Aspects of the Strategic Defense Initiative*, 111 *MIL. L. REV.* 41 (1986). Other weapons of mass destruction not relevant to the issue of planetary defense would be biological and chemical weapons. *Id.*

42 Parkerson, supra note 39, at 82-83; P. Dunay *Military Use of Outer Space: Implications for International Law*, in *MILITARY TECHNOLOGY, ARMAMENTS DYNAMICS AND DISARMAMENT: ABC WEAPONS, MILITARY USE OF NUCLEAR ENERGY AND OF OUTER SPACE AND IMPLICATIONS FOR INTERNATIONAL LAW*, 472-475 (H. Branch, ed., St. Martin's Press 1989).

43 Gallagher, supra note 41, at 41-42.

44 Markoff, *Disarmament and "Peaceful Purposes" Provisions in the 1967 Outer Space Treaty*, 4 *J. SPACE L.* 3 (1976); S. Lay and H. Taubenfeld, *THE LAW RELATING TO ACTIVITIES OF MAN IN OUTER SPACE*, 97, n. 3 (1970). See Gallagher, supra note 41, at 42-47 for a detailed refutation of this theory.

<sup>45</sup> Of course, this leaves unanswered the question as to what is aggressive. One View is that aggression "usually means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State or in any other manner inconsistent with the United Nations Charter." P. Menon, *Arms Limitation in Outer Space for Human Survival*, in *MILITARY TECHNOLOGY, ARMAMENTS DYNAMICS AND DISARMAMENT: ABC WEAPONS, MILITARY USE OF NUCLEAR ENERGY AND OF OUTER SPACE AND IMPLICATIONS FOR INTERNATIONAL LAW*, 468, n.40 (H. Branch, ed., St. Martin's Press 1989).

<sup>46</sup> Morgan, supra note 37, at 300.

<sup>47</sup> Dunay, supra note 42, at 474.

48 Morgan, supra note 37, at 300. During the debate on the Outer Space Treaty in the U.N. General Assembly, several delegations questioned the propriety of excluding outer space from the coverage of the second part of Article IV because to do so would create the implication that outer space could legally be used for non-peaceful purposes. Thus the issue was recognized and debated, yet the provision remained unchanged. This, of course, supports the View that only partial demilitarization of outer space was contemplated by the Treaty. Moreover, the Treaty's drafters specifically used the words "outer space including the moon and other celestial bodies" in other articles when they wanted to apply a provision to outer space, but they did not do this in Article IV. Because military uses were in outer space and not on the moon or other celestial bodies and were the overwhelmingly predominant uses of outer space at the time the Treaty was signed and ratified, the drafters may have recognized and did not attempt to ban a very obvious and accepted ongoing practice. *Id.*

49 U.N. Charter, art. II. The U.N. Charter entered into effect with respect to the United States on Oct. 24, 1945. 59 Stat. 1031, T.S. 993, 3 Bevans 1153; 1963 amendments, 16 U.S.T. 1134, T.I.A.S. 6529; 1971 amendment, 24 U.S.T. 2225, T.I.A.S. 7739.

50 *Id.*

51 Dunay, supra note 42, at 474-475

52 See C. CHRISTOL, *THE MODERN INTERNATIONAL LAW OF OUTER SPACE*, 29 (1982). Article III of the Outer Space Treaty declares that "States... shall carry on activities in the... use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding." *Id.*

53 The U.N. Charter, supra note 49, states the resolution that in order to "live together in peace," we must ensure that "armed forces shall not be used, save in the common interest." It also declares the purpose of the United Nations: to "maintain international peace ... suppress acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations,"

and, as has been mentioned, to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered," and to "refrain ... from the threat or use of force ... inconsistent with the Purposes of the United Nations," and "to only use force for self-defense."

<sup>54</sup> Gallagher, supra note 41, at 45-46. Customary international law is not a creature of treaty or any other formal agreement, but rather is the product of the practice and understanding of various nations, over time, somewhat akin to common law. As the name implies, it is the result of custom or habit. As such, it is more informal and less precise than international law resulting from treaties or other written agreements.

<sup>55</sup> R. Bridge, *International Law and Military Activities in Outer Space*, 13 AKRON L. REV. 658, 663 (1979).

<sup>56</sup> Gallagher, supra note 41, at 45-46.

<sup>57</sup> U.N. Doc. A/C. 1/PV.1289 at 13 (1962), quoted in Gallagher, supra note 41, at 46.

<sup>58</sup> Bridge, supra note 55, at 664; Morgan, supra note 37, at 299-300.

<sup>59</sup> B. CARTER AND P. TRIMBLE, *INTERNATIONAL LAW*, 114-121(1991).

<sup>60</sup> Morgan, supra note 37, at 310. The Vienna Convention on the Law of Treaties, Vol. VIII, *International Legal Materials* 679 (1969), was concluded at Vienna on May 23, 1969, and entered into force on Jan. 27, 1980. To date, there are 59 parties to the convention. The United States has not formally ratified it, but has long treated it as controlling authority in matters of treaty interpretation.

<sup>61</sup> Vienna Convention, art. 31.

<sup>62</sup> Id.

<sup>63</sup> Article 32 states:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

See Morgan, supra note 37, at 310-311.

<sup>64</sup> I.C.J. Reports 3, para. 73 (1969).

<sup>65</sup> I. Vlastic, *The Legal Aspects of Peaceful and Non-Peaceful Uses of Outer Space*, in *PEACEFUL AND NON-PEACEFUL USES OF SPACE: PROBLEMS OF DEFINITION FOR THE PREVENTION OF AN ARMS RACE*, 45 (B. Jasani, ed. 1991).

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> This latter provision comes from U.N. Resolutions, not the treaty itself. International law and the U.N. Charter require that the use of outer space. not involve armed force or the threat of force unless it is in the "common interest" or for legitimate "self-defense." See Morgan, supra note 37, at 310-311.

<sup>70</sup> In support of the total demilitarization View are Morgan, supra note 37, at 310-312 and Markoff, supra note 44, at 3. In support of the contrary, partial demilitarization view are Parkerson, supra note 39, at 82-83 and Gallagher, supra note 41, at 41-42.

<sup>71</sup> Vlastic, supra note 65, at 37.

<sup>72</sup> Id., at 37-38.

<sup>73</sup> Id., at 38. Despite the fact that the term "peaceful" in relation to outer space can be found in virtually all U.N. documents relating to outer space matters as well as in the space law treaties, more than three decades after the launching of Sputnik I the term still lacks an authoritative definition. However, any notion that "peaceful" meant "non-military" was contradicted by the practice of States, primarily the United States and the Soviet Union, early and often. Between October 1957 and the adoption of the Outer Space Treaty in January 1967, these two space powers placed into orbit several military payloads and came to rely increasingly on space technology in their military planning. Id., at 37.

<sup>74</sup> See Parkerson, supra note 39, at 89-91; Vlastic, supra note 65, at 38-40.

<sup>75</sup> Bridge, supra note 53, at 658.

<sup>76</sup> Parkerson, supra note 39, at 81.

<sup>77</sup> Statements by the President of the United States on International Cooperation in Space, in Senate Committee on Aeronautics and Space Sciences, Sep. 21, 1971, 12.

<sup>78</sup> 42 U.S.C. § 2451(a). This language is Very similar to that of the Outer Space Treaty.

<sup>79</sup> Parkerson, supra note 39, at 81-82. Because of this well-established prior position, there certainly would have been some mention of this in the Preamble or in the text of the Outer Space Treaty if that Treaty was in fact meant to change the meaning of "peaceful purposes" so significantly. The Treaty would have had the practical effect of repealing important provisions of the Aeronautics and Space Act, and the United States would not have allowed this to happen without thorough debate and explicit language to that purpose.

80 A. Chayes, A.H. Chayes, and E. Spitzer, *Space Weapons: the Legal Context*, WEAPONS SPACE, No. 7, 193-197; Vlasic, *supra* note 65 at 42.

81 These delegations included those from India, Iran, Austria, Japan, Brazil, and Mexico. See Parkerson, *supra* note 39, at 85, n. 101.

<sup>82</sup> See Cheng, *supra* note 39, at 102 and n. 40.

<sup>83</sup> Morgan, *supra* note 37, at 316. Generally, before a practice can properly be considered customary international law, it must satisfy two tests: (1) there must be a repetition or recurrence of the acts giving rise to the practice (the usage element); and (2) there must be the mutual conviction that this repetition is in fact the result of a customary practice (*opinio juris*), i.e., nations adhere to the rule because they believe it is binding on them. A rule becomes one of customary international law when a significant majority of States, including those whose interests are specifically affected, act extensively and virtually uniformly in accordance with it because of the belief that it is binding. In the United States, the President plays the main role in articulating views as to what is customary international law. *Id.*, at 315.

<sup>84</sup> Outer Space Treaty, art. 1.

85 Vienna Convention, *supra* note 60.

86 Outer Space Treaty, preamble.

87 This portion of the analysis focuses on the meaning of "weapon" to the exclusion of "military" because the first paragraph of art. IV makes no reference to "military" actions in outer space. The discussion herein of the meaning of "military" is generated by the "peaceful purposes" language of the second paragraph; also, the term "military" does itself appear in that paragraph, in connection with bases, installations, fortifications, maneuvers, and personnel on the moon or other celestial bodies.

88 WEBSTER'S DELUXE UNABRIDGED DICTIONARY, (2<sup>nd</sup> ed. 1979).

<sup>89</sup> RANDOMHOUSE COLLEGE DICTIONARY (Revised ed. 1984).

<sup>90</sup> Tool is usually defined as:

1. an instrument (as a hammer or saw) used or worked by hand: an instrument used by a craftsman or laborer in his work: IMPLEMENT
- 2.a. an implement or object used in performing an operation or carrying on work of any kind: an instrument or apparatus necessary to a person in the practice of his Vocation or profession
- 2.b. something that serves as a means to an end: an instrument by which something is effected or accomplished.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, Unabridged (1981).

91 This same analysis could be used to argue that the term "military" presupposes as its opponent something other than a totally natural, inanimate object independent of human control. For example, "military" has been defined as "of or relating to soldiers, arms, or war; belonging to, engaged in, or appropriate to the affairs of war." *Id.* Soldiers, arms, or war are only used against human enemies and their creations, not against meteors, asteroids, or comets.

92 See J. FAWCETT, *OUTER SPACE: NEW CHALLENGES TO LAW AND POLICY*, 109 (1984); B. HURWITZ, *THE LEGALITY OF SPACE MILITARIZATION*, 58, n. 20 (1986); E. Galloway, *International Institutions to Ensure Peaceful Uses of Outer Space*, *Annals Air & Space L.* 310 (1984). See also J. MORENOFF, *WORLD PEACE THROUGH SPACE LAW*, 296 (1973) for an examination of the legality of the United States' use of reconnaissance satellites in light of the "intent" behind the satellites. Morenoff notes that use of satellites for reconnaissance could become legal (as in fact it has), irrespective of whether it is a military activity, if there is a "rightful intent."

93 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, Unabridged 1981).

94 See Parkerson, *supra* note 39, at 79-91; Gallagher, *supra* note 41, at 31-47.

<sup>95</sup> See I. Sourbes and Y. Boyer, *Technical Aspects of Peaceful and Non-Peaceful Uses of Space*, in *PEACEFUL AND NON-PEACEFUL USES OF SPACE: PROBLEMS OF DEFINITION FOR THE PREVENTION OF AN ARMS RACE*, 65 (B. Jasani, ed. 1991).

96 It is conceivable that a planetary defense system also could be used to destroy certain exceptionally large manmade pieces of space debris that would pose a threat upon reentering the atmosphere. SkyLab is a notable example of manmade space debris that, at least potentially, was dangerous once its useful life was over. Even the largest such objects are dwarfed by the comets, meteors, and asteroids that would be the usual targets of a planetary defense system, so it is very likely that the system would lack sufficient precision to be used against them. If this is the case, the system would be ineffective as a defense against such comparatively small objects. But if the system could be used effectively against manmade space debris, the fact that the debris is no longer under any human control and is not directed offensively against any target would allow the planetary defense system to be employed against the debris without jeopardizing its classification as a non-weapon, consistent with the arguments set forth previously. Discarded, useless, used-up pieces of space debris are different in kind from ICBMs or other missiles that SDI, for example, was intended to target. Use of a planetary defense system against such debris is thus akin to its use against comets, meteors, and asteroids; in each instance, the target is not of military value and is not under any recent human control, if at all. Therefore, the system qualifies as a non-weapon.

97 Although SDI was always presented as a purely defensive system intended to defend the United States from missile attack, this did not protect it from vigorous challenges. Opponents of SDI alleged that it violated both the Outer Space Treaty and the Treaty on the Limitation of Anti-Ballistic Missile Systems, as discussed *infra*:

<sup>98</sup> Outer Space Treaty, para. 1. See Gallagher, *supra* note 41, at 38-40,

<sup>99</sup> See Markoff, *supra* note 44, at 11; Parkerson, *supra* note 39, at 83-84.

100 Parkerson, *supra* note 39, at 84-86. It can be persuasively argued that SDI, albeit operated solely by the United States for the defense of the United States, would indeed benefit other countries and perhaps the entire world. If SDI were to intercept and destroy nuclear weapons in space, this would prevent large amounts of collateral radiation from spreading over the Earth. The United States would not be the sole beneficiary of this, but also other nations that would have been contaminated by the radiation. Also, if sufficient nuclear weapons were rendered harmless, a "nuclear winter" scenario, which potentially could threaten all nations, might be averted.

101 Outer Space Treaty, an. IV.

102 *Id.*

103 Outer Space Treaty; an. VII.

104 An absolute liability standard is also imposed by another treaty, the Convention on International Liability for Damage Caused by Space Objects of 1972 [hereinafter the Liability Convention]. The Liability Convention establishes liability for damage (including loss of life, personal injury, or other impairment of health, or loss of or damage to property) caused by a "space object" (which includes launch vehicles and components of objects launched into space). Article II states that "A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight." Therefore, under both the Outer Space Treaty and the Liability Convention, the United States must be prepared to pay compensation for any damages caused by its planetary defense system, without regard to fault.

105 Another peripheral issue is the question of creating additional space debris. The testing, deployment, and use of a planetary defense system would inevitably add to the already large amount of "space junk" orbiting the Earth. There are some concerns that this debris might pose a hazard to spacecraft or cause other undesirable effects. It is likely that the United States will ultimately be responsible for identifying, cataloguing, and removing its debris, whether under various current laws or under a new space debris agreement or treaty (which is currently under negotiation). The United States is also liable for any damage caused by its debris. In addition to the Outer Space Treaty, other instruments relevant to these issues include the Liability Convention and the Convention on Registration of Objects Launched into Outer Space of 1976. See generally G. Leinberg, *Orbital Space Debris*, 4 J. L. & TECH. 93-116 (1989).

106 Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. 5433, 480 U.N.T.S. 43 (effective Oct. 10, 1963) [hereinafter Nuclear Test Ban Treaty]. This is sometimes known as the Limited Test Ban Treaty or the Nuclear Weapon Test Treaty.

107 Nuclear Test Ban Treaty, art. I.

108 Even an underground detonation would be prohibited if it "causes radioactive debris to be present outside the territorial limits" of the nation conducting the test.

<sup>69</sup>Vienna Convention, art. 31, para. 2 provides, "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes...." (emphasis added).

110 Nuclear Test Ban Treaty, Preamble (emphasis added).

111 See 7. MCBRIDE, *THE TEST BAN TREATY: MILITARY, TECHNOLOGICAL, AND POLITICAL IMPLICATIONS*, 13-21 (Chicago, Regnery Co., 1967).

112 The Nuclear Test Ban Treaty, Report of the Committee on Foreign Relations, U.S. Senate, 88th Cong., 1st Sess., Exec. Rep. No. 3, Sept. 3, 1963, Appendix II, 29. The British-American draft, dated Aug. 27, 1962, contained in its Article 11 this express saving clause entitled "Explosions for Peaceful Purposes" The explosion of any nuclear device for peaceful purposes which would take place in any of the environments described, or would have the effect proscribed, in paragraph 1 of Article I may be conducted only: (1) if unanimously agreed to by the Original Parties; or (2) if carried out in accordance with an Annex hereto, which Annex shall constitute an integral part of this Treaty.

113: E. Schwelb, *The Nuclear Test Ban Treaty and International Law*, 58 AM. J. INT'L L. 643-644(1964).

114 MCBRIDE, *supra* note 111, at 88-89. 11s Schwelb, *supra* note 113, at 646.

116 MCBRIDE, *supra* note 111, at 88-89. See also J. Eltman, *A Peace Zone on the High Seas: Managing the Commons for Equitable Use*, 5 INT'L LEGAL PERSPECTIVES 47, 62 (Fall, 1993) in support of the proposition that the ban on "any other nuclear explosion" arose from "the difficulty inherent in distinguishing weapon tests from other peaceful explosions;" A. MYRDAL, *THE GAME of DISARMAMENT: How THE UNITED STATES & RUSSIA RUN THE ARMS RACE*, 212-16 (New York: Pantheon, revised ed., 1982), arguing that "All nuclear devices are potential bombs, and of a destructive force way beyond conventional explosives," and that "there is no distinction possible between nuclear explosive devices for military or for civilian purposes...." *Id.*, at 213.

117 Schwelb, *supra* note 113, at 644-45. The author cites various contemporaneous interpretations of the treaty by President Kennedy, the chief U.S. negotiator Averell Harriman, Secretary of State Dean Rusk, and others in support of the conclusion that "there seems to be agreement between the principal parties to the treaty, concurred in by United Nations organs, that the treaty does not provide for the outlawing of the employment of nuclear weapons in war." *Id.*, at 645.

118 Bechhoefer, *The Nuclear Test Ban Treaty in Retrospect*, 5 CASE W. RES. J. INT'L Law 125, 153 (1973). Of course, although not what the Secretary of State had in mind at the time, planetary defense is an extremely important form of self-defense, not only for one nation but for the entire world.

119 V. Emelyanov, *On the Peaceful Use of Nuclear Explosions*, in *NUCLEAR PROLIFERATION PROBLEMS*, 215 (Almgvist & Wiksell 1974).

120 23 U.S.T. 3435, T.I.A.S. No. 7503 (effective Oct. 3, 1972) [hereinafter the ABM Treaty].

121 ABM Treaty, Statement of Purpose, para. 3.

122 The Treaty defines ABM systems as including interceptor missiles, launchers, and radars, irrespective of whether they are operational, under construction, undergoing testing, undergoing overhaul, repair, or conversion, or mothballed. ABM Treaty, art. II, paras. 1 and

123 See Gallagher, *supra* note 41, at 26-27. Article III 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. No other ABM systems or their components are allowed under Article III. *Id.* at 27.

124 ABM Treaty, art. V, para. 1. (emphasis added). See A. Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 19 HARV. L. REV. 1972, 1982 (1986).

125 ABM Treaty, art. II, paras. 1 and 2.

126 See W. Kinsel, *The Role of Arms Control in Strategic Nuclear Doctrine: SDI, MAD, and the .ABM Treaty*, 62 WASH. L. REV. 780 (1987).

127 *Id.*, at 779-80. The Soviet View has some support. United States Secretary of State Rogers stated that the enumeration of components of an ABM system was intended to be an illustrative reference to systems then currently in use, and not a limitation of the Treaty's coverage. Also, Dr. Raymond Garthoff, the Executive Secretary and a Senior Advisor in the United States delegation that negotiated the ABM Treaty, stated that the word "currently" was deliberately inserted into the text to close a loophole in the ban on future systems that otherwise may have been permissible under the Treaty. *Id.*, at 780, n. 64. See also A. Chayes and A.H. Chayes, Testing and Development of "Exotic Systems" Under the ABM Treaty: The Great Reinterpretation Caper, 99 HARV. L. REV. 1956-58 (1986).

128 See generally Parkerson, *supra* note 39, at 96-156; Gallagher, *supra* note 41, at 26-31; T. Longstreth, J. Pike, and J. Rhineland, THE IMPACT OF U.S. AND SOVIET BALLISTIC MISSILE DEFENSE PROGRAMS ON THE ABM TREATY, 3-9, 64-66 (3d ed., 1985).

<sup>129</sup> ABM Treaty, art II, para. 1 (emphasis added).

130 This Standing Consultative Commission was established, in Article XIII, as the forum for discussing future ABM Treaty issues.

131 Such testing is proscribed by Article VI(a).

132 The Vienna Convention on Succession of States in Respect of Treaties governs this situation in which a nation fragments, dissolves, or otherwise changes into one or more nations. See also A. Khodakov, The Commonwealth of Independent States as a Legal Phenomenon, 7 EMORY L. REV. 13 (1993).

133 Parkerson, *supra* note 39, at 122:

134 ABM Treaty, art. XV, § 2. This language is identical to that in the Nuclear Test Ban Treaty, except for the requirement for six as opposed to three months notice.

135 H.R. 2483, 104th Congress, 1st Sess. The bill was introduced on October 17, 1995.

136 Section 2 of the bill states, *inter alia*, that Congress finds that "the territory of the United States is currently unprotected against attacks, purposeful or accidental, with ballistic missiles" and "the international proliferation of ballistic missiles and weapons of mass destruction constitute extraordinary events that have jeopardized the supreme interests of the United States." Section 4 would mandate, within 1 year after enactment, at least one test of either an ABM interceptor based in space; a sensor in space capable of providing data directly to an ABM interceptor; or an existing air defense, theater missile defense, or early warning system to demonstrate its capability to counter strategic ballistic missiles or their elements in flight trajectory.

137 Conference Report to accompany H.R. 1530, Report 104-406, Subtitle C, 104th Cong., 1st Sess. (1995).

138 *Id.*, § 232. Congress made "findings" that there is a "significant and growing" threat posed to the national security interests of the United States by the proliferation of ballistic missiles, and that the deployment of ballistic missile defenses is a "necessary, but not sufficient, element of a broader strategy to discourage both the proliferation of weapons of mass destruction and the proliferation of the means of their delivery and to defend against the consequences of such proliferation." Further findings indicated that development and deployment of a national missile defense system against the threat of limited ballistic missile attacks would strengthen deterrence and reduce the incentives for countries to acquire or augment ballistic missile launch capabilities.

139 *Id.*, § 236, Policy Regarding the ABM Treaty.

140 7, Rhineland and S. Goodman, The Legal Environment, in DEFENDING DETERRENCE: MANAGING THE ABM TREATY REGIME INTO THE 21ST CENTURY; 64 (A. Chayes and P. Doty, ed.1989); See, Restatement of the Law, Second, Foreign Relations Law of the United States A.L.I.412-13(1965).

141 For a discussion of the legal and political factors to be considered, see Kinsel, *supra* note 126, at 772-78.

142 This Agreement was annexed to U.N. General Assembly Resolution 34/664, adopted Dec. 5, 1979. It was opened for signature on Dec. 18, 1979, at U.N. Headquarters in New York city.

143 Menon, *supra* note 45, at 458-59. See N. Jasentuliyana, The Moon Treaty, in MAINTAINING OUTER SPACE FOR PEACEFUL USES, 130 (N. Jasentuliyana, ed. 1984).

<sup>144</sup> Vlasic, *supra* note 65, at 43.

## **Contractor Recovery for Current Environmental Cleanup Costs Under World War II-Era Government Contract Indemnification Clauses**

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### I. INTRODUCTION

In the late 1970s, concern for the environment resulted in the enactment of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), <sup>1/</sup> a strict, retroactive, environmental law put in place to clean up the nation's myriad of hazardous waste sites. Also known as the Superfund law, this far-reaching statute set up a framework for assessing cleanup liability for those responsible for environmental damage. Another outgrowth of the concern for damage to the environment was the development of environmental tort law and an increase in the number of actions brought for toxic-related personal injury and property damage. As the investigation into the causes of environmental



contamination progressed, it became clear that a number of Superfund sites were the result of private industry performing their military government contracts. Indeed, some of those contracts dated back to the United States' war efforts in World War II.<sup>12/</sup>

Because the costs of environmental cleanup are staggering, /3/ responsible parties understandably have turned to all possible sources for contribution and indemnification for their potential liabilities. As a result, theories for attempting to pass all or part of that liability on to other parties have been developing. One theory seeks to apply indemnification clauses in World War II-era government contracts to force the Federal Government to pay for current environmental cleanup costs. This theory is based on contracts entered into under the authority of the First War Powers Act of 1941/<sup>4/</sup> and the Contract Settlement Act of 1944.<sup>5/</sup> The purpose of this article is to present that theory and to assess its viability as a method to shift the burden of current environmental cleanup costs to the Federal Government.

This article begins with a brief discussion of liability under CERCLA. Then, after a discussion of the historical basis of the World War II-era military contracts, the theory of indemnification as a basis for recovery under World War II-era contracts is explored. This article concludes with an overall assessment of the theory and its potential as a successful method of shifting liability for current environmental cleanup costs.

## II. CERCLA LIABILITY

CERCLA stands as the primary federal statute addressing cleanup of inactive hazardous waste sites<sup>16/</sup> and is regarded by some to have "become the most prominent federal environmental statute." /7/ It provides broad authority under a "no fault" liability scheme for implementing cleanup of sites contaminated with hazardous substances and imposes responsibilities for required activities and costs. /8/ Despite this legislative and regulatory progress, there are still problems with the process in affecting an efficient approach to environmental cleanup.<sup>19/</sup>

One of CERCLA's key provisions establishes liability of four classes of "potentially responsible parties" (PRPs) for hazardous waste releases. /10/ Under 42 U.S.C. § 9607(a)(1)-(4) the following "persons" are liable for response costs for hazardous substance releases: (1) current owners or operators of facilities from which a release occurs; (2) past owners and operators of facilities at the time of disposal; (3) persons who arranged for disposal, treatment or transport of wastes; or (4) persons who accepted hazardous substances for transport to a facility. Current owners are liable for hazardous waste cleanup costs whether or not they owned the site at the time of disposal or were responsible for the release of the hazardous material. /11/ Past owners are liable if the hazardous waste was disposed of at the site at the time of ownership. /12/ For a court to impose cleanup liability under CERCLA, a plaintiff must prove four elements:

- (1) The site in question is a "facility" as defined in 42 U.S.C. § 9601(a);
- (2) The defendant is a "responsible person" under 42 U.S.C. § 9607(a);

(3) There was a release /13/ or threat of release of hazardous substances; <sup>/14/</sup> and

(4) That such release caused the plaintiff to incur necessary costs consistent with the National Contingency Plan (NCP). <sup>/15/</sup>

Interestingly enough, the plaintiff is not required to prove causation. Once the plaintiff has proven a prima facie case, the burden falls on the defendant to disprove causation. /16/

For hazardous waste generators or transporters at a site they neither owned nor operated, the courts have applied a relatively simple causation connection for plaintiffs. The plaintiff need only show:

(1) a hazardous substance attributable to the PRP has been disposed of at the site;

(2) the site is known to contain the same type of hazardous substance disposed of by the defendant;  
(3) there is a release or threatened release of a hazardous substance from the site; and  
(4) the release or threatened release has caused the government to incur response costs."

Although CERCLA does not expressly provide for strict liability, the courts have interpreted CERCLA to hold PRPs strictly liable without regard to fault under 42 U.S.C. § 9607(a)" for any response costs consistent with the National Contingency Plan (NCP).<sup>/19/</sup> Also, CERCLA does not explicitly provide for joint and several liability, but the courts have held that parties can be held jointly and severally liable. One approach, followed in *United States v. Chem Dyne*, depends on whether the harm caused by the defendants is divisible.<sup>/20/</sup> To avoid joint and several liability, the defendant must prove the amount of harm it caused (or the volume of waste contributed to a site), is a reasonable basis upon which to apportion liability.<sup>/21/</sup> CERCLA does provide for a right of contribution of one PRP against another. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

Since CERCLA provides little guidance regarding apportionment, the courts have applied the "Gore Factors" derived from an unenacted amendment to CERCLA in 1980 by then-Senator Al Gore.<sup>/23/</sup> The primary factor is the harm each causes the environment, with a secondary factor being the degree of cooperation with governmental entities so as to affect timely cleanup of hazardous waste sites.<sup>/24/</sup> Nothing under CERCLA prevents any PRP from bringing an action for contribution in the absence of a civil action under 42 U.S.C. §§ 9606 or 9607.<sup>/25/</sup> In a private party contribution case, however, the party seeking contribution or indemnity must prove causation.<sup>/26/</sup> The amount of liability for the release of a hazardous substance<sup>/27/</sup> can consist of response costs incurred in two types of cleanup actions: (1) remedial action, or long-term or permanent containment or disposal programs; and (2) removal actions, or short term cleanup actions.<sup>/28/</sup>

Following the passage of CERCLA, various private parties were imposed upon to shoulder the environmental cleanup liability for the World War II contractor sites. Companies have attempted to seek contribution from other PRPs, including the Federal Government. The liability of the Federal Government has been raised in cases in which

government contractors performed contracts at government-owned contractor-operated facilities. /29/ One theory that was successfully used in one case resulted in the court concluding that the Federal Government should be liable as an "owner, operator or arranger" according to 42 U.S.C. § 9607(a)(2),(3), despite the fact that the government did not own or literally operate an industrial site. Under the theory, the private party PRP claimed that the government had exercised such pervasive regulatory control over the operations of a privately-owned World War II-era factory so as to equate to de facto indirect management. /30/

FMC Corporation v. United States Department of Commerce, /31/ involved a CERCLA action against an owner of a facility located at Front Royal, Virginia. The facility was constructed in 1937 by American Viscose, a company that owned and operated it as a textile rayon manufacturing plant until 1963. At that time FMC Corporation (FMC) purchased the facility and operated it until 1976 when it sold the operation to Avtex Fibers-Front Royal, Inc. /32/ Following the attack on Pearl Harbor in 1941, the expansionist Japanese military effectively cut off 90 percent of the American crude rubber supply. /33/ The United States determined it needed synthetic rubber substitutes for its airplane tires, jeep tires and other war-related products. The War Production Board, using the priorities ranking system, commissioned American Viscose to expand and convert its plant to manufacture the required high tenacity rayon. By the end of the war, the plant at Front Royal was producing one-third of all the high tenacity rayon yarn in the United States.

One of the by-products of this production process was accumulation of carbon bisulfide, a chemical used in the manufacture of rayon. A total of 65,500 cubic yards of the hazardous waste had been disposed of in unlined basins during the war. In 1982, the EPA began cleanup operations and notified FMC of its potential liability under CERCLA. /35/ Four years later, the EPA listed the Front Royal facility on its Superfund National Priorities List when carbon disulfide was detected in the groundwater. Beginning in 1988, FMC totally financed the site cleanup. /36/ Thereafter in 1990, FMC filed suit for contribution under 42 U.S.C. § 9613(f) against the United States Department of Commerce, the successor to the Defense Plant Corporation that had originally been involved in the World War II-era contract. FMC alleged that as a result of the government's activities during World War II, the United States was jointly and severally liable with FMC as an "owner" and

"operator" of the facility and as an "arranger for disposal" of hazardous waste at the Front Royal site. /37/

The District Court held that the government was liable as an owner, operator and arranger, and held the United States jointly and severally liable for FMC's response costs for hazardous waste releases. /<sup>38/</sup> The court based its conclusion on the following facts:

- (1) the government required American Viscose to stop making regular rayon and start producing high tenacity rayon;
- (2) the government mandated the amount and specifications of the rayon produced and the selling price;
- (3) the government owned the equipment used to make the high tenacity rayon and owned a plant used to make raw materials;
- (4) the government supervised the production process through the enactment of specifications and the placement of on-site supervisors and inspectors, it supervised the workers, and it had the power to fire workers or seize the plant if its orders were not followed; and
- (5) the government knew that generation of waste inhered in the production process, it was aware of the methods for disposal of the waste, and it provided the equipment for the waste disposal. /39/

On appeal, the Third Circuit affirmed that the government was an "operator" under CERCLA, applying the "actual control test" whereby one corporation is liable for the environmental violations of another corporation if there is evidence that it exercised "substantial control" over the other corporation, through "active involvement in the activities" of the other corporation. The Third Circuit found the indicia of substantial government control to satisfy the test, concluding that the government determined "what product the facility would produce, level of production, price of the product, and to whom the product would be sold." /40/ The resulting liability, according to the government, put the United States cleanup contribution between \$26 million and \$78 million for a 26 percent allocated share. /41/ In conclusion, the court observed: "Our result simply places a cost of the war on the United States, and thus on society as a whole, a result which is neither untoward nor inconsistent with the policy underlying CERCLA." /<sup>42/</sup>

In analyzing the precedential impact of FMC, some observers have concluded the case was very fact specific pointing to the fact that the government was far more involved in the rayon tire program than the vast majority of other production programs implemented during World War II /43/

Nonetheless, the theory has been asserted in other cases including the Love Canal litigation. /44/

### III. TWO CASE STUDIES OF ENVIRONMENTAL LIABILITY FOR WORLD WAR II-ERA GOVERNMENT CONTRACTS

Two companies, Ford Motor Company and General Dynamics, currently face environmental liability and are seeking to apply a theory based on contractual indemnification in order to force the United States Government to assume the companies' individual CERCLA liability, and in the case of General Dynamics, its tort liability. If successful, there will undoubtedly be other similarly-situated PRPs that will attempt to apply the same theory.

The theory, distinct from that of CERCLA contribution, seeks to hold the Federal Government liable for the cost of cleanup for environmental damage based on indemnification clauses contained in government contracts from the World War II-era. The United States Air Force is the agency defending against liability in both cases. The cases involve an aircraft production contract and a modification center contract, both of which were terminated for convenience by the government at the end of the World War II.

#### A. Ford Motor Company and the Willow Run Site in Michigan

In September 1941, the Federal Government, through the Army Air Forces with the Defense Plant Corporation (DPC), /45/ contracted with Ford Motor Company (Ford) under a cost-plus-fixed-fee contract to manufacture and deliver 795 complete B-24E bombers at the Willow Run, a site to be built and operated by Ford. /46/ Ford had begun construction of the Willow Run plant in April 1941. In June, Ford conveyed the property to DPC, which in turn leased it back to Ford to complete the construction and operation. /47/

In 1942, Ford built a sludge lagoon formed by constructing an earthen dam at the south end of a natural

ravine. Between 1942 and 1945, sludge from the acid-cyanide plating wastewater treatment plant was deposited in the lagoon.

Ford continued to build bombers at the Willow Run plant until May 1945. Thereafter, the surplus materials were disposed of as Ford received instructions from the government. Ford was directed to vacate the plant on November 1, 1945, so that the new contractor, Kaiser-Frazer Corporation, could manufacture automobiles for the government under another contract. /48/ Kaiser-Frazer subsequently purchased the plant and operated it until 1953 when it sold it to General Motors Corporation. /49/ General Motors then manufactured automobile transmissions at its Hydramatic Transmission Plant. During this time sludge continued to be pumped from the waste water treatment plant to the sludge lagoon. After 1964, however, no more sludge was pumped into the lagoon. Ford sold the sludge lagoon to the University of Michigan in 1950, the latter conveying the property to Wayne County in 1977. The Willow Run Airport was acquired by the University of Michigan in 1947 and 1949 from the United States for use in part for the University's research project with the United States Air Force and for continued operation as a public airport. /50/

In 1979 the Michigan Department of Natural Resources (DNR) discovered contaminated soil at the Willow Run Sludge Lagoon (WRSL) site. The soil contained polychlorinated biphenyls (PCBs) and heavy metals including cadmium, chromium, copper cyanide, lead, and mercury. In 1987 the EPA proposed the WRSL site for inclusion as a National Priorities Site (NPL) site. /51/

The following year, the EPA sent special response action notices to Ford and six other parties under 42 U.S.C. § 9622(e) allowing them to conduct a remedial investigation and feasibility study (RI/FS) at the WRSL. The parties included: General Motors, Ypsilanti Township, Wayne County, the University of Michigan, and the Ypsilanti Community Utilities. Although the Department of Justice was sent a special notice on behalf of the Department of the Treasury and Department of Defense, it was not named as a PRP. /52/

In August 1988, Ford and General Motors entered into a consent order with EPA to conduct the RI/FS. After the RI/FS was completed and submitted to EPA, the agency determined in 1993 that it would conduct an engineering evaluation/cost analysis report. The report focused on the removal of the contaminated soil at the Willow Run Creek Site (WRCS), an area surrounding, but not including the WRSL. The EPA

conducted the evaluation and analysis in 1994 in order to evaluate the health and environment risks from site contaminants and to explore the possible cleanup alternatives. /53/

The PRPs proposed a plan, accepted by EPA, which consisted of removal of some 350,000 cubic yards of contaminated sediment from the Willow Run site to a level of 1 milligram of PCBs per kilogram of sediment. /54/ The levels measured at the WWSL site ranged from between 2,000 to 8,000 mg/kg. The projected cost of the cleanup is \$70 million, including construction of the landfill and post-cleanup operation and maintenance requirements. Ford and General Motors voluntarily agreed to clean up the site and consequently it was not listed on the NPL. Also, the EPA agreed to transfer cleanup supervision of the Willow Run Creek Site to the State of Michigan. /55/

The PRPs entered into a Consent Judgment with the Michigan DNR in 1995. In the Consent Judgment, the PRPs agreed to implement the Remedial Action Plan and a Natural Resources Damages Mitigation Plan for the Willow Run Creek Area site. /56/ According to the Consent Judgment, the remediation, restoration and completed cap on the landfill construction are to be finished by December 31, 1997. /57/

Following the Consent Judgment, Chrysler Corporation filed a lawsuit against the PRPs seeking a declaratory judgment under CERCLA, 42 U.S.C. §§ 9607 and 9613 to determine the liabilities of all PRPs. /58/ Ford and General Motors asserted that Chrysler is the successor in interest to the former Kaiser-Frazer Corporation, a previous owner and operator of the former bomber plant between 1945 and 1953. /59/ As a result, Ford and General Motors assert that Chrysler is also liable for the Willow Run response costs. Chrysler admitted that it was the successor in interest to Kaiser Manufacturing Corporation (KMC), but denied KMC ever "owned" or "operated" the former bomber plant or ever "arranged" for disposal or transport of hazardous substances at the Willow Run site. /60/ The case is still pending.

