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ARTICLES

Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No"

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I. INTRODUCTION

United States forces /1/ stationed overseas are a relatively permanent feature of modem American national security policy. Despite recent military cutbacks, /2/ the stationing of those forces in another sovereign's territory /3/ will continue to pose legal challenges regarding their status. One challenge in particular no doubt will be the continuing viability of U.S. policy to maximize criminal jurisdiction over U.S. forces who commit environmental offenses while stationed in a host sovereign's territory. This practice, which for the most part reverses customary international law, is based upon treaties known as status of forces agreements (SOFAs). These agreements are entered into between the U.S. and most countries where a substantial presence of U.S. forces are stationed on a "permanent" basis. Perhaps of greater significance has been the practice that has developed under these treaties of seeking waiver of host nation criminal jurisdiction in the great majority of cases, to include a significant number of cases involving civilians - even when the U.S. has no criminal jurisdiction at all.

This accommodating relationship among allies breaks down occasionally when the politics of sovereignty intrudes. A number of factors have contributed to U.S. Department of Defense (DoD) efforts to revise its policies on environmental compliance at overseas installations, including: a diminishing threat of hostilities, emerging sovereignty attitudes among nations hosting U.S. forces, and recent international environmental incidents creating increased sensitivity to the environment. Host nation environmental legislation (including criminal enforcement) is catching up with - and in some cases overtaking - the scope and complexity of the U.S. environmental law regime. United States authorities, however, are not considering the problems associated with the widening gulf between their pervasive practice of maximizing foreign jurisdiction waivers and the ever-increasing tempo and seriousness of host nation criminal enforcement for environmental noncompliance. This gap appears alarmingly wide when reviewing the few environmental criminal cases that have occurred thus far and the U. S. disposition of those cases after securing (or, more likely, simply assuming) jurisdiction.

This article seeks to focus on the inherent tension between the DoD policy to maximize U.S. criminal jurisdiction over its forces stationed overseas and the growing pressure on host nation allies to respond to environmental noncompliance. This article also focuses on how this tension is exacerbated by the actual or perceived lenient treatment of visiting forces who commit environmental offenses. This article then suggests improved means by which U.S. authorities may continue to seek maximum waiver of jurisdiction over environmental offenses committed by U.S. forces and briefly evaluates the need to persevere with this policy in the context of U.S. civilians committing these offenses.

II. FOREIGN CRIMINAL JURISDICTION AND STATUS OF FORCES AGREEMENT

A. International Law Foundation

Customary international law /4/ is generally inadequate to deal with the question of criminal jurisdiction over visiting forces when both the host nation and sending nation /5/ assert jurisdiction over an offender./6/ On the one hand, it appears clear that, in the absence of a special agreement, nations as sovereigns may exercise criminal jurisdiction over all persons within their territory, including foreign military forces. /7/ On the other hand, the sending State has an equally compelling sovereign interest in exercising criminal jurisdiction over its military forces in another sovereign! s territory./8/ Application of this sovereignty interest and immunity from host nation jurisdiction was perfected in the "law of the flag" theory. /9/ Law of the flag advocates cite The Schooner Exchange v. McFadden /10/ as authority for their position that sending State forces are immune from the jurisdiction of a foreign receiving State./11/ This "immunity" was extended in subsequent case to U.S. forces stationed in (not just passing through) a foreign country. /12/ Careful reading of Chief Justice Marshall's opinion in The Schooner Exchange, however, reveals that any such immunity of sending State forces from foreign criminal jurisdiction is wholly dependent on the nature and extent of the host nation's consent to be restricted in the application of its own criminal jurisdiction. /13/ Nonetheless, customary international law had evolved to the point where license to enter foreign territory carried with it the right to exercise military criminal jurisdiction free from the territorial sovereign' s interference. /14/

Until the post-World War II era of negotiated SOFAs that addressed this conflict between sovereigns, U.S. policy was to rely heavily on the concept of immunity from host nation criminal jurisdiction created by the host nation's implied consent in expressly consenting to U.S. forces being stationed there. /15/ The American policy of insisting on complete immunity from foreign criminal jurisdiction continued in the early post-World War II period, /16/ but ultimately gave way to the negotiation of systems of "concurrent jurisdiction" /17/ in SOFAS and bilateral supplementary agreements. /18/

B. Status of Forces Agreements and Jurisdictional Allocations

1. SOFA Intent

In the wake of strong disagreement among nations and commentators on the immunity of a sending State's forces from a host nation's criminal jurisdiction, the predominant focus of the NATO SOFA /19/ was the issue of allocation of criminal jurisdiction and the sharing of this sovereign prerogative. /20/ The drafters' solution was to distinguish between offenses involving the exclusive jurisdiction of either state and the concurrent jurisdiction of both states. /21/ In the case of concurrent jurisdiction, the NATO SOFA grants the primary right of jurisdiction to the receiving State, except for offenses solely against the property, security, or members of the sending State force, or for offenses arising out of the performance of official duty. /22/ This approach recognizes both the territorial sovereignty of the receiving state as well as the law of the flag principle. /23/

Despite this compromise found in SOFAs, /24/ one must remember that this allocation of concurrent criminal jurisdiction presupposes the consent of the

receiving State and eliminates virtually any notion of sending State force immunity. /25/ The few court cases addressing this allocation necessarily acknowledge that SOFA waivers are narrowly interpreted to maintain primary host nation jurisdiction (and thus the integrity of that host nation's sovereignty) when a criminal defendant challenges such jurisdiction. /26/

2. Jurisdiction Allocation Formula

In order to understand the potential application of U.S. jurisdiction over environmental offenses committed by its forces in host nations, it is appropriate to briefly explain the specific allocation of criminal jurisdiction. Article II of the NATO SOFA Article VII will be used as an example. Paragraph I of this article sets forth the basic guidelines for the exercise of concurrent jurisdiction. /27/ The immediate question is whether the U.S. could exercise concurrent jurisdiction over U.S. civilian employees /28/ Having established the fundamental concession that the sending State may exercise some criminal jurisdiction within a receiving State, the SOFA then defines the contours of exclusive /29/ and concurrent jurisdiction. /30/

Paragraph 3 fills the gap in international law regarding which nation has priority when concurrent jurisdiction exists. /31/ Of particular interest in the area of environmental offenses is the "official duty" exception to the host nation's primary right to exercise jurisdiction. This would arise when a member of the force commits an offense under sending and receiving State laws arising out of the performance of his duties. /32/ Although not stated in the SOFA itself, according to a government legal advisor closely involved with the NATO SOFA negotiations, the criterion for distribution of cases of concurrent jurisdiction is one of "predominant interest. "/33/ Some also have suggested that the primary right scheme of allocating concurrent jurisdiction has disregarded doctrine and relied instead on conceptions of good faith, reasonableness, and efficacy. /34/

Recognition of these interests is codified in the NATO SOFA, article VII, 'paragraph 3(c), which allows sending and receiving States to change the primary right to exercise concurrent jurisdiction on an ad hoc basis. /35/ If a host nation with the primary right to exercise concurrent jurisdiction receives a request to waive that right, its only obligation is to give the request "sympathetic consideration. "/36/ In practice, however, many SOFA signatory receiving States, even in recent years, have acceded to U.S. requests for waivers in a significant number of cases. /37/ In fact, it has been suggested that our policy of successfully requesting waivers wherever possible has led to the result that American forces are in fact "extraterritorial" (and de facto following law of the flag principles), rather than subject to foreign criminal jurisdiction (with certain exceptions). /38/ The question remains whether the U.S. would be successful in requesting a waiver to prosecute a military member in cases involving environmental offenses or whether, even in official duty cases, if the U.S. could successfully assert its primary right. /39/ Even less certain is our ability to request host nation "waivers" in civilian cases which, although occurring /40/ are not entitled to "sympathetic consideration" due to the absence of concurrent military criminal jurisdiction. /41/

C. U.S. Policy to Maximize Its Sending State Jurisdiction

1. Individual Cases

Our policy of maximizing jurisdiction to the greatest extent possible stems from the Senate Resolution on the NATO SOFA. /42/ The Senate declaration, adopted on July 15, 1953, did not expressly require the U.S. to obtain jurisdiction in all cases, but instead required a compulsory waiver request only when the offender's commander believed "there is danger that the accused will not be protected because of the absence or denial of Constitutional rights he would enjoy in the United States. "/43/ From this mandate grew our policy to secure jurisdiction whenever possible in cases where the receiving State had the primary right of jurisdiction. /44/ Even a few courts have expressed a preference for trial by court-martial of military personnel overseas as opposed to trial in foreign courts. /45/

2. Blanket Waivers

Although the negotiation of a waiver on a case-by-case basis is the most common method to maximize jurisdiction, the second prong of American strategy has been through the negotiation of bilateral agreements. These agreements typically invert the system of priorities by granting to the U.S. a general waiver of the receiving State's primary right. /46/ One type of bilateral agreement negotiated with the Netherlands requires a blanket waiver of its primary right upon request of U.S. authorities except in cases where the Netherlands determines it is of "particular importance. /47/ This general waiver formula was further refined /48/ in a multilateral agreement with Germany and NATO States having forces stationed in Germany. /49/

The agreement results in an automatic waiver of Germanys primary right, but Germany may recall the waiver when "by reason of special circumstances in a specific case, major interests of German administration of justice make imperative the exercise of German jurisdiction." /50/

These waiver mechanisms convert otherwise rigid jurisdictional rules into flexible guidelines owing the parties to consider whose stake in prosecution should prevail. /51/ The functioning of the NATO SOFA model of allocation, despite the vagaries of fluctuating political environments, has withstood the strain of overseas base practice remarkably well. /52/ Whether it will remain so in an era of emerging sovereignty -- particularly in the area of environmental offenses highlighted by international sensitivity to environmental compliance and cleanup - is questionable.