#### B. General Dynamics and the Tucson International Airport Area Superfund Site

Within two months of the United States' entry into World War II, Consolidated Aircraft Corporation (Consolidated), /61/ the fourth largest aircraft manufacturer in the country, /62/ contracted with the Army Air Forces for the operation of a Modification Center at the Municipal Airport at Tucson, Arizona. /63/



Modification centers like the one at Tucson helped accelerate the flow of planes to the armed forces. As changes in aircraft occurred, due to the changes in combat demands, modification centers were needed to make those changes. They were used rather than the original factories such as Willow Run, in order to avoid disrupting the production process. /64/

Under the terms of the contract, Consolidated was to operate a temporary and then, upon government construction, a permanent center to be used for:

the modification, completion, alteration, overhaul, repair, maintenance, preflight testing, flight testing, and storage of, and for the performance of any and all other services required for or upon, aircraft of the Government or United Nations designated as Contractor's models, and for use as a dispersal point for such aircraft from Contractor's plants, . . . . /65/

The Army Corps of Engineers built all the necessary facilities for the Modification Center, and Consolidated then performed the terms of the contract. /66/ Consolidated continued to lease the site until 1948, when the site was enlarged and turned into an airport. /67/ During the course of their contract, Consolidated employees may have dumped solvents, fuels and chromium onto the ground. /68/ During the performance of the contract, workers needed to strip the camouflage paint using lacquer thinner near the runways. Also metal parts were anodized and heat treated by immersing them in hot baths of concentrated salt solutions and followed by chrome plating. Degreasing of hydraulic and oxygen lines of modified aircraft was also performed. /69/

After Consolidated's lease terminated, various other aircraft companies leased the hangar area at the Tucson Airport including Grand Central Aircraft Company (1950-1954), Douglas Aircraft Company (1954-1958), and Hughes Tool Company (1958-1966), the United States Air Force (for two six-week periods from 1966-1969), and various tenants engaged in light industrial activities since 1969. /70/ Among the PRPs, Consolidated was considered to be only a minor contributor to the groundwater contamination. /71/

In the early 1980s, while Hughes Aircraft Corporation was leasing a site near the former modification center (known as "Air Force Plant 44") from the United States Air Force, the Air Force discovered that the Tucson groundwater near the site was contaminated with

trichloroethylene (TCE), considered by EPA to be a possible carcinogen. Specifically, the Air Force found levels of TCE as high as 27,000 parts per billion (ppb) at Air Force Plant #44. /72/ In fact, there were indications as early as the 1950s that groundwater was being contaminated when elevated levels of chromium, a chemical used in electroplating, was detected in municipal wells near Air Force Plant #44. /73/ Until 1976, wastewater and spent solvents were discharged into unlined ditches or waste pits and ponds. At that time lined wastewater holding ponds were constructed for the wastewater discharges. However, before the precautions were taken, wells in the area provided drinking water for over 47,000 people. /74/ Hughes and other military contractors had used the TCE as a degreasing agent and then allegedly disposed of the substance in unlined ponds at the plant site. /75/ Under EPA regulations, TCE is not to exceed 5 ppb in water, but concentrations exceeding 300 ppb were found in the groundwater near the Air Force plant. /76/ In 1981, the City of Tucson began closing all municipal wells that had contaminants exceeding state health levels. /77/ Consequently, in 1983, EPA listed the site on the NPL: /78/

It was not long before environmental tort suits began to be filed. In 1985, seven Tucson families filed a lawsuit against Hughes Aircraft Corporation claiming family members had suffered illness or death by unwittingly drinking TCE and chromium-tainted water. Hughes in turn then sued the Tucson Airport Authority. /79/ In 1991, Hughes agreed to pay \$85 million to over 1,620 plaintiffs to settle the Valenzuela lawsuit. /80/ After the Valenzuela case settled, another group of individuals living near the site filed a class action alleging injuries from the TCE contamination. Other cases were also filed in the United States District Court in Tucson against Hughes. Hughes, in turn, filed third-party actions against each of the PRPs for contribution. /81/

In 1988, the EPA notified seven entities that they were PRPs for response costs at the Tucson NPL site -- Tucson Airport Authority (operator of the airport); the City of Tucson (owner of the airport property); McDonnell Douglas Corporation (previously known as Douglas Aircraft Company), Hughes Aircraft, and General Dynamics (successor in interest to Consolidated-Vultee Aircraft Corporation) (all current or former site tenants and operators at the airport); the Arizona National Guard and the United States Air Force (generators of hazardous substances and arrangers for disposal of such substances at the airport). /82/

In 1990, the EPA issued a proposed consent decree which was agreed to by all of the named-PRPs, except General Dynamics. Under the proposed consent decree, the PRPs agreed to construct a groundwater extraction and treatment system at a cost of \$12-15 million. /83/ Under the Consent Decree, the PRPs were to agree to implement EPA's remedial action plan consisting of the construction and operation of a groundwater extraction and treatment system so that the groundwater would meet Federal and state cleanup levels and then be fed back into Tucson's drinking water system. /84/ Additionally, the PRPs were to reimburse EPA \$2.3 million for its oversight costs. The remedial action was estimated to be operated for 25 years. /85/ All but General Dynamics agreed to the Consent Decree in 1991. /86/

The following year in 1992, EPA issued another RI/FS order for the PRPs to investigate soil contamination on or near the airport site and to analyze potential cleanup remedies. /87/ The remedial investigation was completed in 1995, with TCE being the prime contaminant detected, and the feasibility study is expected to be complete by the end of 1996. /88/ In 1994, the Tucson Airport Authority filed a complaint for contribution under 42 U.S.C. § 9607 against General Dynamics. General Dynamics filed an answer, a counterclaim and a third party complaint against the United States alleging that the United States is responsible for defending General Dynamics, and has assumed any claims against the company under the terms of the settlement of the Modification Center contract. This theory is explained in more detail later in this article. /89/

#### IV. INDEMNIFICATION CLAUSES AND COST REIMBURSEMENT PRINCIPLES IN WORLD WAR II-ERA GOVERNMENT CONTRACTS

The essential elements for PRPs attempting to require the United States to assume CERCLA cleanup liability under World War II-era government contracts are the indemnification clauses and the principles for cost reimbursement included in those 'contracts.

##### A. Government Contracting During World War II

In the period immediately preceding World War II, government contracting procedures consisted of a maze of uncoordinated legislation developed over a hundred-year period. Taken as a whole, the laws inhibited efficient and expeditious government procurement. /90/

One of the first items of business for Congress after the bombing of Pearl Harbor on December 7, 1941, was the passage of the First War Powers Act. <sup>/91/</sup> The primary purpose of the Act was the "promotion of the national defense in time of great emergency, [with] contractors [being] the incidental beneficiaries of the Act. <sup>/92/</sup> The effect of the First War Powers Act was to put wartime buying on a similar free footing as private enterprise. <sup>93</sup> Section 201 of Title II of the Act provided:

The President may authorize any department or agency of the Government exercising functions in connection with prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war. <sup>/94/</sup> (emphasis added)

In yet still another remarkably short time, President Roosevelt issued Executive Order 9001 on December 27, 1941, delegating powers granted by the First War Powers Act to the War and Navy Departments and the Maritime Commission. <sup>/95/</sup> By the authority of Executive Order 9001, the military departments could relieve a contractor from bad commitments, and could amend, modify or reform contracts without consideration or mutuality of mistake. <sup>/96/</sup> Despite the clear easing of contract restrictions, Executive Order 9001 did include a number of requirements, including: (1) a prohibition of racial discrimination was to be included in all contracts; (2) the allowance of advance payments only upon close scrutiny when they promoted the national interest; (3) a proscription against commissions for contract agents; (4) a prohibition against cost-plus-percentage-of-cost-contracts; (5) the maintaining of existing ceilings on profits and fees (e.g. fees in CPFF contracts were limited to seven percent); and (6) the continued applicability of labor laws protecting contractor employees. <sup>/97/</sup> Nonetheless, the First War Powers Act, as implemented by Executive Order 9001, provided a virtually complete emancipation from peacetime procedural limitations on contracting. <sup>/98/</sup>

One of the lessons learned from World War I was the need to have absolute control over industry to ensure military and essential civilian production was

unencumbered. In addition to control, synchronization was needed. President Roosevelt began to put new agencies in place directed by "economic czars" including the Reconstruction Finance Corporation (RFC), the Office of Production Management (OPM), the War Production Board (WPB), and eventually the Office of War Mobilization (OWM.<sup>/99/</sup> The RFC was established in the Summer of 1940 for the purpose of lending money to or buying stock in corporations organized to promote the national defense, or to create such corporations. In particular, the act setting up the RFC allowed the organization of the Defense Plant Corporation (DPC) to loan working capital to manufacturers and finance facility expansion.<sup>/100/</sup> The WPB was vested with the broadest powers to "exercise general direction over the war procurement and production program with the WPB set as the central coordinating point for war procurement, all federal agencies."<sup>/101/</sup>

President Roosevelt also revived the Advisory Commission under the cabinet committee known as the Council of National Defense, a remnant of World War I and the National Defense Act of 1916.<sup>/102/</sup> This seven-member advisory commission, referred to as the National Defense Advisory Commission (NDAC), or the Defense Commission, was charged' to start mobilizing industrial resources for the impending war.<sup>/103/</sup> After the attack on Pearl Harbor, the OPM was replaced by the War Production (WPB). It was in the WPB that President Roosevelt concentrated the war mobilization powers conferred on him through the authority of the First War Powers Act. The WPB eventually became responsible for reviewing all contracts in excess of \$500,000.<sup>/104/</sup>

In June 1940, Congress passed legislation establishing the defense contract priorities system requiring [deliveries to the Army or Navy to "take priority over all deliveries for private account or for export."](#)<sup>/105/</sup> The priorities system also required that manufacturers who needed raw materials for war contracts and subcontracts could acquire them ahead of civilian manufacturers.<sup>/106/</sup>

Congress went still further in September 1940, when it passed the Selective Training and Service Act of 1940,<sup>/107/</sup> a part of which gave War and Navy Department contracts precedence over all other orders and contracts with nonmilitary parties. It also gave the War and Navy Departments the right to seize a contractor's plants if the contractor refused to manufacture requested products or materials, or furnish them at a reasonable price as determined by the government. The contractor also could be

charged with a felony and face up to three years in prison and a \$50,000 fine. This provision was identical to the respective provision in the National Defense Act of 1916. /108/

All of these efforts by the Congress and the Executive Branch helped foster the environment whereby military contractors became what President Roosevelt referred to as the "Arsenal of Democracy." /109/ The mobilization plan; under the direction of President Roosevelt's war planners, began working in 1941 like an engine picking up steam. To accomplish the production required to meet the World War II challenge, the government needed to adapt its contracting procedures.

The passage of the First War Powers Act set the stage for a much more unhampered set of procedures for government contracting during World War II. The enormous scale, complexity, and novelty of war procurement during World War II allowed for development and extensive use of the letter of intent and the Cost-Plus-Fixed-Fee (CPFF) contract. The letter of intent allowed for immediate work on the contract. After negotiations reached the point where an order was certain, the letter of intent formally advised a contractor that a government department intended to place an order for production of specified articles or construction of facilities. /110/ The letter of intent was followed by the contracting officer placing of an actual order in the form of a formal contract. This procedure avoided delay because when the prospective contractor accepted the letter, a contract was actually created. /111/ The letter of intent was successful mainly because upon completion of negotiations as to item, quantity, price and delivery, initial work by the contractor could begin immediately. Thereafter, the principal contract provisions were worked out in additional time-consuming negotiations. /112/

Based on the negative experience with the cost-plus-percentage-of-cost contracts during World War I, their use was prohibited in World War II /113/ The CPFF contract was substituted for contracting situations where there was unusually great uncertainty or there was a need for frequent changes in scheduling. /114/ Consequently, contractors, otherwise unwilling to accept uncertain contingencies and inevitable difficulties of a fixed price contract, were more willing with a CPFF contract. The CPFF contract was expressly sanctioned by the Congress in 1940. /<sup>115</sup>/ The CPFF contract gave contractors protection and

guaranteed a profit, though their profit ratio was lower due to a lower financial risk. /116/

Cost reimbursement contracts, including the CPFF contract, were widely used during World War II, accounting for approximately \$60 billion of contracts let between 1941 and 1946. /117/ Other cost-reimbursement contracts included cost or cost-sharing contracts and the cost-reimbursement portion of time-and-materials contracts. /118/ The CPFF provided for the contractor to be reimbursed for the total allowable costs incurred from contract performance, plus a percentage of estimated cost as a fee. The fee was fixed when the contract was entered into and was not subject to change unless changes in the scope of the contract were ordered with the main uncertain element being the future allocable costs of the contract. /<sup>119/</sup>

An important aspect of CPFF contracts was the cost principles and the determination of allowable and allocable costs included in the contracts. Under World War II-era CPFF contracts, the contracting officer had the duty to determine such costs following cost standards incorporated by reference into the contract. The two most widely used standards during World War II were Treasury Decision (TD) 5000, § 26.9 and the War Department and Navy Departments Explanation for Principles for Determination of Costs Under Government Contracts, informally known as the Green Book. /120/

Originally, TD 5000 was promulgated to measure excess profits under the Vinson-Trammell Act. /121/ In August 1940, the Treasury Department, jointly with the Navy and War Departments, issued TD 5000, a revised regulation for the Vinson-Trammell Act. /122/ Two months later, following the beginning of the German bombing of the Battle of Britain, the United States began its plans to increase purchases of war munitions. Government planners believed, however, that the shipbuilders and aircraft manufacturers would be reluctant to enter into contracts because of the Vinson-Trammell Act profit limitations. To alleviate this concern, Congress enacted legislation suspending the Vinson-Trammell Act, but imposed a war-time excess profits tax upon corporate income. /123/ This put all of industry, civilian or military, on an equal footing. /124/

Even though the Vinson-Trammell Act had been suspended, TD 5000 continued to be applied. Many government agencies incorporated that decision into CPFF contracts as a source of cost principles. /125/ The War and Navy Departments issued the Green Book, which followed the principles of TD

5000, to assist its personnel to determine costs under their war procurement contracts. /126/

For costs to be allowable and therefore reimbursable they must have been proximately related to proper performance of the CPFF contract. /127/ CPFF contracts provided government contracting officers and contractors alike with a useful tool for war procurement. Purchasing by CPFF eliminated the need for detailed specifications, removed substantial risk for contractors to produce new types of war materials, and were especially geared for government-owned, contractor-operated plants like those operated by Ford and Consolidated. Despite their wide usage, CPFF contracts were criticized because they lacked financial incentives for productive efficiency and they had administrative and auditing burdens for both parties. /128/

Well before the allied- march across the Rhine and the bombing of Hiroshima, the war planners were looking ahead to the mammoth task of the reconversion of American industry to a peacetime economy. /129/ The United States had learned of the pitfalls caused by long, drawn-out litigation of contract claims following World War I, resulting in uncompensable losses due to early cancellation of government contracts. /130/ There were two fears of inadequate preparation for termination of contracts at the war's end: (1) the effect on labor and high unemployment it might cause; and (2) the effect on capital, including serious financial loss, business disorganization, and a flood of bankruptcies. /131/

The authority for the government to terminate contracts stemmed from the First War Powers Act that conferred power on the President "to enter into contracts and into amendments of contracts." /132/ This was interpreted to include the power to agree upon terms and conditions of partial performance and, upon termination, to agree to pay for partial performance. /133/ The basis for this opinion relied on the 1875 United States Supreme Court case of United States v. Corliss Company, involving a terminated Civil War government contract. /134/ This analysis led to the theory of the negotiated lump-sum settlement and to a vigorous program to conform to this policy. To implement this policy, the War Department issued Procurement Regulation 15 and the Termination Accounting Manual. /135/ These regulations allowed for war contracts to be amended to include standard termination articles. /136/ They also allowed contracts to be terminated and settled by the contracting officer by a separate supplemental agreement. /137/



In the spring 1943, President Roosevelt recommended to Congress that they begin consideration of postwar reconversion. The Senate and House each established a Committee on Postwar Economic Planning. /138/ Before passage of a contract settlement bill, the Director of the Office of War Mobilization, issued a new Uniform Termination Article for fixed price supply contracts, and a Statement of Principles for Determination of Costs. /139/ Although it did not apply to CPFF contracts, it was important because it retained the doctrine of the contracting officer effecting a final settlement by negotiation, including a reasonable allowance for profit. It provided uniform language and was intended to lead to speedy and fair settlements. /140/

In June 1944, Congress enacted the Contract Settlement Act of 1944, which contained two fundamental principles: (1) businessmen shall be paid speedily the fair compensation which is due them for the termination of their war contracts; and (2) the government, when paying out such fair compensation, should be carefully protected against waste and fraud. /141/

One of the key provisions of the Act was the finality of settlements. /142/ Section 3(m) of the Act defined final and conclusive as: "such settlement, finding or decision [which] shall not be reopened, annulled, modified, set aside, or disregarded by any officer, employee or agent of the United States, or in any suit, action or proceeding, except as provided in the act." /143/

Section 6(c) of the Act provided that termination claims were to be settled by agreement, or by determination of the amount due without agreement. If the settlement was arrived at by agreement, such agreement was to be final and conclusive except: "(1) to the extent that the parties may have otherwise agreed in the settlement, (2) for fraud, (3) upon renegotiation to eliminate excessive profits under the Renegotiation Act . . . or (4) by mutual agreement made before or after payment." /144/

One commentator concluded that the purpose of the provision, when considered with other provisions, was to avoid subsequent reopening of settlements by the GAO, thus making final settlement similar to private agreements. /145/

The authority to indemnify contractors was included in § 20(a)(3) of the Act. Specifically, it conferred authority on the contracting agency when settling any termination claim, "to agree to assume, or indemnify the war contractor

against, any claims by any person in connection with such termination claims or settlement." /146/ This provision, and the respective clause in the settlement agreement, provides contractors with the basis for seeking indemnification for post-settlement third party claims, such as those of Ford and General Dynamics for current environmental cleanup costs.

The Act also provided for the contracting agencies to establish methods and standards for determining fair compensation for the termination of war contracts, including cases in which claims could not be settled by agreement. /147/ In November 1944, Procurement Regulation (PR) IS and the Technical Accounting Manual (TAM) /<sup>148</sup>/ were reissued as the combined regulations of the War and Navy Departments titled the Joint Termination Regulation, Including Joint Termination Accounting Manual, or the JTR. /<sup>149</sup>/

Appeals were provided for termination claims not settled by agreement. Where a contractor contested the agency determination, it could appeal to the Appeal Board of the Office Contract Settlement or bring suit against the United States in the Court of Claims (now called the United States Court of Federal Claims) or any appropriate District Court. /<sup>150</sup>/ The Act was silent on any Statute of Limitations. Rather, the limitation was on the claim being based on a terminated war contract. /<sup>151</sup>/

In October 1944, the Office of War Mobilization and Reconversion was established by Congress, replacing the OWM with added jurisdiction over the Office of Contract Settlement. /152/ After passage of the Contract Settlement Act and through the Fall of 1944, approximately 4,000 contracts were canceled each month, totaling \$1.5 billion. By January 1, 1945, the undelivered value of outstanding contracts was estimated at \$65 billion. /153/ The average time lag between termination and final settlement was four months compared to eight months after World War I. /154/ Two of the thousands of settlement agreements included those with Ford and Consolidated.

#### B. Ford Motor Company's Contract for B-24 Bombers at Willow Run

It was during World War II that Ford's war effort made it the pride of the nation. Following the Spring and Summer of 1940 when the Germans overwhelmed the Low Countries and France and began a bombing campaign against the British, President Roosevelt delivered his famous Fireside Chat in which he appealed to American industry to become the "Arsenal of Democracy." /155/

Ford Motor Company responded immediately to the President's challenge. Although Ford had already contracted with the Army in 1939 to develop Jeeps, and Ford was already involved in follow-on projects to develop the M4 tank, anti-aircraft gunnery and amphibious vehicles, its biggest contract was to build the B-24 Liberator at Willow Run. /156/ Although Henry Ford had opposed U.S. aid or arms to Britain and France in 1939, and cared little for President Roosevelt, Ford boldly declared, nonetheless, on May 28, 1940, that the Ford Motor Company stood ready to "swing into a production of a thousand airplanes of standard design a day." /157/

On January 8, 1941, a member of Ford's Board of Directors and Director of Production, flew to San Diego, California along with Dr. George Mead from the National Defense Advisory Council to meet with the President of Consolidated Aircraft Company, developers of the B-24 bomber: /158/ Consolidated was unable to mass produce the plane without significant enlargement of their factory. Because of its west coast location, however, the United States Army Air Corps felt it was vulnerable to attack. /159/ After analyzing the facility, Ford conceived of the plant that would adapt the mass production assembly line concept to aircraft production. The following day, Ford told the National Defense Advisory Council that it was prepared to manufacture the B-24 as long as it could manufacture the complete airplane, not just assemblies. /160/

On February 21, 1941, Ford Motor Company received a Letter of Intent to build 1200 bombers to be shipped to Consolidated's Tulsa and Fort Worth plants for assembly. /161/ On April 18, 1941, groundbreaking at the Willow Run factory site began. Ford Motor Company carried on the planning and construction until June 25, 1941, when the Defense Plant Corporation (DPC) assumed ownership and responsibility for the Willow Run project. Ford entered into a lease arrangement with the DPC to manage construction and factory operations on their behalf. /162/

The sewage and water treatment facilities which many years later were to become the subject of EPA scrutiny, were designed by a Detroit firm. The sewage disposal plant for activated sludge was built south of the main factory near the banks of Willow Run. /163/

Article 3 of the contract specified the terms of consideration. This

clause provided that cost would be determined by TD 5000, § 26.9. Ford refers to this article in support of current claims for cost reimbursement for environmental cleanup costs. /164/ TD 5000, § 26.9 included as an element of contract cost, general expenses that included expenses of distribution, servicing, and administration. /165/ Article 9 of the contract provides the terms for termination of the contract for convenience of the government. /166/ These contract clauses form the basis of the theory for Ford's current claim for indemnification and reimbursement of environmental cleanup costs.

### C. Consolidated Aircraft's Modification Center Contract in Tucson, Arizona

When World War II commenced, Consolidated was among the largest companies in the aircraft industry along with Douglas, Lockheed, North American (all in southern California) and Boeing in Washington and Kansas. /167/ By 1942, Consolidated had merged to become Consolidate-Vultee and helped form the Aircraft War Production Council with other West Coast aircraft manufacturers to discuss mutual problems and share knowledge. /168/ Consolidated Aircraft contracted with the Army Air Forces, first by a Letter Contract Special Form on April 14 1942, and later by a Modification Center Contract on October 5, 1942, to "establish, organize, operate and provide personnel for a Modification Center" at the Municipal Airport at Tucson Arizona. /169/ The contract was a CPFF contract with an estimated cost of \$2,597,000 and a fixed fee of \$155, 820, or six percent. /170/

Article 3 of the contract provided for consideration and the government agreed to pay Consolidated's costs. In particular, Article 3(b) defined allowable costs, as in the Ford Willow Run contract, and incorporated TD 5000 into the contract by reference. The language is similar to the Ford contract, but is not identical. /171/ Article 9 contained the termination provisions. /172/

On June 30, 1944, the government suspended work on the Modification Center Contract. On November 9, 1945, Consolidated and the government entered into a Settlement Agreement purportedly settling the rights and responsibilities of the parties arising out of the contract. The settlement Agreement incorporated Article 9 of the contract. /173/ The claim by General Dynamics focuses on the assumption of liability by the government under Article 9. Both the Ford Willow Run B-24 production contract and the Consolidated Modification Center contract contain indemnification language and cost reimbursement clauses upon

which the respective companies are currently relying for indemnification and reimbursement from the government.

## V. INDEMNIFICATION AS A THEORY OF RECOVERY FOR CURRENT ENVIRONMENTAL CLEANUP COSTS

### A. Indemnification Theory

Indemnify is defined generally as: "(1) to make good a loss that someone has suffered because of another's act or default; (2) to promise to make good such a loss; or (3) to give security against such a loss:" <sup>/174/</sup> To illustrate, using New York law as an example, indemnity can arise in three ways: (1) by a contract in which an indemnification agreement explicitly describes the terms of the agreement; <sup>/175/</sup> (2) by implication when a special legal relationship creates an implied right of indemnification, and (3) when a person has discharged a duty owed by him, but as between himself and another, should have been discharged by the other. <sup>/176/</sup> When the United States is a party to a government contract containing an indemnity clause, the contract clause is interpreted according to appropriate federal standards. <sup>/177/</sup>

In order to claim indemnification under a World War II-era government contract terminated under the Contract Settlement Act, the party seeking indemnification would need to prove the clause in the contract explicitly provided for indemnification and was not otherwise discharged by a release in the settlement agreement. A critical requirement is that the expense for which indemnification is sought was a cost otherwise reimbursable under the contract i.e. did the expense arise out of performance of work under the contract? Thus, under the theory of indemnification, if the contractor can prove there is a duty to reimburse under the contract, and that duty had not been released, nor otherwise expired because of the passage of time, then under the theory, the contractor should be able to enforce the terms of the indemnification.

### B. Statutory and Regulatory Authority for Indemnification Under the Contract Settlement Act of 1944

The Contract Settlement Act provides in § 20(a)(3), in its general provisions clause, that the contracting agency shall "[have authority] in settling any termination claim, to agree to assume or indemnify the war contractor against any claims by any person in connection with termination

claims or settlement." /178/ The legislative history of the Act provides no clarification regarding the provision. /179/ There is also no evidence that this broad grant of powers to indemnify has ever been litigated. /180/ Presumably, it was included to support the overall purpose of the Act to "facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit" and "to assure ... contractors . . . [a] speedy and final settlement of claims." /181/

The Joint Termination Regulation (JTR), promulgated by the War and Navy Departments in 1944 to implement the Act, reiterated that expeditious settlements was one of the basic policies of the Act. The JTR provided that one of the objectives of war contract terminations was to "make a fair and prompt settlement with the war contractor to compensate him for the work done and the preparations made for the terminated part of the contract." /182/ It also emphasized that "[u]niformity of procedures [would] facilitate the prompt and equitable settlement of war contracts." /183/

For CPFF contracts, as with fixed-price contracts, the policy of the War and Navy Departments was that "settlement of a terminated [CPFF] contract [was to] be complete and final." /184/ The JTR authorized the contracting officer to proceed with the final settlement agreement after receipt of the final audit status letter. Despite the general policy of final settlements and releases, there was provision for exceptions and reservations. The final settlement agreement was to include all government and contractor claims except for costs "which are the subject of ... [a]n exception which is shown to be outstanding in a final audit status letter . . . and which remains uncleared." /185/ In negotiating final settlements the JTR provided for reservations as follows:

Where rights of the Government and of the prime contractor are to be reserved and are not to be affected by the settlement agreement, the agreement should specify the extent of such reserved rights. For example:

- . . . .
- (c) Rights and liabilities of either party under . . . covenants of indemnity, /186/
- . . . .

The authors of the JTR anticipated that there would be post-settlement litigation under CPFF contracts, for both parties, such as for labor or tax issues, which would affect

reimbursable costs. The settlement agreement was to expressly except such items from the settlement release. /187/

The JTR included form articles to be used for settlement agreements for CPFF contracts after complete termination. The final settlement agreement for termination claims were to conform to the prescribed forms." Article 4(c) provided in pertinent part:

Upon payment of said sum of \$ \_\_\_\_ (a) ... all rights and liabilities of the parties under the Contract and under the Act.... shall cease forthwith and be forever released except: [The following list of excepted rights and liabilities is intended to cover those which should most frequently be excepted and which 'should in any event be scrutinized at the time a settlement agreement is signed.]

. . . .

(3) Claims by the Contractor against the Government which are based upon responsibility of the Contractor to third parties and which involve costs reimbursable under the Contract, but which are not now known to the Contractor.

. . . .

(7) All rights and liabilities of the parties under the articles, if any, in the Contract applicable to ... covenants of indemnity, . . . 189 (emphasis added)

In addition, Article 5 provides further guidance regarding third party liabilities:

(1) In addition to the payment of the sum provided for in Article 4, the government will reimburse the Contractor payments made in discharging claims described in subparagraph (1) and (3) of said article.

(2) Even though neither the existence nor the amount of any claim referred to in subparagraph (3) of Article 4 may now be known to the Contractor, reimbursement for payments made by the Contractor in discharge of any such claim shall include, along with wages and salaries otherwise reimbursable, all additional amounts determined (either by approval of the Contracting Officer or by litigation as hereinafter provided) to be due and payable for overtime compensation and allowances under local, state or Federal laws in connection with such wages and salaries.

(3) The Contractor shall promptly notify the Contracting Officer of any claims of the type described in subparagraph (3) of Article 4 which are asserted subsequent to the execution of this Agreement: In the event of the assertion of any such claim against the Contractor, he shall, if requested by the Contracting Officer, promptly and diligently proceed in good faith to assemble all data and information relative to such claim. The expenses incurred by the Contractor in the performance of this duty shall be reimbursable under the Contract.

(4) If the Contracting Officer shall determine that the best interests of the Government require that the contractor initiate or defend litigation in connection with claims of third parties arising under the Contract or by virtue of its termination, the Contractor will proceed with such litigation in good faith and the costs and expenses of such litigation, including judgments and court costs, allowances rendered or awarded in connection with suits for wages, overtime or salaries, and other items, and reasonable attorneys' fees for private counsel when the Government does not furnish Government counsel, shall be reimbursable under the Contract. The term "litigation" shall include suits at law or in equity and proceedings before any Governmental agency having jurisdiction over the claim.' (emphasis added)

Nonetheless, despite these exceptions for agreed upon reservations, the settlement agreements were otherwise to be final and conclusive. The policy of the War and Navy Departments was that final settlements should be reopened only in unusual cases, otherwise the Act's objective of finality of settlements would be thwarted. /191/

The language in the settlement agreement article demonstrates that reimbursement for costs resulting from then unknown third party claims and covenants of indemnity were recognized and expected to occur. The language in the article fails to make clear, however, what the limitations of the claims might be. It is also unclear from the JTR language whether there was a limit to the time for reservations or whether it was for an indefinite time period. The language in the JTR form articles 4(c) and 5 do make it clear that for the third party claims to be reimbursable, they must have involved "costs reimbursable under the contract." /192/

The language in the War Department's Procurement Regulation (PR) 15 after which the JTR was patterned, is substantially similar to the reservation and indemnity



language in the JTR. In fashioning a final settlement agreement, the contracting officer and the contractor were to:

execute a final settlement agreement in the form of a supplemental agreement to the contract [section reference omitted]. Such supplemental agreement will set forth the amount of such final payment of cost reimbursement and of the fixed fee, will state the terms of any adjustment of the fixed fee, will state that all Government property under the contract and theretofore undisposed of has been delivered to the Government, will list such property or will incorporate a list thereof by reference, will embody a general release by the contractor and the Government of all claims against each other, and will state in detail all the exceptions to said release (see, for list of such possible deductions, exceptions and reservations, §88.15537(b)). /193/ (emphasis added)

The exceptions "which are not to be affected by the settlement" listed at § 88.15-537(b) include "[t]he rights of either party under . . . covenants of indemnity. /194/ PR 15 also provided for third party claims when it stated:

Where there is substantial risk of later litigation (e.g. actions under the Wages and Hours Act, State taxes) affecting reimbursable costs under the terminated contract, such items may be expressly excepted from the releases if the contract provisions with respect to releases (either as originally set forth in the contract or as inserted by amendment) authorize such exceptions. /195/ (emphasis added)

In the form Termination Articles of PR 15, the following termination language is included:

(2) Upon the termination of this contract as hereinbefore provided, full and complete settlement of all claims of the Contractor arising out of this contract shall be made as follows:

(a) The Government shall assume and become liable for all obligations, commitments and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract, and the Contractor shall, as a condition to receiving the payments mentioned in this Article, execute and deliver all such papers and take all such

steps as the Contracting Officer may require for the purpose of fully vesting in the Government the rights and benefits of the Contractor under such obligations or commitments.

(b) The Government shall reimburse the Contractor for all expenditures made in accordance with Article 3 and not previously reimbursed. '96 (emphasis added)

Although "full and complete settlement" was contemplated, the CPFF contract final settlement agreement form in PR 15 includes the following reservation language in Article 4(2): "All rights and liabilities of the parties hereto under the articles, if any, in the contract applicable to . . . covenants of indemnity, . . . [may be reserved]." /197/ The language regarding risk of later litigation in 10 C.F.R. § 88.15-656 (1943 Supp.) was not included in this form settlement agreement article. /198/

#### C. Requirement for a "Reimbursable Cost"

For the third party claims to be reimbursable, they must have involved "costs reimbursable under the contract." /199/ There were several methods for determining reimbursable costs under CPFF contracts.

The JTR included the Joint Termination Accounting Manual as Appendix A. It specified at paragraph 4, however, that the manual was not applicable to CPFF contracts. Rather, it stated that the War Department Technical Manual (TM) 14-1000, Administrative Audit Procedures for Cost-Plus -A-Fixed-Fee Supply Contracts, was applicable /200/ TM 14-1000 was originally issued according to a memorandum approved by the Under Secretary of War on May 27, 1942, and was applicable for then existing and future CPFF contracts. /201/ The purpose of an administrative audit was described in TM 141000 in the following terms:

The purpose of the administrative audit of [CPFF] supply contracts is to ascertain that the claims for reimbursement made by the contractor are in accordance with the provisions of the contract, and that they are substantiated by his records and other supporting evidence. The auditor should consider the following aspects of every cost claimed: Is the item of cost allowable under the terms of the contract, has it been actually incurred, and in the case of a direct charge to the contract, has it been paid by the contractor? /202/

The manual notes that the allowability of costs are also governed by the provisions of the contract defining cost and also TD 5000, where the contracts incorporated TD 5000 into the definition of cost. <sup>/203/</sup> The manual also describes the procedures for settlement of completed CPFF contracts. The general plan of settlement was provided as follows:

d. When substantially all determinable costs have been presented and the contracting officer and contractor have agreed upon a settlement date, the auditor, upon notification in writing by the contracting officer, will prepare a closing statement as a basis for the settlement agreement.

. . . .

f. It is recognized that particular types of claims not yet determinable may be excluded under the terms of the settlement agreement. When claims of these types subsequently arise, they should be presented in accordance with the requirements of the individual service involved. <sup>/204/</sup>

More particularly, the manual provides the following procedure for additional liabilities:

Where the settlement agreement excludes particular items or types of items which are contingent in nature or for any other reason are indeterminable at the settlement date, it is essential that a complete statement be prepared by the contractor covering all available information which is pertinent to the items excluded and which may be of value to the Government in determining proper payment at any later date. <sup>/205/</sup>

Chapter 6 of the TM 14-1000 sets forth cost interpretations with instructions for War Department accounting personnel. The basic premise on cost interpretations is that the specific terms of the contract governs. Thereafter, the cost interpretations may be given consideration where the contract is silent, vague or ambiguous on the respective matter. <sup>/206/</sup> The interpretations were meant to be consistent with TD 5000, § 26.9. <sup>/207/</sup>

The elements of cost of performing a government contract were defined in TD 5000, § 26.9 as:

[T]he sum of (1) the direct costs, including therein expenditures for materials, direct labor and direct expenses incurred by the contracting party in performing the contract or subcontract, and (2) the

proper proportion of any indirect costs ... incident to and necessary for the performance of the contract or subcontract. <sup>/208/</sup> (emphasis added)

The remainder of § 26.9 lists the various elements and sub-elements of cost, including: factory cost, other manufacturing cost, miscellaneous direct expenses, indirect engineering expenses, expenses of distribution, servicing and administration, and guarantee expenses. <sup>/209/</sup>

In determining costs to effect a settlement of a CPFF contract, the particular contract usually would list the allowable reimbursable costs. Frequently, TD 5000, § 26.9 was incorporated by reference in the definition of cost found in the consideration article. <sup>/210/</sup> Thus, the contract cost definitions and the provisions of TD 5000 established the framework to determine if a given cost in a reserved claim was allowable.

The "Green Book" was the short name given to the pamphlet issued by the War and Navy Departments in April 1942. It was formally titled: Explanation of Principles for Determination of Costs Under Government Contracts. <sup>/211/</sup> The purpose of the pamphlet was to "present in basic outline the principles according to which cost may be determined" under War and Navy Department supply contracts. It specifically recognized TD 5000 as the source of cost principles for those contracts, incorporating that standard by reference. The Green Book stated its object was to "state in principle which costs may be admissible . . . , which costs may be inadmissible, and which costs may be subject to limitations as to their admissibility. <sup>/212/</sup> The Green Book outlined the items of cost, stating the overall cost principle as "the total cost under a contract is the sum of all costs incurred by the contractor incident to and necessary for the performance of the contract and properly chargeable thereto. <sup>/213/</sup> (emphasis added) Thus, the Green Book, in establishing general principles was in accord with TD 5000, § 26.9 regarding the basic requirement that all costs be incident and necessary to contract performance.

#### D. Case Law in Support of Indemnification

Prior to the creation of the War Department Board of Contract Appeals (WDBCA) in 1942, when a contractor desired to appeal a final decision of a contracting officer, he could present an appeal to the head of the department, and then either present a claim to the General Accounting Office, or to the courts. After CPFF contracts were sanctioned by the Act of July 2, 1940, <sup>/214/</sup> the Comptroller

General issued several opinions regarding reimbursement of costs under CPFF contracts.

The Comptroller General's decisions from the World War II-era seemed to intermingle the government's duty to indemnify the contractor with issues of cost reimbursement. One of the first Comptroller General's opinions dealt with a clause in a CPFF contract providing for reimbursement for loss or damage to a contractor's equipment caused by the negligence of a government employee. /<sup>215</sup>/ The contract for rehabilitation of a rail net at Raritan Arsenal, New Jersey, provided for reimbursement for premiums for insurance and for losses and expenses not covered by insurance sustained "in connection with the work" and found to be "just and reasonable." /<sup>216</sup>/ The Comptroller General approved reimbursement concluding in general about CPFF contracts:

[T]he contract basically contemplates that the actual cost of the whole work and the risk thereof are to be assumed by the Government; that is, that the contractor is to come out whole, regardless of contingencies, in performing the work in accordance with the contract and the directions and instructions of the contracting officer. /<sup>217</sup>/

The Comptroller General concluded' that the essence of CPFF contracts is that the government assumes the risks in consideration of a small fixed fee, and thereby, the government, in effect, guarantees the contractor against loss. /<sup>218</sup>/

This broad language supporting reimbursement was not unlimited, however. The Comptroller General later held that the government's assumption of risk under CPFF contracts has limits: "[it] does not mean that the Government is to assume the risk of the contractor's own fault or folly, or that the contractor is to come out whole regardless of careless conduct of the work or other disregard of his contractual duties. /<sup>219</sup>/ The Comptroller General held that a contractor "may not be reimbursed for losses where his failure to perform his contractual duties and obligations is a proximate cause of the loss." /<sup>220</sup>/ He held that reasonable care in the hiring and retention of competent employees is necessary before reimbursement for negligent loss caused by such employees will be allowed. /<sup>221</sup>/

In two other decisions, the Comptroller General articulated the key test in determining cost reimbursement. The test was whether the expense was necessary to perform the contract work. Based on this test, the Comptroller

General allowed transportation and housing expenses for transferred contractor employees at a remote work site. <sup>/222/</sup> He also allowed the cost of operating a cafeteria at a remote Defense Plant Corporation site near Houston, Texas, holding that the cafeteria was "incident to and necessary for the performance of the contract." <sup>/223/</sup>

The Comptroller General determined various costs were not reimbursable because they were not "reasonably necessary [for the] performance of the contract work," including: the cost of deputizing plant guards as deputy, sheriffs; <sup>/224/</sup> the cost of back pay approved by the contracting officer for reinstated employees discharged for alleged union activities; <sup>/225/</sup> and for unearned wages erroneously paid by a subcontractor. <sup>/226/</sup>

One commentator summarized five general rules of cost reimbursability gleaned from World War II-era Comptroller General decisions in absence of specific contract language:

The item of cost incurred must (1) be "reasonably incident" to work, (2) not "presumed (to be) included in the fixed fee," (3) "serve a useful purpose in fulfilling contract requirements," (4) not result from the absence of due care by Contractor management and (5) the contractor may not be reimbursed for any cost incurred "in contravention of the law." <sup>/227/</sup>

As the number of war procurement contracts increased dramatically with the United States' entry into World War II, the Secretary or Under Secretary of War could no longer personally consider the contract appeals that followed. On August 8, 1942, the War Department Board of Contract Appeals (WDBCA) was created, similar to the War Department Board of Contract Adjustment created at the end of World War I. <sup>/228/</sup> The WDBCA was appellate in nature and its jurisdiction was under the contract authorizing the appeal to a representative of the Secretary of War. As such, its decisions were binding on the parties. <sup>/229/</sup> The disputes article used in war procurement contracts made the decision of the WDBCA conclusive only as to factual matters. <sup>/230/</sup> The WDBCA issued written opinions including findings of fact, decision, and an appropriate order for disposition. A number of cases dealt with claims for indemnity and, cost reimbursement under CPFF contracts. <sup>/231/</sup>

In Pan American Airways, Inc., <sup>/232/</sup> the WDBCA analyzed an indemnity clause in various Pan American contracts. The contractor was seeking reimbursement for various payments to

employees for costs incurred. The contract had a clause which stated:

[T]he Government shall indemnify and hold the Contractor harmless against any loss, expense (including expense of litigation) or damage (including personal injuries and deaths of persons and damage to property) of any kind whatsoever arising out of or connected with the performance of this contract, unless such loss, expense or damage should be shown by the Government to have been caused directly by bad faith or willful misconduct on the part of some officer or officers of the Contractor acting within the scope of his or their authority and employment.  
/233/

The contractor claimed that even if the contracting officer disallowed certain costs, they would become losses and expenses directly attributable to the work under the contract. The WDBCA rejected this open-ended interpretation of the indemnity clause as untenable. The Board held that it was "the intent of the contracts ... that the Government would bear all expense of the project and to this end would reimburse appellants for all reasonable costs and expenses incurred." /<sup>234</sup>/ The Board interpreted the indemnity clause to mean the government agreed to reimburse "losses and expenses incident to the performance of the work in accordance with the provisions of the contracts and not losses and expenses incurred . . . as a result of acts in disregard of such provisions." /<sup>235</sup>/ Thus, the government would indemnify the contractor if the costs were reasonable, were in accord with the contract provisions, and were incident to the performance of the contract work.