D. Emerging Sovereignty and Potential Conflict with SOFA Obligations

1. Postwar Historical Developments

The NATO SOFA and other SOFAs developed in the aftermath of World War II represented a logical and restrained approach to the delicate problem of balancing sovereignty between sending and receiving States in an international system (unlike that from which customary international law developed) requiring a long-term presence of significant numbers of visiting forces in the territory of a receiving State. /53/ Nevertheless, changing world events and the emerging sovereignty of traditional postwar receiving States have changed the climate, if not yet the general practice, of adhering to SOFA treaty obligations. Despite continued cooperation and good

relations among allies most of the time, a problem remains - the compatibility of permanently stationed "visiting" forces with the host nation's sovereignty. /54/

> Reliance on SOFAS and supplementary agreements and practices thereunder should no longer be taken for granted. /55/ Particularly for such cutting edge issues as environmental compliance at overseas installations and disposition of environmental offenses under U.S. law, political changes must be taken into account. Attitudes toward U.S. forces overseas in peacetime have changed, and a "complex web of essentially subjective, psychological factors revolving around issues of sovereignty, national dignity/humiliation" emerge. /56/ The relevance of such factors is evident not only in familiar "trouble spots" such as Greece, Panama, and Turkey, but also in countries with which we have traditionally enjoyed close defense ties such as Germany and South Korea. /57/ Moreover, the end of the Cold War, to include the reunification of Germany in 1990, the dissolution of the Warsaw Pact in 1991, and the emergence of new democracies in Eastern Europe, has provided a catalyst for receiving States in Europe, particularly Germany, to scrutinize their security arrangements and to review the diminution of sovereignty in the NATO SOFA and any bilateral agreements. /58/

United States military authorities who may have become complacent in relying on the old SOFA practice are well advised to study the Revised German Supplementary Agreement, /59/ negotiated as the result of the above changes and emerging German sovereignty. /60/ NATO sending States were willing to make the concessions adopted in the Revised Supplementary Agreement in the interest of cooperative relations between allies and a continued presence in this strategically important region of the world. /61/ Notable changes in the context of compliance with German law and environmental requirements include Article 53, /62/ Article 54A, Article 54B, and Article 57. /63/ The point to be drawn from the Revised Supplementary Agreement is that we should not underestimate public pressure within a receiving State nor its willingness to alter the traditionally relaxed SOFA practice regarding criminal jurisdiction enjoyed by the U.S. /64/

2. Conflicting Treaty Obligations

Finally, in the sovereignty context, one must be aware of the possibility of a receiving State not abiding by its SOFA commitment due to sovereignty in the form (or guise) of conflicting treaty obligations. Particularly contentious cases may strike a host nation's sensitive political nerves. The unanticipated sensitivity of the host nation's populace may yield undesirable results which we cannot prevent by simply relying on past practices under a SOFA. Perhaps the most instructive examples of this are capital offenses committed by U.S. forces that are punishable by the death penalty under American military law now politically unacceptable in many countries. /65/ In one recent case, despite the applicability of the *inter se* exception which gives the U.S. the primary right of jurisdiction for a murder offense, /66/ the Netherlands refused to turn over an American military member who was facing the possibility of the death penalty. They contended this would violate their European Convention on Human Rights /67/ treaty obligation . /68/

It is not too far fetched to imagine a receiving State making a similar argument in the environmental arena. Although a host nation' s NATO SOFA may obligate it to defer primary right of criminal jurisdiction for an environmental offense in an official duty case, the nation may rely on perceived treaty obligations especially if political

pressure is brought to bear - to strictly enforce environmental criminal provisions under national or European Union (EU) /69/ law. The EU has an aggressive agenda on environmental compliance in the wake of the Single European /70/ Act's incorporation of environmental law power into the Treaty of Rome.

Authority exists under this structure for EU law to impose obligations independent of national law. Member states, such as Germany, with elaborate existing environmental protection regimes, are obligated to meet these laws. /71/ Such obligations have not yet reached the area of criminal enforcement (civil enforcement and liability is partially covered), but an analysis of the zealous EU environmental protection program reveals the reality of such a scenario.

A recent example of such a potential conflict involved an EC regulation /72/ on the transboundary movement of hazardous waste. The U.S. argued that its shipments of hazardous waste qualified for an exemption from the Basel Convention's /73/ (and thus the EC Regulation's) requirements. /74/ There was justifiably some concern over whether such an approach subjected U.S. civilian employees (particularly in the Defense Logistics Agency) to criminal liability /75/ for sending or receiving transboundary hazardous wastes without following the EU regulation's procedures. One may argue that such obligations are not really incompatible with the NATO SOFA. /76/ In the end, however, in a system of sending State jurisdiction built entirely on the consent of the receiving State, the exercise sovereignty can be cloaked by a legal argument whenever a nation desires or is forced to take certain action.

III. SUBSTANTIVE LAW APPLICABLE TO U.S. FORCES OVERSEAS

A. Extraterritorial Application of U.S. Law

1. General Rules

At the turn of the century, American jurisprudence generally prohibited any extraterritorial application of U.S. law. The U.S. Supreme Court articulated this view in *American Banana Co. v. United Fruit Co. /*77/ This rule has since evolved into a rebuttable presumption that U.S. laws apply only territorially. /78/ The most often cited case for this proposition is *Foley Bros. v. Filardo, /79/* in which the Supreme Court emphasized "[t]he canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."/80/ A more recent pronouncement came from the Court in *Equal Employment Opportunity Com'n v. Arabian American Oil* Co., /81/ requiring "an affirmative intention of the Congress clearly expressed" to overcome the presumption. /82/ The Court articulated two rationales for the strict rule. First, Congress is assumed to legislate primarily with domestic concerns in mind. The second rationale is that the presumption is intended to avoid encroachment on foreign sovereignty and the resulting creation of international discord./83/ With very few exceptions (such as "market statutes" in the fields of antitrust and securities law), courts are loath to disturb this well-ensconced canon of statutory construction. /84/

2. US Environmental Legislation

The available commentary on the issue of extraterritorial application of U.S. environmental statutes unanimously concludes that these laws do not apply outside

U.S. teritory, /85/ with the controversial possible exception of the National Environmental Policy Act. /86/ A review of the major environmental statutes reveals that these statutes are generally designed to cover pollution occurring within the territory of the U.S.. For example, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) defines the "environment" as "any surface water, ground water, drinking water supply, land surface or subsurface strata or ambient air within the United States or under the jurisdiction of the United States," and requires the President to adopt a National Contingency Plan that addresses releases or threatened releases "throughout the United States." /87/ The Clean Water Act's (CWA) objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation' s waters" and defines covered navigable waters as "waters of the United States." /88/ The Clean Air Act's (CAA) purpose is "to protect and enhance the quality of the Nation's air resources," and sets up an elaborate scheme using air quality control regions in the U.S /89/

The Resource Conservation and Recovery Act's (RCRA) /90/ extraterritorial application to the United Kingdom was litigated and resolved in *Amlon Metals Inc.* V. *FMC* Corp. /91/ In reviewing statutory language similar to the above statutes /92/ and the legislative history, the Supreme Court concluded that the plaintiff had not met the threshold showing required by *Foley Bros./ARAMCO* to overcome the presumption against extraterritoriality. /93/ The issue of another environmental statute's extraterritorial application was litigated in *Defenders of Wildlife, Friends of Animals v. Lujan, /94*/ but the Supreme Court reversed the lower courts' finding of extraterritoriality on standing grounds. /95/

An interesting controversy remains as to the extraterritorial application of NEPA due to some sweeping language in the statute (e.g., "harmony between man and his environment," "eliminate damage to the environment and biosphere," "restoring and maintaining environmental quality to the overall welfare and development of man," and "recogniz[ing] the worldwide and long-range character of environmental problems"). /96/ Unlike other U.S. environmental statutes (most with criminal provisions), NEPA contains no substantive requirements and is essentially procedurally. /97/ It only requires federal agencies to create an environmental impact statement (EIS) for any major federal project or action "significantly affecting the environment. /98/ The issue of whether an EIS was required for a major federal action abroad was addressed in Executive Order (E.O.) 12,114. /99/ The order specifically exempts federal agencies from conducting an EIS-type procedure for major federal actions significantly affecting the environment of a *foreign nation,* unless that foreign nation is not participating with the U.S. or not otherwise involved with the action. /100/ However, *EDF v. Massey /101/* created something of an exception to E.O. 12,114. In this case, the D.C. Circuit Court held that NEPA's EIS requirement did apply to National Science Foundation activities in Antarctica, a place the court characterized as a sovereignIess continent without foreign policy problems if NEPA applied. /102/ In any event, the controversy appears to have subsided by virtue of *NEPA Coalition of Japan v.* Aspin, /103/ a D.C. District Court case which held that NEPA was inapplicable to U.S. Navy activities in Japan where the court found Japan was involved in the proposed action. /104/

3. The Uniform Code of Military Justice

Under standard SOFA provisions outlining concurrent criminal jurisdiction, sending States have the right to exercise criminal jurisdiction over those persons subject to the military law of the sending State. /105/ The Uniform Code of Military Justice (UCMJ) /106/ is a classic application of such military law. Article 5 /107/

specifies that "[t]his chapter applies in all places," as Congress clearly intended to make it extraterritorial. /108/ Convening a court-martial in a foreign country clearly constitutes an exercise of extraterritorial jurisdiction by the U.S. /109/

At one time the military did not have jurisdiction over offenses committed off an installation and triable by civilian authorities, if an offense was not "service-connected." /110/ This limitation has since been eliminated, and jurisdiction over U.S. military forces is determined by a "status test." This test allows us to establish subject matter jurisdiction over an offense committed anywhere, depending solely on an accused's status as a member of the U.S. armed forces. /111/ The locus of the crime and its connection to the armed services and its mission makes no difference as to UCMJ jurisdiction, albeit successful prosecution of military members stationed overseas for environmental offenses still depends on using a punitive article of the UCMJ. /112/

What does make a difference, however, is the military status of an offender. /113 It should come as no surprise that civilians are not normally subject to the UCMJ. During the first decade following World War II, however, UCMJ jurisdiction was regularly asserted to prosecute civilians accompanying U.S. forces abroad /114/ Who committed criminal offenses. /115/ Thus, when the NATO SOFA was negotiated, the U.S. was in a jurisdictional position similar to other European civil law countries that exercised criminal jurisdiction over their nationals wherever they might be, /116/ although the U.S. derived this authority solely from the UCMJ. /117/

A series of Supreme Court cases sounded the death knell for our use of the UCMJ to assert criminal jurisdiction over civilians accompanying U.S. forces overseas. Beginning with *Reid v. Covert"'* and *Kinsella v. Krueger,* /119/ the Court held that UCMJ, Article 2(a)(11), /120/ could not be constitutionally applied to civilian dependents in capital cases. Scrambling to recover its basis for jurisdiction, the U. S. took the narrow view that because *Reid* expressed no opinion on the constitutionality of courts-martial for noncapital offenses committed by civilian employees accompanying U.S. forces, it would continue to exercise this jurisdiction. /121/ A few years later in the companion cases of *McElroy v. United States ex rel Guagliardo* and Wilson v. *Bohlender, /*122/ the Court extended *Reid's* holding to any court-martial of civilian employees (in peacetime). Consequently, although U.S. “Jurisdiction," as that term may be loosely defined administratively, /123/ may still exist, inevitably receiving States enjoy exclusive criminal jurisdiction over any class of civilian accompanying U.S. forces under a SOFA treaty arrangement. /124/ Member nations to bilateral and multilateral SOFAs with the U.S. conceptually understand this limitation on U.S. criminal jurisdiction over civilians. /125/ Nonetheless, the U.S. policy of maximizing the return of cases continues unabated, even when fair trial issues are not present. /126/

4. General US. Criminal Law

Although the U.S. lacks UCMJ criminal jurisdiction over U.S. civilian employees, a remote possibility exists for extraterritorial application of certain federal crimes found in Title 18 of the U.S. Code. Generally, U.S. criminal jurisdiction is based on territorial principles, and criminal statutes are not given an extraterritorial effect. /127/ Currently, the U.S. only has extraterritorial jurisdiction within its special maritime and territorial jurisdiction and even then only for certain individual offenses clearly extraterritorial in the U.S. Code, such as treason. /128/ The special maritime and territorial jurisdiction covers U.S. embassy compounds, U.S. ships on the high seas, and other limited locations, but not overseas military bases. /129/ Most offenses committed by civilians accompanying our forces do not fall within this jurisdiction. /130/

One provision with potential application to U.S. civilian employees committing environmental offenses overseas is 18 U.S.C. Sec. 1001. /131/ In *United States v.* Walczak, /132/ this provision was held to apply to a false statement made on a U.S. Customs form outside the U.S., since the customs procedure and form were within the jurisdiction of the Department of the Treasury. Depending on the substantive duties of U.S. civilian employees to make records regarding environmental matters (a prime example being the disposal of hazardous waste), /133/ such a statute could conceivably apply. /134/

B. Environmental Compliance Obligations for U.S. Forces Overseas

1. Presidential and Congressional Mandates

As early as the Carter Administration, there was general concern about the environmental consequences of federal agency actions overseas. In 1979, President Carter issued Executive Order 12,114, which imposed a limited form of NEPA compliance on agency actions abroad./135/ It has been construed as not applying to most of our military forces overseas, because it requires an EIS-type environmental review only if foreign nations are not participating with the U.S. or otherwise not involved in the action./136/ Prior to its issuance, President Carter had issued Executive Order 12,088, *Federal Compliance with Pollution Control Standards,/137/* which requires each executive agency to comply with the "applicable pollution control standards" of Federal environmental statutes - meaning the same substantive and procedural requirements that would apply to a private person. /138/ Executive Order 12,088 did address overseas facilities to the extent it required each agency responsible for the construction or operation of federal facilities outside the U.S. to ensure that such construction or operation complied with the environmental pollution control standards of general applicability in the host country. /139/ At that time, the Department of Defense (DoD) also had been operating under a directive requiring our forces overseas to conform at all times to the environmental quality standards of the host country, international agreements, and Status of Forces Agreements. /140/

In the 1980s, environmental groups took their concerns about DoD's overseas environmental compliance to Congress. Congress began to focus on which standards to apply at overseas bases during the Bush Administration. /141/ A House Armed Services Committee investigation in 1991 found that U.S. bases overseas followed practices inconsistent with U.S. and host nation environmental standards. /142/ About the same time, a General Accounting Office report warned that hazardous waste disposal practices at overseas military installations could jeopardize international relationships because U.S. forces overseas had received little guidance as to what environmental law or policies they should follow. /143/

In the wake of these findings, Congress directed the Secretary of Defense to "develop a policy for determining applicable environmental requirements for military installations located outside the United States," and "[i]n developing the policy, the Secretary shall ensure that the policy gives consideration to adequately protecting the health and safety of military and civilian personnel assigned to such installations." /144/ In response to this Congressional mandate, DoD issued another directive to create a process to establish and implement specific environmental standards at overseas installations. /145/ Department of Defense Directive 6050.16 generally implements the following procedures for environmental executive agents (EAs): /146/ (a) identify host nation environmental standards (including those specifically delegated to regional or local governments for implementation) and the enforcement

record of such laws and standards to determine their applicability to DoD installations; (b) identify and review applicable environmental standards from base rights agreements and Status of Forces Agreements; (c) compare host nation law applicable to U.S. forces with baseline guidance to be developed from U.S. environmental law requirements; and (d) draft and publish mandatory standards for environmental compliance incorporating the stricter of either host nation environmental law or the baseline guidance. /147/ Department of Defense Directive 6050.16 has led to the creation of baseline and country-specific environmental compliance standards.

2. Overseas Environmental Baseline Guidance Document and Final Governing Standards

In 1992, the DoD adopted the Overseas Environmental Baseline Guidance Document (OEBGD) /148/ to begin implementing the mandates of the FY91 NDAA and DoD Directive 6050.16. The OEBGD contains specific environmental compliance criteria based on U.S. environmental laws /149/ to be used by EAs in developing "final governing standards" /150/ to be used by all DoD installations in a particular host nation./151/ Furthermore, the OEBGD provides that, unless inconsistent with applicable host nation law, base rights, SOFAs, or other international agreements, the baseline environmental guidance shall be applied by U.S. forces overseas when host nation environmental standards do not exist or provide less protection to human health and the natural environment than the baseline guidance. /152/ The OEBGD and final governing standards contain standards for the following: air emissions; drinking water; wastewater, hazardous materials; solid and hazardous waste; medical waste management; petroleum, oil and lubricants; noise; pesticides; historic and cultural resources; endangered species and natural resources; polychlorinated biphenyls; asbestos; radon; environmental impact assessments; spill prevention and response planning; and underground storage tanks./153/ The OEBGD and final governing standards apply to DoD installations overseas, but not to ships, aircraft, and operational and training deployments off the installation. /154/

The OEBGD's strategy for enforcing binding /155/ final governing standards is to use the individual service structures. /156/ Temporary waivers or compliance deviations with any final governing standards are available if compliance at a particular installation or facility would seriously impair its operations, adversely affect relations with the host nation, or require substantial expenditure of funds not available for such purpose. /157/

The OEBGD originally envisioned final governing standards by late 1993 unless responsible commanders (e.g., the commander of U.S. European Command for countries in Europe) approved a waiver. /158/ As of the date of this article, not all final governing standards have been approved. /159/ When final governing standards are completed and approved, representing the more protective of either the OEBGD or the enforced host nation standards, /160/ DoD views them as the "sole compliance standards at installations and facilities in foreign countries." /161/ Executive Agents are required to revalidate the final governing standards annually to reflect significant changes in host nation requirements or the OEBGD /162/

3. SOFA Obligations

As a matter of customary international law, activities of a foreign nation within the territory of a host nation are governed by host nation law unless there is an agreement otherwise between the nations. /163/ Status of Forces Agreements have constituted such an agreement whereby the U.S. has agreed only to "respect," but not generally be bound

by, host nation law with respect to our activities overseas. /164/ Most SOFAs and bilateral supplementary agreements were drafted in an age when environmental issues were hardly considered (if at all) and thus reflect an absence of any specific provisions concerning compliance with host nation environmental law. /165/

Theoretically, compliance issues should be resolved with the approval of final governing standards which apply host nation environmental laws that are stricter than our own. Practical, problems associated with this theory, however, include the difficulty associated with keeping up with new and rapidly changing host nation environmental laws and regulations, /166/ the lack of references to host nation laws and Standards in final governing standards, /167/ delays *in 'incorporating new host nation laws into the final governing standards, /168/ and the perception by host nations that compliance with final governing standards will not necessarily equal host nation compliance. /169/ Nonetheless, final governing standards give our overseas forces clear and tangible compliance standards against which they may be judged, as well as substantive standards to facilitate our efforts to maximize jurisdiction over offenses committed by our forces.