The WDBCA considered two other appeals by Douglas in which the issue of costs being "incident to and necessary to the performance of the contract" was raised. The cases are of interest in part because they used language similar to that found in both the Ford and Consolidated contracts. The Douglas contracts included "Article 3 - Consideration" in which TD 5000, § 26.9 was incorporated by reference. In one case, Douglas appealed a denial by the contracting officer to reimburse the cost of circular stickers with the company's logo on them for use by employees. /<sup>236</sup>/ The Board held the cost should be reimbursed because the use of the stickers was to assist employees in labeling their tools and to promote employee loyalty and morale. As such, the proper proportion of indirect costs were "incident to and necessary for the performance of the contract." under TD 5000, § 26.9(a)(2). /237/

In another case, attorneys fees in defense of a tort action filed against Douglas by one of its employees were not considered necessary to the performance of the contract. <sup>/238/</sup> In that case an employee filed a tort action against a fellow employee and Douglas after the plaintiff's tool chest was broken into and his patented blueprints were stolen by the fellow employee. The contract included special definitions of cost items in Article 3 including subparagraph (1) covering the following cost: "[c]ost and expenses incurred in the defense and/or discharge of such claims of others on account of death or bodily injury of persons or loss or destruction of or damage to property as may arise out of or in connection with the performance of the work under this contract." <sup>/239/</sup>

The Board held the lawsuit was not instituted as a result of bodily injury, death, or property damage involving a member of the public or an employee, therefore subparagraph (10) was inapplicable. The Board also held that TD 5000, § 26.9 contained no special provision covering the cost of defending lawsuits growing out of, or occurring during, the performance of a contract. If the cost was reimbursable at all, it needed to fall under the general rule of §26.9(b) covering indirect costs incident to and necessary for performance of the contract.

Douglas cited the broad language of the Comptroller General's decision regarding CPFF contracts. The Board rejected Douglas' argument that the defense of the lawsuit arose out of the contract performance, holding the circumstances of the tort had no relationship to performance of the contract, but only coincidentally occurred while the contact was being performed. <sup>/240/</sup> The Board concluded: "[attorneys fees were actually] overhead expenses, compensation for which, in the absence of a specific provision to the contrary, is to be assumed to be included in the fixed fee and thus not to be reimbursed as part of the cost of the work." <sup>/241/</sup>

The Contract Settlement Act, § 13 established the Appeal Board of the Office of Contract Settlement (ABOCS) charged with hearing and deciding appeals under the Act. <sup>/242/</sup> The ABOCS only had jurisdiction over terminated war contracts, hearing a total of 280 appeals from 1945 to 1953. A party could appeal the ABOCS decision by appealing to the United States Court of Claims or the United States District Court (for claims of \$10,000 or less). <sup>/243/</sup>

The ABOCS did not specifically decide any cases interpreting the indemnity provision of § 20(a)(3) of the



Contract Settlement Act. <sup>/244/</sup> The issue was discussed indirectly, however, in claims where the issue of release in settlement agreements was presented. The issue arose in cases where contractors sought reimbursement for excess unemployment compensation taxes following World War II.

In *United States Rubber Company v. Department of the Army*, <sup>/245/</sup> the contractor was denied reimbursement for unemployment compensation taxes in 1945 prior to the settlement agreement. Following the settlement, the Court of Claims held that such claims would be allowable. <sup>/246/</sup> The government agreed the cost was reimbursable, but that it was barred by the terms of the settlement agreement release. The release included an exception for "covenants of indemnity." The contract contained a clause in which the government agreed generally to: "[i]ndemnify and hold the contractor harmless against any loss, expense (including expense of litigation) or damage (including personal injuries and deaths of persons and damage to property) of any kind whatsoever arising out of or connected with the performance of the work." <sup>/247/</sup> The contract also had a specific clause in which the contractor was to be reimbursed for "disbursement on account of personnel." The Board held that:

Since the parties have described the liability for the instant claim with particularity, that liability cannot also be found under the general clause even though in the absence of the specific clause the general would have covered it. (*Mutual Life Insurance Co. v. Hill*, 193 U.S. 551.) We therefore hold that the claim is not a right under the contract article applicable to "covenants of indemnity" and that it is not saved by any exception in the release. <sup>/248/</sup>

Thus, the Board concluded that the release exception for "covenants of indemnity" would have allowed the indemnity clause to survive the settlement agreement, if there had not been more specific language which was not included in the release.

In *Stewart-Warner Corporation v. Department of the Army*, <sup>/249/</sup> the contractor sought reimbursement for similar "excess taxes." The issue was whether the so-called "unknown claims" clause exception to the release would allow for reimbursement. The clause stated: "claims by the Contractor against the Government which are based upon the responsibility of the Contractor to third parties and which involve costs reimbursable under the Contract, but which are not now known to the Contractor." <sup>/250/</sup> The Board held that the future excess taxes were an "unknown responsibility

which was excepted from the settlement agreement by the "unknown claims" clause. It reasoned that the possibility of excess taxes depended upon many variable factors, none of which could have been determined with "reasonable certainty" when the settlement agreement was signed. /251/

A case which held the release was final was National Gypsum Company v. Department of the Army, /252/ relying on the fact that the release language was specific as to anticipated taxes in certain future years, but failed to list a certain year. The Board held that the "unknown claims" clause failed to save the omitted year because the taxes could have been anticipated (and treated as known) in the same way taxes were estimated for the excepted years. /253/

The burden of proof in a claim regarding the release clause was held to be upon the party relying on it. Thus, when the government had to show the asserted claim was covered by the release, it also had to show that the claim was not within the exception. /254/

The Board also held that a party may seek a reformation of the settlement agreement based on a mutual mistake, but the party seeking such reformation had the burden to prove that (1) the parties would have made a different settlement had they known the true facts; and (2) the parties assumed the liability did not exist and entered into the settlement agreement based on that assumption. The matter of the mistake must have been a basic assumption of the settlement, otherwise the party seeking reformation was considered to have taken "the risk that it was not liable to pay [the expense], and the claim for reimbursement of such cost was therefore released." /255/

The Board also decided a number of cases dealing with cost reimbursement under terminated war contracts. In a leading early decision, Studebaker Corporation v. War Department, /256/ the ABOCS established its jurisdiction to determine cost reimbursement claims. In that case, the Board allowed a claim for legal fees and expenses incurred on a completed part of a terminated CPFF contract, refusing to follow the Comptroller General's position that legal fees are not a reimbursable cost under CPFF contracts. /257/

The ABOCS interpreted the TD 5000 language regarding the reimbursability of costs "incident to and necessary for the performance of the contract" in various cases. In Hudson Motor Car Company v. Navy Department, /258/ the Board held that expenses of employees who organized a band at the

contractor's plant were reimbursable, the Board held that they were "employees' welfare expenses" instead of nonreimbursable entertainment expenses. The Board noted "the fact that music in a war plant in time of war contributes to employee's welfare and consequently to war production is too well established to require demonstration ." /259/ The Board concluded that the words "necessary for the performance" in TD 5000 should not be construed literally in determining the intent of the draftsmen of TD 5000. /260/

These cases indicate the ABOCS relied on the principles articulated in the Comptroller General's decisions, WDBCA opinions, as well as TD 5000 and TM 14-1000 for their analysis. The ABOCS, however, was not reluctant to act independently, according to their own charter, in determining whether costs were "necessary for contract performance" and were otherwise intended to be reimbursable.

The Court of Claims had jurisdiction to hear claims arising out of the Contract Settlement Act under § 13(b). /261/ The Claims Court decided over 100 cases referencing the Contract Settlement Act, but no case ever interpreted § 20(a)(3) regarding indemnity. /262/ Several cases did address the issues of releases in the settlement agreements and reimbursable costs.

In the case of Federal Cartridge Corporation v. United States, /263/ the Court of Claims decided a claim by a small-arms manufacturer seeking reimbursement under a War Department contract. The contractor was required to pay excess Minnesota state Social Security taxes because its payroll exceeded a certain limit as a result of its war contract. /264/ The CPFF ordnance contract provided for reimbursement under the standard indemnity clause language in which the government agreed to: "[h]old the [c]ontractor harmless against any loss, expense . . . or damage of any kind whatsoever arising out of or in connection with the performance of the work under the contract ." /265/ The Court held that the contractor was to be reimbursed in full because the excess tax was an expense "incident to carrying out [the] contract, and under its plain terms." /266/ Although the claim was not based on the Contract Settlement Act, it set a precedent for a number of Contract Settlement Act claims decided by the ABOCS in 1949 and 1950 on similar issues with state "excess taxes." /267/

One of the claims relying on Federal Cartridge was United States Rubber Company v. United States. /268/ The ABOCS originally heard the claim in 1951 and held against the contractor. The Board relied on the Green Book

principles in determining costs as was provided for in the Navy Department ordnance contract. The Board concluded that the excess North Carolina state unemployment taxes were not "properly chargeable" to the CPFF contract because they occurred well after contract termination and therefore, were not in the "performance of the contract ." /269/ The contractor then filed suit with the Court of Claims.

The Court addressed two issues: (1) whether the release provisions of the final settlement barred the contractor's recovery; and (2) if not, whether excess taxes claimed were reimbursable costs under the contract. /270/ The Court noted the settlement agreement contained the "unknown claims" clause and held that the clause did not bar subsequent claims because the contractor lacked knowledge of the information required to determine whether a tax was owed in later years. /271/ The Court cited a memorandum of the War and Navy Departments that interpreted the "unknown claims" clause under the JTR. It stated:

[I]t is the position of the War and Navy Departments that a claim will not be considered as "known to the contractor" within the meaning of this provision where such claim against the Government is based upon a claim of a third party against the contractor and where (a) the claim of the third party arose in connection with performance of the contract as distinguished from its termination and (b) the claim of the third party- has not been asserted against the contractor up to the time of the settlement agreement. This interpretation is not intended to indicate the only cases which may properly be considered as falling within the exception, but merely to indicate that at least under the circumstances stated the claim will not be considered as "known to the contractor" at the time of settlement. /272/ (emphasis added)

This opinion indicates that the claim must have arisen during contract performance and had not been asserted until after settlement. It did not answer the question whether a claim could have arisen after the settlement and yet still be considered to have arisen in connection with performance of the contract. The Courts opinion on the issue of cost reimbursability indicates that this was possible so as to allow a claim to fall within the exception.

The Court went further and reversed the ABOCS decision holding that the excess taxes were reimbursable discounting the "properly chargeable" limitation as inapplicable in this case. The Court held that the taxes were "incident to and necessary for" contract performance. The Court reasoned:

It cannot be questioned that performance of the contract necessitated the hiring of adequate personnel, that payment of tax contributions on their taxable wages was necessitated by the laws of the State, and that contract termination made necessary the discharge of employees and produced the consequential effect on plaintiff's reserve account giving rise to a condition depriving plaintiff of the lower tax rates in 1948 and 1949 that it otherwise would have enjoyed. The causal effect of the contract in producing, through successive stages, the result complained of cannot be denied and is not diluted by the intervention of time. The payment of excess taxes was a derivative necessity, one which resulted as a direct consequence of having taken action which was necessary to perform the contract. /273/ (emphasis added)

This language is helpful precedent when applying the cost principles to other post-settlement expenses such as environmental cleanup costs, that, it can be argued, resulted from performance of the contract.

A third case, *Houdaille Industries, Inc. v. United States*,<sup>/274/</sup> with similar issues was filed with the Court of Claims after the ABOCS was abolished on January 13, 1953. /275/ The contractor in this case also was subjected to excess unemployment taxes that it incurred from its government contract operations following the contract termination on November 21, 1945. The CPFF contract was for the operation of a plant for the production of "highly secret [classified] materials" under direction of a contracting officer of the Manhattan Project.<sup>/276/</sup> The contract included a reimbursement clause which stated "the cost of losses or expenses not compensated by insurance or otherwise ... actually sustained by the Contractor in connection with the work and found . . . to be just and reasonable unless reimbursement therefor is expressly prohibited. /277/ The government argued that the taxes should not have been reimbursed because they were incurred after the contract had expired. The Court held this argument was without merit and followed the ABOCS decisions in *Certain-Teed* and *Hercules*<sup>/278/</sup> in extending the Federal Cartridge holding when it stated:

The expenses arose on account of plaintiff's operation under the contract and the fact that the amount of the expenditures could not be determined until after performance under the contract had been fulfilled makes them no less reimbursable.

. . . .

[S]o long as the expenditure arose on account of the contractor's performance under the contract, and the expenditure is not otherwise excluded from payment by other provisions, the mere fact that liability cannot be determined until after the termination or completion date of the contract is no reason to penalize the contractor to the extent of its subsequent payments which are attributable to the Government contract. /<sup>279/</sup>

The Court of Claims decisions seem to be in accordance with the ABOCS decisions in allowing claims to be reimbursed which were unknown at the time of the settlement agreement and release and which otherwise were "incident to and necessary for" contract performance. None of the cases, however, dealt with claims which arose decades after termination such as in the Ford and Consolidated cases.

#### E. The Indemnification Theory As Applied

On January 20, 1994, Ford Motor Company notified the United States Air Force (hereinafter "Air Force") that Ford had been named as a PRP in 1988 by the EPA under CERCLA and given the opportunity to participate in a remedial investigation and feasibility study (RI/FS). /<sup>280/</sup> The letter also notified the Air Force that Ford had received notice in July 1993, that the EPA was planning to conduct an engineering evaluation/cost analysis and design report in order to implement a removal action at the Willow Run Creek Site. Ford stated that the EPA action was based on environmental contamination to the Willow Run Sludge Lagoon (WRSL) and to Tyler Pond. The WRSL had allegedly received sludge from the waste water treatment plant (WWTP) located at the Willow Run bomber plant leased to Ford by the Defense Plant Corporation for manufacture of B- 24 bombers under CPFF contract no. W535-ac-21216 during World War II. /<sup>282/</sup> Tyler Pond allegedly received treated waste water that had been discharged from the WWTP, a sanitary WWTP, and waters from the bomber plant storm drains and sewer. /<sup>283/</sup>

Ford cited language which was a variation of the "unknown claims" clause from the JTR. /<sup>284/</sup> The letter also referenced Article 9 of the Ford contract regarding termination containing the indemnity language prescribed in the termination articles of PR 15. /<sup>285/</sup> Ford discussed its theory of indemnification in a separate memorandum. /<sup>286/</sup> In that memorandum, Ford cited "Article 3 - Consideration" of the bomber contract that included the cost principles of TD 5000, § 26.9; incorporated by reference, as well as 14 other reimbursable cost items. /<sup>287/</sup> Ford maintained that the site

cleanup costs resulting from contract performance would be charged directly to the contract because Ford was merely complying with law, making the costs of the investigation and remediation allowable contract costs. /288/

Ford then posited that the United States had assumed and become liable for all obligations and commitments Ford incurred in performing the bomber contract, including preventing injury to the public from handling hazardous wastes generated in contract performance. Ford maintained that even without a reservations clause, the obligation the government assumed was not terminated because the government had not made any payment concerning Ford's handling of the hazardous waste, thereby triggering the release. /289/ Nonetheless, Ford also contended that he reservations and exceptions in the initial settlement agreement allegedly made in 1946 included an "unknown claims" clause. Under Ford's interpretation of the language, the claim must, at a minimum: (1) involve costs reimbursable under the contract; (2) be based on the contractor's responsibility to third parties; and (3) not be known to the contractor at the time of settlement. /290/ Ford reasoned:

[S]ince under Article 9(b)(1) . . . the Government assumed and became liable for all obligations, commitments and claims that Ford may have undertaken or incurred in connection with the contract work, costs required to remedy such contract work are encompassed within the meaning of "costs reimbursable under the contract." /291/

Ford concluded by contending that third parties are those who have an interest in the cleanup including the State of Michigan and Wayne County, Michigan. Finally, Ford asserted that at the time of the settlement agreement in 1946, it was not aware of the nature of any hazardous waste liability, thereby satisfying the unknown claims element of the reservation to the release. /292/

Ford did not produce a copy of the settlement agreement with the actual language. It did provide the Air Force with a copy of its consolidated lumpsum settlement proposal. /293/ In that proposal Ford stated:

SECTION XI: UNKNOWN THIRD PARTY AND EMPLOYEE CLAIMS

. . . .

There are other situations existing in connection Ford's war work which may give rise to the

presentation of claims by third parties or employees but which have not yet and may never, reach the stage of actual assertion against the Company. Under the above circumstances, all of the costs associated with the Company's CPFF contracts have not as yet been determined. The contractor has no control over the number and character of claims which may be asserted and reimbursed under the reservations under consideration. Accordingly, Ford knows of no sound basis at this time on which to predicate an offer in settlement.

. . . .

#### SECTION XIII: STANDARD RESERVATIONS

6. Rights and liabilities of the parties under Contract articles, if any, applicable to options, covenants not to compete, covenants of indemnity, and agreements with respect to the future care and disposition by the Contractor of Government-owned facilities remaining in his custody. <sup>/294/</sup>

Based on the language in this proposal, Ford asserted that its responsibility to third parties was not released by the consolidated settlement agreement.

Finally, Ford contended that there is no statute of limitations preventing it from now seeking indemnification. Ford relies on the Contract Disputes Act for the proposition that the six-year Statute of Limitations for actions before the Court of Federal Claims does not apply after the contractor elects to proceed under the Contract Disputes Act. <sup>/295/</sup>

The theory of indemnification' articulated by Ford is still in the form of a notice of claim to the successor contracting officer. It is likely that Ford will bring suit in the Court of Federal Claims or before the Armed Services Board of Contract Appeals. <sup>/296/</sup>

General Dynamics' theory of indemnification is articulated in its third-party complaint involving the Tucson International Airport Area Superfund Site (the "Tucson Site"). <sup>/297/</sup> General Dynamics alleged that pursuant to the First War Powers Act, the War Department issued procurement regulations establishing uniform termination and assumption of risk clauses for war contracts. Such regulations allegedly provided war contractors with "broad protection against economic risks" and "needed incentives for contractors to bid on war contracts." <sup>/298/</sup> General



Dynamics also alleged that under the Contract Settlement Act, Congress provided war contractors with "fair compensation" upon contract termination. General Dynamics alleged:

Where the amount of fair compensation for a particular cost or potential cost was undeterminable at the time of contract termination, the government had the authority either to assign a value to such cost, subject to the contractor's statutory right of appeal, or to assume the contractor's liability for such cost. Id. § 20(a)(3).... In either case, Congress required that the government's agreement to provide such compensation would be scrupulously honored by officers agents, and employees of the Government. See id. § 3(m), 6(c). /<sup>299</sup>/

The complaint alleged further that the CPFF Modification Center contract that Consolidated had entered into with the Army Air Forces contained the standard indemnity language provided for in PR 15. /<sup>300</sup>/ General Dynamics further alleged that under the Contract Settlement Act, the CPFF Modification Center contract was modified slightly to require the war contractors to mount their own defense, and then seek reimbursement from the government. /<sup>301</sup>/ General Dynamics also alleged that "unless the Government modified its assumption of liability obligations before termination of a particular war contract, however, it was forever precluded from doing so. /302/

Regarding Consolidated's CPFF contract, General Dynamics alleged that in "Article 3 - Consideration" it contained the expenses incurred in defense of third party claims as allowable costs. /<sup>303</sup>/ The CPFF contract also included indemnity language in "Article 9 - Termination of Contract By Government." /304/ General Dynamics alleged that Article 9 was incorporated by reference in the government's termination notice closing the Tucson Modification Center and releasing funds for final payment. General Dynamics alleged such notice constituted a settlement of a termination claim within the meaning of the Contract Settlement Act, § 6(c). According to General Dynamics, the assumption by the government became final and conclusive within the meaning of the Contract Settlement Act, §§ 3(m) and 6(c) upon expiration of Consolidated's rights of appeal under the Contract Settlement Act § 13. /<sup>305</sup>/ As a result, "the United States irrevocably assumed all obligations and liabilities arising out of work performed by Consolidated" under the contract and responsibility to defend Consolidated and pay for all related costs. /<sup>306</sup>/

General Dynamics asserted that because of the indemnification under the terminated contract whereby the United States "assumed all liability for all claims", General Dynamics proceeded to notify the Air Force of EPA's groundwater remediation claim. General Dynamics alleged it advised the government it was responsible for defending General Dynamics and for any other obligation of EPA's claim. /307/ General Dynamics also alleged that in 1991 the PRPs at the Tucson Superfund Site entered into a Consent Decree (of which General Dynamics was not a party) agreeing to finance cleanup actions. Thereafter, the Tucson Airport Authority filed the contribution action against General Dynamics. /308/ Also in 1991, EPA notified General Dynamics of the soil remediation claim about which General Dynamics alleged it notified the government demanding the United States defend General Dynamics. /309/ General Dynamics further alleged that Hughes Aircraft Company was sued in tort by private individuals claiming injuries resulting from the water contamination. Hughes thereafter filed a third-party action against General Dynamics for which General Dynamics also demanded the government to defend it. /310/

Under its action, General Dynamics sought a variety of remedies in District Court. It sought declaratory and injunctive relief compelling the United States to "defend General Dynamics in the pending actions, and to indemnify the company for all liabilities, costs and expenses arising from these actions." /311/ Particularly, it alleged violations of the Contract Settlement Act, the Administrative Procedure Act, /312/ constitutional violations under the Public Debt Clause, the Fourteenth Amendment Due Process Clause, and the Fifth Amendment Takings Clause, a claim for mandamus relief under 28 U.S.C. § 1361, breach of contract, and for contribution under CERCLA. /313/

In April 1996, the District Court granted the United States' motion for partial judgment on the pleadings. Without reaching the merits of the case, the Court held in all but two counts that the United States had not waived sovereign immunity for General Dynamics' claims in federal district court. The Court wrote, "The Tucker Act vests in the Court of Federal Claims exclusive subject matter jurisdiction over federal contract claims exceeding \$10,000." /314/ The Court concluded that the various claims by General Dynamics were really contract-based claims and therefore should be brought in the Court of Federal Claims. /315/ Therefore, the issues related to indemnification under the Modification Center contract have yet to be decided.

The indemnification theory as postulated by Ford and General Dynamics is based primarily on the authority to indemnify found in § 20(a)(3) of the Contract Settlement Act. It also relies on the settlement and termination language in the Joint Termination Regulation and Procurement Regulation 15. The JTR settlement language contemplated claims which would survive the settlement release, including claims by third parties and "covenants of indemnity." The predecessor to the JTR was PR 15, that also recognized exceptions to the release, including claims subject to future litigation. It also expressly provided a standard termination clause in which the government was to "assume and become liable for" claims the contractor may have incurred under the contract.

Linked to the indemnification clause was the requirement that the contractor be reimbursed only for allowable costs as provided for in Article 3 of the contract. Reimbursable costs were determined by the contract and cost principles derived from TM 14-1000, TD 5000, § 26.9, and the Green Book. In TM 14-1000, the exception for unknown claims upon settlement was specifically recognized. A key principle, however, was the requirement that all costs were to be incident to and necessary for contract performance.

The issues of indemnification and cost reimbursability in CPFF contracts were the subject of various decisions by the Comptroller General, the War Department Board of Contract Appeals, the Appeals Board of the Office of Contract Settlement, and the Court of Claims. They all reiterated the principle that cost reimbursement is based on rights and obligations under the contract with the key test being whether the expense was "incident to and necessary for" contract performance. The Court of Claims and the ABOCS decided several cases regarding reservations to the release as they applied to excess taxes incurred following settlement. The central issue in those cases was whether the taxes were incurred in the performance of the contract.

The theory as applied to the Ford and General Dynamics cases is similar. In Ford's reliance on the contract clauses, it argues that its costs are reimbursable, were based on its responsibility to third parties, and survived the settlement release. General Dynamics also argues its costs were reimbursable because under Article 3 of the contract, expenses incurred in defense of third party claims are allowable. It also relied on the indemnity language in

Article 9 whereby the government agreed to assume the contractor's liability obligations. Both Ford and General Dynamics contend that their CERCLA liabilities fall under the indemnity clause of their respective World War II-era contracts.

## VI. POTENTIAL BARRIERS AGAINST RECOVERY

In order for a contractor to prevail on a theory of recovery based on indemnification under a World War II-era government contract, it must overcome several barriers. First, and foremost is the obstacle of the Anti-Deficiency Act.<sup>/316/</sup> In order to prevail on this issue, the contractor will need to establish that the prohibition against obligating funds in . advance of appropriations in the form of an open-ended indemnification agreement was excepted by Congress under either the First War Powers Act or the Contract Settlement Act. A second obstacle is the issue of whether, the cost is reimbursable under the terms of the contract. Particularly, since the claims for environmental cleanup were made more than 40 years after the contract settlement itself, the question is raised whether a claim can arise after the contract performance is complete. Another issue related to cost reimbursability is liability insurance and whether the contractor should have obtained such insurance to cover environmental liability. A final issue is the question of finality of the settlement agreement and the effect of the release. These issues will be addressed, as well as, an assessment of the strength of both the Ford and General Dynamics' claims for indemnification of current environmental cleanup costs.

### A. Anti-Deficiency Act

The starting point for any discussion of the Anti-Deficiency Act is the Appropriations Clause in Article 1, Section 9, Clause 7 of the United States Constitution. It requires that "no money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . "<sup>/317/</sup> This clause flows from the basic "power of the purse" granted in Article I, Section 8, authorizing Congress to "pay the Debts and provide for the common Defence and general Welfare of the United States; . . . [and] to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.. . ."<sup>/318/</sup>

The pertinent section of the Act concerning limitations on spending and obligating funds currently reads:

§ 1341. Limitations on expending and obligations amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia Government may not-

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or  
(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. /<sup>319</sup>/

To summarize the significance of the Act, it is considered the "cornerstone of Congressional efforts to bind the Executive branch of government to the limits on expenditure of appropriated funds set by appropriation acts and related statutes. /<sup>320</sup>/

The courts and the Comptroller General have generally determined that when a contracting officer agrees to open-ended liability under a contractual indemnification agreement, he has violated the Anti-Deficiency Act. /<sup>321</sup>/ The Comptroller General issued an opinion regarding the use of the "InsuranceLiability to Third Persons" clause in federal cost-reimbursement supply and research and development contracts. /<sup>322</sup>/ In reversing a 40-year practice of using the clause, the Comptroller General stated:

[T]he accounting officers of the government have never issued a decision sanctioning the incurring of an obligation for an open-ended indemnity in the absence of statutory authority to the contrary. This line of cases stretches back to the days before this Office came into existence. In 15 Comp. Dec. 405 (1909), the Comptroller General's predecessor ... said: Under the [Anti-Deficiency Act]; no officer of the Government has a right to make a contract on its behalf involving the payment of an indefinite and uncertain sum, that may exceed the appropriation and which is not capable of definite ascertainment by the terms of the contract, but is wholly dependent upon the happening of some contingency, the consequences of which cannot be defined by the contract. The line of decisions applying this general principle stretches, unbroken, right up to the May 3 decision at issue. [citations omitted]. /<sup>323</sup>/

Thus, the Anti-Deficiency Act is clear in its prohibition against indemnification agreements which obligate the government to a contingent liability in an indefinite amount.

The Act, however, does allow for such agreements if they are authorized by another statute. <sup>/324/</sup> The Claims Court reviewed the issue in *Johns Manville Corporation v. United States*, <sup>/325/</sup> regarding contractors' claims for indemnification under World War II-era shipbuilding contracts for the United States Navy. In that case, the government argued that the Anti-Deficiency Act prohibited the contractors' indemnification for former employees' for asbestos-related injuries that the contractors became obligated to pay. The Court concluded:

[The Anti-Deficiency Act] ordinarily prohibits the Government from including indemnity agreements in its contracts that might subject the Government to unlimited liability. [citation omitted]. The few situations in which the Comptroller General has permitted exceptions were narrowly drawn and based on factual circumstances that do not lend themselves particularly to favorable comparison with the instant case. <sup>/326/</sup>

Although there are no federal laws that provide generally for indemnification for government contractors, a number of statutes since World War II provide for indemnification in government contracts under specific circumstances. <sup>/327/</sup>

Public Law 85-804 is probably the broadest grant of authority by Congress to the President to indemnify government contractors. The statute was implemented by Executive Order 10789 and gives various departments and agencies the authority to grant extraordinary contractual relief to facilitate national defense. <sup>/328/</sup> This Act succeeded the First War Powers Act <sup>/329/</sup> which expired on June 30, 1958. <sup>/330/</sup>

Like the First War Powers Act, Public Law 85-804, as implemented by Executive Order 10789, limited relief to "the amounts appropriated and the contract authorization provided therefor. <sup>/331/</sup> It was not until Executive Order 11610 was issued in 1971 that the President provided for specific indemnification beyond appropriated amounts. It stated that the limitation to relief under Public Law 85-804 "shall not apply to contractual provisions which provide that the United States will hold harmless and indemnify the

contractor against any of the claims and losses." /<sup>332/</sup> It further provided, however, that the indemnification exception only applied to "risks that the contract defines as unusually hazardous or nuclear in nature. /<sup>333/</sup>

Public Law 85-804 as implemented also provides further limitations. A clause may be included in a contract that is entered into, amended or modified in accordance with the Act, but only after the agency head has considered various factors such as "self-insurance, other proof of financial responsibility, workers' compensation, insurance, and the availability, cost and terms of private insurance." /<sup>334/</sup> Though the indemnification clause is broad, in scope covering claims by third parties for death, personal injury, property loss or damage, as well as contractor or government property damage, it nonetheless contains the following limits:

This indemnification applies only to the extent that the claim, loss, or damage (1) arises out of or results from a risk defined in this contract as unusually hazardous or nuclear and (2) is not compensated for by insurance or otherwise. Any such claim, loss, or damage, to the extent that it is within the deductible amounts of the Contractor's insurance, is not covered under this clause. If insurance coverage or other financial protection in effect on the date the approving official authorizes use of this clause is reduced, the Government's liability under this clause shall not increase as a result. /<sup>335/</sup>

Limitations are also found in the other statutes providing for indemnity. The Price-Anderson Act, /<sup>336/</sup> covering nuclear accidents, was originally enacted in 1957 and, though amended during the last 40 years, is still in existence. It provides for indemnification as part of a system for liability recovery for the nuclear energy industry combining insurance and government indemnification. /<sup>337/</sup> The Act sets up a four-tier system of recovery relying on private insurance, a deferred premium insurance from a pool of other licensees, a recovery ceiling of \$7.4 billion for injured parties due to a nuclear incident, and government indemnification. Government indemnity only covers losses above the other insurance mechanisms. Under the current plan, there is no authorization for payment above the current recovery ceiling. /<sup>338/</sup>

Under 10 U.S.C. § 2354, government contractors with military departments performing research or development contracts may be indemnified for uninsured third-party

claims and contractor's loss of property, involving "unusually hazardous risk." /339/ The clause for use in cost-reimbursement contracts provides for claims similar to Public Law 85-804, but provides some limitations. /340/

These statutes and clauses represent exemptions to the Anti-Deficiency Act. The intent to provide for indemnification, and the limitations thereof, is clearly manifested by the respective statutes, and the implementing Executive Orders, and regulations.

In order for indemnification agreements based on the First War Powers Act and the Contract Settlement Act to satisfy the requirements of the Anti-Deficiency Act, they must either be limited to available appropriations or there must be express statutory authority allowing for such indemnification. In the case of World War II-era contracts otherwise settled 50 years ago, the appropriations for the contracts would have long since expired. /341/ The other possibility then is to find express statutory authority for indemnification.

In Title II of the First War Powers Act, Congress authorized the President (or any department or agency involved in the prosecution of the war effort) to "enter into contracts and into amendments or modifications of contracts without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts" in order to facilitate the prosecution of the war. /342/ This language is similar to that found in Public Law 85-804. /<sup>343</sup>/ Executive Order 9001 implementing the First War Powers Act differs substantially from those implementing Public Law 85-804. In Title I of Executive Order 9001, the delegation of authority to the War and Navy Departments was subject to the "limits of the amounts appropriated therefor to enter into contracts and into amendments or modification of contracts heretofore or hereafter made." /<sup>344</sup>/ The Claims Court, in discussing the Anti-Deficiency Act in the Johns Manville case, addressed the issue of statutory authority for indemnification under the First War Powers Act and Executive Order 9001. It stated:

[T]he Executive Order authorized [the War and Navy Departments] to exercise this contracting power only "within the limits of the amounts appropriated therefor." The effect of this limitation was nearly identical to that of the ADA [Anti-Deficiency Act]. Just as the ADA prohibited government officials from



spending or obligating an amount in excess of appropriations for the particular purpose, the language of the Executive Order delegated this broad power to make or amend contracts only insofar as the exercise of that power did not exceed the amounts appropriated for those contracts. Just as an indemnity agreement exposing the Government to potentially unlimited liability would create an obligation in excess of appropriations (a violation of the ADA), the same agreement would be an exercise of the power to make or amend contracts that goes beyond "the limits of the amounts appropriated therefor" (and therefore is an action not authorized by the Executive Order). Since the combined effect of the First War Powers Act and Executive Order 9001 was to free the ... government entities . . . from the constraints of contract law provisions such as the ADA, the inclusion of indemnity agreements in Johns-Manville's contracts would not be violations of the ADA by the government contracting officials. Rather, they were actions beyond the scope of the legal authority of the officials to obligate the Government. Such actions do not bind the Government to contracts so entered or amended. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384, 92 L. Ed. 10, 68 S. Ct. 1 (1947); *Gratkowski v. United States*, 6 Cl. Ct. 458, 461 (1984). Therefore, Johns-Manville's claims based on alleged express or implied-in-fact contracts for indemnity must be dismissed as a matter of law.<sup>345/</sup> (emphasis added)

In 1943, the Comptroller General reviewed a Corps of Engineers' contract involving the "Manhattan Project." The contract cited the First War Powers Act as authority and included a broad indemnity agreement providing:

[I]t is agreed that all work under this contract is to be performed at the expense of the Government, and that the Contractor shall not be liable for, and the Government shall indemnify and hold the contractor harmless against, any delay, failure, loss, expense (including expense of litigation) or damage (including personal injuries and deaths of persons and damage to property) of any kind and for any cause whatsoever, arising out of or connected with the work; ... that the Government shall assume and carry on the defense of all claims, suits, or legal proceedings which may be asserted or instituted against the Contractor on account of acts or omissions in the performance of the work; and that the Government shall pay directly and discharge

completely all final judgments entered against the Contractor in such litigation and all claims which may be settled by agreement approved by the Contracting Officer. <sup>/346/</sup>

The Comptroller General determined that the indemnity clause was permissible due to the approval by the President under the First War Powers Act, that the contractor was to receive a fixed fee of only \$1.00, and because of the "unusual and abnormal conditions" under which the contract work was to be performed, but only "to the extent funds may be available therefor." <sup>/347/</sup> This opinion is consistent with the limitation on funds set forth in Executive Order 9001. Based on the analysis of this opinion and that found in the Johns-Manville case, it is clear the First War Powers Act fails as express statutory authority so as not to violate the Anti-Deficiency Act.

The Contract Settlement Act is more explicit than the First War Powers Act and Executive Order 9001 in providing express statutory authority for government officials to enter into indemnification agreements, but it also fails to satisfy the Anti-Deficiency Act. Section 20 (a)(3) of the Contract Settlement Act expressly states that agencies have authority in settling termination claims "to agree to assume or indemnify the war contractor against any claims by any person in connection with termination claims or settlement." <sup>/348/</sup>

Section 22 of the Act provides the funding mechanism in the use of appropriated funds. It authorizes any contracting agency to "use for . . . the payment of claims . . . any funds which have heretofore been appropriated or allocated or which may hereafter be appropriated or allocated to it or which are or may become available to it, for such purposes or for the purposes of war production or war procurement." <sup>/349/</sup> This section indicates that claims for indemnification were limited to the extent of funds either appropriated or available to the contracting agency for the payment of claims or war production or procurement. Indemnity was not open-ended. Whatever funds were appropriated for those purposes have long since expired.

There is no legislative history expressing congressional intent regarding the limitations, if any, to the indemnification or to the funding mechanism. <sup>/350/</sup> Prior to the enactment of the Contract Settlement Act, there appears to be little express statutory authority for open-ended contractual indemnity. In fact, the trend in congressional appropriations tended to be one which preferred

holding a tighter "purse string." In one area both during and after World War II, indemnification without regard to the Anti-Deficiency Act was expressly provided for. Contracts covering international short-wave radio stations included an express indemnity provision. The statute reads:

Notwithstanding the provisions of section 3679, Revised Statutes (31 U.S.C § 665) [the Anti-Deficiency Act]; the Office of the Coordinator of Inter-American Affairs is authorized in making contracts for the use of international short-wave radio stations and facilities, to agree on behalf of the United States to indemnify the owners and operators of such radio stations and facilities; from such funds as may be hereafter appropriated for the purpose, against loss or damage on account of injury to persons or property arising from such use of said radio' stations and facilities. /351/

By implication, had Congress intended to offer open-ended indemnification in the Contract Settlement Act, it would have expressly included language similar to that used above allowing indemnification without regard to the Anti-Deficiency Act. Following World War II, the congressional legislation permitting indemnification tended to be explicit about the limitations or funding mechanisms. Since the interpretation of 41 U.S.C. § 120(a)(3) would be a case of first impression in the United States Court of Federal Claims or before the Armed Services Board of Contract Appeals, the contractor seeking indemnity would need to persuade the judge that this clause is in fact an exemption to the Anti-Deficiency Act. In light of congressional mandate at the time against government officials making obligations in advance of or without appropriations, this barrier would prevent indemnification.

#### B. Reimbursable Costs

Assuming the contractor can overcome the burden of establishing the Anti-Deficiency Act would not be violated by the indemnification agreement, he would still need to prove that the costs claimed are reimbursable under the contract. The contract article covering consideration requires that allowable cost items be in accordance with TD 5000, § 26.9 and the cost principles set forth in the contract. In TD 5000, § 26.9, the costs must have been direct costs incurred "in performing the contract" and indirect costs "incident to and necessary for the performance of the contract." /352/ In the contract article covering termination, the government agreed to

"assume and become liable for all obligations, commitments and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract." (emphasis added). Furthermore, the government agreed to reimburse the contractor for all costs incurred in termination as determined by the consideration article. These clauses tend to imply costs that had already been incurred as of the date of settlement. <sup>/353/</sup>

The obvious objection by the government is that the environmental cleanup costs incurred more than 40 years after the contract termination are simply not reimbursable at all under the contract. The language in the consideration article requires the costs must have been incurred directly "in performing the contract" or were indirectly "incident to and necessary for the performance of the contract." Arguably, costs of cleanup of the environment or for tort liability occurring long after the contract itself was complete are not incurred or necessary in the performance of the contract. Rather, they resulted later as laws, such as CERCLA, were enacted requiring new standards of environmental liability which were totally unrelated to the specific performance of the contracts. The key to determining whether pre-CERCLA indemnification clauses cover post-CERCLA cleanup cost or damages depends on the specific language of the actual clauses. <sup>/354/</sup> The interpretations in various cases deciding post-termination claims is helpful.