4 The Revised German Supplementary Agreement

A renegotiated Revised German Supplementary Agreement, /170/ the first of its kind but not yet ratified by all signatory States, directly applies German law to the activities of U. S. forces in Germany. /171/ In addition, the specific environmental provisions of the Revised Supplementary Agreement: (a) require the use of fuels, lubricants, and additives that are low pollutant in accordance with German environmental regulations for U. S. aircraft and motor vehicles, if such use is compatible with the technical requirements of these aircraft and vehicles; /172/ (b) apply German regulations for the limitation of noise and exhaust gas emissions from passenger and utility vehicles to the extent not excessively burdensome; /173/ (c) require the U.S. to observe German regulations on the transport of hazardous materials; /174/ and (d) require the U.S. to bear the running costs of necessary measures within the installation to prevent physical environmental damage. /175/

Whether the Revised Supplementary Agreement goes beyond the requirements of the final governing standards for Germany remains to be seen. /176/ Moreover, the ability of U.S. forces to use the final governing standards to shield themselves from the exercise of a host nation's criminal jurisdiction over environmental offenses could depend largely on the actual or perceived gap, if any, between host nation legal requirements and the final governing standards themselves. In some nations with embryonic environmental legislation or enforcement, such a disconnect may not present a problem. In a nation such as Germany - with advanced and complex environmental legislation /177/ as well as environmental criminal provisions /178/ - the U.S. may find it difficult to rely on the German FGS for standards against which to assert jurisdiction over its forces, particularly after the ratification of the Revised Supplementary Agreement squarely requiring application of German law.

IV. INTERNATIONAL SENSITIVITY TO ENVIRONMENTAL ISSUES

A. Some Recent Events Focusing Attention on the Environment

The concept of nation-state responsibility to abate environmental damage caused in another sovereign's territory was codified and publicized in the 1992 Rio Declaration on the Environment. This effort was a product of the celebrated United Nations Conference on the Environment and Development in Rio de Janeiro. It stated in part, "States have ...

the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States. /179/ The subject of heightened environmental sensitivity overseas should not be news to anyone. /180/ A 1991 GAO report concluded that such heightened concern had in turn brought the environmental practices of U.S. bases under greater scrutiny by host nation opposition political groups, the media, and the public./181/ In fact, the policy of using the more restrictive host nation standards, when they exist, seems designed to avoid jeopardizing our relationship with host nations if U.S. forces cause a major pollution incident. /182/

B. Legal Developments

Together with increased political concern over environmental issues, particularly in highly industrialized countries where the U.S. has the majority of its overseas forces stationed, /183/ is an expansion of the number and scope of environmental laws. Leading the way has been the EU, which, through the process of directives and regulations binding on member nations, has surpassed even rigorous and comprehensive national legal systems, such as those in Germany and the Netherlands. /184/ European Union law prevails over member nation law and, unlike the U.S. federal system of environmental law, generally imposes different and more rigorous environmental requirements on member nations./185/ One commentator estimates that between one-third to one-half of all legislation necessary to implement the Single Internal Market of the EU consists of environmental or health and safety measures, many of which are specific and stringent enough to minimize member nation discretion in implementation. /186/

A rather unique feature to EU environmental practice, somewhat analogous to the citizen suit available under U.S. environmental law, has been the citizen complaint procedure, which acts as a catalyst to move the more lethargic member nations to implement and enforce EU legislation. /187/ The resolution of complaints made to the EU Commission (its administrative arm) is usually informal and confidential with the member nation, /188/ but a 1988 European Court of Justice opinion allowed individuals to sue in their national courts to protect their rights when an EU directive had a direct effect on individuals. /189/

Sensitivity to the environment has also driven the expansion of national environmental legislation (apart from EU influences) in some EU member nations where U.S. forces are present. Probably the most comprehensive scheme of environmental regulation exists in Germany. In addition to the civil media statutes and the Federal Environmental Liability Act which provide strict liability for air, water, or soil pollution, /190/ the German Criminal Code establishes criminal liability for certain activities affecting these media. /191/ The criminal code specifically imposes punishment for unauthorized contamination of waters, for adversely affecting the air in violation of a permit or administrative order or for the unauthorized disposal of waste. /192/ Maximum sentences include up to five years of imprisonment for intentional violations and up to two years of imprisonment for negligent violations. /193/ German prosecutors have become much more active in the past five years in their use of these provisions, and there is a growing concern among them that German government agencies have been too lenient in their environmental dealings with U.S. forces. /194/

Two Asian countries where the U.S. maintains significant forces, Japan and South Korea, have also experienced a large increase in the scope and complexity of their environmental laws. Unlike other Asian countries, Japan addresses environmental concerns through a regulatory system comparable to the U.S. Passed about the same time as U.S. statutes, national legislation in the areas of air emissions, wastewater, solid

and hazardous waste, noise, and chemicals has been enacted. /195/ Of more recent vintage has been the Japan's willingness to use its criminal enforcement provisions for any environmental pollution which may endanger the fives or health of the public. /196/ Environmental protection in South Korea became an increasingly public issue in the late 1980s and 1990s in the wake of its industrial growth, and new media-based laws effective in February 1991 have begun to address environmental concerns on a more sophisticated level. /197/

V. ENVIRONMENTAL CRIMINAL ENFORCEMENT: MILITARY MEMBERS

A. Official Duty Status

Status of Forces Agreements grant the primary right of exercising concurrent criminal jurisdiction to the U.S. as a sending State for "offenses arising out of any act or omission done in the performance of official duty. "/198/ The application of this provision raises two questions: (1) Who makes the determination of whether an offense fits within this definition? and (2) What is meant by the phrase "in the performance of official duty"? /199/ The NATO SOFA is silent on these issues, /200/ and the application of this common provision in SOFAs has not been without controversy. /201/ As to who decides whether an offense arises out of the performance of official duty, the U.S. has adhered to the position that only the sending State may make this determination. /202/ Some agreements make it clear that the U.S. occupies this controlling position. /203/ In other countries where the agreement is not explicit on this issue (e.g., the United Kingdom, Italy, and Turkey) the. courts have generally accepted the U. S. military authority's determination. /204/

What constitutes an offense arising in the performance of official duty has also been debated. The concept is not usually defined in SOFA’s /205/ and consistent with our policy of maximizing jurisdiction, U.S. authorities have adhered to the position that any act or omission occurring incidental to the performance of official duty is covered. /206/ In politically sensitive cases, host nations have sometimes disputed this assertion as overreaching. /207/ An approach generally advocated among military practitioners has been whether the act or omission constituting the offense is reasonably related to the duty to be performed and done in an effort to perform the duty (versus completely foreign and unrelated to the duty). /208/ The U.S. has also specifically disfavored any analysis of specific intent crimes as being ineligible for official duty classification (although used in the past by host nations on occasion), since such an analysis ignores the broader SOFA terminology; i.e., "offenses arising out of any act or omission done in the performance of official duty. “ /209/

In the context of environmental offenses, one may readily conclude that U.S. forces fall under the official duty umbrella of U.S. primary jurisdiction for offenses involving negligence. Of less certainty are cases involving intentional (or knowing or reckless) conduct. In both negligent and intentional cases, offenses have been committed incident to the performance of a duty. However, the political and environmental sensitivities could galvanize a host nation - especially in the absence of an agreement giving the U.S. authority to resolve official duty questions - to make its own determination of official duty status. /210/

Finally, an entire category of environmental offenses exists unrelated to the performance of any duty. For example, a soldier who changes his own automobile oil and dumps the waste oil down a sewer drain should not be eligible for an official duty classification. To do so would be tantamount to equating official duty jurisdiction

with mere presence or status - clearly an illogical and unintended result. /211/ Nevertheless, it is clear U.S. authorities would seek a waiver of host nation jurisdiction in this type of case and issue an official duty certificate. The real risk - beyond short term embarrassment if asked by the host nation to explain how such an incident is classified as official duty - could well be the erosion of the official duty certification in a more egregious case on its facts but much closer to a defensible application of SOFA (e.g., such as a *willful* or reckless emission of a pollutant by a military member whose job is related to the control or authorized discharge of such an emission).