In *Global Associates*, <sup>/355/</sup> the NASA Board of Contract Appeals held that attorneys fees and costs from the successful defense of a third party personal injury action did not result from performance of the contract. The contract contained a standard "Insurance--Liability to Third Persons" clause. <sup>/356/</sup> It also included a standard allowable cost clause which required a release upon termination. The release excepted "claims based upon liabilities of the Contractor to third parties arising out of the performance of [the] contract. <sup>/357/</sup>

In interpreting the phrase "arising out of the performance of the contract," the Board reasoned that there must have been "a relationship between the injury or liability and contract performance." The Board held:

The Government is not bound to indemnify a contractor when the facts underlying the litigation show that the contractor's actions were not in furtherance of Contract performance and the costs incurred did not benefit Contract performance. [citations omitted].

When the liability occurs both after the completion of performance and not as a direct result of contract performance, the relationship has been considered too attenuated to find indemnification for third-party liabilities. Johns -Manville Corp. v. United States, [citation omitted]. /<sup>358</sup>/

The Board determined that the claim made against the contractor arose because of the fact of performance of "a contract" with the government, but the subject of the claim did not occur "because of the performance of the contract. One of the factors considered by the Board was the fact that the injury involved occurred more than a year after the expiration of the contract. /<sup>359</sup>/

The Johns-Manville /360/ decision cited in Global Associates discussed the third-party liabilities arising from uninsured risks under CPMF contracts. The Court analyzed the "cost principles" in effect during World War II, including TD 5000, § 26.9 and the Green Book, concluding that "[l]osses suffered or payments incurred under a contractor's policy of self-insurance will be recognized only to the extent of actual losses suffered or payments incurred during performance of the contract or subcontract and properly chargeable thereto." /361/ (emphasis added). Though the claim in Johns-Manville was under a breach of warranty of specifications theory in a fixed-price supply contract, the principles of "cost of performance" appears equally applicable to a claim under an CPMF contract indemnification clause. The Court concluded:

Based on a review of the case law and evidence, it can be said that, as a general proposition, indemnification for third party liabilities may be considered a cost of performance for a breach of warranty of specifications, if the injury to the third-party occurs, or liability is incurred, incident to contract performance. The relationship between contract performance and liability become attenuated when liability occurs both after the completion of performance and not as a direct result of contract performance. In this case the relationship is too attenuated. /362/

The cases decided after World War II by the Court of Claims, the WDBCA, and the ABOCS generally dealt with costs occurring during contract performance. The "excess tax" cases, though also post-termination claims, may not be too analogous to environmental cleanup and tort liability costs. The increased taxes were directly attributable to the

increased payroll measured during the years of performance of the war contracts. The environmental cleanup costs are probably more analogous to the asbestos claims arising years after the contract, and may be considered too attenuated.

Another cost-reimbursement issue involves the requirement for the contractor to carry insurance. Article 3(b)(13) of the Ford contract allowed reimbursement for the cost of insurance carried by Ford "against liability . . . for damages because of bodily injury, including death . . . , damage . . . or destruction of property, . . . ." /363/ In addition, the Ford contract also provided that the contractor would not be reimbursed for any amount for which it would have been indemnified, but had failed to procure the proper insurance according to the contracting officer's requirements. The Consolidated contract also includes a clause in Article 3(b)(7) allowing for reimbursement of the cost of insurance as required by the contracting officer and a similar clause precluding reimbursement if the proper type of insurance as required by the contracting officer was not obtained. /364/

The contractors seeking indemnification will first need to establish that they were not otherwise indemnified by insurance and that they were not required to carry the type of insurance which would have covered the liability for which they are currently seeking indemnification. World War II-era contractors with the Navy Department were generally required to procure and maintain employers' and bodily injury liability insurance in their cost--reimbursement contracts. /365/ The precise nature of the insurance requirements will have to be determined, including whether the government intended to cover additional risks not otherwise contemplated by the parties, such as for environmental liability. /366/

### C. Finality of the Settlement Agreement

Another potential barrier against recovery for the contractors will be overcoming the finality of the settlement agreement terminating the contract. One of the basic objectives of the where there had been a complete release. /367/ The Board reversed its prior position in 1946 allowing for such appeals after final payment. /368/ Contract Settlement Act was to effect final settlements which would not be reopened except as otherwise agreed to in the settlement. /369/ The contractors presumably have the burden of proof on the issue of the right to indemnification under their respective contracts. The government then would have the burden of proof on the issue of whether the

reservations to the release in the settlement agreement apply to the contractor's indemnification claims. /370/

During and following World War II, the WDBCA decided a number of contract appeals following final payment. The general rule prior to 1946 was that neither the Secretary of War nor his representative had authority to consider appeals after final settlement of the contract and after final payment

Though the Board had jurisdiction, the Contract Settlement Act provided that where there was a "final and conclusive" settlement, it was not to be "reopened, annulled, modified, set aside, or disregarded" except as otherwise agreed to in the settlement. /371/ The JTR provided for a number of standard reservations, which were intended to remain executory after other phases of the contract were completed: /<sup>372/</sup>

The issue was presented in *American Employers Insurance Company v. United States*. /<sup>373/</sup> In that case a World War II-era contractor with the United States Maritime Commission paid workers' compensation policy premiums to American Employers, the underwriter. Following termination of the contract in 1948, the contractor assigned its rights to the underwriter. The final settlement of the contract occurred in 1950. After 1977, more than 30 claims were received by the underwriter from former contractor employers for asbestos-related injuries due to work on the World War II contract. American Employers filed suit in the Claims Court in 1982 seeking additional reimbursement under the World War II-era contract. The Claims Court held that the final settlement disposed of and released all further claims against the government because American Employers failed to show there had been any exemption for the employees claims at the time of the final settlement.

The United States Court of Appeals for the Federal Circuit affirmed the Claims Court holding that there was no evidence the settlement contained "explicit or plain" exception whatever, citing the basic purpose of the Contract Settlement Act which was to "effectuate speedy and final settlement" of wartime contracts. /<sup>374/</sup> The Court noted that the underwriter never requested that a reserve be set aside for future claims which served to show an effective release from all future claims.

The contractor seeking to litigate a claim from a decades-old war contract will need to establish that there was a plain and explicit exception to the final settlement. In Ford's case, the actual settlement agreement has not been located. The settlement proposal includes a section for unknown third-party and employees claims "which have not yet and may never, reach

the stage of actual assertion against the Company. " /375/ This appears to be an open-ended reservation for claims "in connection with Ford's war work." It was included in the settlement agreement along with the standard reservation covering covenants of indemnity in the contract. Such language, however, may not be considered plain and explicit to cover specific environmental cleanup costs and tort liability. It tends to be a very nonspecific reservation for any claims which may ever arise related to the contract. In light of American Employers, the Claims Court may strictly construe such language as not being explicit enough.

The Supplemental Settlement Agreement to Consolidated's contract includes the standard release language excepting: "The rights and liabilities of the parties under the articles, if any, in the contracts applicable to ... covenants of indemnity." /376/ The covenant of indemnity arguably refers to the clause in Article 9(b)(1) /377/ in which the government agreed to "assume and become liable for all obligations, commitments and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with" the contract. Strictly construing this covenant of indemnity so as to make it plain and explicit, it may be limited to obligations, etc., which were in existence at the time of the release, although unknown. Obligations which did not arise until the 1980s may be considered beyond the mutual intent of the parties of the release.

## VII. CONCLUSION

The bases for environmental liability under CERCLA has become well-established as a result of litigation over the last 15 years involving issues of "owner, operator, and generator," as well as contribution among potentially responsible parties. The question of liability of the Federal Government as an "owner, operator, or generator" of hazardous waste at contractor-operated sites dating back to World War II has also received attention in recent years as the courts have delved into the issue of government control of war-time contractor operations. The question of Federal Government liability under a contractual indemnification agreement included in World War II-era government contracts has yet to be decided.

This article has reviewed the theory of liability based on the indemnification clauses found in World War II-era cost-plus-fixed-fee contracts. Historically, war procurement contracts were made with the goal of expeditious procurement through the Federal Government exercising maximum control over the nation's industrial base. Because of the uncertainties accompanying a war-time environment, war contracts,



particularly armament production contracts, were frequently made as cost reimbursement contracts. At the conclusion of hostilities of both wars, the contracts were terminated in an equally swift manner.

The World War II-era contracts included termination clauses containing indemnification language. Were the contracts containing these "indemnification clauses" meant to be open-ended? On their face, the clauses providing that the United States agreed to assume liability for third-party claims against the war contractors in connection with the contract appear to be clear and straightforward. They do not appear to be limited either as to time or the nature of the claims covered. However, there are several problems against contractor recovery. The major obstacle involves the intent of Congress in enacting the Contract Settlement Act terminating contracts containing open-ended indemnification clauses. Such language may be limited by the Anti-Deficiency Act because it does not appear likely that Congress intended contracting agencies to offer such open-ended indemnity. Historically, Congress has been reluctant to allow the Executive branch to obligate funds beyond Congress' control of the "purse." Additionally, the environmental costs claimed occurred well after the war was concluded and the contracts completed. To be reimbursable, the costs must arise out of the performance of the contract. Recent case law involving both asbestos and Agent Orange litigation suggests that costs occurring decades after contract completion may be considered too attenuated to have arisen from performance under the World War II-era contracts. Finally, the release in the settlement agreements may prevent recovery because the reservations, when strictly construed, were not explicit enough to exempt future environmental cleanup costs from settlement.

These problems will likely be litigated in determining the extent of the assumption of risk between the United States and the war contractors stemming from the conflict that raged more than a half century ago. The sharing of the liability under the CERCLA contribution theory is possible in both the Ford and General Dynamics cases following the FMC. /378/ analysis. The answer to the question of assumption of risk under the indemnification theory, however, will determine whether environmental cleanup of contractor operations will be considered a cost of World War II shifted entirely to the shoulders of the United States, and thus society as a whole, under the contract indemnification clauses.

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<sup>1</sup> 42 U.S.C. §§ 9601-9675 (1994).

<sup>2</sup> See generally, Note, Van S. Katzman, *The Waste of War: Government CERCLA Liability at World War II Facilities*, 79 VA L. REV. 1191 (1993).

<sup>3</sup> A recent General Accounting Office report estimated that the cost of cleaning up just federal hazardous waste sites could run up to \$400 billion. See \$400 Billion Toxic Cleanup Bill, WASH. POST, July 18, 1996, at A25.

<sup>4</sup> First War Powers Act, 1941, ch. 593, 55 Stat. 838, 839 (1941) (codified as 50 U.S.C. App. § 611 (repealed 1966)).

<sup>5</sup> 41 U.S.C. §§ 101-125 (1994).

<sup>6</sup> Chris Amantea & Stephen C. Jones, *The Growth of Environmental Issues in Government Contracting*, 43 AM. U. L. REV. 1585, 1590 (1994).

<sup>7</sup> Troyen A. Brennan, *Environmental Torts*, 46 VAND. L. REV. 48 (1993).

<sup>8</sup> Charles M. Chadd, et al., *Avoiding Liability for Hazardous Waste: RCRA, CERCLA, and Related Corporate Law Issues*, 57 C.P.S. A-27 (1994).

<sup>9</sup> The General Accounting Office in its report entitled, *Federal Facilities: Consistent Relative Risk Evaluations Needed for Prioritizing Cleanups* stated that "[a]n incomplete inventory of contaminated federal facilities and a backlog of unevaluated facilities have limited the scope of priority-setting efforts.... Furthermore, no national guidance ensures that EPA's regions use a consistent approach in choosing which facilities to evaluate for inclusion on the NPL [National Priorities List] from the backlog of facilities awaiting this step." *Data Inadequate for EPA Identification of High-Priority Cleanups*, GAO Reports, 27 Env't Rep. (BNA) No. 13, at 648 (July 26, 1996).

<sup>10</sup> 42 U.S.C. § 9607(a) (1994).

<sup>11</sup> See, e.g. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (holding present owner liable for costs to cleanup hazardous material disposed on his property, even though he had not participated in the generation or transportation of the waste and had not caused the release); *Emhart Indust., Inc. v. Duracell Int'l Inc.*, 665 F.Supp. 549, 574 (M.D. Tenn. 1987) (holding current owner is a "person" under CERCLA definition and is liable for response costs even though it did not own facility at time of disposal).

<sup>12</sup> *Shore Realty*, 759 F.2d 1032; *Emhart*, 665 F. Supp. 549.

<sup>13</sup> A release under CERCLA is defined as: "[A]ny spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)." 42 U.S.C. § 9601(22).

<sup>14</sup> A "hazardous substance" includes those substances designated as hazardous under any one of five federal statutes and cross-referenced

in CERCLA. See Chadd, *supra* note 8, at A-28 n.17 (citing Federal Water Pollution Control Act (Clean Water Act) § 311(b)(2)(A); Resource Conservation and Recovery Act (RCRA) § 3007; Clean Water Act §307(a); Clean Air Act § 112; and Toxic Substances Control Act § 7).

15 Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 325 (7th Cir. 1994) (enumerating elements of CERCLA liability); Environmental Transportation Systems v. Emsco, Inc., 969 F.2d 503, 506 (7th Cir. 1992) (enumerating the four-part test).

16 Westfarm Assocs. v. Washington Suburban Sanitary Comm., 66 F.3d 669, 681 (4th Cir. 1995) ("Contrary to the rule followed in most areas of the law, the burden of proof as to causation in a CERCLA case lies with the defendant."); *In re Bell Petroleum Servs. Inc.*, 3 F.3d 889, 893 n.4 (5th Cir. 1993) (noting that "in cases involving multiple sources of contamination, a plaintiff need not prove a specific causal link between the costs incurred and an individual generator's waste," citing *Amoco Oil Co. Borden Inc.* 889 F.2d 664 (5th Cir. 1989)).

17 Chadd, *supra* note 8, at A-31; *United States v. Bliss*, 667 F.Supp. 1298; 1309-10 (E.D. Mo. 1987); *United States v. Stringfellow*, 661 F.Supp. 1053, 1060-61 (C.D. Cal. 1987); *Conservation Chem. Co.*, 619 F.Supp. 162, 235-36 (W. D. Mo. 1985) (noting that is unnecessary to "fingerprint" a particular generator's waste to establish liability of that generator).

18 Kerr-McGee Chem. Corp., 14 F.3d at 326.

<sup>19</sup> *United States v. Monsanto Co.*, 858 F.2d 160, 167 & n.11 (4th Cir. 1988) ("The overwhelming body of precedent ... has interpreted [CERCLA] as establishing a strict liability scheme."), *cent. denied* 490 U.S. 1106 (1989); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) (good overview of CERCLA at 1039-43).

20 *United States v. Chem-Dyne*, 572 F.Supp. 802, 808 (S.D. Ohio 1983); see also *In re Bell Petroleum Services, Inc.*, 3 F.3d. 889, 894-902 (5th Cir. 1993) (holding that the Chem-Dyne approach is most appropriate among three different approaches described and followed by federal circuit courts).

21 *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1280 (3d Cir. 1993); motion to amend denied, opinion clarified, 833 F.Supp. 332 (E.D. Va. 1993) (following approach in *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992)).

22 42 U.S.C. § 9601(32)(1994) (defining liability as that in 33 U.S.C. § 1321 (1994)); *GNB Battery Technologies, Inc. v. Gould*, 65 F.3d 615, 620 (7th Cir. 1995); *Kerr-McGee Chem. Corp.*, 14 F.3d at 325.

<sup>23</sup> The "Gore Factors" include: the ability to distinguish contribution to a hazardous waste release, amount and degree of toxicity of the hazardous waste, degree of PRP involvement, degree of care exercised by PRPs, and the degree of cooperation with the government officials. They were cited in *United States v. A & F Materials*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984); see also *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F.Supp. 1100 (N. D. 111. 1988); *Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78 (D. Me. 1988); see Chadd, *supra* note 8, at A-39.

<sup>24</sup> William D. Evans, Jr., *The Phantom PRP in CERCLA Contribution Litigation: EPA to the Rescue*, 26 *Env't Rep. (BNA)* 2109,2111 (Mar. 8, 1996); *One Wheeler Road Assoc. v. Foxboro Co.*, 1995 W.L. 7919371, at \*9-\*12 (D.C. Mass. Dec. 13, 1995) (applying Gore factors in a suit by a present property owner against a prior owner).

25 *Key Tronic Corp. v. United States*, 114 S. Ct. 1960, 1965-66 (1994) (noting that the amended CERCLA statute expressly authorizes contribution action under 42 U.S.C. § 9613 and impliedly under 42 U.S.C. § 9607); *Kerr-McGee Chem. v. Lefton Iron & Metal*, 14 F.3d 321, 326 (1994) (holding that a party may seek contribution from another PRP under 42 U.S.C. § 113(f)).

26 *Farmland Industries, Inc. v. Morrison-Wuirk Grain Corp.*, 987 F.2d 1335, 1339 (8th Cir. 1993).

27 42 U.S.C. § 9601(14) (1994) (hazardous waste defined).

28 42 U.S.C. §§ 9601(23), (24) (1994). The various types of costs can include: (1) all costs of removal or remedial action incurred by the United States Government, a state, or an Indian tribe not inconsistent with the NCP; (2) any other necessary costs of response incurred by any other person consistent with the NCP; (3) damages for injury to, destruction of, or loss of natural resource; and (4) the costs of any health assessment or health affects study carried out pursuant to CERCLA. 42 U.S.C. § 9607(a)(4)(1994).

29 See Mark J. Connor, *Government Owner-Contractor Operated Munitions Facilities: Are They Appropriate in the Age of Strict Environmental Compliance and Liability?*, 21 *MIL. L. REV.* 1 (1991).

30 *FMC Corp.*, 786 *F.Supp. at* 472.

31 *FMC Corp. v. United States Dep't of Commerce*, 786 *F.Supp.* 471 (E.D. Pa. 1992), *aff'd*, 29 F.3d 833, 845 (3d Cir. 1994).

32 *American Viscose went out of business and Avtex was in bankruptcy reorganization at the time of the action against FMC Corp. FMC. Corp.*, 29 F.3d at 836.

33 *FMC Corp.*, 786 *F.Supp. at* 472; Katzman, *supra* note 2, at 1200.

34 *FMC Corp.*, 29 F.3d at 835.

35 *Id.*

36 See, Katzman, *supra* note 2, at 1200-1201.

<sup>37</sup> *FMC Corp.*, 29 F.3d at 836.

<sup>38</sup> *FMC Corp.*, 786 *F.Supp. at* 486-87.

39 *FMC Corp.*, 29 F.3d at 838.

40 *Id. at* 843.

41 *Id. at* 838, 846.

42 *Id. at* 846. The policy referred to is that of placing the burden of cleanup on responsible parties to serve as an incentive for the

sound treatment and handling of hazardous substances. *Id.* at 840; see also *Dedham Water Co. v. Cumberland Farms Dairy*, 805 F.2d 1074, 1081 (1st Cir. 1986) (articulating CERCLA policy, citing *United States v. Reilly & Chem. Corp.*, 546 F.Supp. 1100, 1112 (D. Minn. 1982)).

43 *FMC Corp.*, 786 F.Supp. at 484; Katzman, *supra* note 2, at 1232.

44 *Elf Atochem N. Am. v. United States*, 914 F.Supp. 1166 (E. D. Pa 1996) (denying summary judgment holding issue of fact exists on government's control, case pending); *United States v. Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir. 1995), cert. denied, 115 S. Ct. 2609 (1995) (holding United States not liable because statutory/regulatory duty to allocate raw materials did not constitute possession or ownership); *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990) cert. denied, 498 U.S. 1046 (1991) (holding there was management and control by the government); *United States v. McLamb*, 5 F.3d 69 (4th Cir. 1993) (holding sufficient management not found); *Maxus Energy Corp. v. United States*, 898 F.Supp. 399 (1995) (holding no basis to impose CERCLA liability as operator or arranger in this Agent Orange case); *Rospatch Jessco Corp. v. Chrysler Corp.*, No. 4:93-CV-47, 1995 U.S. Dist. LEXIS 12692 (W.D. Mich. Aug. 8, 1995) (holding United States was not an operator, but reserved judgment on issue of owner of plating equipment, case pending); Katzman, *supra*, note 2, at 1233.

45 The DPC was a New Deal-era federal agency authorized to provide federal money for construction of new facilities and conversion or expansion of existing facilities to help meet defense needs. Katzman, *supra* note 2 at 1199.

46 INDUSTRIAL PLANNING PROJECT, LOGISTICS PLANNING DIVISION, ARMY AIR FORCES, CONSTRUCTION AND PRODUCTION ANALYSIS, FORD-WILLOW RUN, at viii (1946).

47 WARREN B. KIDDER, WILLOW RUN: COLOSSUS OF AMERICAN INDUSTRY, HOME OF HENRY FORD'S B-24 "LIBERATOR" BOMBER 91 (1995).

48 *Id.* at 18.

49 In July 1945, Henry Kaiser, a wealthy West Coast businessman in the construction and shipbuilding industries, and Joseph Frazer, a successful Detroit automotive supplier, combined forces to create the Kaiser-Frazer Corporation. In Sept. 1945, they leased the Willow Run Plant from the Reconstruction Finance Corporation, and moved into the plant in Nov. 1945. Cars built by the Kaiser-Frazer Corp. never caught on, with the company capturing only five percent of the American market. The company sold the Willow Run plant to General Motors in 1953, and abandoned passenger car production altogether in 1955. ALAN CLIVE, *STATE OF WAR* 21 (1979).

50 *Chrysler Corp. v. Township of Sterling*, 410 F.2d 62, 74 (6th Cir. 1969) (tax case dealing with real property assets owned by the University of Michigan including the Willow Run Airport).

51 See 52 Fed. Reg. 2492 (1988).

52 See Superfund Enforcement Tracking System (SETS), EPA-I.D. MID981089246, Willow Run Sludge Lagoon, (Oct. 1995) (LEXIS, Envirn library, PRP file, search for records containing "WILLOW RUN"); Willow Run Contamination Evaluation Begins, 8 SUPERFUND WEEK (Pasha Publications, Inc.), Jan. 14, 1994, at 1.

53 Willow Run Contamination Evaluation Begins, *id.* at 5.

54 Lagoons: PCB-Contaminated Sludges From 1960s Bound For Landfill Under Michigan Plan, 20 SLUDGE (Business Publishers, Inc., Silver Spring, Md.), July 4, 1995, at 114.

55 Bids Near For Willow Run PCB Fix, *supra* note 52, at 6.

56 Consent Judgment at 2, Kelley v. General Motors, No. 95-79987-CE (Mich. 30th Jud. Cir. Mar. 24, 1995).

57 *Id.* at 13.

<sup>58</sup> Complaint, Chrysler Corp. v. Ford Motor Co., complaint filed, No. 95-CV-12112DT (E.D. Mich. May 24, 1995).

59 *Id.* at 9.

<sup>60</sup> *Id.* at 10.

61 Consolidated Aircraft Corporation was later known as Consolidated-Vultee Aircraft Corporation, and ultimately as General Dynamics, its successor in interest, after their merger in 1954. See Defendant's Answer, Counterclaim and Third-Party Complaint, at 3, 9, 13, Tucson Airport Auth. v. General Dynamics Corp., 922 F.Supp. 273, 1996 U.S. Dist. LEXIS 8012 (D. Ariz. 1996) (CIV 94-355-TUC-ROS).

62 GERALD D. NASH, WORLD WAR II AND THE WEST 9 (1990).

63 The contract superseded a Letter Contract Special form dated April 14, 1942. The work on the contract actually began on February 1, 1942. Consolidated had actually been working on "an extensive and continuous program of production and modification of Model B-24 heavy bombardment airplanes ... involy[ing] the use of contractor's plants located at San Diego, California, Tucson, Arizona, Downey, California and Fort Worth, Texas. See Cost-PlusFixed-Fee Modification Center Contract, at 2, 11, No. W 535 AC-26999, Army Air Forces, War Dep't (Oct. 5, 1942) (hereinafter "Consolidated Contract"); Supplemental Settlement Agreement to Fixed Price and Cost-Plus-A-Fixed-Fee Contracts for Supplies, at 2, No. W 535 AC-26999, Army Air Forces, War Dep't (Nov. 14, 1945). (on file with the Environmental Litigation Division, Air Force Legal Services Agency, Arlington Va).

64 NASH, *supra* note 62, at 72-73.

65 Consolidated Contract, *supra* note 63, at 2. During World War II the Army Air Forces built 28 such modification centers for the "modification completion, repair, maintenance, testing, and storage of aircraft." See Defendant's Answer, Counterclaim and Third-Party Complaint, at 16, Tucson Airport Auth. v. General Dynamics Corp., 922 F. Supp. 273, 1996 U.S. Dist. LEXIS 8012 (D. Ariz. 1996).

66 Defendant's Answer, Counterclaim and Third-Party Complaint; at 17, Tucson Airport Auth. v. General Dynamics Corp., *id.*

67 John J. Rampe, Results of the Tucson Airport Area Remedial Investigation, Phase I, Vol. III: An Evaluation of the Potential Sources of Groundwater Contamination Near the Tucson International Airport, Tucson, AZ. 23 (Nov.1985) (unpublished report, on file with EPA Region IX, San Francisco, CA) (hereinafter Rampe).

<sup>68</sup> A subsurface investigation prepared for the EPA in the late 1980s disclosed soil contamination caused by trichloroethylene (TCE) (less than 5 ppb), dichloroethylene (DCE), a chemical breakdown of TCE (ranging from 16 to 281 ppb), benzene, used as a solvent, especially lacquer thinner, and also in gasoline, and phenol (at approximately 3,000 ppb). CH2M Hill, Final Draft, Assessment of the Relative Contribution to Groundwater Contamination from Potential Sources in Tucson Airport Area, Tucson, Arizona, at 3-6 (Aug. 1989) (unpublished report, on file with EPA Region IX, San Francisco, Ca.). Chromium, a chemical used in electroplating and also a component of zinc chromate used as a paint primer in World War II-era aircraft was also found in another investigation of the area. See Rampe, *supra* note 67, at 20. Contamination of the groundwater near the Tucson Airport is believed to have occurred through percolation of waste water containing contaminants to the water table. CH2M Hill, *id.* at 3-18.

<sup>69</sup> Rampe, *supra* note 67, at 23-27. The Rampe Report concluded, however, that "the evidence actually implicating Consolidated in polluting the groundwater was largely circumstantial . . . and is based largely on the uncorroborated recollections of a single person." Rampe, *id.* at 28.

<sup>70</sup> Daniel B. Stephens & Assocs., Inc., Final Existing Data Report, Tucson International Airport RI/FS, Volume 1: EDR Text, at 3-1 to 3-2 (Feb. 1993) (unpublished report, on file with EPA Region IX, San Francisco, Ca.).

<sup>71</sup> CH2M Hill, *supra* note 68, at 3-10.

<sup>72</sup> Claudia MacLachlan, Nightmare on Calle Evelina; Community Profile; Tucson, Arizona, NAT'L L. J., Sept. 21, 1992, at S7.

<sup>73</sup> At that time some drinking wells were affected, but a full investigation was not completed. Above-ground pollution sources were attempted to be controlled, but the effects of very low levels of organic pollutants in the drinking water were not fully appreciated. Rampe, *supra* note 67, at 6.

<sup>74</sup> Site Description, Tucson Int'l Airport Area, EPA I.D. #AZD980737530, EPA, Apr. 1995, at 1.

<sup>75</sup> MacLachlan, *supra* note 72, at S7; see also *Smith v. Hughes Aircraft Co.*, 10 F.3d 1448, 1450 (9th Cir. 1993).

<sup>76</sup> MacLachlan, *supra* note 72.

<sup>77</sup> Site Description, *supra* note 74, at 2.

<sup>78</sup> Tucson Int'l Airport Area, CERCLIS, EPA-ID: AZD988737530, Vista Information Solutions, Inc. (Dec. 1995) (LEXIS, Envirn library, Site file, search for records containing "AZD988737530").

<sup>79</sup> *Valenzuela v. Hughes Aircraft Co.*, CIV 85-903-TUG-WDB, complaint filed, 1985 (D. Ariz.); Defendant's Answer, Counterclaim and Third-Party Complaint, at 24, *Tucson Airport Auth. v. General Dynamics Corp.*, 922 F.Supp. 273, 1996 U.S. Dist. LEXIS 8012 (D. Ariz. 1996); see also *Dateline Tucson*, UPI, Jan. 23, 1987, available in LEXIS, Regnws Library, Allnws File:

80 Hughes Aircraft Agrees to Pay 8'85 Million for Ground Water Contamination in Arizona, 21 Env't Rptr. (BNA) No. 44, at 1939 (Mar. 1, 1991).

81 Yslava v. Hughes Aircraft Co., 845 F.Supp. 705 (D. Ariz. 1993) (Plaintiffs sought recovery for past and future medical monitoring under CERCLA and state common law); see Defendant's Answer, Counterclaim and Third-Party Complaint, at 24, Tucson Airport Auth. v. General Dynamics Corp., 922 F.Supp. 273, 1966 U.S. Dist. LEXIS 8012 (D. Ariz. 1996).

<sup>82</sup> Tucson Superfund Cleanup Settlement Announced, PR Newswire, Sept. 27, 1990; available in LEXIS, Regnws Library, Allnws File; Dateline San Francisco, UPI, Jan. 25, 1989, available in LEXIS, Regnws Library, Allnws File.

83 PR Newswire, id.

<sup>84</sup> 55 Fed. Reg. 42080 (1990).

<sup>85</sup> Bill Contoy, Superfund Action Cold Stall Lending in Scottsdale, BUSINESS J. PHOENIX & VALLEY OF THE SUN at 1, Feb. 4, 1991, available in LEXIS, News Library, Wires File.

<sup>86</sup> Tucson Superfund Cleanup Settlement Approved by Federal Court, PR Newswire, Jun. 21, 1991, available in LEXIS, Regnws Library, Allnws File.

<sup>87</sup> EPA Orders Cleanup For Tucson Site, J. OF COMMERCE, July 14, 1992 at B-2, available in LEXIS, News Library, Wires File.

<sup>88</sup> Tucson Airport Soil RI Completed, 9 SUPERFUND WEEK (Pasha Publications, Arlington, Va.), Dec. 1, 1995, at 3.

89 Defendant's Answer, Counterclaim and Third-Party Complaint, at 20-24, Tucson Airport Auth. v. General Dynamics Corp., 922 F.Supp. 273, 1966 U.S. Dist. LEXIS 8012 (D. Ariz. 1996).

90 OFFICE OF THE GENERAL COUNSEL, DEPARTMENT OF THE NAVY, NAVY CONTRACT LAW 244 (2<sup>nd</sup> ed. 1959).

91 First War Powers Act, 1941, ch. 593, 55 Stat. 838, 839, 50 U.S.C. App. § 601-05, 611, (repealed 1966), 616 (omitted), 618 (repealed 1947), 619-20 (transferred to 50 U.S.C. App. §§ 32-37), 621-22 (repealed 1966). The First War Powers Act, 1941, was signed on December 18, 1941, just 10 days after its introduction in Congress.

92 Fogarty v. United States, 176 F.2d 599, 603 (8th Cir. 1949).

93 OFFICE OF THE GENERAL COUNSEL, supra note 90, at 7.

<sup>94</sup> First War Powers Act, 1941, § 201,.50 U.S.C. App. § 611 (repealed 1966).

95 JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING 427 (1992).

96 Executive Order No. 9001 (Dec. 27, 1941), 3 C.F.R. Cum. Supp. 1054 (Compilation 1938-1943).

97 OFFICE OF THE GENERAL COUNSEL, supra note 90, at 8.



98 *Id. at* 9.

99 NAGLE, *supra* note 95, at 406-07.

100 *Id. at* 419. Other RFC subsidiaries included: the Metals Reserve Company, Defense Supplies Corporations, Petroleum Reserves Corporation, Rubber Reserve Company, U.S. Commercial Company, War Emergency Pipelines, Inc., and the War Insurance Corporation. *Id. at* 420.

101 Executive Order No. 9024, (Jan. 14, 1942), 3 *C.F.R. Cum. Supp.* 1079 (Compilation 19381943); OFFICE OF THE GENERAL COUNSEL, *supra* note 90, at 8; see also *Johns-Manville v. United States*, 13 Cl. Ct. 72, 88 (1987), vacated, 855 F.2d 1571 (Fed. Cir. 1988) ("The WPB controlled what could and could not be produced, the sequence of production, the securing of scarce materials from abroad, and the allocation of scarce materials.")

102 Ch. 134, § 120, 39 Stat. 213 (1916); Brian E. Waddell, *Economic Mobilization for World War II and the Transformation of the American State* 143 (1993) (unpublished Ph.D. dissertation, City University of New York).

103 BRUCE CATTON, *THE WAR LORDS OF WASHINGTON* 21 (1946).

<sup>104</sup> CATTON, *id. at* 24; Waddell, *supra* note 102, at 160, 205. During 1940 and 1941, due to Knudsen's efforts to encourage industry to start making weapons, Chrysler began mass producing tanks and anti-aircraft guns and Ford agreed to build the B-24 Liberator bomber at Willow Run. CATTON, *id.*

105 An Act to Expedite National Defense, ch. 440, § 2, 54 Stat. 676 (1940).

106 NAGEL, *supra* note 95, at 418; CATTON, *supra* note 103 at 89, 111.

107 Ch. 720, 54 Stat. 892(1940):

<sup>108</sup> NAGEL, *supra* note 95, at 420-21.

109 *Id. at* 404.

110 David Fain & Richard F. Watt, *War Procurement. A New Pattern in Contracts*, 44 *COL. L. REV.* 130 (1944). Thus, the letter of intent was really a written confirmation of an earlier indication that an order might be placed. *Id. at* 131.

111 PRESTON SHEALEY, *WAR SUPPLEMENT TO THE LAW OF GOVERNMENT CONTRACTS* 2 (1943).

112 Fain and Watt, *supra* note 110, at 133.

113 *Id. at* 143. The First War Powers Act specifically provided that "nothing herein shall be construed to authorize the use of the cost-plus-percentage-of-cost system of contracting." David A. Goldman, *Termination of War Department Contracts At The Option of the Government*, 42 *MICH. L. REV.* 733, 737-38 (1944).

<sup>114</sup> Fain & Watt, *supra* note 110, at 143.

<sup>115</sup> Act of July 2, 1940, ch. 508, § 1, 54 Stat. 712 (1940) (former 50 U.S.C. App. § 1171 (a),(b) was repealed six months after the termination date of World War II, which occurred on Dec. 31, 1946, by Presidential Proclamation No. 2714, 61 Stat. (Pt. 2) 1048).

<sup>116</sup> Goldman, *supra* note 113, at 738.

117 Note, Determination of Cost in Military Procurement Cost-Plus -A-Fixed-Fee Contracts, 65 HARV. L. REV. 1035 (1952).

118 *Id.* at 1035 n. 1.

119 *Id.* at 1035-36. The fixed fee was not to exceed seven percent according to Executive Order No. 9001. See Executive Order No. 9001 (dec. 27, 1941), 3 C.F.R. Cum. Supp. 1054 (Compilation 1938-1943). The fixed fee amount was later reduced to six percent for contracts entered into after Sept. 9, 1942, for construction and installation of buildings, utilities, and appurtenances at military posts. See Act of June 5; 1942, ch. 340, § 8, 56 Stat. 314 (terminated 1946); Goldman, *supra* note 113, at 738 n.15.

120 26 C.F.R. § 26.9 (1940 Supp.); Note, *supra* note 117, at 1036. TD 5000 and the Green Book are reproduced in an excellent monograph covering early cost principles. See John Cibinic, Jr., Cost Determination, GOVERNMENT CONTRACTS MONOGRAPH NO. 8, (Apps. 1) at 141-158 (1964).

121 See Ch. 95 § 3(b), 48 stat. 503 (1934). Under the Vinson-Trammel Act, the Treasury Department issued a regulation for determining the cost of performing a contract. The regulation, however, contained only a few sentences and generated various questions. In 1936, Congress extended the Vinson-Trammel Act profit limitation to contracts for the Merchant Marine and allowed the limitation to be applied based on total prices of all contracts entered into by a contractor during a taxable year. Congress again amended the Vinson-Trammel Act in 1939 imposing a 12 percent profit limit upon both Navy and Army aircraft contracts. See National Defense Act, ch. 35, § 14, 53 Stat. 555, 650 (1939). After the fall of France to the Nazis in June 1940, Congress changed the percentages again and made them applicable only to contracts exceeding \$25,000. See Act of June 28, 1940, ch. 440, § 2(b), 54 Stat. 676 (1940). The regulation was titled, Excess Profits on Contracts for Naval Vessels and Army and Navy Aircraft, but was widely used in cost reimbursement contracts.

<sup>122</sup> See 1940-2 C.B. 397 (Navy and Army); 5 Fed. Reg. 2788 (1940). TD 5000 was signed July 29, 1940 by John L. Sullivan, Acting Secretary of the Treasury, August 2, 1940, by Henry L. Stimson, Secretary of War, August 6, 1940, by Frank Knox, Secretary of the Navy. See Goldman, *supra* note 113, at 739 n.16.

123 Second Revenue Act of 1940, ch. 757, sec. 201; §§ 401, 506, 54 Stat. 974, 975, 1003, 1008 (1940).

124 NAGLE, *supra* note 95, at 421.

125 see, e.g. Northrop Aircraft Inc. v. United States, 127 F. Supp. 597, 600 (Ct. Cl. 1955); Bell Aircraft Corp. v. United States, 100 F. Supp. 661, 695 (Ct. Cl. 1951), *affd.*, 343 U.S. 860 (1952) (per curiam by equally divided court); North American Aviation, Inc. v. United States, 67 F. Supp. 1007, 1015 (Ct. Cl. 1946).

126 See supra note 120.

127 Note, supra note 117, at 1040; see Lockheed Aircraft. Corp., War Dep't B.C.A. No. 1375, 4 Con. Cas. Fed. (CCH) Para. 60391 (1947) (relation must be "susceptible of recognition").

128 Note, supra note 117 at 1049.

129 By 1944 American industry was producing \$90 billion for war purposes under government contracts, roughly one-half of the total national production to the war effort. *Id.* at 69 n.40. Two-thirds of all persons employed in manufacturing were engaged in war work. SPECIAL COMM. ON POST-WAR ECONOMIC POLICY AND PLANNING, POST-WAR ECONOMIC POLICY AND PLANNING, H.R. REP. NO. 1443, 78th Cong., 2d Sess. 3 (1944).

130 *Id.* at 59. Of 25,000 War Dep't contracts terminated in World War I and involving settlement questions, over 3,000 were litigated before the Court of Claims. Erwin E. Nemmers, Comparative Study of Termination Articles in Government War Contracts, 1945 WIS. L. REV. 41, 43 (1945).

131 Maurice L. Cowen, Vital Legal Aspects of War Contract Terminations: A Practical Approach, 40 ILL. L. REV. 29, 29-30 (1945).

132 Ch. 593, 55 Stat. 838, 50 U.S.C. App. § 611, (repealed 1966); see 10 C.F.R. § 88.15-104 n.1 (1943 Supp.), supra note 91.

133 Goldman, supra note 113, at 750.

134 91 U.S. 321 (1875) (holding that the government may terminate a government contract for convenience and the settlement and compensation for partial performance is binding on the government); see *id.* at 747-50.

135 10 C.F.R. Pt. 88.15 (1943 Supp.) (titled Procurement Regulation 15, Termination of Fixed Price Supply Contracts for the Convenience of the Government, hereinafter "PR"). The Termination Accounting Manual (hereinafter "TAM") applied to termination of lump-sum supply contracts and fixed price supply contracts under CPFF prime supply contracts. See 10 C.F.R. § 88.15-109 (1943 Supp.).

136 Goldman, supra note 113, at 750-51.

137 See 10 C.F.R. § 88.15-310(5) (1943 Supp.).

138 HERMAN M. SOMMERS, PRESIDENTIAL AGENCY: THE OFFICE OF WAR MOBILIZATION AND RECONVERSION 175 (1950).

139 The War Dep't had already been using a uniform termination article in fixed price supply contracts since 1941. There was a need to make the termination article and procedures uniform for all agencies and contractors. Goldman, supra note 113 at 761.

140 David A. Goldman, The War Contract Settlement Act of 1944, 23 MICH. ST. B. J. 515, 517-18 (1944).

141 SENATE COMM. ON MILITARY AFFAIRS, CONTRACT SETTLEMENT ACT OF 1944, S. REP. NO. 836, 78th Cong., 2d Sess. 2, reprinted in 1944 U.S.C.C.A.N. 1161-73 (1944).

142 When a settlement was made, it was to be final and conclusive except for fraud or upon renegotiation to eliminate excessive profits under the Renegotiation Act. H. R. REP. NO. 1443, 78<sup>th</sup> Cong., 2d Sess. 3 (1944).

143 41 U.S.C. § 103 (m) (1994).

144 41 U.S.C. § 106(c) (1994).

145 Louis M. Brown, Termination of War Contracts: Some Observations on the Contract Settlement Act of 1944, S. CAL. L. REV. 1, 9-10 (1944).

146 41 U.S.C. § 120(4)(3) (1994).

<sup>147</sup> 41 U.S.C. § 106(b), (d) 1994).

148 See supra note 135.

<sup>149</sup> 10 C.F.R. Pts. 841-849 (1945 Supp.); The Joint Termination Accounting Manual applied to fixed-price supply contracts. The Termination Manual (TM) 14-1000, Administrative Audit Procedures for Cost-Plus-Fixed-Fee Supply Contracts, was issued for use with CPFF contracts. 10 C.F.R. § 841.114-2 (1945 Supp.); see also Edmund W. Burke, War Contract Termination. The Contract Settlement Act of 1944, 23 CHI.-KENT L. REV. 107, 154 (1945).

150 41 U.S.C. § 113(b) (1994).

151 41 U.S.C. § 103(h) (1994).

152 HOLD G. VATTER, THE U.S. ECONOMY IN WORLD WAR 11 83-84 (1985).

153 UNITED STATES OFFICE OF WAR MOBILIZATION AND RECONVERSION, FIRST REPORT: PROBLEMS OF MOBILIZATION AND RECONVERSION 54 (1945).

154 *Id.* at 56.

155 FDR'S FIRESIDE CHATS 170-72 (Russell D. Buhite & David W. Levy eds., 1992). Shortly after this Fireside Chat, President Roosevelt delivered his famous "Four Freedoms Speech" in his annual message to Congress on Jan. 6, 1941. In it he reiterated his call for an increase in armament production. See Four Freedoms Speech, Franklin D. Roosevelt, 1941, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 663 (FactsOn-File, Inc., ed. 1995).

156 PETER COLLIER & DAVID HOROWITZ, THE FORDS: AN AMERICAN EPIC 177, 181 (1987). Due primarily to the B-24 contract, Ford Motor Company became the third largest defense contractor in World War II. General Motors was the largest; Curtiss-Wright, the Wright brothers' Ohio plane-making company was second. Detroit prided itself on being the "arsenal of democracy" due in large part to Ford's various contracts. ROBERT LACY, FORD: THE MEN AND THE MACHINE 386-87, 390 (1986).

157 LACY, *id.*

158 KIDDER, supra note 47, at 47.

<sup>159</sup> *Id.*

160 *Id.* at 51, 54-5.

161 *Id. at* 66.

162 KIDDER, *supra* note 47, at 91.

163 *Id. at* 95. The water treatment plant was 71 feet by 70 feet and covered an area of 18,000 square feet. *Id. at* 307. Also at the Willow Run plant was a cyanide plant with three reaction plants, the only one of its kind in the country. It also had a Detrex Solvent Machine which used trichlorethylene and washed stock up to 10 feet long. *Id.*

164 Article 3(b) provided:

For purposes of determining the amounts payable to Contractor under this contract, allowable items of cost will be determined by the Contracting Officer in accordance with regulations for the determination of the cost of performing a Government contract as promulgated by the Treasury Department in section 26.9 of Chapter I of Title 26 of Code of Federal Regulations, as contained in T. D. 5000 and approved by the Secretary of War August 2nd, 1940, it being understood and agreed, without limiting the generality of the foregoing that:

. . . . .  
(3) Upon completion or termination of this contract all costs of rehabilitation of Contractor's plant and equipment, including rearranging facilities within a department, necessary in order to restore Contractor's plant to condition for use in the ordinary operation of Contractor's business, excluding, however, all such costs in any plant or plants made available under an Emergency Plant Facilities Contract, a Defense Plant Corporation Lease or similar contract or lease, shall be allowable items of cost hereunder; Provided, That prior to the making of any changes in the plant of the Contractor for which a rehabilitation charge will subsequently be claimed, the Contractor shall notify the Contracting Officer of the proposed changes and shall furnish the Contracting Officer such information concerning the proposed changes as the Contracting Officer may direct.

. . . . .  
(5) The costs of depreciation, maintenance, repairs and renewals of, and of insurance on or in connection with, all the facilities needed and used for the performance of this contract, shall be allowable items of cost hereunder, except to the extent that provision is made, apart from this contract, for the payment of such costs by Defense Plant Corporation or by the Government or otherwise than by the Contractor.

. . . . .  
(8) Costs (or readily separable items thereof) commonly termed "overhead" or "burden" or "indirect expenses" attributable wholly to divisions or units of facilities used by Contractor and used exclusively in producing the articles called for in this contract may be charged direct to this contract, without the necessity of applying rules for the allocation thereof;

. . . . .  
(10) In addition to normal wastage, scrap, and corrective labor under usual manufacturing conditions, all excessive wastage, scrap, and corrective labor, reasonably incident to work under existing abnormal conditions, shall be allowable items of cost hereunder;

. . . . .

(13) Premiums paid by the contractor, but not in excess of a total amount approved by the Contracting Officer, for insurance of the Contractor against liability imposed upon the Contractor by law for damages because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, and/or against liability imposed upon the Contractor by law for damages because of injury to or destruction of property, including the loss of use thereof, that may result from accident and arise out of the operation, use, maintenance or existence of any of the airplanes or spare parts manufactured hereunder, including premiums for the defense by the insurer of any litigation in respect thereto, shall be allowable items of cost hereunder; ....

Id. at 4-6.

165 26 C.F.R. § 26.9 (g) (1940 Supp.)

Expenses of distribution, servicing, and administration.-- Expenses of distribution, servicing, and administration, which are treated in this section as a part of general expenses in determining the cost of performing a contract or subcontract (see paragraph (b) of this section), comprehend the expenses incident to and necessary for the performance of the contract or subcontract, which are incurred in connection with the distribution and administration of the business, such as--(1) Compensation for personal services of employees.--The salaries of the corporate and general executive officers and the salaries and wages of administrative clerical employees and of the office service employees such as telephone operators, janitors, cleaners, watchmen, and office equipment repairmen.

166 Contract No. W 535-ac-21216, Sept. 26, 1941, at 14,15(a) (on file at the Air Force Material Command Law Office, Wright-Patterson Air Force Base, Ohio) provided:

**(b) Upon the termination of this contract as hereinbefore provided, full and complete settlement of all claims of the Contractor arising out of this contract shall be made as follows:**

(1) The Government shall assume and become liable for all obligations, commitments and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract; and the Contractor shall, as a condition to receiving the payments mentioned in this Article, execute and deliver all such papers and take all such steps as the Contracting Officer may require for the purpose of assuring to the Government, so far as possible, the rights and benefits of the Contractor under such obligations or commitments.

(2) The Government shall reimburse the Contractor for all costs incurred by the Contractor in the partial performance of this contract as determined in accordance with Article 3 and not previously reimbursed.

. . . .

(5) The obligation of the Government to make any of the payments required by this Article shall be subject to any unsettled claims for labor or material or any claim the government may have against the Contractor.

(c) Upon the making of said payments all obligations of the Government to make further payments or to carry out other undertakings hereunder shall cease forthwith and forever, except that all rights and obligations of the respective parties under the articles, if any, of this contract applicable to Patent Infringements and Reproduction Rights shall remain in full force and effect (emphasis added) Id.

167 NAGLE, supra note 95, at 435.

168 Id. at 456.

169 Contract No. W 535-ac-26999, Oct. 5, 1942 (on file with the Environmental Litigation Division, Air Force Legal Services Agency, Arlington, Va.).

170 Id. at 5.

171 Article 3(b) provided:

(b) [Allowable items of cost will be determined by the Contracting Officer in accordance with regulations for the determination of the cost of performing a contract ... [and] the following shall be considered as allowable items of cost hereunder;

. . . .

(7) Cost of such bonds and insurance as the Contracting Office may approve or require, and costs and expenses incurred in the defense and/or discharge of such claims of others on account of death or bodily injury of persons or loss or destruction of or damage to property as may arise out of or in connection with the performance of the work under this contract; provided that such reimbursement shall not include any amount for which the Contractor is indemnified or compensated by insurance or otherwise, or any amount for which it would have been so indemnified or compensated except for the failure of the Contractor to procure or maintain bonds or insurance in accordance with the requirements of the Contracting Officer

....

(11) All losses and expenses actually sustained or incurred by the Contractor in the performance of this contract not compensated for by insurance or otherwise, and not proximately caused by the fault or negligence of the Contractor, provided

however, that willful negligence, willful misconduct, or failure to exercise good faith by any of Contractor's personnel (other than Contractor's officers, directors and employees having supervision of the Center and its major operations) shall not be deemed to be the fault or neglect of the Contractor; except in cases where Contractor has failed to exercise reasonable care in the selection of employment of individual workers involved, or where such persons have been retained after Contractor has had reason to believe that such persons are not reliable and trustworthy. Id.

172 Article 9 provided

(a) [S]hould conditions arise which make it advisable or necessary in the interest of the Government that work be discontinued under this contract, the Government may terminate this contract by a notice in writing from the Contracting Officer to the Contractor....

(b) Upon the termination of this contract as hereinbefore provided, full and complete settlement of all claims of the Contractor arising out of this contract shall be made as follows:

(1) The government shall assume and become liable for all obligations, commitments and claims that the Contractor may have theretofore in good faith undertaken or incurred in connection with said work and in accordance with the provisions of this contract, . . . .

(2) The Government shall reimburse the Contractor for all expenditures made in accordance with Article 3 and not previously reimbursed.

**(3) The Government shall reimburse the Contractor for such further expenditures as the Contractor may incur after and because of the termination or expiration of this contract. Such expenditures shall include, without limiting the generality of the foregoing, expenditures for the protection of Government property, and accounting services in connection with the settlement of this contract as may be approved by the Contracting Officer.**

. . . . .  
(c) Upon the making of said payments all obligations of the Government to make further payments or to carry out other undertakings hereunder shall cease forthwith and forever except that all rights and obligations of the respective parties ... in respect of costs, expenses, and liabilities which may thereafter be imposed on, or incurred by, the Contractor, without its fault or neglect, which are then undetermined or incapable or determination as to either existence, validity or amount, shall remain in full force and effect (except to the extent that responsibility therefor may have been assumed by the government under or pursuant to the provisions of subparagraph (1) of paragraph (b) of this Article). Id.



173 Tucson Airport Authority v. General Dynamics Corp., 922 F. Supp. 273, No. CIV-94-355TUC-ROS, 1996 U.S. Dist. LEXIS 8012 at \*6 (D. Ariz. Apr. 9, 1996).

<sup>174</sup> BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 436 (1995) ("Etymologically, the word derives from *indemnis* (= harmless) combined with *facere* (= to make). Thus, *indemnify* has long been held to be perfectly synonymous with *hold harmless* and *save harmless*. See *Brentnal v. Holmes*, 1 Root (Conn.) 291, 1. Am. Dec. 44 (1791)"); see also *American Transtech Inc. v. U.S. Trust Corp.*, 1996 U.S. Dist. LEXIS 10006, at \*28\*29 (S.D.N.Y. July 16, 1996) ("Indemnification is a cause of action which allows the party who is held legally liable to shift the entire loss to another, as opposed to contribution where two or more parties share the loss.")

175 *Haynes v. Kleinewefers & Lembo Corp.*, 921 F.2d 453, 456 (2d Cir. 1990) ("When a claim is made that a duty to indemnify is imposed by an agreement, that agreement must be strictly construed so as not to read into it any obligations the parties never intended to assume."); *Monaghan v. SZS 33 Assocs.*, 1995 U.S. Dist. LEXIS 2735, \*8 (S.D.N.Y. Mar. 8, 1995) ("A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and surrounding facts and circumstances."').

176 Gerald M. Levine, *Spreading Costs for Cleaning Up Contaminated Property. Contribution and Indemnification Under CERCLA*, 63 N.Y. ST. B. J., July-Aug. 1991, at 41, 43.

177 *Global Assocs.*, 88-2 B.C.A. (CCH) Para. 20,723 (1988), at 104,719.

178 41 U.S.C. § 120(a)(3) (1994); see *supra* note 146 and accompanying text.

179 SENATE COMM. ON MILITARY AFFAIRS, CONTRACT SETTLEMENT ACT OF 1944, S. REP. NO. 836, *supra* note 141.

180 Frank P. Grad, *Contractual Indemnification of Government Contractors*, 4 ADMIN. L. J. AM. U. 433, 461 (1991).

181 41 U.S.C. § 101(a),(b) (1994).

182 10 C.F.R. § 841.133 (1945 Supp.).

183 10 C.F.R. § 841.137 (1945 Supp.).

184 10 C.F.R. § 845.562.1(1) (1945 Supp.).

185 10 C.F.R. § 845.563.6(a)(a) (1945 Supp.).

186 10 C.F.R. § 847.743-6 (1945 Supp.).

187 10 C.F.R. § 847.743-9 (1945 Supp.).

188 10 C.F.R. §847.142-3 (1945 Supp.).

<sup>189</sup> 10 C.F.R. § 849.983-1 (1945 Supp.).

190 *id.*

<sup>191</sup> 10 C.F.R. § 847.748-1,2 (1945 Supp.).

192 10 C.F.R. § 849.983-1 (1945 Supp.); see supra note 189 and accompanying text.

193 10 C.F.R. § 88.15-655 (1943 Supp.).

194 10 C.F.R. § 88.15-537(b) (1943 Supp.).

195 10 C.F.R. § 88.15-656 (1943 Supp.).

196 C.F.R. § 88.15-905(2)(a),(b) (1943 Supp.).

197 10 C.F.R. § 88.15-934 (1943 Supp.).

198 10 C.F.R. § 849.983-1, art. 5 (1945 Supp.).

199 10 C.F.R. § 849.983-1 (1945 Supp.), see also 10 C.F.R. § 88.15-905(2)(a) ("Government shall assume . . . all obligations . . . the contractor may have in accordance with the provisions of this contract.", supra note 196).

200 10 C.F.R. § 841.114-2 (1945 Supp.).

<sup>201</sup> WAR DEPARTMENT, TECHNICAL MANUAL 14-1000: ADMINISTRATIVE AUDIT PROCEDURES FOR COST-PLUS-A-FIXED-FEE SUPPLY CONTRACTS, at iv (1946) (repealed 1955).

202 [Id. at](#) 1.

203 [Id. at](#) Para. 5.

204 [Id. at](#) Para. 147.

205 [Id. at](#) Para. 163.

206 [Id. at](#) Para. 183-84.

207 [Id. at](#) Para. 185.

208 26 C.F.R. § 26.9(a) (1940 Supp.).

209 [Id. at](#) § 26.9(b)-(h) (1940 Supp.).

210 See PR 15, 10 C.F.R. § 88.15-651(h)(1943 Supp.).

211 JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 146 (3d ed. 1995); see supra note 120 and accompanying text.

212<sub>1d</sub>.

213 [Id. at](#) 147.

214 Ch. 508, 54 Stat. 712 (1940) (repealed 1946), see supra note 115.

215 20 Comp. Gen. 632, 1941 [U.S. Comp. Gen. LEXIS](#) 101, at \*2 (1941).

216 [Id. at](#) \*6-\*8.

217 *Id. at* \* 13.

218 *Id. at* \* 14-\* 15.

219 21 Comp. Gen. 149, 1941 *U.S. Comp. Gen. LEXIS* 240, at \*8 (1941). The Comptroller General stated that cost reimbursement is fact specific based on rights and obligations under the *contract. Id. at* \*4. The claim involved lost tools, damaged and destroyed equipment and buildings of the contractor. It had the same clauses regarding insurance and losses not covered by insurance that were included in the contract reviewed in 20 Comp. Gen. 632 (1941), *id. at* \*12, *supra* note 215.

220 *Id. at* \*21.

221 *Id. at* \*19-\*20. In 22 Comp. Gen. 892, 1943 *U.S. Comp. Gen. LEXIS* 100, at \*9-\*10 (1943), the Comptroller General distinguished his opinion in 21 Comp. Gen. 149 (1941), by stating it had no objection to a contract clause reimbursing insurance premiums that also covered liability to third parties for acts of the contractor's employees, even though exercise of due care in hiring and retention could have avoided liability.

222 21 Comp. Gen. 466, 1941 *U.S. Comp. Gen. LEXIS* 335, at \*15 (1941) ("[A]n expense incurred by the contractor, not otherwise specifically provided for, must be shown to be reasonably incident to the performance of the work and to serve a useful purpose in fulfilling the contract requirements.").

223 23 Comp. Gen. 867, 1944 Comp. Gen. *LEXIS* 128, at \*4 (1944).

224 22 Comp. Gen. 183, 1942 *U.S. Comp. Gen. LEXIS* 220, at \*22 (1942).

225 22 Comp. Gen. 349, 1942 *U.S. Comp. Gen. LEXIS* 270, (1942) (holding contracting officer's authority is not unlimited).

226 22 Comp. Gen. 948, 1943 *U.S. Comp. Gen. LEXIS* 118, \*10 (1943) (holding that payments made to contractor's cost-plus subcontractor for unearned wages erroneously paid by the subcontractor to its employees was not allowed as a "loss or expense" because contractor had failed to maintain competent and careful employees (i.e. subcontractor)).

2<sub>2</sub>7 W. NOEL KEYES, *GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION* § 16.17(c) (1986).

228 Hugh C. Smith, *The War Department Board of Contract Appeals*, 5 *FED. B. ASS'N J.* 74, 74-75 (1943).

229 *Id. at* 75.

230 There were a few exceptions under a separate clause included in some contracts which also covered questions of *law. Id. at* 77.

231 *Id. at* 81. As of Nov. 1, 1943, the WBCA had received 413 appeals, and had disposed of 244 *cases. Id. at* 82.

232 3 *Cont. Cas. Fed. (CCH)* 278 (1945).

233 *Id. at* 280.

234 [Id. at](#) 286.

235 [Id.](#)

236 Douglas Aircraft Co., Inc., 3 Cont. Cas. Fed. (CCH) 731 (1945).

237 [Id. at](#) 733.

238 Douglas Aircraft Co., Inc., 3 Cont. Cas. Fed. (CCH) 126 (1944).

239 [Id. at](#) 128.

240 [Id. at](#) 129.

241 [Id.](#) (citing MS Comp. Gen. No. B-36008, 2 Sept. 1943; and Central Constr. Corp. v. United States, 63 Ct. Cl. 290, 296 (1927)).

242 41 U.S.C. § 113 (d) (1994); GENERAL SERVICES ADMINISTRATION, 5 DECISIONS OF THE APPEAL BOARD, OFFICE OF CONTRACT SETTLEMENT AND A HISTORY OF THE APPEAL BOARD 271 (1953).

243 [Id. at](#) 271-72. A total of 39 claims were appealed to the courts, and in only seven cases did the court differ with the ABOCS [decision. Id. at](#) 273.

244 A review of the indexes from the five-volume set of reported cases reveals no citations to § 20()(3).

245 5 App. Bd. OCS (No. 313) 87 (1951).

246 Federal Cartridge Corp. v. United States, 77 F.Supp. 380 (Ct. Cl. 1948).

247 5 App. Bd. OCS at 90.

248 [Id. at](#) 91-92.

249 5 App. Bd. OCS (No. 358) 60 (1950).

250 [Id. at](#) 61.

251 [Id.](#) A similar result was reached in Hercules Powder Co. v. Dep't of the Army, 5 App. Bd. OCS (No. 342) 24 (1950) (holding unknown claims, clause satisfied because excess tax depended on too many variables undeterminable at time of settlement agreement). The Board in Hercules also held that the unknown claims clause does not apply only to unknown claims presently existing, but also to future [claims. Id. at](#) 28.

252 5 App. Bd. OCS (No. 337) 43 (1950).

253 [Id. at](#) 47.

254 Maryland Sanitary Mfg. Corp. v. Dep't of the Army, 3 App. Bd. OCS (No. 264) 238, 248 (1949).

255 *Id.* at 219. See also *Nassau Boat Basin, Inc. v. War Dep't*, 1 App. Bd. OCS (No. 112) (1947) (holding the government was not at fault for contractor's failure to include a cost in the settlement agreement and for which there was no reservation claimed). *Accord Coat Corp. of Am. v. War Dep't*, 2 App. Bd. OCS (No. 108) 37 (1947) (holding no mutual mistake for omission of cost in settlement agreement).

256 1 App. Bd. OCS (No. 51) (1946).

257 *Id.* at 17-18; see also *Douglas Aircraft Co., Inc.*, 3 Cont. Cas. Fed. (CCH) 126 (WDBCA relying on the Comptroller General's position against allowing attorney's fees as costs in litigation), *supra* note 238 and accompanying text.

258 2 App. Bd. OCS (No. 110) 21 (1947).

259 *Id.* at 25.

260 *Id.*

261 41 U.S.C. § 113(b) (1994) ("Whenever any war contractor is aggrieved by the findings of a contracting agency on his claim . . . he may, at his election -- (1) appeal to the Appeal Board . . . ; or (2) bring suit against the United States for such claim . . . in the United States Claims Court or in a United States District Court.").

262 This includes the Claims Court successors: the Court of Claims from 1982 to 1992, and the Court of Federal Claims from 1992 to the present. Search of LEXIS, Genfed library, Claims file (July 22, 1996), produced 119 hits of the phrase "Contract Settlement Act," with over 70 percent of the cases decided before 1960.

263 77 F. Supp. 380 (Ct. Cl. 1948); see *supra* note 246 and accompanying text.

264 *Id.* at 378-79.

265 *Id.* at 388.

266 *Id.* at 389.

267 See *supra* notes 245, 249, 252, and accompanying text; see also *Hercules Powder Co. v. Department of the Army*, 3 App. Bd. OCS (No. 274) 186 (1949); *Stewart-Warner Corp. v. Department of the Army*, 3 App. Bd. OCS (No. 280) 192 (1949); *Hercules Powder Co. v. Department of the Army*, 3 App. Bd. OCS (No. 275) 196 (1949); *E. I. du Pont de Nemours & Co., Inc. v. Department of the Army*, 3 App. Bd. OCS (No. 272) (1949); *Atlas Powder Co. v. Department of the Army*, 3 App. Bd. OCS (No. 278) 206 (1949); *Hotpoint Inc. v. Department of the Army*, 4 App. Bd. OCS (No. 297) 8 (1949); *Northwest Airlines, Inc. v. Department of the Army*, 4 App. Bd. OCS (No. 282) 20 (1949); *E. I. du Pont de Nemours and Co. v. Department of the Army*, 4 App. Bd. OCS (No. 347) 226 (1950); *Certain-Teed Products Corp. v. Department of the Army*, 4 App. Bd. OCS (No. 317) 157 (1950).

268 5 App. Bd. OCS (No. 324) 166 (1951), *rev'd*, 160 F.Supp. 492 (Ct. Cl. 1958).

269 5 App. Bd. OCS at 169-70.

270 160 [F.Supp. at 495](#).

271 [Id. at 496](#).

272 [Id. at 500](#).

273 [Id. at 499-500](#).

274 151 F. Supp. 298 (Ct. Cl. 1957).

275 Act of July 14, 1952, ch. 739, 66 Stat. 627 (1952).

276 151 [F. Supp. at 301-02](#).

277 [Id. at 304-05](#).

278 *Certain-Teed Products Corp. v. Department of the Army*, 4 App. Bd. OCS (No. 317) 157 (1950); *Hercules Powder Co. v. Department of the Army*, 3 App. Bd. OCS (No. 274) 186 (1949), see *supra* note 251.

279 151 [F. Supp. at 312](#).

<sup>280</sup> Letter from Kathy J. Hofer, Senior Attorney, Office of the General Counsel, Ford Motor Company, to Successor to Contracting Officer, Army Air Forces Materiel Command (Jan. 20, 1994) (on file with Air Force Materiel Command Law Office, Wright-Patterson Air Force Base, Ohio).

281 [Id. at 3](#).

282 [Id. at 2](#).

283 [Id. at 4](#).

284 [Id. at 1](#); see 10 C.F.R. § 849.983.1 (1945 Supp.) (referencing art. 4(c)(3) of the form settlement agreement); see also *supra* note 189 and accompanying text.

285 [Id. at 2](#); see 10 C.F.R. § 88.15-905 (1943 Supp.) (referencing proposed [art. at](#) Para. 2(a)), *supra* note 196; see also *supra* note 166 and accompanying text for Ford's art. 9(b) language.

286 [Id. at](#) encl. 5, Government Responsibility for Willow Run Site Cleanup Costs Required Under CERCLA, (Jan. 20, 1994).

287 Included in those other items were all costs of rehabilitation of contractor's plant and equipment, costs of maintenance and repairs of the facilities used for contract performance, and overhead [costs](#). [Id. at](#) 2-3.

288 [Id. at 4](#).

289 [Id. at 5](#).

290 [Id. at 6](#).

291 [Id.](#)

292 [Id.](#)

293 Letter including Proposal for the Settlement of War Department Contracts, from L. D. Crusoe, Vice-President, Ford Motor Company, to Kenneth C. Royall, Under Secretary of War, Washington, D.C. (Feb. 28, 1947) (on file with Air Force Materiel Command Law Office, Wright-Patterson Air Force Base, Ohio).

294 *Id.* at 56, 61.

295 Letter at encl. 5, *supra* note 280 at 7.

296 As of the date of this article, no suit had been filed.

297 Defendant's Answer, Counterclaim, Third-Party Complaint at 11-38, Tucson Airport Auth. v. General Dynamics Corp., 922 F.Supp. 273, 1996 U.S. Dist. LEXIS 8012 (D. Ariz. 1996) (CIV-94-355-TUC-ROS).

298 *Id.* at 13, Para. 14.

299 *Id.* at 15-16, Para. 15.

300 see *supra* note 196 and accompanying text; 10 C.F.R. § 88-905 (1943 Supp.).

301 Defendant's Answer, Counterclaim, Third-Party Complaint at 16-17, Para. 19, Tucson Airport Auth. v. General Dynamics Corp., 922 F.Supp. 273, 1996 U.S. Dist. LEXIS 8012 (D. Ariz. 1996) (CIV-94-355-TUC-ROS).

302 *Id.* at 17, 19.

303 *Id.* at 18, Para. 25; see *supra* note 171.

304 *Id.* at 18-19, Para. 26; see *supra* note 172.

305 41 U.S.C. §§ 103(m), 106(c) (1994); Defendant's Answer, Counterclaim, Third-Party Complaint at 28, Paras. 64-65, Tucson Airport Auth. v. General Dynamics Corp., 922 F.Supp. 273, 1996 U.S. Dist. LEXIS 8012 (D. Ariz. 1996) (CIV-94-355-TUC-ROS).

306 *Id.* at 19, Paras. 27-28. 307 *Id.* at 21 Para. 32.

308 *Id.* at 22, Para. 35-36.

309 *Id.* at 23, Para. 37-39.

310 *Id.* at 25, Paras. 47-51..

311 Tucson Airport Auth. v. General Dynamics Corp., 922 F.Supp. 273, 1996 U.S. Dist. LEXIS 8012, at \*3 (D. Ariz. 1996).

312 5 U.S.C. §§ 701-706 (1994).

313 Tucson Airport Auth., 1996 U. S. Dist. LEXIS 8012, at \*3.

314 See 28 U.S.C. § 1491 (a)(1) (1994); *id.* at \*13.

315 Tucson Airport Auth., 1996 U.S. Dist. LEXIS 8012, at \*13-\*14.

316 Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251 (codified as amended at 31 U.S.C. § 1341(a)(1) (1994)).

317 U.S. CONST. art. 1, § 9, cl. 7.

318 U.S. CONST. art. 1, § 8, cls. 1,18.

319 31 U.S.C. § 1341 (a)(1) (1994).

320 Gary L. Hopkins and Robert M. Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 MIL. L.R. 55, 56 (1978).

321 *Hercules v. United States*, 64 U.S.L.W. 4117, 4120 (U.S. Mar, 5, 1996)(No. 94-818) (holding no implied-in-fact agreement of indemnification existed in Agent Orange contract) ("The Comptroller General has repeatedly ruled that Government procurement agencies may not enter into the type of open-ended indemnity for third-party liability that petitioner ... claims to have implicitly received under the Agent Orange contracts."):

322 *In re Assumption by Government of Contractor Liability to Third Persons-Reconsideration*, 62 Comp. Gen. 361 (1983) (holding clause providing contractors "virtually complete indemnity" for liability during contract performance in unlimited amounts violates the Anti-Deficiency Act).

323 *Id.* at 364-65. See 7 Comp: Gen. 507 (1928) (holding obligation in utility contract clause prohibited as too indefinite and uncertain); 16 Comp. Gen. 803 (1937) (holding indemnity clause in license agreement null and void because contracting officer exceeded authority executing clause too indefinite and uncertain); 20, Comp, Gen. 95 (1940) (holding provision in aircraft plant contract imposing contingent and continuing obligation to reimburse contractor for indefinite period after contract completion violates Anti-Deficiency Act); 35 Comp. Gen. 85 (1955) (holding contracting officer exceeded his authority entering into lease provisions obligating government to indemnify lessor); 59 Comp. Gen. 369 (1980) (holding State Dep't agreement to indemnify Australia for damages from hurricane seeding agreement violated Anti-Deficiency Act).

324 62 Comp. Gen. 361, 365 (1983) ("Another category of permissible indemnity contracts is those which are protected by the statutory umbrella."); see also Marc F. Efron and Devon Engel, *Government Indemnification for Environmental Liability*, FED. PUBS. BRIEFING PAPERS, Oct. 1992, at 1, 3.

325 12 Cl. Ct. 1 (1986).

326 *Id.* at 22-23.

327 For a comprehensive review of indemnification statutes see generally, Grad, *supra* note 180, at 433-525. Statutes granting indemnification authority include: Pub. L. 85-804, Act of Aug. 28, 1958, 72 Stat. 972 (1958), (codified at 50 U.S.C. §§ 1431-1435 (1994)) (permitting President to authorize government agency to enter into contracts or amendments "without regard to other provisions of law relating to making, performance, amendment, or modification or contracts, whenever he deems that such action would facilitate the national defense"), see also, Executive Order 10789, 3 C.F.R. §§ 426-27 (1954) (reprinted in 50 U.S.C. § 1431 (1994)) (clarifying use of indemnification), 48 C.F.R. §§ 50.400 to 403-3 (1996) (standards for use of indemnification in contracts under Pub. L. 85-804), § 52.250-1 (1996) (contract language for use under Pub. L. 85-804); § 5350.401-90



(1996) (specifying criteria for Air Force indemnification clauses under Pub. L. 85-804); Price-Anderson Act, 71 Stat. 576 (1957) (codified as amended at 42 U.S.C. § 2210 (1994)) (indemnification for government contractors and licensees for limited class of nuclear power plant disasters); Foreign Assistance Act of 1961, pt. III, ch. 2, § 633, 75 Stat. 454 (1961) (codified at 22 U.S.C. § 2393 (1994)) (providing authority for the President to make contracts "without regard to provisions of law" regarding formation and performance of contracts similar to Pub. L. 85-804); National Defense Contracts Act, ch. 882, § 5, 66 Stat. 726 (1952) (codified as amended at 10 U.S.C. § 2354 (1994) (statute authorizing indemnification provisions for Dep't of Defense research or development contracts), see also 48 C.F.R. § 235.070 (1996), § 252.235-7001 (cost-reimbursement contract language to be used for indemnification under 10 U.S.C. § 2354); 38 U.S.C. § 7317 (1994), 105 Stat. 220 (1991) (providing Dep't of Veterans Affairs authority to provide indemnity in research contracts involving risks "of an unusually hazardous nature"); Pub. L. 96-48, § 6(b), 93 Stat. 348 (1979) (providing authority for NASA to indemnify "any user of a space vehicle" for liability to third parties); 42 U.S.C. § 241(a)(7) (1994) (providing authority for Dep't of Health and Human Services to conduct research and investigation in accordance with military dep't contracts, including authority to indemnify, see National Defense Contracts Act, supra); Federal Aviation Act of 1958, 72 Stat. 800-806 (1958) (codified at 49 U.S.C. app. §§1531-1542 (1994) (providing authority for insuring civil American aircraft against risks from the operation of aircraft in carrying out the foreign policy of the U.S.)).

328 Karen L. Richardson, *The Use of the General and Residual Powers Under Pub. L. No. 85-804 in the Department of Defense*, 14 PUB. CON. L. J. 128, 129 (1983).

329 55 Stat. 839 (1941); see supra note 91 and accompanying text.

330 KEYES, supra note 227, at § 50.1 n.2.

331 RALPH C. NASH, JR. & JOHN CIBINIC, JR., 2 FEDERAL PROCUREMENT LAW 1934 (3d ed. 1980).

332 Executive Order 11610, 3 C.F.R. 594 (1971).

333 Id.

334 48 C.F.R. § 50.401 (1996).

335 48 C.F.R. § 52.250-1(c) (1996).

336 42 U.S.C. §2210 (1994):

337 Richard A. Smith, *Indemnification of Government Contractors*, FED. PUBS. BRIEFING PAPERS, Oct. 1982, at 6-7.

338 Grad, supra note 180, at 457.

339 see RAMI HANASH, ENVIRONMENTAL LIABILITY OF GOVERNMENT CONTRACTORS 89-90 (1992).

340 48 C.F.R. § 252.235-7001 (1996) provides: (c) The claim, loss, or damage -

(1) Must arise from the direct performance of this contract;

(2) Must not be compensated by insurance or other means; or be within deductible amounts of the Contractor's insurance;

(3) Must result from an unusually hazardous risk as specifically defined in the contract;

(4) Must not result from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, managers, superintendents, or other equivalent representatives who have supervision or direction of -

- (i) All or substantially all of the contractor's business;
- (ii) All or substantially all of the Contractor's operations at any one plant or separate location where this contract is being performed; or
- (iii) A separate and complete major industrial operation connected with the performance of this contract;

(5) Must not be a liability assumed under any contract or agreement (except for subcontracts covered by paragraph (i) of this clause), unless the Contracting Officer . . . specifically approved the assumption of liability; and

(6) Must be certified as just and reasonable by the Secretary of the department or designated representative.

(3) Must result from an unusually hazardous risk as specifically defined in the contract;

(4) Must not result from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, managers, superintendents, or other equivalent representatives who have supervision or direction of -

- (i) All or substantially all of the contractor's business;
- (ii) All or substantially all of the Contractor's operations at any one plant or separate location where this contract is being performed; or
- (iii) A separate and complete major industrial operation connected with the performance of this contract;

(5) Must not be a liability assumed under any contract or agreement (except for subcontracts covered by paragraph (i) of this clause), unless the Contracting Officer . . . specifically approved the assumption of liability; and

(6) Must be certified as just and reasonable by the Secretary of the department or designated representative.

Id.

341 During this period, Congress provided that properly obligated funds were available for expenditure for two fiscal years after the period of obligation had terminated. See also OFFICE OF THE GENERAL COUNSEL, NAVY DEPARTMENT, BUREAU OF NAVAL PERSONNEL, NAVY CONTRACT LAW 72 (1949) (citing previously codified 31 U.S.C. § 713) ("After the 1st day of July, in each year, the Secretary of the Treasury shall cause all unexpended balances of appropriations which shall have remained upon the books of the Treasury for two fiscal years to be carried to the surplus fund and covered into the Treasury.").

342 Ch. 593, § 201, 55 Stat. 838, 839 (1941) (codified at 50 U.S.C. App. § 611 (repealed 1966)).

343 See supra note 327.

344 Executive Order 9001, tit. I, § 1, 3 C.F.R. Cum. Supp. 1054, 1055 (Compilation 19381943).

345 12 Cl. Ct. 1, 23 (1986). The Court notes that the opinion rendered by 40 Op. Att'y Gen. 225 (1942), "may have misunderstood or ignored the limitations" on contract authority when it stated that indemnification of a Corps of Engineers dredging contractor was permissible under the Executive Order. *Id.* at 24.

346 Unpublished decision of the Comptroller General, B-33801, Apr. 19, 1943, and a related decision, Oct. 27, 1943; see also OFFICE OF THE GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE, 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (2ed. 1992) at 6-39 n.30. The decisions were classified and the subject matter was carefully concealed. They were declassified in 1986. *Id.*

347 B-33801, *id.* at 3.

<sup>348</sup> 41 U.S.C. § 120(a)(3) (1994).

349 41 U.S.C. § 122 (1994).

350 In 1986, in response to a congressional inquiry regarding amendments to the Price-Anderson Act, supra note 336, the Comptroller General issued an opinion highlighting the key issue involved in indemnification legislation. He stated: "An indemnity statute should generally include two features--the indemnification provisions and a funding mechanism. Indemnification provisions can range from a legally binding guarantee to a mere authorization. Funding mechanisms can similarly vary in terms of the degree of congressional control and flexibility retained. It is impossible to maximize both the assurance of payment and congressional flexibility. Either objective is enhanced only at the expense of the other.... If payment is to be assured, Congress must yield control over funding, either in whole or up to specified ceilings.... Conversely, if Congress is to retain funding control, payment cannot be assured in any legally binding form and the indemnification becomes less than an entitlement." Comp. Gen., B-197742 (1986), cited in OFFICE OF THE GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE, supra note 346 at 6-40 to 6-41.

351 Act of Oct. 26, 1942, ch. 629, tit. II, 56 Stat. 996 (1942) (emphasis added). The same language is used in an appropriations act for the Dep'ts of State, Justice, Commerce, and the Judiciary, in the Act of July 5, 1946, ch. 541, 60 Stat. 447 (1946).

352 26 C.F.R. § 26.9(a) (1940 Supp.).

353 See art. 9(b)(1),(2), of the Ford and Consolidated contracts, supra notes 166, 171.

354 Courts have examined pre-CERCLA indemnification clauses in private contracts and have determined that that precise language of the clauses controls whether those clauses will be upheld. See *Kerr-McGee Chemical Corp. v. Lefton*, 14 F.3d 321, 326-28 (7th Cir. 1994) (holding pre-CERCLA indemnity agreement sufficiently clear and "party may indemnify another party for liability arising out of a law not in existence at the time of contracting"); *Gopher Oil Co. v. Estate of Romness*, Nos. 95-1309, 95-1338, 1996 U.S. App. LEXIS 12310, at \* 10-\* 13 (8th Cir. May 29, 1996) (holding pre-CERCLA indemnity agreement was clear in limiting liability to those claims "existing at closing" and did not contemplate covering environmental laws of CERCLA).

355 88-2 B.C.A. Para. 20,723 (1988).

356 The clause provided in pertinent part: "(c) The Contractor shall be reimbursed: (i) for the portion allocable to this contract of the reasonable cost of insurance as required or approved pursuant to the provisions of this clause, and (ii) for liabilities to third persons for loss of or damage to property . . . , or for death or bodily injury, not compensated by insurance otherwise, arising out of the performance of this contract whether or not caused by the negligence of the Contractor, his agent, servants or employees; provided, such liabilities are represented by final judgments or by settlements approved in writing by the Government, and expenses incidental to such liabilities..... (emphasis added) *Id.* at 104,718.

357 *Id.*

358 *Id.* at 104,719.

359 *Id.* at 104,720.

360 13 Cl. Ct. 72 (1987), vacated, 855 F.2d 1571 (Fed. Cir. 1988) (the second of two cases brought by Johns-Manville Corporation in the Claims Court concerning World War II-era Navy Dep't contracts involving liability for asbestos personal injury claims).

361 *Id.* at 161.