This entire discussion on the U.S. primary right to jurisdiction in official duty cases presupposes that we have a basis in the first place under military law to prosecute military members for environmental offenses. Indiscriminate requests for waivers are often made to maximize jurisdiction without considering what basis the U.S. military would use to prosecute. /212/ There is a fundamental legal difference between requesting a waiver when the U.S. does, in fact, have a basis for concurrent criminal jurisdiction, and requesting a "waiver" where it does not. The latter is, in effect, simply a request not to prosecute at all and is not entitled to SOFA "sympathetic consideration. *" /213/* While such a policy undoubtedly makes sense from the standpoint of consistency in military discipline and morale, authorities implementing this policy may easily lose sight of the need to back up U.S. waiver requests with a proper basis for U.S. criminal prosecution (especially in 214 cases of official duty where jurisdiction is blithely assumed). The ability of the UCMJ to address environmental offenses fortunately has been largely untested and unquestioned by host nation authorities, but it desperately needs studied reinforcement to serve as the basis for U.S. military concurrent jurisdiction over environmental offenses. Without an application that will withstand appeal in military courts and the U.S. Supreme Court, the U.S. simply has no concurrent jurisdiction, whether environmental crimes are committed in the performance of official duty or not.

B. Bases of UCMJ Jurisdiction: Theory

1. Dereliction of Duty

Article 92, clause 3, of the UCMJ /215/ provides for criminal liability for dereliction of duty. The elements of the offense include: (a) that a person had certain duties; (b) that the person knew or reasonably should have known of the duties; and (c) that the person was willfully or through neglect or culpable inefficiency derelict in the performance of those duties. /216/ A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service. /217/ Actual knowledge of a duty need not be shown if the person reasonably should have known of his duties, which may be demonstrated by, for example, regulations and training. /218/

The potential application of this punitive provision to derelictions by military members for environmental matters seems obvious. As noted, however, in part III.B.1 of this article, before the OEBGD and final governing standards, specificity was lacking and justifiably criticized. Vague and broad pronouncements by the President in E.O. 12,088 could not serve as the basis for a specific, articulable duty for purposes of Article 92(3). In addition, the SOFA treaty obligation requiring sending State forces to "respect" host nation law is much too vague absent a military regulation implementing some specific provision of the SOFA to constitute the basis of a dereliction of duty prosecution under Article 92 ./219/

The OEBGD and the first attempts by the U.S. at minimum substantive compliance standards based on U.S. law would have been a promising source of the duty necessary to prosecute environmental offenses under Article 92(3), but for the following language: "This document does not create any rights or obligations enforceable against the U.S., DoD, or any of its services or agencies, nor *does it create any standard of care or practice for individuals,* /220/ Such language seems curiously at odds with the DoD's OEBGD policy "to be on the forefront of environmental compliance and protection, "/221/ but underscores one of the themes of this Article that harmonizing the new compliance scheme with enforcement, particularly under SOFA allocations of jurisdiction, was simply not considered. /222/

Compounding this problem in the OEBGD is the incorporation of boilerplate exculpatory language into some of the final governing standards (FGS). /223/ For example, the Korea FGS draft, /224/ the final Japan FGS, /225/ and the final Italy FGS /226/ incorporate the OEBGD language on individual responsibility verbatim. One wonders whether this language, which may preclude the use of Article 92(3) for dereliction of duty on the basis of OEBGD or certain FGS noncompliance, was intentional or an oversight. Its apparently nonbinding nature evidently led the U.S. Navy Comptroller to take the position that OEBGD and FGS standards are not "legal requirements" for purposes of funding overseas environmental compliance. /227/ Can the standards be nonbinding legal requirements for purposes of federal funding, but still be binding on federal servants for purposes of criminal prosecution?

The FGSs could constitute the requisite source of duty for an Article 92(3) dereliction prosecution /228/ if they were without this exculpatory language /229/ Since they pick up direct language from the OEBGD requiring military departments, and particularly installation commanders, to "comply with the FGS." Further, the FGSs for the United Kingdom and Turkey actually contain positive language referencing individual responsibility for environmental duties. /230/ The author of this FGS language specifically intended to make violations of the FGSs for these countries punishable under Article 92(3) as a dereliction of duty. /231/ If DoD is as serious as it claims to be in its pronouncements about being at the forefront of environmental compliance at its overseas bases, then it should ensure its EAs who are responsible for drafting final governing standards use language assisting, not crippling, the military prosecution of environmental offenses violating these standards.

Besides the elements of duty and a violation thereof, no discussion of Article 92(3) dereliction would be complete without mentioning the element of knowledge of those duties. Training is often an essential method of proving a defendant's actual or imputed knowledge of his duties. All of the FGSs have language requiring installation commanders to "develop and conduct training/education programs to instruct all personnel in the environmental aspect of their jobs and the requirements of the final governing standards." /232/ The DoD has a unique turnover problem regarding training of its military members, who generally stay three to five years at an overseas installation. The significance of this training difficulty becomes apparent when looking at DoD environmental compliance failures, most of which are related to "people processes" and attention to detail in areas such as the handling and disposal of hazardous waste. /233/ Criminal prosecution as a compliance incentive may be one of the only ways DoD may overcome an institutional problem of leadership and training in an effort to encourage a transient force to "do the fight thins." /234/

In addition to training, required reports constitute another source probative of a defendant's knowledge of his duties. Reports .concerning FGS compliance are currently required by one of the military departments. /235/ The UK and Turkey FGSs require

individual members or DoD employees to "report to superior authority any condition, event or practice that is not in conformity with the final governing standards. /236/Such an approach further solidifies the viability of an Article 92(3) dereliction prosecution for not complying with an underlying substantive duty or not reporting the failure by another member of the U.S. forces to comply with that FGS duty. /237/

2 Failure to Obey a Lawful General Order or Regulation

Article 92, clause 1, of the UCMJ /238/ covers the offense of failure to obey a certain class of orders or regulations. The elements of this offense include: (a) that there was in effect a certain lawful general order or regulation; (b) that. the defendant had a duty to obey it; and (c) that the defendant violated or failed to obey the order or regulation. /239/ Unlike the other offenses found under this article, /240/ Article 92(1) requires no proof of a defendant's knowledge of a regulation. /241/ Because of this "strict liability" feature, few military regulations fall into this category, and such regulations are strictly construed. /242/ Regulations meeting Article 92(l) must be "punitive" (i.e., cannot simply specify general guidelines), /243/ must evince their punitive nature in a self-evident manner in the regulation, /244/ and must be issued by a general officer in command of a unit (or General Court Martial Convening Authority or higher authority such as the President, Secretary Defense, or Secretary of a military department). /249/

At least one FGS mentions the use of a punitive regulation. The Japan FGS specifically leaves open this possibility by providing: "These standards are not issued as a punitive directive. Installation and activity commanders are authorized, however, to issue punitive orders to implement these standards. " /246/ To date, no punitive general regulations have been issued addressing violations of any FGS. /247/ Nonetheless, at least one military environmental law practitioner in Europe has recommended that the hazardous waste portions of the European countries! FGSs be made punitive for Air Force members by the Commander, U.S. Air Forces in Europe. /248/ Such a measure appears particularly warranted in countries such as Italy, where the FGS EA has hindered U.S. military authorities from asserting UCMJ jurisdiction on the basis of the FGS alone. /249/ A punitive regulation making conduct which violates the FGS criminal does not ran afoul of concerns that the U.S. should not issue punitive regulations punishable under Article 92(l) solely for the purpose of preventing foreign criminal jurisdiction. /250/

3. Service Discrediting Conduct and Damage to Real Property

The General Article of the UCMJ is found at Article 134, clause 2. /251/ It punishes conduct of a nature to bring discredit upon the armed forces by either injuring the reputation or tending to lower the reputation of the armed services in public esteem. /252/ Pursuant to this provision, acts in violation of foreign law may be punished if proof beyond a reasonable doubt exists that such an act is of a nature to bring discredit on the aimed forces. /253/ Commentators have noted the potentially wide swath cut by this provision giving the U.S. jurisdiction over any case which violates a receiving State's law. /254/ The military case law interpreting the scope of this provision has held that violations of foreign law *per se* are not punishable under Article 134(2). /255/ Use of this theory of criminal liability hardly appears in the military justice reporters, probably due to the fact that specific punitive articles, when covering an act or omission, are easier to prove.

In any event, the most attractive use of Article 134(2) may well be for environmental offenses committed off an overseas installation where an FGS will not apply. /256/ The commission of the offense within the host nation community itself, possibly depending on how egregious the offense is viewed by the local community, should give tile U.S. a basis to prosecute. /257/ Ironically, the more political pressure brought by a host nation to prosecute under its laws, the stronger our argument for exercising jurisdiction under Article 134, especially in an official duty case.

3. Waste, Spoilage, or Destruction of Property

Finally, Article 109 of the UCMJ /258/ may afford the U.S. a basis for military jurisdiction. Article 109 provides for criminal liability for willfully or recklessly wasting or spoiling or otherwise willfully and wrongfully destroying or damaging any property other than military property of the U.S.. The property referred to includes any real property not owned by the U.S.; wasting or spoiling refers to acts of voluntary destruction or permanent damage such as cutting down trees; and damaging refers to any damage and must be done intentionally and contrary to law, regulation, lawful order, or custom. /259/ Of particular application to environmental offenses committed on or off an installation is the provision regarding damage to real property (the host nation owns the installation, and real property off the installation is owned by a host nation or subordinate government or private person).

The *scienter* requirement is high, but like Article 134(2), the more notorious the case (here due to a U.S. military member's conduct), the better chance the U.S. has of asserting criminal jurisdiction under Article 109.

C. Bases of UCMJ Jurisdiction: Practice

Very few cases have involved environmental crimes committed by U.S. forces under the UCMJ. All of the few cases where records or recollections of these events exist have occurred in Europe. None of these incidents resulted in a court-martial, and in that respect, the record of U.S. forces overseas approximates the U.S. military's record within the U.S. /260/

In 1989, two cases arose where host nation authorities indicated they wished to prosecute installation commanders for undisputed environmental violations occurring on those installations. The first case, occurring at Sembach Air Base, Germany, involved two violations of German environmental laws determined through a German inspection of the base. One violation involved an automobile junkyard with vehicles leaking oil and antifreeze into the ground. The inspector informed the U.S. employee accompanying him that the junkyard was illegal, but the employee apparently never passed this word through the chain of command, and the installation commander allowed the junkyard to operate. /261/ The second violation involved a fire training pit area with no leachate protection, and German officials requested U.S. authorities at the base to install a ground protection system complying with German law. /262/ In both instances, no apparent efforts were taken by U.S. authorities to remedy either problem despite subsequent German requests. The German prosecutor opened a criminal investigation as a means of forcing compliance, but not with the objective of a criminal proceeding against the commander who had already transferred back to the U.S. /263/ The case was released back to the U.S. (the Germans assuming on their own that the case involved official duty), and no disciplinary action was taken against any U.S. personnel. /264/

The second case, occurring at Aviano Air Base, Italy, involved a spin on the 261 installation of about 1200 gallons of aviation fuel during a fuel transfer. Italian authorities expressed interest in prosecuting the commander and requested information as to the names of anyone responsible for the spill. /266/ United States authorities denied the Italians' request for information, stating the U.S. had the primary right of jurisdiction and that Italian attempts to investigate or punish individual Air Force members for dereliction of duty were "beyond the scope of Italian jurisdiction." /267/ Nearly six years later, the Italian Ministry of Grace and Justice requested what action had been taken against any U.S. forces for the fuel spill. /268/ In a response typifying the problem with the U.S, policy of maximizing its criminal jurisdiction and then not taking any action on a case, the U.S. Sending State Office responded that the Air Force had taken no disciplinary action against the installation commander or anyone else, since they, "bore no criminal liability for the fuel spill." /269/ The U.S. avoided having to state the basis for asserting primary concurrent jurisdiction or answer why no action was taken against anyone for a substantial spill in these two 1989 cases. Nonetheless, U.S. military authorities working SOFA waivers or overseas environmental compliance would do well to remember that these cases occurred against the backdrop of a still divided Germany, a Warsaw Pact, and a Soviet threat.

Two cases in Germany involving oil dumped into storm (trains resulted in Article 15, UCMJ, nonjudicial punishment. /270/ One incident at Hahn Air Base was charged under Article 92(2) for a violation of a military housing regulation. The other incident, off Rhein-Main Air Base, was charged as a violation of Article 109, damage to real property. /271/

The latter of these two cases involved an Air Force officer stationed at Ramstein Air Base, Germany. In 1992, this officer was in charge of a vehicle convoy during a training deployment on the German autobahn and ordered the fuel in a poorly running vehicle to be drained into a sewer drain. /272/ His conduct was aggravated by the fact his subordinates had informed him that this was against German law, and was furhter aggravated by his order to surround the vehicle with other military vehicles to obstruct the public's view. /273/ The disposition of the case is a classic study in the problems experienced in applying the UCMJ to environmental offenses overseas. No regulations existed proscribing this conduct that would allow for a prosecution under Article 92(1) or (2). /274/ As to Article 92(3), the German FGS /275/ would have established a duty not to drain fuel into a sewer, but it was not yet effective, and the base Staff Judge Advocate (SJA) concluded that the OEBGD standards had not been given the training and command emphasis to establish the officer's knowledge of those standards. /276/ Articles 134(2) and 109 were considered, but there was insufficient command interest in proceeding with Article 15 nonjudicial punishment and in fully determining whether the conduct violated German environmental law. /277/ The German authorities did inquire about the disposition of the case (an administrative written counseling) only after an American subordinate of the offender informed the Germans of the incident. /278/

The FGSs and regulations - and the training conducted pursuant to them will add considerably to our ability to exercise criminal jurisdiction over forces committing environmental offenses (at least on an installation). A recommended starting point to make the UCMJ a useful tool of this policy would consist of the removal of exculpatory language from the OEBGD and all FGSs, enactment of punitive general regulations concerning the most frequently violated FGS standards (possibly matching the standards in which host nation authorities are most interested), and the actual implementation of the comprehensive training regimen called for in FGSs. Finally, U.S. military commanders must use the UCMJ in appropriate cases to handle

environmental offenses if the U.S. wishes to defend and preserve its policy of maximizing criminal jurisdiction in this sensitive area.

VI. ENVIRONMENTAL ENFORCEMENT:

CIVILIAN EMPLOYEES

A. Exercise of U.S. "Jurisdiction" over the Civilian Component /279/

As discussed previously, the U.S. Supreme Court has ruled it unconstitutional to exercise UCMJ jurisdiction over civilians accompanying U.S. forces overseas. The effect of these rulings is to deprive the U.S. of the concurrent jurisdiction it once had under SOFA provisions allocating jurisdiction. /280/ The basis for this conclusion comes from SOFA language which specifies and allocates jurisdiction by military authorities over persons subject to the military law of a sending State. /281/ As a result of the Supreme Court's rulings, the SOFA provisions regarding waivers and the primary right to exercise jurisdiction in official duty cases become equally inapplicable. /282/

In practice, however, we have continued the policy of maximizing U.S. 'Jurisdiction" over civilians committing offenses overseas. /283/ This has led to confusion regarding the basis for doing so /284/ and the options for handling these cases. /285/ The practical, if not legal, efficacy of this policy has depended upon our ability to administer a credible program of administrative discipline for violations of host nation law. /286/ So far, we have not been asked about the failure to take criminal action against U.S. civilians committing crimes in host nations, due in large part to a recognition by host nation authorities that the U.S. possesses no other way to handle these cases. /287/ Since the Supreme Court removed this ability, however, there has been an interesting shift in attitude among U.S. authorities responsible for handling civilian misconduct. In 1957, overseas commanders believed that "discipline would be disrupted, morale impaired and ability to perform the assigned mission reduced" if UCMJ jurisdiction over civilians was denied. /288/ Since that time, we have found ourselves defending the adequacy of decidedly weak administrative actions /289/ to preclude exercise of host nation jurisdiction. /290/

In the context of environmental offenses, the FGS system should go a long way toward providing a basis to discipline civilian employees. /291/ There are few reported cases concerning environmental violations by civilians accompanying U.S. forces, although information exists concerning several situations arising in Germany. For example, German prosecutors cited two U.S. Army civilians for groundwater contamination from a race track and auto junkyard, but "jurisdiction" was transferred to U.S. authorities at their request, and the case was disposed of administratively. /292/ In another case in the late 1980s, two U.S. Army local national civilians were charged by German prosecutors for negligent discharge of oil into a stream after U.S. authorities had determined no procedures were violated. One employee eventually paid a "sum of atonement" before criminal charges were dropped. /293/ Recognizing the jeopardy of host nation criminal prosecution in hazardous waste disposal, recent policies by some of the military services in Europe prohibit civilian employees from signing hazardous waste manifests and require U.S. military personnel to do so. /294/

Environmental violations are uniquely subject to host nation sensitivities. Political reaction may be strong if a country honors a U.S. request for a "waiver" not to prosecute a U.S. civilian employee who is responsible for a significant environmental incident, especially if a similarly situated citizen of that nation would have been subject to severe

criminal enforcement. Concerns may be heightened when these countries learn of prosecutions involving DoD federal employees for environmental violations in the U.S., which often result in significant fines, lengthy probation, and sometimes imprisonment. /295/

B. Proposed Legislation for Extraterritorial Criminal Jurisdiction

The need to fill the jurisdictional void for civilians accompanying U.S. forces overseas has been recognized for quite some time. In its 1979 report, the GAO concluded that extraterritorial jurisdiction was required to remedy the problem./296/ The GAO identified two problems with the current jurisdictional vacuum, including: (1) civilians could be subject to foreign judicial systems that may not offer all the guarantees that criminal defendants in the U.S. enjoy, and (2) civilian offenders would escape judicial sanction for their crimes if host nations chose not to exercise criminal jurisdiction. /297/ The GAO further opined that our inability to dispose of such misconduct outside of administrative sanctions could cause serious discipline and morale problems in overseas communities. /298/ The report further noted that our policy of maximizing jurisdiction (which the GAO viewed as inadequate since it was limited to administrative sanctions) tended to aggravate the situation. /299/

Legislation first proposed in 1967 and periodically reintroduced in some form has purported to address the jurisdictional problem concerning the civilian component./300/ It has never been passed into law. A more recent proposal, The Jurisdiction, Apprehension, and Detention Act of 1995, /301/ would have added a chapter 50 to Title 10 of the U.S. Code. This proposal provided that any person serving with, employed by, or accompanying U.S. forces outside the U.S. who engages in conduct that would constitute a criminal offense if the conduct were engaged in within the special maritime and territorial jurisdiction /302/ of the U.S., Shan be guilty of a like offense. /303/ The bill also would have authorized U.S. authorities to apprehend an individual for removal to the U.S. for judicial proceedings, or deliver the offender to foreign country authorities for trial, if requested and authorized by treaty. /304/

The Federal Criminal Law Improvements Act of *1995* /306/ adding chapter 212 to Title 10 of the U.S. Code, provides for the same extraterritorial criminal liability, but only for criminal offenses punishable by imprisonment of more than one year if the conduct were engaged in within the special maritime and territorial jurisdiction of the U.S. /306/ This proposal also provides for the same apprehension, removal, and /307/ delivery procedures. Although these bills, if passed, could have solved the U.S. forces' jurisdictional problem with respect to the civilian component committing some criminal offenses, /308/ they do nothing to solve the jurisdictional void for environmental offenses. The statutes defining the scope of certain offenses committed within the special maritime and territorial jurisdiction of the U.S. are primarily limited to violent crimes such as murder, assault, and robbery. /309/ None of the crimes providing for the special maritime and territorial jurisdiction of the U.S. conceivably includes conduct constituting an environmental offense. Thus, as to environmental crimes committed by civilians accompanying U.S. forces overseas, the jurisdictional void /310/ will continue unless more specific legislation is introduced. There is scant reason for optimism given the length of time the overall problem has lasted.