362 *Id.*

363 see supra note 164.

364 See supra note 326.

365 OFFICE OF THE GENERAL COUNSEL, NAVY DEPARTMENT, supra note 341, at 223.

366 Similar issues of insurance were raised in the Johns Manville case. See 13 Cl. Ct. 72, 103-109 (1987).

367 *John Zimmerman & Sons, Inc*, 3 Cont. Cas. Fed. (CCH) 437, 438-39 (1945) (holding contracting officer was foreclosed from assessing additional charges after final payment had been made); *Goldschmidt & Bethune Co.*, 3 Cont. Cas. Fed. (CCH) 381 (1945) (holding contractor was foreclosed from appeal after final payments on contracts had been made and accepted without protest or reservation); *Trinidad Bean & Elevator Co.*, 3 Cont. Cas. Fed. (CCH) 1000 (1945) (holding contractor not liable for damaged beans because after final payment without reservation there existed no active contract available for appeal).

368 *Reed & Prince Manf. Co.*, 4 Cont. Cas. Fed. (CCH) Para. 60,140 (1946) (overruling its prior position foreclosing appeal after final payment, the WDBCA held when contracting officer acts "under the contract," even after final payment, the WDBCA had jurisdiction to hear an appeal)

369 41 U.S.C. §§ 106(b), 103(m), 106(c) (1994).

370 See *Hatco Corp. v. W.R. Grace & Co.*, 59 F.3d 400, 406 (3d Cir. 1995) (holding that the burden of proof as to the validity of a release is on the defendant who pleads it).

371 41 U.S.C. § 106(c) (1994).

372 10 C.F.R. §§ 847.743-6, 847.743-9, 849.983-1 (1945 Supp.), see supra note 186, 187, 189 and accompanying text; see also Keith I. Parsons & Walter J. Blum, In the Wake of Speedy Termination Settlements, 13 U. CHI. L. REV. 1, 4-5 (1945).

373 812 F.2d 700 (Fed. Cir. 1987).

374 *Id.* at 703-704 ("Congress did not intend, unless there was a plain or explicit exception, to leave contracts open and unsettled for decades. Rather, Congress wanted to end with finality war-time contracts and move swiftly into a peace-time economy.") *Id.*

375 Ford Proposal for Settlement of War Dep't Contracts, supra note 293.

376 Art. 1(f)(4), Supplemental Settlement Agreement to Fixed Price and Cost-Plus-A-Fixed-Fee Contracts for Supplies, Consolidated Vultee Aircraft Corporation, Agreement for Amendment and Termination of Contracts, Nov. 9, 1945.

377 See supra note 166.

378 See FMC Corp., 29 F.3d at 846, supra note 31 and accompanying text.

## **The Role of Regional Organizations in Stopping Civil Wars**

CAPTAIN DAVIS BROWN /\*/

... regional arrangements ... possess a potential that should be utilized in serving the functions covered in this report: preventive diplomacy, peace-keeping, peacemaking and post-conflict peace-building./1/  
Boutros Boutros-Ghali

### **I. INTRODUCTION**

The "new world order" did not quite turn out as planned. Although the international community need no longer fear a catastrophic superpower war, we are now plagued with dozens of civil wars around the globe-not as widespread, but no less deadly and definitely more vicious.

When such conflicts become threats to international peace and security and in these days, with the impact of refugees on neighboring countries and ethnic groups living across international frontiers, they usually do-states are less in need of collective defense than collective security. The difference between the two is this: collective defense is the banding together of national armed forces to meet a common threat, such as NATO against the Soviet Union. Collective security is joining forces to maintain peace and security within or near the group's area of competence. Examples include the Organization of American States (OAS) in Haiti and Economic Community of West African States (ECOWAS) in Liberia. Joint forces may even deploy outside the borders of the contributing nations, as North Atlantic Treaty Organization (NATO) forces have in the former Yugoslavia. These and other cases discussed herein are examples of the international community taking steps to end a civil war or some other internal threat to the peace.

Used in this manner, multinational forces can assume a multitude of roles. By providing early warning and maintaining a country's territorial integrity and political independence, they may deter unwanted behavior. They may compel certain behavior by enforcing safety or weapons-free zones, disarming combatants and denying them freedom of movement, and enforcing economic sanctions. They may also protect or provide

humanitarian relief to civilian populations. They may also operate in traditional peacekeeping mode, by deploying between combatants and monitoring compliance with peace agreements. <sup>/2/</sup>

Nations need not create arrangements from scratch to put these ideas into practice; such arrangements exist already in the form of regional organizations. The term "regional organization," as used in this article, means any institution, whose members are states, where those members group together and form and/or implement a common policy, whether defense, economic, or something else. A regional organization must be regional; the members must have some common interest, usually created by proximity. For example, Costa Rica and Panama, having common heritage and borders, could form a regional organization, whereas Costa Rica and Brunei have so little in common that a regional organization between them is hard to fathom. Most states are members of some regional organization.

The existence of regional organizations is recognized in the United Nations (U.N.) Charter:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations. <sup>/3/</sup>

Some regional organizations, such as the OAS and the Arab League, existed even before the U.N. was founded. Indeed, the Charter was drafted in anticipation that regional organizations would provide the first line of defense against local threats to peace. It provides that "the Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority." <sup>/4/</sup>

But the Security Council was paralyzed for decades by the Cold War and the veto power of the Soviet Union (or, from the Soviet perspective, the U.S.). During the Cold War, internal tensions were kept in check, making collective security unnecessary. Collective defense, on the other hand, was very necessary, and many regional organizations formed during the Cold War were formed for that specific purpose. The end of the Cold War unleashed those internal tensions and civil wars multiplied. Regional organizations now no longer needed for collective defense have begun to assert a new role in collective security by stopping civil wars and helping (or making) combatants achieve peace.

This article will explore how and why these changes took place. It shall begin with a discussion of the role of regional organizations during the Cold War, and show how the role of regional organizations in preventing or stopping internal conflicts has expanded and the effect of their expanded role on international law. This article will conclude with some predictions of the future and propose how judge advocates may find a practical application for the principles set forth in this article.

## II. PAST TENSE

The basic purpose behind any regional organization is to foster cooperation among the member states--to craft a common solution to a common problem. Cooperation can take the form of economic and/or financial integration, technical and cultural exchanges, or collective defense. Historically, states applied the concept of collective defense to mutual assistance in combating an outside aggressor. Some regional organizations, such as the Cold War defense organizations, came into being solely in response to external threats; others were formed with broader objectives, with mutual defense only one purpose among many.

From the perspective of international peace and security, the development of regional organizations during the post-World War II and early Cold War eras were based, generally speaking, on three principles: (1) an act of aggression against one member is considered an act of aggression against all of the them; (2) members renounce the use of the force (except in self-defense) and pledge to resolve disputes among themselves by peaceful means; and (3) intervention by one member in the internal affairs of another is prohibited. Although at first blush these principles would appear more applicable to controlling intra-regional conflicts, the regional organizations just mentioned were all created with external threats in mind.

This section will begin with a survey of various regional organizations and an analysis of their legal frameworks for implementing collective defense or security. It will conclude with two case studies--the 1965 U.S.-OAS intervention in the Dominican Republic and the 1983 U.S. - Organization of Eastern Caribbean States (OECS) intervention in Grenada--presented as examples of early operational successes but legal failures.

#### A. Pre-Cold War Regional Organizations

The Organization of American States, the League of Arab States, and the Organization of African Unity (OAU) are all examples of regional organizations designed with broader objectives than collective defense or collective security. Their fundamental purposes are to promote cooperation among the nations of that particular region. The OAS and Arab League charters also contain some measures for the implementation of collective defense. The OAU, however, has no such procedures and will not be discussed any further in this article.

The Inter-American system is the oldest regional arrangement still in existence. Though the objectives of its present incarnation, the Organization of American States, (OAS), are widespread, the fundamental principles stated in the OAS Charter are the same three previously mentioned. The seeds of American regionalism were originally planted with defense against external aggression in mind. The 1823 Monroe Doctrine, whose main purpose was to prevent European re-colonization of the Americas, /5/ led to later doctrines protesting against European military and diplomatic intervention. /6/

A series of conferences this century culminated in the 1947 Inter--American Conference For the Maintenance of Continental Peace And Security, which produced the Rio Treaty, and in 1948 the Ninth International Conference of American, during which the OAS was founded. These two documents form the basic framework of the OAS.

The OAS Charter <sup>/7/</sup> has undergone several amendments, but the three fundamental principles stated in the original charter remain intact. Articles 3(g) and 27 <sup>/8/</sup> both make an act of aggression against one American state an act of aggression against all. Articles 3(h) and 23 both direct members to resolve controversies peacefully. <sup>/9/</sup> The prohibition of intervention in the affairs of other members is contained in Articles 18 and 20. <sup>/10/</sup> The real substance of Inter-American collective security, however, is the Inter-American Treaty for Reciprocal Assistance (the Rio Treaty), <sup>/11/</sup> concluded a year before the OAS Charter and incorporated by reference in the Charter (in Article 28). <sup>/12/</sup> Article 3(1) of the Rio Treaty states in the event of an armed attack on an American state, "the High Contracting Parties agree that . . . each one of [them] undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense." <sup>/13/</sup> Article 3(2) provided for the "Organ of Consultation of the Inter-American System," which today would be the OAS Meeting of Consultation of Ministers of Foreign Affairs, <sup>/14/</sup> to agree on collective measures.

The question of action to be taken in the event of aggression by one American state against another was the source of some controversy among the American states, <sup>/15/</sup> and the ensuing compromise was represented in Articles 7 and 8 of the Rio Treaty. Article 7 directed states to consult with each other and decide on appropriate measures, which according to Article 8 could include various diplomatic and economic sanctions, and armed force. They first had to try a peaceful resolution; they could apply "collective enforcement measures" only if peaceful means failed. <sup>/16/</sup> In the 1975 San Jose Protocol amending the Rio Treaty, <sup>/17/</sup> the parties adopted a new Article 3(2), which states,

At the request of the States . . . directly attacked by one or more American states and until the Organ of Consultation ... takes a decision, each of the States Parties may determine, according to the circumstances, the immediate measures it may take individually ... <sup>/18/</sup>

This appears to be an invitation for states to immediately render military assistance to an American state attacked by another American state, as the assisting states deem necessary, until the Organ of Consultation decides what to do. This effectively makes Article 3(2) of the amended Rio Treaty analogous to Article 51 of the U.N. Charter. <sup>/19/</sup>

Although the OAS, through the Rio Treaty, has some procedural mechanisms in place for authorizing collective defense as needed, <sup>/20/</sup> the Charter charges no specific committee or council with establishing a command structures planning long-term joint defense strategies, or negotiating a common defensive foreign policy. As a result, there is no permanent Inter-American defense structure like NATO.

The League of Arab States, or the Arab League, founded in 1945 as the result of a conference to consider political unification of the Arab nations, <sup>/21/</sup> was conceived, according to Article 2 of the Pact of the League of Arab States (the Arab League Pact), to "draw closer the relations between the member States and co-ordinate their political activities . . . and to consider in a general way the affairs and interests of the Arab countries." <sup>/22/</sup> Of the many economic, social, cultural, and political objectives stated in the Pact, collective defense is not one of



them. Article 6 of the Pact merely states "in the case of aggression or threat of aggression by a State against a member State, the attacked or threatened with attack may request an immediate meeting of the Council. The Council shall determine the necessary measures to repel this aggression." /23/ Article 6 also requires such measures be decided by unanimous decision (minus the aggressor) of the Council. The Pact; however, contains no mechanism for implementing these measures.

The Arab League did draw up a Joint Defense Treaty /24/ which was to remedy much of what was missing from the Pact. Article 2 of the Joint Defense Treaty permits members "immediately to adopt, individually and collectively, all steps available, including the use of armed force, to repel the aggression and restore security and peace." /25/ Article 3 gives any member standing to request collective action, enabling the League to come to the aid of a state so quickly overrun that the government is unable to request action on its own. Article 5 provides for a Permanent Military Commission to formulate joint defense plans; the Commission's duties are spelled out in the Military Annex to the Treaty. Article 6 creates a Joint Defense Council to work under the supervision of the Arab League Council.

These procedures were made primarily in anticipation of an external threat. The Treaty was intended to create a joint Arab force, which would not have been possible had the members envisioned an Inter-Arab war. Article 1(a) of the Military Annex charges the Permanent Military Commission "with preparation of military plans to meet foreseeable dangers or armed aggression which might be attempted against . . . the Contracting States." /26/ (emphasis added). During the formative years of the Arab League, no inter-Arab war was foreseeable. /27/ One external threat (from the Arab perspective) was extremely foreseeable: Israel.

Despite the mechanisms for collective security being better laid out in the Arab League's Joint Defense Treaty than in the Rio Treaty and OAS Charter, the Arab League has not been successful in implementing them. The supreme body of the Arab League, the Council, has no enforcement powers. /28/ Article 6 requires League decisions to be unanimous, making them difficult to reach. Arab League measures to maintain peace and security have in recent times been dismal. The Iran-Iraq war, for example, may have dominated the agenda at the 1987 Arab League summit meeting, but the resulting Resolution merely expressed support for Security Council Resolution 598 calling for an end to the war, and condemned Iranian occupation of Iraqi territory. It "signified very little." /29/ During the Gulf War, in which by invading Kuwait Iraq violated a number of provisions in both the Pact and Joint Defense Treaty, /30/ league action was limited to condemning Iraqi aggression, demanding withdrawal, and reaffirming Kuwait's sovereignty. /31/ It is true that the Security Council actively took up the case, /32/ barring Arab League enforcement measures, but the Arab League was not the driving force behind the Security Council's interest in Kuwait, as the OAS was with Haiti.

The Arab League is an example of a regional organization which has not evolved since the end of the Cold War as others have, and will not be discussed further.

## B. Cold War Regional Organizations

The beginning of East-West tensions spawned a network of regional defense arrangements specifically aimed at containment of Communism (or, from the Soviet point of view, containment of western capitalism). These organizations included NATO, SEATO, CENTO and ANZUS.<sup>/33/</sup> In contrast to their predecessors, who had broad objectives, these organizations were formed for self-defense against a common external threat. Other activities, such as economic cooperation, were only peripheral to the main purpose of mutual defense.

Shortly after World War II events in Europe underscored the need for western Europe, already drained of resources; to have additional security measures. Germany still posed a threat and the Soviet menace was stronger than ever. Great Britain, France and the Benelux had just concluded the Brussels Treaty, providing formal guarantees for mutual defense in case of an armed attack against any of them.<sup>/34/</sup> France was pressing for formal guarantees from the U.S. as well. The 1948 Soviet blockade of Berlin galvanized everyone into action; the U.S. provided unilateral assistance for the short term, but the long-term solution; the 1949 North Atlantic Treaty, /35/ ultimately brought the U.S. into an unprecedented formal arrangement. Thus was born the North Atlantic Treaty Organization (NATO). /36/ The preamble of the North Atlantic Treaty reads in part, "the parties to this Treaty ... are resolved to unite their efforts for collective defence and for the preservation of peace and security." /37/ Unlike the charters of the OAS, Arab League, or OAU, the North Atlantic Treaty contains no economic, financial, social, or cultural objectives in the preamble. All other functions typical of a regional organization were subordinate to collective defense. /38/

Article 5 of the North Atlantic Treaty contains the key principle behind defensive regional organizations: an attack against one member is considered an attack against all, and that members will take collective action to defend the attacked member. Other regional organizations have such provisions in their charters too, but the North Atlantic Treaty contains additional obligations signifying the centrality of collective defense to the Treaty. For example, Article 8 prohibits NATO members from entering into any arrangements in conflict with their obligations to NATO. Article 9 directs the North Atlantic Council (NATO's supreme body) to establish a defense committee to recommend measures to be taken in collective self-defense. Unlike other charters, the North Atlantic Treaty specifically directs joint planning:

In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack. /39/

The Rio Treaty, to which the U.S. is also a party, has no similar directive.

The 1950s saw the creation of other collective defensive arrangements. The first was the 1951 ANZUS Treaty, in which the U.S., Australia, and New Zealand undertook to "maintain and develop their individual and collective capacity to resist armed attack," /40/ a similar arrangement to that of Article 3 of the North Atlantic Treaty. Originally conceived by Australia

as a Pacific non-aggression pact, ANZUS did not come about with any specific common enemy in mind /41/ but its timing and goal, stated in the preamble of the ANZUS Treaty, "to coordinate ... efforts for collective defense for the preservation of peace and security" /42/ would easily have lent itself to containment of Soviet aggression. The defense arrangements are not nearly as formalized as in the North Atlantic Treaty; even the principles that an attack on one party is an attack on all is missing. Article IV merely states that each party will "act to meet the common danger." /43/

1954 saw the founding of the Southeast Asian Treaty Organization (SEATO), via the Pacific Charter /44/ and the Manila Treaty, /45/ signed by the Philippines, Thailand, Pakistan, France, Great Britain, Australia, New Zealand, and the U.S. Described as ' NATO's southeast Asian counterpart, it was formed as a bulwark against China, who at the time was a Soviet ally. /46/ In many respects the Manila Treaty closely resembles the ANZUS Pact: Article II provides for maintaining and developing collective capacity to resist armed attack and Article IV states the parties, if attacked, will "meet the common danger." /47/ One peculiar element of the SEATO defense arrangement is that Article IV also entitles SEATO to take collective action in the event of armed attack against any other state agreed on by SEATO members. In the accompanying Protocol /48/ SEATO named Laos, Cambodia and South Vietnam, who were all non-members /49/ This is the only instance of a regional organization's charter explicitly giving itself competence to respond to a threat against a non-member state. SEATO officially disbanded in 1977, its members desiring to improve relations with China. The Manila Treaty remains in force. /50/

The Middle East also had a subsidiary to the anti-Soviet conglomerate: the Central Treaty Organization (CENTO), which had its roots in a pre-World War II non-aggression pact between Turkey, Iran, Iraq and Afghanistan. /51/ The NATO franchise took the form of a defense agreement between Turkey and Iraq, the Baghdad Pact, which was later joined by Pakistan, Iran and Great Britain. /52/ CENTO's immediate objective was stabilization of the Middle East in the wake of the Suez Canal crisis. Its long-term objective, though, was containing the Soviet Union.

Like SEATO, CENTO was a weak organization. Article 1 of the Baghdad Pact states the members "will co-operate for their security and defence." /53/ The Pact does not state that an attack on one member is an attack on all. However, in Article 4 the members pledged "not to enter into any international obligation incompatible with the present Pact." /54/

Article 5 of the Pact expressly invited members of the Arab League to join the CENTO, but the Arab states declined, regarding CENTO as too pro-Western and pro-Israel. CENTO members' foreign policy interests became more discordant over time. Iraq withdrew to join the Arab League; Turkey joined NATO; Pakistan engaged India; Iran strengthened relations with the Soviet Union and then underwent an Islamic revolution. CENTO formally dissolved in 1979. /55/

The European Union (EU) is a peculiar example of a regional organization, originally conceived for mutual defense, which has assumed a much broader role. The first step toward European integration was the 1948 Brussels Treaty, /56/ prompted by the threat of renewed German aggression

/57/ and East-West tensions. The Brussels Treaty has broader objectives than just defense; Article I provides for economic cooperation; Article II for promotion of a higher standard of living; Article III for cultural exchanges. Other than in the preamble, collective defense is not mentioned until Article IV, which directs parties to the Treaty to come to the aid of other parties who have been attacked.

The Western European Union (WEU), a spin off of the arrangement created in the Brussels Treaty, was the result of a political movement to strengthen European integration within NATO. Created by the 1954 Paris Protocol /58/ in which West Germany and Italy acceded to the Brussels Treaty, the WEU was the alternative to a failed French initiative to create a European Defense Community. /59/ Article 2 of the Paris Protocol amended the Brussels Treaty, originally drawn up to counter the threat of renewed German aggression, to promote unity and encourage the progressive integration of Europe. /60/ In contrast to the failed European Defense Community, providing for a joint European Defense Force /61/ Article 3 of the Paris Protocol assigned the task of handling WEU defense matters to NATO.

As the only solely European organization competent to take up defense matters in western Europe, the WEU plays a unique role within the Inter-European system. It remains subservient to NATO, but is the defense component under the umbrella EU. The WEU has no command structure of its own; for the implementation of its defense functions has long since been delegated to NATO. The Maastricht Treaty, /62/ in Article J.4, paragraph 2 "requests the Western European Union . . . to elaborate and implement decisions and actions of the Union which have defense implications." In keeping with the Brussels Treaty, however, paragraph 4 keeps EU defense policy subordinate to NATO policy.

### C. Early Case Studies

The original purpose of military alliances was to defend against a threat from outside. The Cold War never heated up, so there are no NATO operations to discuss-only Inter-American cases. Non-Cold War regional organizations were unprepared to take effective action against a threat to the peace from within, and no one in the post-World War II period would have dreamed that a regional organization would become militarily involved in an internal conflict. One reason for this is the generally accepted norm prohibiting states from interfering in the domestic affairs of other states, a principle embodied in the U.N. Charter /63/ and the charters of quite a few regional organizations. /64/ Another is the perception, and in some instances reality, that one or a few states would dominate militarily over the rest of the organization. /65/ These points are illustrated by examining two case studies: the joint peacekeeping force in the Dominican Republic in 1965 and the 1983 invasion of Grenada.

In April 1965, a military coup in the Dominican Republic led to heavy fighting between two factions. The U.S. sent a force to evacuate Americans and restore democracy. /66/ The OAS immediately convened to decide on measures to restore peace. The OAS's involvement had the blessing of most of the U.N. Security Council. /67/ In early May the OAS, declaring itself "competent to assist the member states in the preservation of peace and the re-establishment of normal democratic

conditions," /68/ created the Inter-American Peace Force (IAPF) under a unified command. /69/ The purpose of the IAPF was to restore normality, maintain security, protect human rights and establish an atmosphere of peace and conciliation. /70/

The Security Council's reaction to the OAS's use of troops was mixed, because of several facts undermining the credibility of the IAPF. /71/ The decision to establish a peacekeeping force to operate within a single state had no basis in the Rio Treaty, as pointed out by Uruguay in Security Council chambers. France also questioned the legality of the force's creation. Several members of the Council, including France and the Soviet Union, called the use of the IAPF an act of intervention, which the U.S., Bolivia, and even the Secretary-General of the OAS denied. /72/

Another factor was the Soviet-propounded accusation that the IAPF was really a front for U.S. occupation of the Dominican Republic. The U.S. had 12,400 troops in the force, compared to 1700 troops from the other six contingents. /73/ Remarks by the Deputy Commander of the Force, U.S. Lt. General Bruce Palmer, suggest the IAPF may have unwittingly become a cover for the American political agenda of preventing a Communist takeover of the Dominican Republic. /74/

Although the operation itself achieved its objectives, it was not recognized as legitimate by the international community. The OAS's lack of preparedness to respond forcefully to any armed conflict, let alone a civil war, forced the organization to build the IAPF on the legal framework established by the initial U.S. intervention, instead of creating it independently. The U.S. justification for its initial invasion was an invitation from the legitimate governmental authority. As Louise Doswald-Beck pointed out in her 1985 article on the legality of intervention by invitation, /75/ the factual (and therefore legal) basis for this justification was shaky. From a legal standpoint, this early attempt at Inter-American collective security failed.

Much has been written on the legality of the 1983 invasion of Grenada, /76/ which took place after the collapse of the government in a coup. Many authors characterize the invasion as a U.S. operation but in fact six other Caribbean nations participated. /77/ The initiative actually came from the Organization of Eastern Caribbean States (OECS), in the form of a verbal and later formal written invitation to participate in an OECS operation to restore peace to the island: /78/ This article will not address the controversial question of the legality of the invasion itself, but rather the competence of the OECS to embark on such an operation.

The purposes and functions of the OECS are set forth in Article 3 of the OECS Treaty, calling for joint policy in everything from international trade to the judiciary. Article 3(1)(b) sets forth one of the OECS's purposes "to promote unity and solidarity among the Member States and to defend their sovereignty, territorial integrity and independence." /79/ The Treaty does not mention humanitarian intervention or restoration of law and order, which were two legal justifications presented for the invasion. /80/ Article 8(4) of the Treaty creates the OECS Defense and Security Committee, whose responsibility is "coordinating the efforts of Member States for collective defense and the preservation of peace and security against

external aggression" /81/ [emphasis added]. The Treaty does not give the Committee the authority to mount a military invasion to end a civil conflict. Article 8(5) requires that decisions of the Defense and Security Committee be unanimous; given that Grenada is a member of the OECS, a unanimous decision to launch an invasion would have been impossible. Thus, it is apparent that the OECS participation in the Grenada invasion was beyond the scope of the OECS Treaty.

It was not, however, beyond the scope of member states acting collectively. The call for action in Grenada did not come from the Defense and Security Committee; it came from the Heads of Government of the members. /82/ The Heads of Government make up the supreme body of the OECS, known as the Authority, /83/ who can enter into relationships with other countries and organizations. /84/ The Authority did exactly that in inviting the U.S. and two other Caribbean nations, Jamaica and the Bahamas (not OECS members) to participate. It is only logical that the Heads of Government would use an already existing organizational structure, the OEC'S, as a forum for collective implementation of a joint policy. This is consistent with the purpose, stated in Article 3(1)(d), "to seek to achieve the fullest possible harmonisation of foreign policy among the Member States."

Like the IAPF, the Grenada force has also been criticized for its lopsided constituency. As Christopher Joyner pointed out in his article on the legality of the invasion of the 7-nation; 2200-member invasion force, the U.S. contingent numbered 1900. /85/ The fact that the U.S. was indeed already predisposed toward invading, /86/ coupled with the overwhelming power of, the U.S. over the other participating states, would easily give the appearance that the U.S. was using the OECS invitation merely to serve its own policy objectives (as the U.S. was accused doing in the Dominican Republic 18 years earlier). However, Robert Beck's article, written 10 years after the invasion, demonstrates that was not the case. Although the Reagan administration may have had a hand in getting the OECS invitation issued, it did not feel justified in intervening without it. Newly released documents show the OECS issued a verbal invitation the day before President Reagan made his final decision. /87/ The U.S. may have played a large part in the actual operation, but this was not a case of small states acquiescing to superpower whims.

### **III. PRESENT PROGRESSIVE**

In the 1990s regional organizations have come of age. During the Cold War their practice was largely devoted to collective defense. Since the end of the Cold War they have begun to find a role in collective security. This section will begin with a discussion of the effects of the end of the Cold War. Then, the new regional role in stopping internal conflicts will be illustrated by using the ECOWAS intervention in Liberia, the OAS in Haiti, and NATO et al. in the former Yugoslavia.

#### **A. The End Of The Cold War**

Fundamental to understanding why events have shaped the way they have are the effects of the end of the Cold War, which is the single most defining event in the change in regional and global security perspectives. East and West came to an understanding, slowly developing into detente and now a sort of alliance. The basic premises of collective security, once

just another word for collective defense, began to crumble as there came to be a real difference between the two. One broken tenet was that the West and East must always be opposed, no longer exists--the mutually exclusive "American club" and "Russian club." With the depolarization of world politics, regional organizations are integrating old enemies. The other one was Security Council paralysis. During the Cold War the U.S. and U.S.S.R. almost always had opposing interests, and one usually vetoed measures favorable to the other, deadlocking the U.N. Security Council. /88/ Now the U.S. and Russia are on the same side, enabling the Security Council to reach decisions impossible just 10 years ago.

A new generation of regional organization has come into being, geared toward preservation of intra-regional peace and security. Their concept of peace departs somewhat from the traditional philosophy of collective defense against an external threat; they concentrate their efforts on maintaining peaceful relations among its members not through military force, but through diplomacy.

Although few must have realized it then, the Final Act of the 1975 Helsinki Summit /89/ was the beginning of the end. That Act created the Conference For Security and Cooperation in Europe (CSCE), now the Organization For Security and Cooperation in Europe (OSCE), /90/ encompassing all of Europe, the former Soviet Union, Canada and the U.S.--"from Vancouver to Vladivostok" as said in some circles. As CSCE Secretary-General Wilhelm Hoyneck put it, its agenda was "to ease block to block confrontation, to limit the Soviet threat, to build bridges between West and East and foster the freedom of captive nations." /91/ This was done via confidence-building measures to reduce the military threat and bolster trust between NATO and Warsaw Pact countries, /92/ and pledges of cooperation in a vast array of economic, scientific, and environmental fields. /93/ In the 1990s, the CSCE put another item on its agenda: human rights. /94/ The OSCE has dispatched missions to several members ranging from helping build democratic institutions to brokering settlements on political independence and integrating non-indigenous populations. In 1994 alone the CSCE had missions in Georgia, Moldova, Tajikistan, Estonia, Latvia, Ukraine and Nagorno-Karabakh. /95/

At the outset, the only tool available to the CSCE to achieve these goals was diplomacy. The Helsinki Summit had no legally binding effect; /96/ the CSCE had no enforcement measures and was never meant to. "It cannot provide military, alliance-type guarantees for the simple reason that it is not a military alliance." /97/ Decisions of the CSCE are made by consensus, /98/ which gives the CSCE plenty of pull toward compliance. Since its creation, the CSCE/OSCE has transformed itself into a vast organization solely devoted to internal, collective security.

The Association of Southeast Asian Nations (ASEAN) was formed in 1967 at a time of instability in the region. Relations between Malaysia and Indonesia were tense; the Philippines had made territorial claims on parts of Malaysia; the war in Vietnam was escalating. /99/ Five southeast Asian nations (Indonesia, Malaysia, the Philippines, Singapore, and Thailand /100/), recognizing the need to strengthen relations among themselves, concluded a Declaration founding ASEAN, whose purposes include "to promote regional peace and stability." /101/ They also undertook to "accelerate the economic growth, social progress and cultural development in the region"

/102/ and to provide mutual educational, technical and other assistance, embracing the philosophy that cooperation in other areas was a vital step to securing peace in the region. /103/

ASEAN has been only minimally active in mutual defense against external aggressors. In 1971 ASEAN adopted the Declaration of Southeast Asia As A Zone of Peace, in which the members declared themselves "determined to exert initially necessary efforts to secure the recognition of, and respect for, South-East Asia as a zone of peace . . . , free from any form . . . of interference by outside powers." /104/ However, ASEAN nations have consciously avoided entering into any formal joint defense arrangements; the 1987 Manila Declaration states only that "while member state shall be responsible for its own security, co-operation on a non-ASEAN basis among the member states in security matters shall continue in accordance with their mutual needs and interests." /105/

ASEAN's real accomplishments have been in maintaining peaceful relations among its members. In 1976, almost a decade after its formation, ASEAN concluded the Treaty of Amity and Cooperation in Southeast Asia, in which ASEAN nations, in Article 10 of the Treaty; agreed not to participate "in any activity which shall constitute a threat to the political and economic stability, sovereignty, or territorial integrity of another . . . Party" /106/ and agreed to measures for the pacific settlement of disputes. /107/ This is a good example of a regional organization achieving collective security solely through preventive diplomacy.

This decade ASEAN is reaching out to the rest of the region. In the 13 years before the Singapore Declaration of 1992, <sup>/108/</sup> ASEAN had worked to keep the Cambodian situation on the international agenda. <sup>/109/</sup> This necessarily put ASEAN at odds with Vietnam, who had invaded Cambodia to oust the Pol Pot regime. By 1992, however, the parties to the Cambodian conflict had signed a peace agreement known as the Paris Agreement. In the Singapore Declaration, ASEAN not only expressed its support for the Paris Agreement, but also declared that "ASEAN welcomes accession by all countries in Southeast Asia to the Treaty of Amity and Cooperation in Southeast Asia" /110/ (emphasis added). This includes Vietnam, Laos and Cambodia. The Declaration further reads, "ASEAN will play an active part in the international programmes for the reconstruction of Vietnam, Laos and Cambodia." /111/

In the Kirchberg Declaration of 9 May 1994, WEU concluded an agreement to make various eastern European countries Associate Partners of the WEU. /112/ Associate Partners may participate in discussions of the WEU Council of Ministers (but not block a decision), associate themselves with WEU decisions, participate in exercises (unless the WEU decides otherwise), and contribute forces to operations under WEU command and control. /113/

On 10 June 1994, on the heels of the Kirchberg Declaration, NATO made its opening bid for the ultimate merger with the former Warsaw Pact. On that day the Heads of State of NATO nations issued an invitation for all European nations to join "an immediate and practical programme that will transform the relationship between NATO and participating states. This new programme goes beyond dialogue and cooperation to forge a real partnership - a Partnership for Peace." /114/ The purpose of the Partnership is to "expand and intensify political and military



cooperation throughout Europe, increase stability, diminish threats to peace, and build strengthened relationships by promoting the spirit of practical cooperation and commitment to democratic principles that underpin our Alliance." /115/ States subscribing to the Partnership for Peace (PFP) would commit to the following objectives: (1) openness of national defense planning and budgeting; (2) keeping the military under "democratic" (i.e. "civilian") control; (3) maintaining the capability and readiness to contribute to operations; (4) developing military relations with NATO, including joint planning, training and exercises for missions such as peacekeeping, search and rescue, and humanitarian operations; and (5) long-term development of interoperability with NATO forces. /116/ As of March 1996, 26 nations had accepted the invitation, including most of eastern Europe and former Soviet republics. /117/

After officially joining the PFP by signing the Framework Document, individual participants submitted programs to NATO outlining the scope, pace and level of participation sought. In 1994 and 1995, NATO and PFP countries conducted 14 joint military exercises designed to improve practical military cooperation and capabilities in PFP-type missions and to develop interoperability. /118/ A PFP Status of Forces Agreement (SOFA) mirroring the NATO SOFA has even been opened for signature, with NATO and PFP countries, including the U.S., having already signed. /119/ The Work Plan for 1996-1997 /120/ contains a long list of topics and activities to cover, including defense policy and strategy, defense structures, legal framework, defense procurement, standardization, logistics, political consultation for security, arms control and non-proliferation, economic development and integrating military industries into the civilian economy, defense budgeting and joint military exercises. 46 more exercises, taking place all over Europe and North America, were planned for 1996, with another 25 in 1997.

With the "new world order" has also come the political reality of active Security Council involvement in both international and civil wars. The Security Council has always had this power, for Article 39 of the U.N. Charter gives the Security Council the power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and "decide what measures shall be taken . . . to maintain or restore international peace and security." Article 42 empowers the Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." Typically such action takes the form authorizing individual countries to militarily enforce Council directives.

The original concept of collective security had regional organizations carrying out enforcement actions, under Security Council guidance, as the first degree of force used, with the Council stepping in only after regional organizations had tried and failed. Article 53(1) reads, ". . . no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council." During the Cold War the political climate was such that the Security Council could not get a concurring vote from all permanent members to authorize regional enforcement actions. Frequently the mere threat of veto deterred the Council from even voting.

Now that the Cold War is over, Security Council authorization of regional enforcement measures has been more forthcoming. Whereas the U.S.--

OECS intervention in Grenada was condemned by most of the international community, regional operations in the 1990s have drawn the support (or at least acquiescence) of the Council, as will be seen in several case studies.

## **B. Case Studies**

A bloody war raging between rival factions vying for power in Liberia prompted ECOWAS, a small, little known subregional organization devoted to economic matters, to impose and implement a cease-fire by deploying the ECOWAS Monitoring Group, or ECOMOG. /121/ The force, consisting of troops from five west African countries (mostly Nigerian), /122/ has repeatedly engaged one of the factions and has established a long-term presence in the country. /123/ ECOMOG is another example of a regional military operation with no specific charter foundation.

In 1975, 15 west African nations adopted the Charter of the Economic Community of West African States (ECOWAS). The "aims" of the organizations, according to Article 2(1), were "to promote co-operation and development in all fields of economic activity." /124/ The Charter does not mention collective defense or security. Even as late as 1989 no practical defense role for ECOWAS was envisioned. /125/

Even so, one common objective during ECOWAS's formation was maintaining its security against external forces. /126/ ECOWAS members recognized that peace and security and economic prosperity go hand-in-hand /127/ and in 1978 enacted the ECOWAS Protocol of Non-Aggression. /128/ Article 1 of that Protocol renounces the use of force; Article 2 prohibits aggression and subversion by one member against other members; Articles 3 and 4 prohibit harboring rebel factions from other states; in Article 5 the members pledge to resolve their disputes peacefully. Although this Protocol was a wonderful first step in establishing collective security, there still remained gaps. ECOWAS failed to address mutual defense against external aggression or a joint defense structure.

The 1981 ECOWAS Protocol on Mutual Assistance on Defense (PMAD) /129/ filled some of these gaps. Article 2 of the PMAD made an attack on one member an attack on all. Article 3 provided for mutual aid in defending against external threats or aggression. Article 7 created the ECOWAS Defense Committee, a defense policy-making body consisting of Ministers of Defense and Foreign Affairs of all the members. Article 11 created the Defense Commission, composed of chiefs of the armed forces of each member, to solve technical aspects of joint defense. The Protocol even specified when ECOWAS was competent to act: external threat or aggression (Article 16), a conflict between ECOWAS members (Article 17), or an insurgency within a member supported from the outside (Article 18). /130/ Article 13 established the ECOWAS Allied Armed Forces to defend members against external attacks and deploy between forces of ECOWAS members at war with each other. Intervention in a purely internal conflict was expressly forbidden by Article 18(2).

Despite all the arrangements set forth in the PMAD, the ECOMOG intervention in Liberia has no basis in the Charter or in the PMAD. The civil war in Liberia did not justify use of the Allied Armed Forces under the PMAD, because it was not an international war. When the Liberia crisis

started, the Defense Commission did not even exist, /131/ for the PMAD itself had never been implemented. /132/ There were procedural problems as well. The decision to intervene was made not by unanimous vote of the Authority of Heads of State, as required, but by the ECOWAS Standing Mediation Committee, whose decision was not unanimously supported. /133/

All these procedural shortcomings, however, do not take away ECOWAS's legal competence to mount the operation. Georg Nolte writes, "the institutional aspects of collective security arrangements are normally not meant to be exclusive." /134/ The fact that ECOWAS's decision had no charter basis does not in itself make the operation illegal. UN peacekeeping forces have no more charter basis than ECOMOG, and the International Court of Justice upheld the legality of UN operations in the Certain Expenses Case, ruling the operations are "for the fulfillment of one of the stated purposes of the United Nations." /135/ It is only natural that the supreme body of any regional organization should have the power to make decisions necessary for promoting the goals of the organization. ECOWAS's decision to intervene is consistent with its overall mission to promote economic stability and development in the region, /136/ which "can be accomplished only if adequate security conditions are assured in all of the Member States of the Community." /137/ Finally, although ECOMOG is generally regarded as an ECOWAS-sponsored force and not simply an ad hoc arrangement between the individual states, /138/ individual states are still free to engage in joint activities with other states who happen to be in the same regional organization.

Unlike the IAPF and the U.S.-OECS intervention in Grenada; ECOMOG appears to have won the acceptance of the international community. The force has not escaped criticism of Nigerian domination in terms of initiative, manpower and materiel, prompting the question of whether ECOMOG imposed a "pax Africana" or "pax Nigeriana." /139/ (The IAPF and Grenada forces were similarly criticized for U.S. domination.) Nevertheless the Security Council has never objected to ECOMOG's presence. Quite the contrary: the Security Council via Presidential Notes and Resolutions has several times commended the ECOWAS peace effort. /140/ ECOWAS has never requested Council approval of the operation, nor has the Council ever passed judgment on its legality. This suggests either that in "commending" ECOWAS the Council was authorizing future ECOMOG activities in Liberia, or that the Council decided ECOWAS needed no formal authorization. /141/ Indeed, ECOWAS has kept the Council fully informed of its activities, in compliance with Article 54 of the U.N. Charter. /142/ Thus the deployment of ECOMOG in Liberia is the first instance of an intervention in a civil war by a regional organization accepted by the international community as legitimate.