C. A Need to Reevaluate the Policy of Maximizing Jurisdiction

As noted earlier, the genesis of our policy to maximize criminal jurisdiction at the time of the NATO SOFA's ratification was the U.S. Senate's concerns about the quality of a criminal defendant's rights under the host nation's criminal justice system. The

Senate Resolution only required requests for waiver if "there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States." /311/ Even the U.S. military's written policy implementing this Congressional will /312/ reads Consistently with the Senate Resolution despite its overbroad application. The real irony of this policy vis-a-vis civilians is that U.S. military jurisdiction over civilians was found unconstitutional more than twenty-five years ago because of concerns that the UCMJ did not afford adequate constitutional safeguards. /313/

Numerous safeguards to protect the rights of U.S. forces overseas who are prosecuted by host nations are in place and constitute a significant duty for military commanders and legal advisors. /314/ Such safeguards include: the use of a waiver request through diplomatic channels if a substantial possibility exists that an accused will not receive a fair trial; the provision for U.S. trial observers at host nation proceedings; the provision of legal advisors for an accused; the payment of counsel fees and expenses in most cases and the payment of bail in all cases; and provisions for care and treatment of personnel confined in a host nation penal institution. /315/

As envisioned by SOFAs, a military member committing an environmental offense overseas at least presents the possibility, of U.S. jurisdiction under the UCMJ, although considerable work and analysis need to be done to credibly assert this jurisdiction. Unlike military members, civilians accompanying U.S. forces have no chance of being prosecuted under the UCMJ (and currently have almost no chance of being prosecuted under U.S. extraterritorial criminal statutes which would not mesh with SOFA obligations even if such statutes existed). Department of Defense and U.S. military authorities would therefore be well advised to reconsider the current policy and encourage the exercise of host nation jurisdiction over serious environmental criminal offenses by U.S. civilians if they are satisfied that the accused will receive a fair trial in the host country.

Compelling justification exists for such a change in policy. First, the U.S. historically has little legal basis to seek to dispose of an offense itself unless an accused will not receive a fair trial by the host nation. Second, the U.S. is simply not adequately equipped with jurisdiction to handle serious cases (the suggestion to reevaluate the policy herein does not advocate wholesale turnover of civilian cases to host nation authorities), and a more reasoned policy avoids being asked embarrassing questions about the basis of U.S. jurisdiction and why serious cases merit only administrative sanctions. There are no good answers to such questions, particularly in a politically charged case involving environmental noncompliance. Finally, "allowing" host nation prosecutions of more serious cases "levels the playing field" between U.S. civilians overseas and their U.S. civilian employee and host nation citizen counterparts who are subject to meaningful sanctions for environmental crimes. This, in turn, should promote compliance because of a stronger deterrent effect.

VII. CONCLUSION

The exercise of criminal jurisdiction over U.S. forces abroad has evolved considerably, particularly since the negotiation of SOFAs with host nations. Despite the attempt to balance the exercise of sovereignty equitably, the general policy and practice of the U.S. has nonetheless been to maximize waivers (or releases) of foreign criminal jurisdiction when host nations have primary concurrent or exclusive jurisdiction. Although this policy probably goes beyond the Congressional mandate of when to maximize U.S. jurisdiction, the policy has operated largely without host nation perception of infringement on sovereignty - so far. This policy has been defended on the additional

ground that it is needed to ensure consistent military discipline among U.S. forces, and this justification makes sense as long as the U.S. has the capability and will to discipline its own forces.

Complacency has resulted from the maximization policy, to the point where many U.S. commanders do not appreciate the infringement on sovereignty that a waiver or release request represents. In some host nations such as Germany, U.S. authorities have, for all practical purposes, reverted to the law of the flag. This practice conflicts with SOFA provisions against a background of emerging sovereignty among many host nations. The case of a reunited Germany and a renegotiated Supplementary Agreement presents a compelling general example of politics that are no longer solicitous of a protective U.S. presence. Other nations hosting substantial numbers of U.S. forces are likewise more aware of the general intrusion on their sovereignty in an era of perceived diminishing external threats to their security.

Moreover, host nations are less likely to be more generous to U.S. interests than a SOFA requires when a conflict exists with another treaty obligation or a nations sense of values. A recent example involved a conflict between the U.S. military authorities' right to adjudge a death penalty and Dutch perceptions of its human rights obligation.' /316/ The case illustrated a relatively small sovereign's ability to disregard a SOFA obligation (the U.S. primary right to exercise jurisdiction). /317/

With SOFA criminal jurisdiction as background, in the last decade environmental compliance has caught the world's attention. Environmental incidents occurring worldwide have spurred the growth of international environmental legislation and enforcement efforts targeted at noncompliance, to include criminal prosecution. Coincidentally, many industrialized nations which are in the forefront of criminal prosecution also have some of the largest concentrations of U.S. forces overseas. Our activities at overseas installations have not escaped the growing international focus on the environment, and U.S. authorities have struggled for years over what specific environmental laws and standards to apply. After episodes of noncompliance with U.S. and host nation law was criticized at home and abroad, DoD has crafted a policy applying the stricter substantive environmental law standards at overseas installations.' This policy has taken shape in the form of country-specific final governing standards which are now in effect (except in Germany and Korea due in part to last minute funding skirmishes within DoD).
Unfortunately, most FGSs and the DoD guidance on which they are based disclaim setting any standards for individual responsibility. Perhaps unintentional, such exculpatory language could cripple U.S. efforts to enforce the FGS standards against its own forces. The significance of this handicap becomes apparent when our failure to enforce environmental compliance occurs in host nations which are becoming more pressured, willing, or anxious to prosecute environmental offenses themselves as an act of sovereignty. For U.S. authorities to maintain their ability to maximize criminal jurisdiction over environmental offenses, and indeed to maintain their ability to exercise criminal jurisdiction over forces committing environmental offenses arising out of the performance of official duty, U.S. authorities must have the necessary legal tools at their disposal to handle the challenge.

Final governing standards provide the basic foundation for U. S. military authorities to exercise criminal jurisdiction under the UCMJ, but more work and attention to detail are needed to plug the gaps in military law vis-a-vis the handling of environmental offenses. A handful of past cases demonstrates the inability to dispose of many environmental offenses through the UCMJ. The greater concern, however, because it is more difficult to remedy, is U.S. military authorities' apparent lack of will to enforce

environmental compliance, even when UCMJ action is proper. Both the lack of UCMJ tools and the lack of will to use them are at odds with the U.S. policy of maximizing its criminal jurisdiction. The unappreciated danger becomes the significant erosion of U.S. authorities' ability to handle their own cases when environmental offenses are involved. International sensitivity and citizen pressure on host nations will present a formidable challenge to continued U.S. jurisdiction over these uniquely contentious cases - the U.S. will lose by default when the challenge comes in the absence of a criminal apparatus to deal with these offenses.

Environmental offenses committed by a distinct segment of U.S. forces, U.S. civilian employees, present a different problem. Not possessing criminal jurisdiction over these civilian employees and armed only with administrative sanctions, U.S. military authorities have continued, under the umbrella of maximizing waivers, to seek host nation release of these cases. The U.S. Congress has failed for years to enact any legislation which would apply extraterritorially to crimes committed by civilians accompanying U.S. forces overseas. Legislation proposed in both Houses of Congress does not reach environmental offenses. For the sake of U.S. credibility, equal treatment of civilian offenders, and realistic deterrence of environmental noncompliance, U.S. authorities should reevaluate their broad policy of seeking releases in so many cases. Although a potential "slippery slope" in doing so, the U.S. would put itself in the position of intelligently screening appropriate cases for host nation prosecution (if host nation minimum procedural guarantees are met) when it serves U.S. as well as host nation interests.

Department of Defense efforts to develop concrete standards in the FGSs are a significant step forward. Their usefulness becomes diluted, however, by not linking FGS standards with enforcement mechanisms. A lack of enforcement mechanisms also dilutes legitimate U.S. interests in disciplining its own forces, particularly military members. Compounding these problems will be the inevitable questioning and occasional confrontation by host nation authorities as to the U.S. basis to prosecute its forces for environmental offenses and an intense interest in what action is, in fact, taken against an offender - the U. S. should prepare now to answer these questions. Military discipline and environmental compliance are not inconsistent goals, but it is high time for the DoD and its components to match the rhetoric"' about environmental compliance overseas with action. At the same time, the U.S. will help preserve the SOFAs as a cornerstone of modem American strategic policy, while working to resolve critical environmental issues among signatories.

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1. Throughout this article, the term "forces" describes active duty members of the United States military services and civilian employees of these services.