The principles of democracy and self-determination, traditionally held in high esteem by the OAS, have been further strengthened in the 1980s and 1990s by the passage of several documents. The first was the 1985 Protocol of Cartagena de Indias, amending the OAS Charter. /143/ The Charter's preamble, once devoid of preference for any form of government, now reads in part, "Convinced that representative democracy is an indispensable condition for the stability, peace and development of the region." In 1991 the OAS adopted the Santiago Commitment to Democracy; in which the member states declared, "their inescapable commitment to the defense and promotion of representative democracy and human rights in the region, within the

framework of respect for the principles of self-determination and non-intervention. /144/ A day later the OAS General Assembly passed Resolution 1080, requiring organs of the OAS to convene within 10 days of "any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process" and "adopt any decisions deemed appropriate." /145/

It was not long before the OAS found the opportunity to put these commitments into practice. On September 30, 1991, the new democratically elected government of Haiti was overthrown in a military coup. Within days the OAS had condemned the coup, refused to recognize the new regime, and urged its members to freeze Haitian assets abroad and impose trade embargoes. /146/ In reporting all of these measures to the U.N. Secretary-General, the OAS succeeded in putting the matter on the Security Council agenda. In 1993, OAS actions having failed to restore democracy to Haiti, the Council made mandatory the OAS-recommended trade embargo under Chapter VII. /147/ The crisis dragged on, so in July 1994 the Council, in Resolution 940, authorized member states to form a multinational force " . . . to use all necessary means to facilitate the departure from Haiti of the military leadership . . . and the restoration of the legitimate authorities of the government of Haiti." /148/ In September, the Multinational Force (MNF) entered the country to establish a secure environment, paving the way for the United Nations Mission In Haiti (UNMIH) to take over. /149/ Although the force was manned mostly by US troops, it consisted of troops and police monitors from, at one point, 30 nations, mostly from the Western hemisphere. /150/ By January 1995, the MNF had accomplished its mission. This was the first time the Security Council had ever authorized military force to restore democracy--and more interestingly, it was in a situation where no civil war was raging in the streets.

The international effort to restore peace in the former Yugoslavia, more than any other operation discussed in this article, effectively demonstrates the 'vast potential of NATO (a Cold War regional organization) in post-Cold War collective security. /151/ As discussed earlier, NATO's raison d'etre was collective defense against the Soviet Union. Ironically, NATO's first military engagement was not against any enemy of NATO, but one of several warring parties in a civil war outside NATO boundaries. NATO peacemaking activities in the former Yugoslavia, as well as the NATO-led Implementation Force (IFOR) mission of peace-enforcement, is a prime example of what a regional organization can do to stop civil wars.

In June 1991 Croatia and Slovenia declared themselves independent from Yugoslavia. Fighting broke out in Croatia between Croats and Croatian Serbs opposed to independence, with the Yugoslav People's Army (JNA) supporting the Serbs. The fighting escalated into a protracted war in Croatia, where Serb populations rebelled against Croatian rule, and Bosnia and Herzegovina, where Serbs, Croats, and Muslims were all fighting each other. The war has resulted in numerous violations of the law of armed conflict and human rights by the Bosnian Serbs; who engaged in a campaign of "ethnic cleansing" against Muslims, a campaign which has given rise to accusations of genocide. /152/ The Security Council has been actively involved in the conflict since 1991, imposing economic and diplomatic sanctions, banning air traffic, and authorizing use of force to stop the fighting and deter attacks on civilians and other humanitarian law

violations. Almost all of these actions have been taken under Chapter VII.  
/153/

In September 1991 the Security Council, in Resolution 713, imposed a weapons embargo on all of the former Yugoslavia. /154/ In May 1992 the Council, in Resolution 757, imposed a general embargo on the Federal Republic of Yugoslavia (Serbia and Montenegro) (hereinafter "Yugoslavia") for supporting Serb aggression in other countries. /155/ The saga of regional military involvement in the Yugoslav conflict begins in July 1992, when NATO and WEU ships began monitoring compliance with the two Security Council directives. The NATO operation, Operation Maritime Monitor, registered embargo violators; the WEU operation, Operation Sharp Vigilance, was a "surveillance" mission. /156/

In November 1992 the Council, in Resolution 787, called upon states, acting individually or through regional organizations, to enforce the embargoes. /157/ In response, NATO expanded its operation, at that point Operation Maritime Guard, to include stopping, inspecting and diverting ships bound for the rump "Yugoslavia." The WEU operation, then dubbed Operation Sharp Fence, followed suit.

In April 1993, the Council, in Resolution 820, imposed total economic and diplomatic sanctions on Yugoslavia. /158/ In response, NATO and WEU formed a joint operation, Operation Sharp Guard, whose mission was to implement the Resolution by interdicting all unauthorized imports into Yugoslavia and all arms from the former Yugoslavia. At its conclusion, Operation Sharp Guard consisted of 12 ships and numerous aircraft, contributed by 12 NATO members. The operation was highly successful: from 22 November 1992 to its end, NATO and WEU forces challenged over 70,000 ships and diverted nearly 1500. No ships broke the embargo.

In a separate operation, the WEU assisted several eastern European countries in enforcing the sanctions. In an August 1992 meeting of the WEU Council of Ministers, it was suggested that "Member States of WEU could, if requested, offer expertise, technical assistance and equipment to the governments of the Danube riparian states to prevent the use of the river Danube for the purpose of circumventing or breaking the sanctions." /159/ Bulgaria, Hungary and Romania accepted the offer, /160/ and by May 1993 the WEU had a police and customs operation in place on the Danube. That operation also proved highly successful:''

After the Dayton Accords were initialed in November 1995, the Council passed Resolution 1021, phasing out the arms embargo, /162/ and Resolution 1022, suspending sanctions against Yugoslavia. /163/ In June 1996, Operation Sharp Guard was suspended.

In October 1992 the Security Council, in Resolution 781, banned military flights in Bosnian airspace and called upon states (again, acting individually or through regional organizations /164/) to help UNPROFOR enforce the ban. /165/ The ensuing NATO Operation Sky Monitor recorded over 500 flights violating the ban from October 1992 to April 1993.

On 31 March 1993, the Council passed Resolution 816, extending the no-fly zone to all aircraft, and authorizing states to take "all necessary measures" to enforce it. /166/ Less than two weeks later the North Atlantic

Council launched Operation Deny Night, in which 12 NATO countries contributed almost 4500 personnel and nearly 240 aircraft. /167/

On 28 February 1994, in its first ever military engagement, NATO aircraft shot down four aircraft violating the no-fly zone. During the next several months, NATO aircraft acting in self-defense also engaged missile sites and ground radars. In total, NATO flew over 23,000 sorties, effectively denying the use of air as a medium for combat to all the warring parties.

Operation Deny Flight's mission included not just enforcing the no-fly zone, but also close air support to protect UN ground forces and air strikes to protect the UN Safe Areas in Bosnia. Frustrated by recalcitrance of the Bosnian Serb party in making peace, the Security Council in 1993 passed a flurry of resolutions designed to put some teeth into its directives. In February, the Council passed Resolution 807, inviting the Secretary-General to "take ... all appropriate measures to strengthen the security of UNPROFOR, in particular by providing it with the necessary defensive means." /168/ In response to Bosnian Serb "ethnic cleansing" the Council, in Resolution 824, created UN Safe Areas, "free from armed attacks and from any other hostile act." /169/ In Resolution 836 the Council empowered UNPROFOR to use force to protect the safe areas and promote the withdrawal of military forces, authorizing air power to assist UNPROFOR in doing so. /170/ NATO agreed to provide protective air power to UNPROFOR a week later. On 10 and 11 April 1994, NATO aircraft engaged targets within the Gorazde Safe Area to protection UNPROFOR forces deployed there.

In early 1994, NATO began forcing the withdrawal of heavy weapons from the Safe Areas. On 9 February, the North Atlantic Council established a 20-km exclusion zone around Sarajevo, promising to destroy any heavy weapons within the zone, and authorizing air strikes against artillery positions responsible for attacks against the civilian population, if requested by the U.N. All heavy weapons were removed before air strikes became necessary. On 22 April the North Atlantic Council threatened similar actions in the rest of the Safe Areas. /171/ On 5 August and 22 September NATO made good on its threat, striking Bosnian Serb forces violating the Sarajevo exclusion zone. Bosnia remained relatively quiet after that.

On 11 July 1995 Srebrenica came under attack again, requiring NATO aircraft close air support to UNPROFOR units under attack from Bosnian Serbs. In an effort to deter a Serb attack on Gorazde as well, the North Atlantic Council approved additional air strikes if the Gorazde Safe Area were violated, and later made similar threats regarding Sarajevo, Tuzla and Bihac. NATO aircraft engaged Bosnian Serb targets one more time, in Tuzla, on 9 October.

On 19 November 1994, the Security Council passed Resolution 958, authorizing close air support to U.N. forces in Croatia. /172/ Two days later, NATO conducted air strikes against a Croatian Serb airfield used to launch attacks against Bihac (a U.N. Safe Area).

Finally, although it never came to this, the North Atlantic Council, in June 1995, approved plans to provide cover to U.N. forces withdrawing

from the former Yugoslavia, should it have become necessary. Once the Bosnian Peace Agreement was signed, however, no such protection was needed.

The authority for such force was Security Council Resolution 836, which authorized UNPROFOR "to take the necessary measures, including the use of force, in reply to bombardments [sic] against the safe areas ... or in the event of any deliberate obstruction . . . to the freedom of movement of UNPROFOR or of protected humanitarian convoys," /173/ and authorized "Member States" (i.e. NATO) to use air power to assist UNPROFOR in carrying out this new function. /174/ The North Atlantic Council approved plans for air strikes in August 1993, but the first truly offensive NATO air strikes did not take place until 25 May 1995. On that day and the following day NATO aircraft attacked a Bosnian Serb target in Pale, the Bosnian Serb party headquarters, in response to the Serbs shelling UN Safe Areas.

Following several attacks by Bosnian Serbs on Sarajevo, CINCSOUTH and the UN Force Commander decided in August 1995 to conduct a new air campaign against the Serbs. Their decision was based on Resolution 836 and the North Atlantic Council threats to use air strikes against Serbs violating the safe areas previously discussed. The goal of this new campaign, called Operation Deliberate Force, was to reduce the threat to Sarajevo, deter further attacks on Sarajevo, effect the withdrawal of Bosnian Serb heavy weaponry, and secure complete freedom of movement and unrestricted use of the airport. Air and missile strikes against Bosnian Serb military targets began on 30 August 1995 and were discontinued on 20 September, once the Serbs had complied with U.N. and NATO demands.

On 14 December 1995, the Bosnian Peace Agreement 175 was signed. Annex 1-A, Military Aspects of the Peace Settlement, Article I(1) reads:

(a) The United Nations Security Council is invited to adopt a resolution by which it will authorize Member States or regional organizations and arrangements to establish a multinational military Implementation Force . . . . The parties understand and agree that this Implementation Force may be composed of ground, air and maritime units from NATO and non-NATO nations, deployed to Bosnia and Herzegovina to help ensure compliance with the provisions of this Agreement ....176

(b) It is understood and agreed that NATO may establish such a force, which will operate under the authority and subject to the direction and political control of the North Atlantic Council ... through the NATO chain of command.

(c) It is understood and agreed that other States may assist in implementing the military aspects of this Annex.

On 15 December 1995, the Security Council did precisely what the Agreement called for by passing Resolution 1031. /177/ Paragraph 14 "Authorizes the Member States acting through or in cooperation with [NATO] to establish a multinational implementation force (IFOR) under unified command and control." In paragraph 15, the Council authorizes IFOR to take "all necessary measures to effect the implementation of and compliance with ... the Peace Agreement." Paragraph 17 authorizes states to take "all necessary measures ... in defence of IFOR or to assist the force in carrying out its mission."

On 16 December 1995 Operation Joint Endeavour began. IFOR's mission is to ensure continued compliance with the cease-fire, ensure withdrawal of forces and their continued separation, ensure cantonment of heavy weapons and demobilization of forces, create conditions for safe and quick withdrawal of UN forces, and control airspace over Bosnia. IFOR quickly deployed and by February 1996 the withdrawal of forces was complete. By April all parties were moving toward cantonment of heavy weapons and demobilization. Following OSCE-brokered general elections on 14 September, the North Atlantic Council agreed to a phased withdrawal of IFOR. IFOR's mandate was to last one year. This date has past and no firm withdrawal date has been established.

IFOR has contingents from every NATO member, plus 14 PFP countries, including Russia, /178/ and 4 non-PFP muslim countries. /179/ Land forces consist of 3 divisions (UK, France, and the US), encompassing 17 brigades and 36 battalions. The IFOR air component has over 200 aircraft from 10 NATO members. In terms of personnel and materiel, IFOR is the largest peacekeeping force ever created.

### **C. New Legal Norms**

The newfound acceptance by the international community of regional action to stop civil wars has resulted in the formation of new norms in international law and relations. The legal successes of operations in Liberia, Somalia and the former Yugoslavia have vindicated the doctrine of humanitarian intervention without consent of a State's government. The experience in Haiti has validated the theory that democracy can be protected, by force if necessary. These events have also revalidated the doctrine of intervention by invitation. Each of these doctrines will be addressed individually. Also, the question of whether regional agencies now have the primary right of action in internal crises affecting international peace and security will be explored:

Now that the end of the Cold War has made Article 53 of the U.N. Charter a reality, must a threat to the peace, breach of the peace or act of aggression be referred to the appropriate regional arrangement before the Security Council can get directly involved? If so, and if more than one regional arrangement has an interest in the matter, which one has first priority?

In analyzing the intervention in Grenada; Olivier Audeoud opined the more specialized the agency, the greater its responsibility in resolving issues between its members. /180/ Audeoud pointed out that Grenada's membership in the OAS made the OAS competent to deal with the situation. The military action, however, was taken not by the- OAS but by the OEC S, of which Grenada is also a member. Audeoud wrote, "the existence of a subregional institution, the OECS, tended to give it the privilege of taking action." Eight years later, upon U.N. General Assembly condemnation of the ouster. of Haitian President Aristide, /182/ the Canadian delegate remarked that the OAS had acted as the "forum of first instance." /183/ This remark, coupled with Audeoud's statement, would lead one to subscribe to a new rule that regional arrangements have the primary right of action in maintaining international, peace and security.



However, such a conclusion does not necessarily follow. The OAS is competent to take measures to uphold democracy in a member state its own Resolution 1080 expressly makes it competent. The U.N. has no such express authority. Article 39 of the U.N. Charter gives the Security Council the power to take measures only to maintain or restore international peace and security. The ouster of a democratic government in a military coup originating of domestic origin does not necessarily pose a threat to the peace, breach of the peace or, act of aggression. For the Council to be competent to authorize (or mandate) state action, it must first find that such a threat exists. A good example of such a finding lies in S.C. Resolution 940; "Determining that the situation in Haiti continues to constitute a threat to peace and security in the region." /184/

While the OAS may have been the "forum of first instance" in Haiti; it does not follow that every regional agency has a primary right of action. Article 35 of the U.N. Charter entitles members to bring situations to the attention of the Council if likely to endanger international peace and security. I know of no regional arrangement which modifies or abridges that right. As a practical matter, it may be logical for the Council or a large regional organization to delegate a matter to a more specialized group, but there is no obligation to do so.

The legality of armed intervention by a state in a purely domestic conflict in another state, once thought to be a dead doctrine, is in fact alive and well. In the pre-UN international law according to Oppenheim, the act of recognizing a sovereign state "contains recognition of such State's equality, dignity, independence, and territorial and personal supremacy." /185/ Any intervention in the internal affairs of a sovereign state would violate its dignity and independence. An armed intervention would violate the state's territorial supremacy and was therefore forbidden. /186/ But a state could lawfully accept the invitation of another state to assist in putting down an armed rebellion against the government. Such an act would amount to an "intercession" and not "dictatorial interference," making it permissible. /187/ Aiding a rebel movement was forbidden under international law. /188/ Only the government's invitation could be lawfully accepted.

On its face, the U.N. Charter appears to do away with that doctrine, by forbidding any kind of intervention. Article 2(4) reads, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." This section of the Charter was specifically meant to guarantee the protection of smaller states from more powerful ones /189/ --e.g., Hungary, Czechoslovakia and Afghanistan from the U.S.S.R. (or from the Soviet perspective, the Dominican Republic, Grenada and Panama from the U.S.). Article 2(4) does not prohibit use of armed force to quell insurgencies arising from within, /190/ but the Charter is silent on whether a state may accept another's invitation to do so.

The U.N. General Assembly did pass several resolutions on intervention. For example, the 1965 Declaration on the Inadmissibility of Intervention reads in part, "no State has the right to intervene, directly or indirectly, for any reason whatever, in the internal and

external affairs of any State. Consequently, armed intervention and all other forms of interference or attempted threats against ... the State ... are condemned. <sup>/191/</sup> Debate on the resolution, however, was largely limited to unwelcome intervention. Only Argentina and Jamaica addressed intervention by invitation, and both took the position that it did not violate international law. <sup>/192/</sup>

In practice, military interventions have not ceased. Both the U.S. and U.S.S.R. have attempted to justify armed interventions by asserting the existence of an invitation. For example, when the Soviets invaded Hungary in 1956, they claimed it was by invitation of the Hungarian government, to which the U.S. countered the Soviets had installed the Hungarian government for the purpose of getting an "invitation" to invade. <sup>/193/</sup> In the General Assembly, where a resolution condemning the invasion easily passed, <sup>/194/</sup> many countries denounced the intervention as foreign suppression of a popular rebellion. <sup>/195/</sup> Similarly, the majority of nations condemned the 1979 Soviet invasion of Afghanistan as a pretext for armed force, as Great Britain put it, "to quell a rebellious people." <sup>/196/</sup> Some even questioned the existence of the invitation itself <sup>/197/</sup> The interventions in the Dominican Republic and Grenada, led by the U.S. and whose international participation were generally denounced as fronts for military implementation of American political objectives, were also rejected, as discussed earlier. In 1985, Louise Doswald-Beck used these cases and others to conclude the doctrine of intervention by invitation was dead:

The combination of Resolutions 2131 (XX) and 2625 (XXV), taking into account the motivation behind these resolutions, . . . and of the number of statements stressing true independence, self-determination and nonintervention in internal affairs, provides substantial evidence to support a theory that intervention to prop up a beleaguered government is illegal. <sup>/198/</sup>

At the time of her writing no sequence of events permitting lawful acceptance of a lawful invitation had presented itself, so her position might have been understandable.

Then came the Nicaragua Case. <sup>/199/</sup> In that case, the International Court of Justice decided whether the U.S. could lawfully engage in military activities assisting the Nicaraguan contras. The U.S. lost that case on the merits, but in a discussion of the legality of intervention in favor of the insurgents, the ICJ wrote, ". . . it is difficult to see what would remain of the principle of nonintervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. <sup>/200/</sup> The ICJ has thus declared the doctrine of intervention by invitation to be still valid.

In my opinion, a government issuing an invitation to another state for armed assistance in putting down a revolt must still meet two conditions. First, it must be the incumbent government--either the same government the original opposition sought to overthrow, or its constitutional successor. An insurgency cannot be allowed to suddenly overwhelm governmental forces, install itself as the new government, and invite other states to assist in crushing what is now the new opposition. Second, the incumbent government must have the recognition of the international community. Under the

traditional approach of governmental recognition, the government must be in de facto control of the territory and the means of administration, have the acquiescence of the population, and indicate its willingness to comply with the state's international obligations. A government need not come to power via constitutional means to meet this criteria, /201/ although the international community's refusal to recognize the Cedras regime in Haiti /202/ may signify a third condition to be met before an invitation to intervene is valid: constitutional legitimacy. /203/

If the international legal norm is to allow a state to intervene in another state's internal affairs at the lawful invitation of the incumbent and recognized (and legitimate) governmental authority, then a group of states must also be allowed to do so. If several states may participate in a joint operation under such circumstances, so may a regional organization.

In 1992, Professor Thomas Franck wrote "The Emerging Right to Democratic Governance," in which he argued the existence of a right to be governed by representative democracy, and that international law permits enforcement of this right, by or through the Security Council. /204/ The basis for Franck's premise was the realization of totalitarian governments that the "dictatorship of the proletariat" /205/ was a myth dispelled by the new openness and democratic leanings of the Soviet Union. These one-party regimes, having lost their legitimacy, sought revalidation from the international community by holding democratic elections. /206/ Several events in Europe and the Americas appear to have confirmed his position. The first was the CSCE Copenhagen Document, where its members agreed on free elections and democracy as "equal and inalienable rights of all human beings." /207/ Specific elements included free elections held at reasonable intervals under conditions ensuring free expression and choice, a representative government with the executive accountable to the legislature or electorate, and duty of the governmental authority to comply with the law. All these things are the basic building blocks of democratic governance.

The participating States . . . recognize their responsibility to defend and protect . . . the democratic order freely established through the will of the people against the activities of persons, groups or organizations that engage in or refuse to renounce . . . violence aimed at the overthrow of that order or of that of another participating State. /208/

The same year the CSCE adopted the Charter of Paris For A New Europe, marking "a new era of democracy, peace and unity." /209/ The members declared, "We undertake to build, consolidate and strengthen democracy as the only system of government of our nations." /210/ The first section affirms many specific rights and freedoms of democracy, and concludes "Our States will cooperate and support each other with the aim of making democratic gains irreversible." /211/

Malvina Halberstam argues that if a freely elected government is forcefully deposed or prevented from taking office, "other states have not only a right but a responsibility to restore it to power and, if necessary, to use force to that end." /212/ Though this author finds her argument compelling, such action must still have Security Council

approval, through Article 42 of the U.N. Charter, or in the case of regional action, via Article 53.

The OAS has already put enforcement of democracy into practice. The OAS's G.A. Resolution 1080 requires the OAS to meet within 10 days of the overthrow of the democratic government of any member. <sup>/213/</sup> Shortly afterward, the OAS did so in response to the Haiti crisis. The next year the OAS adopted the Washington Protocol, <sup>/214/</sup> adding a new Article 9 to the OAS Charter. This new article entitles the OAS General Assembly to suspend any member whose democratic government has been overthrown by force.

No regional organization has the right to use force to restore democracy without prior Security Council authorization (unless by lawful invitation). The Washington Protocol and Copenhagen Documents do, however, indicate that the international community is beginning to recognize a "democratic entitlement" and that enforcing it is a function within the purview and responsibility of regional organizations.

Humanitarian intervention is the doctrine of using armed force in favor of citizens of another state without the consent of, or in opposition to, its government for charitable purposes. At the time of the Nicaragua decision, it was agreed that humanitarian intervention was incompatible with the U.N. Charter and unlawful. According to the ICJ Article 2(4), which prohibits any use of force in another state (without a lawful invitation), is absolute. The only exception could be the inherent right of self-defense.

The climate of the nineties is different from that of the eighties. In 1992 the Cold War had ended, a U.N.-authorized force had ousted Iraq from Kuwait and was now protecting the Iraqi Kurds, Somalia was in anarchy, ECOWAS had invaded Liberia to restore order, and Yugoslavia was beginning its descent. Against this backdrop, Professor Ved Nanda posed the following justification for humanitarian intervention: 1) to prohibit force directed at the sovereignty, territorial integrity, or political independence of another state; (2) if military intervention for humanitarian purposes does not challenge these state attributes; and (3) for the protection of human rights under the U.N. Charter. <sup>/215/</sup> One of the Purposes of the United Nations is "promoting and encouraging respect for human rights," <sup>/216/</sup> and in Article 56 of the Charter members pledge "to take joint and separate action" for the promotion of "universal respect for, and observance of, human rights and fundamental freedoms." <sup>/217/</sup>

Before the Nicaragua Case was even decided, Professor W. D. Verwey postulated an inherent right to humanitarian intervention under certain conditions. Those' conditions would include "an emergency situation, in which fundamental human rights of a non-political nature, particularly the right to life, are (about to be) violated on a massive scale" and "only a last-resort armed intervention can save the (potential) victims, after all peaceful efforts have failed." Verwey said the intervenors must be disinterested, the force used must be proportional to the objective, and the U.N. must be unable to act. <sup>/219/</sup>

Both Nanda and Verwey presuppose armed intervention to protect citizens from governmental abuse of power. In my opinion, this doctrine should be expanded to also include humanitarian intervention in situations where the lives of populaces are endangered by a lack of governmental authority. Such cases easily

meet the conditions set forth by Verwey. The situation in Somalia, for example, posed as great a threat to the lives of its citizens as that in Haiti or Iraqi Kurdistan. A "lack of governmental authority" can take the form of Somalia-style anarchy, with total breakdown of the infrastructure and gang rule, or Rwanda- or Bosnia-style civil war, where ethnic fighting takes its toll on civilians in devastating--and sometimes genocidal--proportions: These situations can be characterized as internationalized civil wars. /220/

There are several circumstances in which this can happen. First, the war may pit ethnic groups against each other, and these ethnic groups may have substantial populations in neighboring countries. Second, a common byproduct of war are refugees, which may spill over into neighboring countries, creating a destabilizing situation. Third, the fighting itself may cross international borders; one side may even have established safe havens on the other side. Fourth, a state whose government has collapsed into anarchy is a tempting target to leaders of other states whose primary agenda may be usurping more power for themselves. Fifth, warring factions may be receiving arms, supplies, and other assistance from other countries. Finally, in the case of a genocidal war, the international community, through the UN, has a duty to stop it. /221/

For any humanitarian intervention to take place, the Security Council must find that the war constitutes a threat to international peace and security. Such a finding gives it jurisdiction (via Article 39) to take coercive, diplomatic measures under Article 41 or military, enforcement measures under Article 42. A civil war is by definition an internal matter, and generally draws Security Council concern only if it achieves the status of internationalized civil war by meeting one of the criteria set forth above.

In Somalia and the former Yugoslavia some of those criteria were met.

One instance is documented in Security Council Resolution 713, in which the Council was:

Deeply concerned by the fighting in Yugoslavia which is causing a heavy loss of human life and material damage, and by the consequences for the countries of the region, in particular in the border areas of neighbouring countries,

Concerned that the continuation of this situation constitutes a threat to international peace and security.'

The Council's response was a weapons embargo against Yugoslavia under Chapter VII of the Charter. In Resolution 752, which dealt with humanitarian assistance to Bosnia, the Council "Emphasize[d] the urgent need for humanitarian assistance, material and financial, taking into account the large number of refugees and displaced persons," /223/ and under Chapter VII, "Call[ed] upon States to take . . . all measures necessary to facilitate . . . the delivery . . . of humanitarian assistance" in Resolution 770. /224/ In fact, the no-fly zone over Bosnia was the result of the Council's "grave alarm at . . . widespread violations of international humanitarian law." /225/

The Council took a similar attitude with respect to Somalia. In 1992, the U.N. Secretary-General wrote a letter to the Security Council President describing Somalia's descent into lawlessness. Doubting the utility of a traditional peacekeeping force, /226/ the Secretary-General advised the Council to "make a determination under Article 39 of the Charter that a threat to the peace exists, as a result of the repercussions of the Somali conflict on the entire region." /227/ Three days later the Council did -so in Resolution 794:

Determining that the magnitude of human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security,

Acting under Chapter VII ... authorizes the Secretary-General and Member States ... to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia. /228/

It appears from these two instances that the Security Council has set a precedent for the kinds of conditions in which armed intervention on humanitarian grounds is appropriate.

Current state practice suggests the role of regional organizations in humanitarian intervention lies in implementing Council directives. Armed intervention to stop genocide or restore law and order constitutes enforcement action within the meaning of Article 53(1) of the U.N. Charter. That article requires Security Council authorization for enforcement action taken under regional arrangements. This the Council has done on several occasions. Recall, for example, the Council's praise of ECOMOG's activities in Liberia, and its authorizing states, "acting nationally or through regional organizations or arrangements," /229/ to enforce the no-fly zone in Bosnia: /230/ Apparently the Security Council believes in the feasibility of humanitarian intervention by regional organizations, at least under its guidance.

In her comments on regional humanitarian intervention, Lori Fisler Damrosch points out the pros and cons of regional activity: "On the positive side, regional actions may be able to achieve the objectives of humanitarian intervention with less risk of escalation and greater tolerability to the international community than when global superpowers mount the operation." /231/ In other words, a humanitarian intervention carried out by a group of states, as opposed to a single state, has a greater chance of being accepted by the international community, for it is less likely to be viewed as a pretext for invasion to serve some sinister purpose of the intervenor. However, Damrosch recognizes on the negative side, "regional organizations have more than once been manipulated by the superpowers in the service of less than purely humanitarian motivations. /232/ This was the argument made against the interventions in the Dominican Republic and Grenada.

A role for regional organizations in humanitarian intervention has been established. State practice suggests that Security Council approval is a prerequisite to any humanitarian intervention. Since there are no

recent cases studies otherwise, it is impossible to say whether an intervention without such approval (and not by invitation) would be well received by the international community. Because Article 53(1) of the Charter prohibits regional enforcement without prior Council authorization, it is unlikely.

### **III. FUTURE PERFECT?**

#### **A. Future Roles Of Regional Organizations**

The following, discussion of the future role of regional organizations in maintaining collective security will focus on those areas where the United States has an interest: the Americas and Europe.

This century there has been no external threat to the peace and security of the Americas warranting military action (excluding the Falklands War, which was not exactly the kind of "colonial domination" President Monroe had in mind). It is too early, therefore,, to predict what form Inter-American collective defense will take. In the realm of promoting democracy, however, the Haiti crisis has set precedent for the OAS to take a leading role. The OAS has also gotten involved in variances of democratic norms in Peru and Guatemala, with mixed results, but both of these cases are overshadowed by Haiti, where the international community assumed a decidedly forceful stance. The admission of Canada, Guyana and Belize in the OAS may in the long term alleviate the U.S. versus Latin America mentality and the tensions it created. Although not a military organization like NATO, the OAS has made new initiatives in collective security <sup>/233/</sup> to include arms control (which has a direct military element) and drug interdiction (in which the military's indirect role may soon become direct). The OAS's Resolution on Cooperation and Security in the Western Hemisphere, adopted in 1991, may turn the OAS into an American OSCE. That resolution created a Special Commission on Hemispheric Security, which in 1992 began evaluating regional security arrangements in the new post-Cold War security environment. The Commission has discussed creating a Conflict Prevention Center, developing a mechanism for studying Inter-American peacekeeping measures, and reorganizing the Inter-American defense structure. <sup>/234/</sup>

There is always a possibility of a pact among OAS members to use force to guarantee democracy on each other's soil. Such a pact would go far beyond the current scheme, essentially inviting interventions in advance, something even the milestone Resolution 1080 does not do. Given Latin America's historical discomfort with what it sees as American paternalism, such a pact is unlikely in the near future. There is legal and political breathing room, however, to continue the current norm of OAS-sponsored action, if authorized by the Security Council. Besides promoting democracy, the OAS's agenda will probably include those problems from the south currently most plaguing the United States: illegal migration and drug trafficking. <sup>/235/</sup> If anything impedes multilateral force, it will be the U.S.'s tendency to favor unilateral or bilateral solutions to problems affecting the whole region. <sup>/236/</sup> A possible impediment on the other side of the scale would be American unwillingness to get involved, which may deter the rest of the community. Paradoxically, it is difficult to foresee effective use of military force without U.S. leadership.

For years American policy makers have talked of getting European nations to contribute more to their own security. The WEU's maritime enforcement of sanctions against Yugoslavia and the continued regular participation of Great Britain and France in peace operations illustrate the effectiveness of European military force. It is no longer a question of WEU's greater role in European collective security; the raging debate now is over whether WEU's enhanced role will be within NATO or without it. /237/ As discussed before, European defense policy was meant to be subordinate to and implemented by NATO. In June 1996, NATO approved a new concept allowing European operations without U.S. participation, using NATO assets and NATO commanders but under WEU control. The U.S. would be able to opt out of operations in which politics prevented the use of American troops, but could still permit use of its equipment. /238/ The concept has many skeptics, however.

The future role of NATO also has its skeptics. James Eberle wrote in 1991, "NATO must continue to stand as a pillar of stability in a sea of uncertainty," /239/ but as Hugh de Santis wrote in 1995, "NATO has been laboring to infuse meaning into its existence " /240/ Given NATO's commitment to securing peace in the former Yugoslavia, it would appear that the optimists have won out. Karl Kaiser seems to go as far as saying NATO is the only organization in the world capable of implementing true collective security: "NATO countries share interests to such a degree that they have become the core group for global efforts and must remain so." /241/

In terms of force structures, plans in January 1996 called for reductions of up to 25 per cent in peacetime strength from 1990. Given the demise of the Soviet Union and NATO's new role in collective security, NATO forces now include rapid reaction forces maintained at high readiness and available at short notice. NATO is also streamlining its command structure, reducing the major commands from three to two. /242/

In contrast to the WEU question "What shall we do?", the NATO question is "What shall we be?". The wording of the PFP Invitation suggests the PFP is the first step toward expansion of NATO into eastern Europe:

We reaffirm that the Alliance ... remains open to the membership of other European states in a position to further the principles of the [North Atlantic] Treaty and to contribute to the security of the North Atlantic area. We expect and would welcome NATO expansion that would reach to democratic states to our East ... /243/

On 5 December 1995, NATO Foreign Ministers decided on three elements of the next phase of NATO expansion: (1) individual dialogue; (2) further enhancement of the PFP to prepare interested PFP states to assume the responsibilities of NATO membership; and (3) further consideration of what NATO must do internally to ensure that enlargement preserves its own effectiveness. /244/ As of this writing, NATO has not yet invited any new members, though recently President Clinton hinted of pending invitations to Poland, the Czech Republic and Hungary. /245/

Just before press time, NATO Secretary-General Javier Solana said NATO is "moving fast towards a series of decisions - on enlargement; on enhancing PFP; on a strengthened permanent and institutionalised relationship with Russia; ... and on a renewed military structure for the



future which will enable the full participation of all Allies." /246/ He called NATO expansion "inevitable" and said Europe would assume a greater responsibility in European defense and security.

Former U.S. Secretary of State Warren Christopher has gone even further. In an address in Stuttgart on 6 September 1996, he set a timeline for NATO expansion:

NATO enlargement ... is on track and it will happen. Right now, NATO is engaged in an intensive dialogue with interested countries to determine what they must do, and what NATO must do, to prepare for their accession. Based upon these discussions, at the 1997 summit we should invite several partners to begin accession negotiations. /247/

Secretary Christopher also called for expansion of PFP activities, Ukrainian integration into Europe, and a Charter to "create standing arrangements for consultation and joint action between Russia and the Alliance." /248/

In his watershed and oft-cited report "An Agenda For Peace," /249/ U.N. Secretary-General Boutros Boutros-Ghali wrote of the new potential of regional organizations in maintaining and restoring international peace and security:

Consultation between the United Nations and regional arrangements or agencies could do much to build international consensus on the nature of a problem and the measures required to address it. Regional organizations participating in complementary efforts with the United Nations in joint undertakings would encourage States outside the region to act supportively. /250/

That was in 1992. In 1995, the Secretary-General, in a supplement to "An Agenda For Peace, " /251/ described several forms UN-regional cooperation could take, including consultation, diplomatic support, operational support, co-deployment, and joint operations. He cited NATO air support of UNPROFOR (Operation Deliberate Force) as an example of operational support, the presence of both ECOWAS and the United Nations Observer Mission In Liberia (UNOMIL) as an example of co-deployment, and the OAS's contribution to staffing, directing and financing the United Nations Mission In Haiti (UNMIH) as a joint operation. /252/ Clearly regional organizations can make lasting contributions to preventive diplomacy, early warning, peacekeeping, confidence-building measures, and perhaps even a little peacemaking.

But what about the military operations themselves? What happens when the international community must turn to peace-enforcement, and commit troops and equipment to combat? Experience suggests that in peace-enforcement, regional organizations are more operationally effective than the U.N. Regional organizations are not beholden to the bureaucracy of U.N. decision making, and national leadership of an operation usually makes the mission more responsive to the force's operational needs--unencumbered by political representatives, as U.N. Force Commanders have occasionally felt sometimes by U.N. Special Representatives. It was neither U.N. diplomacy nor UNPROFOR's military presence which finally brought the situation in the former Yugoslavia under control and got the Serbs to sign a peace agreement. NATO air strikes accomplished that.

Similarly, the United Nations Operation In Somalia (UNOSOM) encountered difficulties in getting local cooperation. When the forces of General Aidid attacked U.N. peace keepers in 1993, the Security Council authorized "all necessary measures" against his forces. /253/ It was U.S. forces operating outside U.N. command and control who directly engaged Aidid's forces and were the most effective during that period.

Even though regional peace-enforcement operations are more effective than U.N. operations, they still require Security Council authorization. Boutros-Ghali was careful to note this in "An Agenda For Peace." /254/ I predict the Council will continue to authorize regional peacemaking initiatives. The U.N. will continue to sub-contract out peace operations, especially when troops--and therefore expensive material and logistical support--are involved.

A recent report to the Carnegie Commission On Preventing Deadly Conflict <sup>/255/</sup> included a table of unresolved deadly conflicts, including Algeria, Angola, Burundi, Liberia, Rwanda, Egypt, Northern Ireland, Afghanistan, Burma, Sri Lanka, Chechnya, Lebanon, Turkey, Colombia, Guatemala and Peru. In some of these places peace will be regionally imposed; in others, regionally enforced. The wave of the future is more multinational peace operations by regional arrangements, acting with U.N. blessing but not under U.N. control. It is likely that the U.S. will play a more active role than before. As the US gets more involved, American air power will be called upon more often to support peace operations. /256/ As the U.S. Air Force is called to duty, so will Air Force attorneys.

## B. JAG Role

Besides performing traditional legal functions in military justice, claims and legal assistance, Air Force Judge Advocates must know intimately the law of armed conflict and applicable rules of engagement (ROE). We must recognize that different modes of peacekeeping/enforcement may call for varying degrees of force, and should be actively involved in drafting ROE. Attorneys can and should help set policy not only on the use of deadly force, but also on the use of non-lethal force and taking and treating prisoners.

Judge Advocates must also have a thorough understanding of the legal regime for peace operations. We must understand what authorizes the operation in the first place--it may be a treaty or a Security Council Resolution or both. We must be able to advise commanders on Status of Forces Agreements (SOFA) with the host nation, addressing criminal and civil jurisdiction, entry and exit, uniforms, weapons, taxation, capacity to contract, import/export, claims, etc. Local Judge Advocates can make an additional contribution in helping draft Technical Arrangements, which flesh out detailed procedures for implementing the terms of the SOFA, e.g., for entry and exit visas, tax exemptions, and adjudicating claims.

In multinational operations, command and control is a difficult concept. The Force Commander, who may not be American, may have operational control over U.S. forces, but for UCMJ purposes, U.S. troops will remain subordinate to the senior U.S. officer. Different contingent commanders will have different agendas, usually directed from home, and may find themselves serving two masters: the Force Commander and, through the "rear link," their home governments. In several instances this has contributed to a breakdown of cohesiveness in U.N. peacekeeping forces, especially in Cambodia and Somalia. Judge Advocates may need to seek guidance from individual nation's Participation Agreements with the Force, if they are available. '257/ Since much of command and control in multinational forces is driven by international politics, Judge Advocates may have to occasionally fulfill the role of politician/negotiator.

## IV. CONCLUSION

There remains room for optimism about the "new world order." The risk of one big superpower conflagration has been replaced by little fires here and there, generated internally instead of by proxy as before. By being more engaged in stopping civil wars, regional organizations have made the international community more flexible in maintaining international peace and security. Peacekeeping and peace-enforcement are no longer strictly U.N. functions. More OAS and NATO involvement in peacekeeping and peace-enforcement means more U.S. military involvement, and events in the former Yugoslavia have effectively demonstrated the value of air power in peace operations. Judge Advocates may want to keep their bags packed.

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<sup>1</sup> B. Boutros-Ghali, *An Agenda For Peace*, para. 64, UN Doc. A/47/277, S/24111 (1992).

<sup>2</sup> These and other anticipated roles of multinational forces are listed in A. Goodpaster, *When Diplomacy Is Not Enough: Managing Multinational Military Interventions*, 21 (Carnegie Corporation of New York, 1996).

<sup>3</sup> U.N. CHARTER art. 52, 1.

<sup>4</sup> U.N. CHARTER art. 53, 1.

<sup>5</sup> See F.X. DI LIMA, *INTRVENTION IN INTERNATIONAL LAW WITH A REFERENCE TO THE ORGANIZATION OF AMERICAN STATES*, 72-73 (1971).

<sup>6</sup> These are the Calvo & Drago doctrines. See DE LIMA, *supra* note 5, at 67-68.

<sup>7</sup> Charter of the Organization of American States; 30 April 1948, 119 U.N.T.S. 48, as amended by Protocol of Amendment to the Charter of the Organization of American States ("Protocol of Buenos Aires"), 27 February 1967, 721 U.N.T.S. 324, as amended by Protocol of Amendment to the Charter of the Organization of American States ("Protocol of Cartagena de Indias"), 5 December 1985, 25 ILM 529 (1986). The integrated text of the OAS Charter through the Protocol of Cartagena de Indias appears at 33 ILM 985 (1994).

<sup>8</sup> The Cartagena de Indias Protocol renumbered the articles of the OAS Charter. Unless stated otherwise, all references to an article number will be to the article in the OAS Charter as amended.

<sup>9</sup> Simultaneously adopted with the OAS Charter was the American Treaty on Pacific Settlement ("Pact of Bogota"). 30 April 1948, 30 U.N.T.S. 55. The Bogota Pact outlines measures for resolving disputes by mediation, conciliation and arbitration. Article II requires parties to settle disputes "by regional pacific procedures" before going to the U.N. Security Council. *Id.* at 84. This is a departure from the Rio Treaty and OAS Charter, as well as from charters of most other regional organizations, for they stipulate that nothing in the charters is meant to abridge a state's rights under the U.N. Charter. 30 U.N.T.S. 55 at 84.

<sup>10</sup> The exception is "Measures adopted for the maintenance of peace and security in accordance with existing treaties," as stated in Article 22. 33 ILM at 991 (1994).

<sup>11</sup> Inter-American Treaty for Reciprocal Assistance ("Rio Treaty"), 2 September 1947, 21 U.N.T.S. 77, The Rio Treaty was preceded by the Act of Chapultepec, in which American states agreed in principle that an attack on one party constituted an attack on all, and further agreed to conclude a treaty establishing procedures for collective defense. Act of Chapultepec, 8 March 1945, TIAS 1543 reprinted in IX INTERNATIONAL LEGISLATION, p.283, Manley Hudson Carnegie Endowment for International Peace (1950). The resulting treaty was the Rio Treaty.

<sup>12</sup> Article 28 of the OAS Charter says if any American state is the object of attack or aggression, "the American States ... shall apply the measures and procedures established in the special treaties on the subject." OAS Charter as amended, 33 ILM at 992 (1994).

<sup>13</sup> *Id.*

<sup>14</sup> OAS Charter, as amended. Article 64, 33 ILM at 996 (1994).

<sup>15</sup> See U.S. STATE DEPARTMENT, INTER-AMERICAN CONFERENCE FOR THE MAINTENANCE OF CONTINENTAL PEACE AND SECURITY. REPORT OF THE DELEGATION OF THE UNITED STATES OF AMERICA, 15-17 (1948).

<sup>16</sup> *Id.* at 27-38.

<sup>17</sup> Protocol of Amendment to the Inter-American Treaty for Reciprocal Assistance ("San Jose Protocol"), 26 July 1975, 14 ILM 1117, 1122 (1975).

<sup>18</sup> *Id.*

<sup>19</sup> Article 51 of the U.N. Charter says, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

<sup>20</sup> On the request of attacked states, the Organ of Consultation meets and agrees upon collective measures to be taken. Rio Treaty, *supra*, Articles 3 and 6.

21 HUSSEIN HASSOUNA, *THE LEAGUE OF ARAB STATES AND REGIONAL DISPUTES*, 5-6 (1975).

22 Pact of the League of Arab States ("Arab League Pact"), 22 March 1945, 70 U.N.T.S. 248, 252.

<sup>23</sup> *Id.* at 254.

24 Treaty of Joint Defence and Economic Co-operation Between the Arab League States, With Military Annex ("Joint Defense Treaty"), 17 June 1950, reprinted in 157 BRITISH AND FOREIGN STATE PAPERS, 1950 PART 11, 669 (1950).

25 *Id.* at 670.

26 *Id.* at 672.

27 HASSOUNA, *supra* note 21, at 18.

<sup>28</sup> See AErrachidi A., *Le SyWme Arabe de Securite Collective et la Crise du Golse*, 31. ANNUARE DE L'ASRIQUE DU NORD (1992), 117,122-23.

29 Text of Communique from Amman Summit, 11 November 1987, in "League of Arab States: Communiqués from Summit Meetings," 27 ILM 1646, 1651 (1988). The evaluation is in the Introductory Note by N. Ziade, *Id.* at 1647.

30 E.g., Article 2 of the Arab League Pact and Articles 1, 2 and 5 of the Joint Defense Treaty. See Errachidi, *supra* note 28, at 122.

31 *Id.* at 123.

32 E.g., S.C. Res. 660 (1990), in which the Council first condemns the Iraqi invasion of Kuwait; S.C. Res. 661 (1990), in which the Council imposed sanctions; and S.C. Res. 678 (1990), in which the Council authorized armed force to expel Iraqi forces from Kuwait.

33 The Warsaw Treaty Organization, created by the Treaty of Friendship, Co-operation and Mutual Assistance ("Warsaw Pact"), 14 May 1955, 219 U.N.T.S. 3, 24, in response to inclusion of remilitarized West Germany into NATO and the WEU, consisted of the USSR, Poland, Czechoslovakia, Hungary, East Germany, Romania, Bulgaria and Albania (who later withdrew). These countries governments were all Soviet installed and Soviet controlled, and the Unified Command provided for in the Treaty was really a mechanism for the Soviet Union to keep control of eastern Europe. See JAGDISH JAIN, *DOCUMENTARY STUDY OF THE WARSAW PACT* 12-16 (1973), and A. Hyde-Price, *After the Pact: East European Security in the 1990s*, 12 Arms Control 279, 282 (1991). Because the WTO does not fit the criteria of a true multilateral regional organization, it will not be discussed further.

34 Treaty For Collaboration In Economic, Social And Cultural Matters And For Collective Self-Defense ("Brussels Treaty"), Article IV, 17 March 1948, 19 U.N.T.S. 51, 57.

35 North Atlantic Treaty, 4 April 1949, 34 U.N.T.S. 243 reprinted in British Command Paper, C.M.D. 7789. NATO's current membership includes Belgium, Canada, Denmark, France, Germany; Great Britain. Greece, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Turkey, and the U.S.

36 For more detail see generally TIMOTHY IRELAND, *CREATING THE ENTANGLING ALLIANCE: THE ORIGINS OF THE NORTH ATLANTIC TREATY ORGANIZATION*, 80-114 (1981).

<sup>37</sup> North Atlantic Treaty, 4 April 1949, 34 U.N.T.S. 243.

38 The Vienna Convention on Treaties. Article 31(2), says that preambles are considered in interpreting the meaning of treaties. BARRY CARTER & PHILLIP TRIMBLE, *INTERNATIONAL LAW*, 103-104 (1991).

<sup>39</sup> North Atlantic Treaty, Apr. 4, 1949, Art. 3, 34 U.N.T.S. 243, 245.

40 Security Treaty Between Australia, New Zealand and the United States of America ("ANZUS Pact"), Art. 2, 1 September 1951, 131 U.N.T.S. 83, 86.

41 J.G. STARKE. THE ANZUS TREATY ALLIANCE (1965). In his discussion of events leading to the Treaty. Starke makes no mention of any common enemy.

42 131 U.N.T.S. 83, 84.

43 *Id.* at 86.

44 Pacific Charter, 8 September 1954, 209 U.N.T.S. 23.

45 Southeast Asia Collective Defense Treaty ("Manila Treaty"); 8 September 1954, 209 U.N.T.S. 28:

<sup>46</sup> See "South-East Asia Treaty Organization," 6 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 345, 347 (1983).

47 Manila Treaty, 209 U.N.T.S. 28 at 30.

48 Protocol to the Southeast Asia Collective Defense Treaty, 8 September 1954, 209 U.N.T.S. 36.

<sup>49</sup> Article IV(3) of the Manila Treaty says. "It is understood that no action on the territory of any State ... shall be taken except at the invitation or with the consent of the Government concerned." This was one of the legal bases presented by the US for its involvement in the Vietnam conflict. See L. Mocker, "The Legality of United States Participation in the Defense of Viet-Nam," 54 Dcp. of State Bull. 474 (1966), reprinted in 5 ILM 565 (1966).

50 6 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 345 (1983).

51 See 6 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 73 (1983).

52 Pact of Mutual Co-operation ("Baghdad Pact"), 24 February 1955, 233 U.N.T.S. 199, 210. Although the U.S. was formally a member, it did participate in several LENTO activities. See 6 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 73, 74 (1983).

53 Baghdad Pact, 233 U.N.T.S. 212.

54 *Id.*

55 Exchange of Notes terminating the Baghdad Pact, 2 and 4 October 1979, reprinted in British Command Paper 8065 (1980).

56 Treaty for Collaboration In Economic. Social, And Cultural Matters And For Collective Self-Defense, Article IV, 17 March 1948, 19 U.N.T.S. 51.

<sup>57</sup> The previous year, Great Britain and France concluded a mutual defense pact "in the event of any renewal of German aggression." Treaty of Alliance and Mutual Assistance ("Treaty of Dunkirk"), 4 March 1947, 9 U.N.T.S. 187.

58 Protocol Modifying And Completing the [Brussels Treaty] ("Paris Protocol"), 23 October 1954, 211 U.N.T.S. 342.

<sup>59</sup> European Defence Community Treaty, 27 May 1952, reprinted in British Command Paper 9127 (1954). See "European Defence Community," 6 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 149.

60 Paris Protocol, 211 U.N.T.S. 342.

<sup>61</sup> See J. Kunz, "Treaty Establishing the European Defense Community," 47 AJIL 275 (1953).

<sup>62</sup> Treaty On European Union ("Maastricht Treaty"), 7 February 1992, 31 ILM 253 (1992).

63 Article 2(7) says, "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter."

64 OAS Charter, Article 18 and Arab League Pact, Article 8, on pledges not to change forms of government. OAU Charter, 25 May 1963, 479 U.N.T.S. 39, Article 111(2); Baghdad Pact, Article 3; Helsinki Summit, Article 1(a)(vi); ASEAN Declaration. Other Cold War regional organizations include agreements to refrain from any use of force inconsistent with the U.N. Charter.

65 This was a concern specifically raised by Argentina and Chile during the formation of the OAS Charter. U.S. STATE DEPT., NINTH INTERNATIONAL CONFERENCE OF AMERICAN STATES: REPORT OF THE DELEGATION OF THE UNITED STATES OF AMERICA 21 (1948).

66 These were the reasons propounded by the U.S. in Security Council chambers. For further discussion, see "The Situation in the Dominican Republic," YEARBOOK OF THE UNITED NATIONS 1965, 140-58 (1967).

67 *Id.* at 141-43.

68 Resolution Adopted in the Third Plenary Session [of the 10th Meeting of Consultation of Ministers of Foreign Affairs of the OASJ, OAS Doc. 39 Rev. Corr. (1965), 4 ILM 594,595 (1965).

69 See also UN Doc. S/6381/Annex (1965).

70 *Id.*, Resolution, *supra* note 68, at 4 ILM 594.

71 See YEARBOOK OF THE UNITED NATIONS 1965, *supra* note 66, at 149.

72 UN Doc. S/6381/Annex, (1965).

73 YEARBOOK OF THE UNITED NATIONS 1965, *supra* note 66, at 151.

74 As General Bruce Palmer, former Deputy Commander of the IAPF has said, "I was told to take command of the U.S. forces that were already there and those that come in and to prevent the Dominican Republic from becoming a second Cuba, and even more potentially dangerous, another Vietnam. Stabilize the situation and keep undesirable elements out of there. That was really what the mission was." (emphasis in original). B. PALMER, BRUCE PALMER PAPERS, oral history; 152. reprinted in H. BULLOCK; PEACE BY COMMITTEE: COMMAND AND CONTROL. ISSUES IN MULTINATIONAL PEACE ENFORCEMENT OPERATIONS 4 (Air Force School of Advanced Airpower Studies, 1995).

<sup>75</sup> Louise Doswald-Beck, "The Legal Validity of Military Intervention By Invitation of the Government," 56 Brit. YB of Int'l L. 189 (1985).

76 E.g., O. Auddoud, "L 'Intervention Américano-Caraïbe à la Grenade," 29 Ann. Français de D. Int'l 217 (1983); C. Joyner, "Reflections On the Lawfulness of Invasion," 78 AJIL 131 (1984); J. Moore, "Grenada And the International Double Standard," 78 AJIL 145 (1984); R. Riggs, "The Grenada Intervention: A Legal Analysis," 109 Mil. L. Rev. 1 (1985); L. Doswald-Beck, "The Legality of the United States Intervention In Grenada," 34 Neth. Int'l L. Rev. 355 (1987); R. Beck, "International Law And the Decision to Invade Grenada: A Ten-Year Retrospective." 33 Virginia J. Int'l L. 765 (1993). In this paper, information in Beck's article will be used, since it was written ten years after the invasion, when more facts were available.

77 Jamaica, Barbados, Dominica, St. Lucia, Antigua and St. Vincent. Joyner, *supra* note 76.

78 The OECS issued a verbal invitation on 22 October, and made its formal written invitation the evening of 23 October--apparently just after President Reagan had decided to go ahead with the intervention. Beck, *supra* note 76, at 786-794.

<sup>79</sup> Treaty Establishing the Organization of Eastern Caribbean States, 18 June 1981, 1338 U.N.T.S. 97,99.

<sup>80</sup> See, e.g., Moore, *supra* note 76, and Riggs, *supra* note 76.

81 OECS Treaty, *supra* note 64, at 103.

82 Beck, *supra* note 76, at 801.

83 OECS Treaty, Art. 6(1).

84 OECS Treaty, Art. 6(8) & 16(1).

85 Joyner, *supra* note 76, at 132.

86 Beck, *supra* at note 76, at 782-89.

87 *Id.* Beck argues that the OECS actually did not have legal justification to issue the invitation. The focus of this discussion, however, is not the OECS's legal basis to intervene under the Treaty, but rather its competence to intervene in civil wars and armed conflicts between its members in general.

88 Article 27 of the U.N. Charter requires Security Council decisions in non-procedural matters have the concurring vote of all five permanent members.

89 Conference On Security And Co-Operation In Europe: Final Act ("Helsinki Summit"), 1 August 1975, 14 ILM 1292 (1975).

<sup>90</sup> The name was changed in the Budapest Summit Declaration On Genuine Partnership In A New Era, 6 December 1994, 34 ILM 764, 773 (1995).

91 W. Hoyneck, "The CSCE in the New European Security Environment," 5 Helsinki Monitor (No. 1) 16, 17 (1994).

92 Helsinki Summit, *supra* note 89, at 1297-99.

93 *Id.* at 1299-1312.

<sup>94</sup> See Document of the Copenhagen Meeting of the Conference On the Human Dimension ("Copenhagen Document"), 29 June 1990, 29 ILM 1305 (1990); and Document of the Moscow Meeting On the Human Dimension ("Moscow Document"), 3 October 1991, 30 ILM 1670 (1991).

95 CSCE ANNUAL REPORT 1994, corrected reissue (1994).

96 Helsinki Summit, *supra* note 89, at 1292, 2nd note (1975).

97 Hoyneck, *supra* note 91, at 19.

98 *Id.*

<sup>99</sup> See "Association of South-East Asian Nations," 6 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 25 (1983).

100 In 1984 Brunei was admitted into the Association. Declaration of the Admission of Brunei Darussalam into the Association of Southeast Asian Nations, 7 January 1984, reprinted in MICHAEL LEIFER, ASEAN AND THE SECURITY OF SOUTH-EAST ASIA 189 (1989).

101 Association of Southeast Asian Nations Declaration, 8 August 1967, 6 ILM 1233, 1234 (1967).

102 *Id.*

103 The ASEAN Declaration reads in part, "The cherished ideals of peace ... are best attained by fostering good understanding, good neighbourliness and meaningful cooperation among the countries of the region." *Id.*

104 Declaration of Southeast Asia As A Zone of Peace, 27 November 1971, 11 ILM 183,184 (1972).

105 Manila Declaration Of 1987, 15 December 1987, reprinted in LEIFER. *supra* note 100, at 190-191.

106 Treaty of Amity And Co-operation In Southeast Asia, 24 February 1976, reprinted in LEIFER, *supra* note 100, at 170,172.

107 Treaty of Amity, Chapter IV, *supra* note 105, at 173. This chapter, however, has gone unused since its inception. M. Alagappa. "Regionalism and the Quest for Security: ASEAN and the Cambodian Conflict," 46.1. Int'l Aff. 439, 449 (1992/93).

<sup>108</sup> Singapore Declaration of 1992, 28 January 1992, 31 ILM 498 (1992).

109 E.g., Joint Statement of the Special Meeting of the ASEAN Foreign Ministers, 12 January 1979, reprinted in LEIFER, *supra* note 100, at 186; An Appeal For Kampuchean Independence, 21 September 1983, *Id.*, 187; Manila Declaration reprinted in LEIFER, *supra* note 100 at 190,191.

110 Agreement On A Comprehensive Political Settlement of the Cambodian Conflict ("Paris Agreement"), 23 October 1991, 31 ILM 498, 499-500 (1992).

111 *Id.* at 500.



112 Document On A Status Of Association With WEU, part 11 of Kirchberg Declaration of the WEU Council of Ministers, 9 May 1994, reprinted in Tin-'. CHANGING FUNCTIONS OF THE WESTERN EUROPEAN UNION: INTRODUCTION AND BASIC DOCUMENTS 191, 197 (A. Bloed, ed., 1995). The new Associate Partners are Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia. Id, at 199.

113 Id.; see also Declaration Following On From the "Document On Associate Membership", part III of the Kirchberg Declaration, [id. at 200, 201](#),

<sup>114</sup> Partnership For Peace Invitation Issued by the Heads of State and Government participating in the Meeting of the North Atlantic Council, 11 January 1994, 2nd paragraph, reprinted in NATO PARTNERSHIP FOR PEACE 1 (NATO, 1994).

115 Id.

<sup>116</sup> Partnership For Peace Framework Document, para. 3, reprinted in NATO PARTNERSHIP FOR PEACE, *supra* note 114, at 5, see also "Partnership For Peace (PFP)," NATO Basic Factsheet No. 9 (March 1996). Available on the Internet at <http://www.nato.int:80/docu/facts/fs9.htm>.

117 Specifically Albania, Armenia, Austria, Azerbaijan, Belarus, Bulgaria, Czech Republic, Estonia, Finland, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Malta, Moldova, Poland, Romania, Russia, Slovakia, Slovenia, Sweden, FYROM, Turkmenistan, Ukraine and Uzbekistan. NATO Basic Fact Sheet No. 9, March 1996.

118 Id.

119 This information, as well as the PFP SOFA. was provided to this author by Headquarters USAF/JAI, Ramstein AB, Germany.

120 NATO Press Service. "Work Plan For Dialogue, Partnership And Cooperation 1996/1997," NATO Press Release M-NACC-2(95)121, 6 December 1995.

<sup>121</sup> Statement on the conclusion of the ECOWAS Standing Committee on the conflict in Liberia, UN Doc. S/21485/Annex (1991).

122 G. Nolte, "Restoring Peace By Regional Action: International Legal Aspects of the Liberian Conflict," 53 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht [ZaoRV] 608 (1993).

<sup>123</sup> For a detailed historical account of the Liberia conflict up to and including the ECOWAS intervention, see E. NWOKEDI, REGIONAL INTEGRATION AND REGIONAL SECURITY: ECOMOG, NIGERIA AND THE LIBERIAN CRISIS (Centre d'Etude d'Afrique Noire, 1992); K. Kufuor, "The Legality of Intervention in the Liberian Civil War By the Economic Community of West African States," 5 Rev Africaine de Droit MCI et Compare [RADIC] 525 (1993); and especially G. Nolte, *supra*, note 122.

124 Treaty of the Economic Community of West African States, 28 May 1975, 1010 U.N.T.S. 17, 20.

125 See A. MUNU, THE FUTURE OF ECOWAS (Nigerian Institute of International Affairs, 1989). Munu makes no mention of any military role within the organization.

126 [Id. at 4](#).

127 Id. "Resistance will only become effective if the economies of the sub-region are strong and reasonably independent of support from outside the sub-region."

128 Protocols de Non-Aggression de la CEDEAO [ECOWAS Protocol of Non-Aggression], 28 April 1978, reprinted in P. GONIDEC, US ORGANISATIONS INTERNATIONALES AFRICAINES (1987).

129 protocols d'Assistance Mutuelle en Matiere de Defense [Protocol on Mutual Assistance on Defense ("PMAD")] 1, 29 May 1981, reprinted in 40 M. GTLELE-AHANHANZO, INTRODUCTION A L'ORGANISATION DE L'UNITE AFRICAINE I.°I' AUX ORGANISATIONS REGIONALES AFRICAINES 267 (1986). All translations are by the author.

130 The Protocol does not distinguish between insurgencies supported by non-member states with those supported by other member states.

131 Kufuor, *supra* note 123.

132 Nolte, *supra* note 122.

133 Kufuor, *supra* note 123, at 538-39. The Committee's decision to establish ECOMOG is contained in UN Doc. S/21485/Annex. See also Nolte, *supra* note 122, at 616.

134 Nolte, *supra* note 122, at 615.

135 Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962, 10 Reports 1962, 151.

136 ECOWAS Treaty. Article 2. *supra* note 124, at 20.

137 PMAD, *supra*, note 129, at 267.

138 See Nolte, *supra* note 122, at 617.

139 Nwokcidi, *supra* note 123 at 9. The Standing Mediation Committee was a Nigerian proposal, and Nigeria contributed 70% of the manpower and funding for the operation. *Id.* at 10.

140 E.g., in U.N. Docs. S/22133 and S/23866, and S.C. Res. 788 (1992), S.C. Res.813 (1993), S.C. Res. 886 (1993), and S.C. Res. 1041 (1996).

141 Nolte considers this latter possibility as the "most plausible." Nolte, *supra* note 122, at 633.

142 See U.N. Docs. S/21485, S/22025, S/23863, S/24218, S/24735.

143 See *supra*, note 7. The Protocol entered into force on 16 November 1988.

144 Santiago Commitment to Democracy and the Renewal of the Inter-American System, 4 June 1991, AG/doc2734/91, reprinted in THE FUTURE of THE OAS, *supra* at 103.

145 AG/Res. 1080 (XXI-0/91), 5 June 1991.

146 See U.N. Docs. S/23127, S/23131 and S/23132.

147 S.C. Res. 841 (1993). For a more detailed account of the events surrounding the overthrow of the Aristide presidency in Haiti, see UNITED NATIONS PEACE-KEEPING OPERATIONS INFORMATION NOTES 1993; UPDATE No. 2 109-16, DPI/1306/Rev.2 (1993).

<sup>148</sup> S.C. Res. 940, para. 4 (1994).

149 Report of the Multinational Force in Haiti, UN Doc. S/1994/1107.

150 Fourth report of the Multinational Force in Haiti, U.N. Doc. S/1994/1258. Of particular mention are the Bangladeshi and Guatemalan contingents and the Caricom battalion. The full complement of participating states, as of January 1995, included Antigua and Barbuda, Argentina, Australia, Bahamas, Bangladesh, Barbados, Belgium, Belize, Benin, Bolivia, Costa Rica, Denmark, Dominica, Great Britain, Grenada, Guatemala, Guyana, Israel, Jamaica, Jordan, Netherlands, Philippines, Poland, St. Kitts & Nevis, St. Lucia, Trinidad and Tobago and the U.S.

151 Much of the information in this section was taken from the following official NATO fact sheets obtained from the Internet: "NATO/WEU Operation Sharp Guard," IFOR Final Fact sheet, 19 June 1996, <http://www.nato.int:80/ifor/general/shrp-grd.htm>; "Final Fact Sheet: Operation Deny Flight," IFOR Operation Deny Flight Final Fact sheet, 21 December 1995, <http://www.nato.int:80/ifor/general/fs-fin.htm>; "NATO's Role in Peacekeeping in the Former Yugoslavia," NATO Basic Fact sheet No. 4, September 1996, <http://www.nato.int:80/docu/facts/fs4.htm>. "NATO's Role in the Implementation of the Bosnian Peace Agreement," NATO Basic Fact Sheet No. 11, September 1996, <http://www.nato.int:80/docu/facts/fs11.htm>; "IFOR Fact sheet," IFOR AFSOUTH Fact sheet, 20 September 1996, <http://www.nato.int:80/ifor/general/fs-ifor.htm>; "Fact Sheet: IFOR Ground Components," IFOR AFSOUTH Fact Sheet IFOR Land Component, 13 September 1996, <http://www.nato.int:80/ifor/general/fs-land.htm>; "Fact Sheet IFOR Air Components," IFOR AFSOUTH Fact sheet Air Components, 20 September 1996, <http://www.nato.int:80/ifor/general/fs-air.htm>. Any factual assertion not otherwise cited is supported by one of the above fact sheets.

152 Bosnia has sued Yugoslavia in the ICJ for fomenting a genocidal war in Bosnia against Muslims.

153 For more details about the how the war in the former Yugoslavia started and U.N. involvement, see THE UNITED NATIONS AND THE SITUATION IN Tim FORMER YUGOSLAVIA, U.N. REFERENCE PAPER, 7 MAY 1993, DPI/ 1312/Rcv.1 (1993).

154 S.C. Res. 713 (1991). At this point. Yugoslavia still encompassed Slovenia, Croatia, Bosnia and Macedonia. It did not officially break up until May 1992. See S.C. Res. 753 (1992), recommending admission of Croatia into the United Nations; S.C. Res. 754 (1992), Slovenia; S.C. Res. 755 (1992), Bosnia-Herzegovina; S.C. Res. 817 (1993), Former Yugoslav Republic of Macedonia.

155 S.C. Res. 757 (1992).

156 See [WEU] Council of Ministers, Extraordinary Meeting on the Situation in Yugoslavia, 10 July 1992, reprinted in THE CHANGING FUNCTIONS OF THE WEU, supra note 112, at 155. In Extraordinary Meeting Council of Ministers Communique, 28 August 1992, *id.* at 157, 158, WEU ministers "noted the success of Operation `Sharp Vigilance' to monitor the embargo in the Adriatic.

<sup>157</sup> S.C. Res. 787, para. 16 (1992).

158 S.C. Res. 820 (1993).

159 Extraordinary Meeting Council of Ministers Communique, 28 August 1992, supra note 156, at 158.

160 [WEU] Council of Ministers Communique, 19 May 1993, reprinted in THE CHANGING FUNCTIONS OF THE WEU, supra note 112, at 171, 173.

161 [WEU] Council of Ministers Declaration ("Luxembourg Declaration"), 22 November 1993, *id.* at 183, 188.

162 S.C. Res. 1021 (1995).

163 S.C. Res. 1022 (1995).

164 All of the Security Council Resolutions discussed in this section which authorize states to enforce Security Council mandates authorize regional organizations to enforce them also.

165 S.C. Res. 781, para. 1 (1992).

166 S.C. Res. 816, para. 1, para. 4 (1993).

167 Some of these aircraft were also used for Operation Sharp Guard. Because Operation Deny Flight encompassed other air operations as well, the statistics given in the NATO Fact Sheets may actually reflect the number of personnel and aircraft participating in all aspects of Deny Flight, not just enforcement of the no-fly zone.

168 S.C. Res. 807, para 8 (1993).

169 S.C. Res. 824, paras. 3 and 4 (1993). The Safe Areas surrounded the cities of Sarajevo, Tuzla, Zepa, Gorazdc, Bihac and Srebrenica.

170 S.C. Res. 836, paras. 5 and 10 (1993).

171 See also S.C. Res. 913, para. 2 (1994), inviting the Secretary-General to take necessary steps to ensure respect of the Gorazdc Safe Area.

172 S.C. Res. 958 (1994).

173 S.C. Res. 836, para. 9 (1993). Ironically, UNPROFOR was given its new authority "acting in self-defense." Because this new authority was designed to give UNPROFOR the power to enforce its mandate, however, this author considers paragraph 9 to be a grant of authority to use offensive force.

174 *Id.*, para. 10.

175 General Framework Agreement For Peace In Bosnia And Herzegovina, Bosnia and Herzegovina-Croatia, Yugoslavia, 14 December 1995, reprinted in UN Doc. S/1995/999; also at 35 ILM 75 (1996) and on the Internet at <http://hq.nato.int/ifor/gfa/gfa-home.htm>.

176 35 ILM 92 (1996).

177 S.C. Res. 1031 (1995).

178 Albania, Austria, Bulgaria, Czech Republic, Estonia, Finland, Hungary, Latvia, Lithuania, Poland, Romania, Russia, Sweden and Ukraine. Slovakia contributes civilian personnel.

179 Egypt, Jordan, Malaysia and Morocco. As of 20 September 1996, contacts were in progress with Saudi Arabia about participation.

180. Audoud, "L'Intervention Americano-Caraibe a la Grenade;" 29 Ann. Francais de D. Int'l 217 (1983):

181 Id at 226. Translation by author.

182 In U.N. [G.A. Res. 46/7](#) (1991).

183 See Y. Daudet, "L'ONU et l'OEA en Haiti et le Droit International," 38 Ann. Francais de Droit Int'l 89, 94 (1992).

184 [G.A. Res. 46/7](#) contained a vague request for the Secretary-General to support the OAS in fulfilling the OAS mandates. Without such authority from the General Assembly, the Secretary-General could not have done even that much.

185 1 OPPENHEIM, INTERNATIONAL LAW, sec. 113 (1905).

186 Id., sec. 134.

187 Id. Emphasis in original.

188 2 OPPENHEIM, INTERNATIONAL LAW, sec. 298: "There is no doubt that a foreign State commits an international delinquency by assisting insurgents in spite of its being at peace with the legitimate Government."

189 LELAND GOODRICH, EDVARD HAMBRO AND ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 44-45 (3d & rev. ed., 1969).

190 Id.

191 Declaration of the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, U.N. G.A. Res. 2131 (XX). The resolution passed by a vote of 109-0-1 (Great Britain abstaining). U.N. GAOR, 20th Sess., 1408 plen. mtg., p. 9 (1965).

192 Argentina in GAOR, 20th Sess., 1st Comm., 1398th mtg., para. 40 (1965); Jamaica in GAOR, 20th Sess., 1st Comm., 1406th mtg., para. 32 (1965). In 1970 the General Assembly adopted the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625 (XXV), without a vote. This Declaration repeats nearly verbatim the prohibition of intervention in the 1965 Declaration.

193 U.N. GAOR, 2nd Emer. Spec. Sess., 564th plen. Mtg. (1956); U.N. SCOR, 11th Sess., 746th mtg. (1956). See also R. Mullerson, "Intervention by Invitation" in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 128-29 (L. Damrosch & D. Scheffer, ed., 1991) for discussion of Soviet invasions of Hungary, Czechoslovakia and Afghanistan.

194 G.A. Res. 1004 (ES-II). It passed by a vote of 50-8-15. GAOR, 2nd Emer. Spec. Sess., 564th plen. mtg. (1956).

195 GAOR, 2nd Emer. Spec. Sess., 564th and 568th-571st plen. mtgs. (1956). Several countries denounced intervention under any conditions whatsoever.

196 U.N. Doc. [S/PV.2186](#) (1980).

197 E.g., Pakistan in U.N. Doc. [S/PV.2185](#) (1980) and Canada in GAOR, 35th Sess., 69th plen. mtg. (1980).

<sup>198</sup> Louise Doswald-Beck, "The Legal Validity of Military Intervention By Invitation of the Government," *supra*, note 75 at 251.

<sup>199</sup> Military and Paramilitary Activities (Vicar. v. US), 1986 ICJ 94 (Merits, June 27).

200 *Id.* at 126, para. 209. Emphasis added.

201 See L.T. GALLOWAY, RECOGNIZING FOREIGN COURTS 5-10 (1978), reprinted in B. CARTER & P. TRIMBLE, INTERNATIONAL LAW, *supra* at 421-22 (1991). Some governments avoid the prickly issue of appearing to validate "extraconstitutional" governments by recognizing only new states, ignoring the means by which the government came into power. This is known as the Estrada Doctrine. *Id.*

202 For example, in an ad hoc Meeting of the Ministers of Foreign Affairs, the OAS passed a resolution "To recognize the representatives designated by the constitutional Government of President Jean-Bertrand Aristide as the only legitimate representatives of the Government of Haiti. . . ." "Support to the Democratic Government of Haiti," para. 3, MRE/RES.1/91 corr. 1, OEA/Ser.F/V.1, reprinted in [U.N. Doc. S/23131/Annex](#) (1991).

203 The Tobar or Betancourt Doctrine is a refusal to recognize any government come to power not by constitutional means until free elections are held. Its purpose is to encourage democratic and constitutional government. GALLOWAY, *supra*.

204 Thomas Franck, "The Emerging Right to Democratic Governance," 86 AJIL 46 (1992).

205 Thomas Franck, "Intervention Against Illegitimate Regimes," in LAW AND FORCE, *supra* at 159, 162. This piece pre-dates his AJIL article, but makes essentially the same points.

206 For a discussion of legitimacy and symbolic validation in international law and relations, see THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

207 M. Halberstam, "The Copenhagen Document: Intervention in Support of Democracy," 34 Harvard Int'l L. J. 163 (1993).

208 *Id.*

209 Charter of Paris For A New Europe, 21 November 1990, 30 ILM 190,193 (1991).

210 *Id.* at 193.

211 *Id.* at 195.

212 M. Halberstam, "The Copenhagen Document: Intervention in Support of Democracy," 34 Harvard Int'l L. J. 163, 167 (1993).

213 OAS G.A. Res. 1080.

214 protocol of Amendments to the Charter of the Organization of American States ("Protocol of Washington"), 14 December 1992, 33 ELM 1005 (1994).

215 V. Nanda, "Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti--Revisiting the Validity of Humanitarian Intervention Under International Law," 20 Denver J. Int'l L. & Pol'y 305, 310 (1992).

216 UN Charter, Article 1(3).

217 Article 56 incorporates by reference Article 55, which reads, "the United Nations shall promote: ... c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

218 Proportionality is one of the basis principles of the law of armed conflict. See Hague Convention IV of 1907, art. 23(c).

219 w. Verwey, "Humanitarian Intervention under International Law," 32 Neth. Int'l L. Rev. 357,418 (1985).

220 This term was coined by a colleague of mine, Michael Mattler, in his paper "The Distinction Between Civil Wars And International Wars And Its Legal Implications," presented at the NYU Conference on the Law of International Organizations in Situations of Civil War, 28-30 January 1994. The opinions on how a civil war may reach the status of an internationalized civil war are mine and not necessarily his.

221 Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"), 9 December 1948, 78 U.N.T.S. 277. Article I states, "The Contracting Parties confirm that genocide ... is a crime under international law which they undertake to prevent and punish. Article VIII reads, "Any Contracting Party may call upon the competent organs of the United Nations to take such action . . they consider appropriate for the prevention and suppression of acts of genocide. . . ."

222 S.C. Res. 713, 3rd and 4th preambular paragraph (1991). Emphasis in original.

2<sup>23</sup> S.C. Res. 752, para. 7 (1992). Emphasis in original.

224 S.C. Res. 770, para. 2 (1992). Emphasis in original.

225 S.C. Res. 771, 3rd preambular paragraph (1992). The Council demanded, in para. 3, that the human rights violations cease, or it would take further measures. para, 7.

226 Traditional peacekeeping forces are not specifically authorized in the Charter but are generally characterized as being under "Chapter 6 1/2". The key element to any traditional peacekeeping force is the consent of the host government. For a detailed discussion of the elements of both traditional peacekeeping and Chapter VII peacekeeping, see this author's article "The Role of the United Nations in Peacekeeping and Truce-Monitoring: What Are the Applicable Norms," 1994/2 Rev. Beige de Droit Int'l 559 (1995).

227 U.N. Doc. S/24868.

228 S.C. Res. 794, 3rd preambular paragraph and paragraph 10 (1992).

229 S.C. Res. 816, para. 4 (1993).

<sup>230</sup> Paragraph 7 requests states to keep the Council informed of their actions, apparently in keeping with Article 54 of the Charter.

231 L. Damrosch, "Commentary on Collective Military Intervention to Enforce Human Rights," in LAW AND FORCE, supra note 193, at 215, 221.

232 Id

233 J.-P. Therien, M. Fortmann & G. Gosselin, "The Organization of American States: Restructuring Inter-American Multilateralism," 2 Global Governance 215, 218 (1996).

234 Id.

235 Therien et al., supra at 226. See also four separate articles in LAW AND FORCE, supra note 193, at 224-244.

236 Id. at 235.

237 See T. Taylor, "West European Security and Defence Cooperation: Maastricht and Beyond," 70 Int' I Aff. 1 (1994).

238 J. Ulbrich, "European allies revive plan for joint army," European Stars And Stripes, 27 August 1996, 21.

239 J. Eberle, "NATO Reborn," 12 Arms Control (Special Issue: European Security Without the Soviet Union) 17, 21 (1991).

240 H. de Santis, "Romancing NATO: Partnership for Peace and East European Stability," in THE FUTURE of NATO 61, 62 (T. Carpenter ed., 1995).

241 K. Kaiser, "Reforming NATO," 103 Foreign Policy 128, 135 (1996).

242 "NATO's New Force Structures," NATO Basic Factsheet No. 5, January 1996.

243 NATO PARTNERSHIP FOR PEACE 1 (NATO, 1994).

244 "NATO's Enlargement," NATO Basic Factsheet No. 13, March 1996.

245 Robert Burns (AP), "Clinton pushes NATO expansion," European Stars And Stripes, 23 October 1996, at 4. President Clinton called for NATO to have new members from the former Soviet bloc by 1999.

246 Javier Solana, "Address to the International Institute of Strategic Studies," London, 19 September 1996, available on the Internet at <http://www.nato.int:80/docu/speech/1996/s960919s.htm>.

247 B. Sammon, "New words of hope from Christopher," *European Stars And Stripes*, 6 September 1996, 1. The text of the entire speech is in "A New Atlantic Community For the 21st Century," U.S. Dept. of State, Office of the Spokesman (Stuttgart, Germany), 6 September 1996.

248 *Id.* at 4.

249 See *supra*, note 1. 250 *Id.*, para. 65.

251 "Supplement to An Agenda for Peace," UN Doc. A/50/60, S/1995/1 (1995).

252 *Id.*, para. 86.

253 S.C. Res. 837, para. 5 (1993). .

254 See *supra* note 1, in para. 64.

255 See A. Goodpaster, *supra* note 1.

256 As Lt Col Brooks Bash wrote, "In addition to showing commitment, Airpower also can provide added credibility to peacekeeping in the eyes of the disputing parties." B. Bash, "Airpower And Peacekeeping," 9 *Airpower J.* 67; 67 (1995). Lt Col Bash authored a more detailed discussion in *THE ROLE OF UNITED STATES AIR POWER IN PEACEKEEPING* (Air Force School of Advanced Airpower Studies, 1994).

257 For example, Italian and Pakistani contingents in Somalia sometimes refused to deploy in certain areas on the instructions of their governments. The UN peacekeeping force in Cambodia had similar problems. See D. Lorch, "Disunity Hampering UN Somalia Effort," *New York Times*, 12 July 1993, at A8; A. Cowell, "Italy, in UN Rift, Threatens Recall of Somalia Troops," *New York Times*, 16 July 1993, at A1; J. Coburn, "Shooting An Elephant: The United Nations In Cambodia," *Village Voice*, 20 July 1993, at 26.