2. For example, as the number of active duty personnel in the Department of Defense (DoD) declined from 2,138,213 in 1988 to 1,610,490 in 1994, the total number of active duty military personnel assigned overseas disproportionately declined from 458,446 in 1988 to 251,122 in 1994. See DoD Selected Manpower Statistics for Fiscal Year 1994, tbl. 2-16 (Sept. 30, 1994).

3. The following countries make military installations available to the United States where U.S. forces maintain a significant presence: Germany, Japan, Korea, the United

Kingdom, and Italy See DoD Worldwide Manpower Distribution by Geographical Area, tbl. 309 (Sept. 30, 1994). United States forces also maintain a sizable presence in Greece, Iceland, the Netherlands, Portugal (Azores), Spain, Turkey Australia, Bermuda, Canada, Cuba, Diego Garcia, Greenland, and Panama. Id The number of overseas installations that continue to be used by U,S. forces is shrinking due to overseas base "closures" (turning installations back over to host nations) driven by the study mandated in Sec. 206(b) of the Defense Authorization Amendments and Base Closure and Realignment Act Pub. L. No. 100-526, 102 Stat 2623 (1988). As overseas installations are turned over to host nations, however, remaining overseas installations used by U.S. forces are subject to a heavy influx of temporarily assigned forces in the wake of a decreased "permanent" presence and a steady increase since 1990 in overseas deployments for exercises and real world combat operations. See Robert S. Dudney, Size Down, Work Up, A. F. MAG., Jan. 1995, at 12.

4. Customary international law is defined as "a general practice accepted as law." J. BRIERLY, THE LAW OF NATIONS 60 (6th ed. 1963).

5. The meaning of "sending," "host," and "receiving" nations or States is illustrated by the following example. When the United States deploys forces to be stationed in the territory of Germany, the United States is the sending State and Germany is the receiving or host State.

6. S. LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 9 (1971).
The classic controversy arises primarily over winch nation has the right to first exercise jurisdiction over the offending member of the visiting force.

7. G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 84 (194 1). *See also* The Case of the S.S. Lotus, P.C.I.J., Ser. A, No. 10 (1927). This general rule does not apply during armed conflict in enemy or occupied territory when sending State forces are immune from local criminal jurisdiction. LAZAREFF, supra note 6, at 13.

8. The dilemma. in resolving these competing sovereign interests has been repeatedly discussed by commentators. *See, e.g., Criminal Jurisdiction Over American Armed Forces Abroad,* 70 HARV. L. REV. 1043, 1046 n.22 (1957).

9. The basis for such jurisdiction is that a member of the sending State forces is a representative of the sovereign, and as suck is accountable only under the "law of the flag" of the sending State. Stanger, *Criminal Jurisdiction Over Visiting Armed Forces,* 52 U. S. NAVAL WAR C. INT'L STUDIES 8(1965).

10. 11 U.S. (7 Cranch) 116 (1812).

11. S. LAZAREFF, supra note 6, at 15. The often cited dicta by Chief Justice Marshall states, "The grant of a free passage [through a foreign nation], therefore, implies a waiver of all jurisdiction over the troops, during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which his army may require." 11 U.S. (7 Cranch) at 139.

12. Dow v. Johnson, 100 U.S. 158, 165 (1879); Coleman v. Tennessee, 97 U.S. 509, 516 (1878).

13. Chief justice Marshall Wrote:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself [A]ll exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself ... This consent may be either express or implied.
11 U.S. (7 Cranch) at 136.

14. Steven I Lepper, *A Primer on Foreign Criminal Jurisdiction,* 37 A.F. L. REV. 169, 171 (1994).

15. S. LAZAREFF, *supra* note 6, at 21-28. *See, e.g.,* Agreement Between the United States of America and the United Kingdom of Great Britain and Northern Ireland Respecting Criminal Jurisdiction Over Criminal Offenses Committed by Armed Forces, July 27, 1942, 57 STAT. 1193, E.A.S. No. 355. *See also* Department of Defense Response to Inquiry from the Government of Australia, reprinted in 58 AM. J. INT'LL. 994 (1964).

16. See, e.g., Hearings on H.J. Res. 309 and Similar Measures Before the House Committee on Foreign Affairs, 84th Cong., 1st Sess. (1954), at 349. The 1951 MANUAL FOR COURTS-MARTIAL asserted that criminal jurisdiction over American forces "remains" in the United States under international law. *Criminal Jurisdiction Over American Armed Forces Abroad, supra* note 8, at 1049 n.42.

17. Concurrent jurisdiction, as that term is expressed in customary international law and SOFA provisions, refers to jurisdiction over a member of the visiting force who commits an offense that is a violation of the laws of both the sending and receiving States.

18. Several developments facilitated this change. Forces were to be "permanently" stationed overseas, not temporarily. The U.S. State Department adopted a restrictive theory of sovereign immunity such that sovereign or public acts, but not private acts, would be given sovereign immunity. 26 DEP'T ST. BULL. 984-985 (1952) (the Tate Letter). During the North Atlantic Treaty Organization (NATO) SOFA Congressional hearings, the Departments of State and Justice took the position that there existed no implied immunity from the criminal jurisdiction of local courts under international law. *Hearing before the Committee on Foreign Relations on the Status of North Atlantic Treaty Organization, Armed Forces, and Military Headquarters,* 83d Cong., 1st Sess. (1953) at 29 [hereinafter Foreign Relations Committee Hearings]. DEPARTMENT OF JUSTICE MEMORANDUM ON INTERNATIONAL LAW AND THE STATUS OF FORCES AGREEMENT, *reprinted in Supplementary Hearings before the Senate Comm. on Foreign Relations on Status of Forces of the North Atlantic Treaty,* 83d Cong., 1st Sess. (1953), at 38-56.

19. Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces, June 19,1951, 4 U.S.T. 1792,199 U.N.T.S. 67 [hereinafter NATO SOFA].

20. Mark D. Welton, *The NATO Stationing Agreements in the Federal Republic of Germany: Old Law and* New *Politics,* 122 MIL. L. REV. 77, 95 (1988). Permanently stationing U.S. forces overseas in peacetime under a general rule of international law subjecting them fully to host nation jurisdiction is not acceptable for political reasons. The need to exercise consistent military discipline over the force is another important concern. *See* Richard J. Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative,* 37 A.F. L. REV. 137,140 (1994).

21. NATO SOFA, Supra note 19, art. VII, paras. 1-3.

22. Id. at para. 3.
23. Welton, supra note 20.

24. The NATO SOFA was the blueprint for subsequent agreements, which generally follow its jurisdictional allocation scheme. *See, e.g.*, Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan with Agreed Minutes, Jan. 19, 1960, 11 U.S.T. 1652, 373 U.N.T.S. 248 [hereinafter Japan SOFA], Article XVII; Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea with Agreed Minutes, Agreed Understandings, Exchange of Letters and Other Implementing Agreements, Jul. 9, 1966, 17 U.S.T. 1677, 674 U.N.T.S. 163 [hereinafter Korea SOFA], Article XXII.

25. GEORGE STAMBUK, AMERICAN MILITARY FORCES ABROAD 52 (1963). *See also* G.I.A.D. DRAPER, CIVILIANS AND THE NATO STATUS OF FORCES AGREEMENT 12-13 (1966).

26. E.g., Smallwood v. Clifford, 286 F. Supp. 97, 100-02 (D.D.C. 1968), *judgment vacated as* moot, No. 22,053 (D.C. Cir. May 14, 1969). *See also* United States v. Murphy, 18 M.J. 220 (C.M.A. 1984).

27. Paragraph I reads as follows:

1. Subject to the provisions of this Article,

(a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;

(b) the authorities of the receiving State shall have jurisdiction over the members of a **force or** civil component and their dependents with respect to offenses committed within the Territory of the receiving State and punishable by the law of that State. NATO SOFA, supra note 19, at 1798.

28. As a general rule, the U.S. as a sending State under a SOFA jurisdictional allocation scheme may exercise criminal jurisdiction only over its military members. *See infra* part III.A.3.

29. Paragraph 2 of art. VII provides in part:

(a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offenses ... punishable by its law but not by the law of the receiving State.

(b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offenses ... punishable by its law but not by the law of the sending State. NATO SOFA, supra note 19. Given the international growth in environmental sensitivity and burgeoning legislation *(see infra* parts III.B.3. and IV), it is difficult to conceive of many cases where the U.S. would have exclusive jurisdiction over forces committing environmental offenses.

30. Paragraph 3 of art. VII allocates primary concurrent jurisdiction as follows:

(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or a civilian component in relation to

(i) offenses solely against the property or security of that State, or offenses solely against the person or property of another member of the force or civilian component of that State or of a dependent;

(ii) offenses arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offense the authorities of the receiving State shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other state for a waiver of its right in cases where that other State considers such waiver to be of particular importance.
Id.

31. S. LAZAREFF, *supra* note 6, at 160.

32. This exception's application over the years and in the newer context of environmental violations is fraught with uncertainty. *See infra* part V.A. The other exception, known as the *inter* se exception, is not addressed herein since its application would likely be rare in the instance of most environmental violations affecting the host nations property (the installation itself used by U.S. forces) or host nation personnel. *See* JOSEPH M. SNEE & KENNETH A. PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION 55 (1957).

33. See JOHN WOODLIFFE, THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW 178 (1992). *See also S.* LAZAREFF, supra note 6, at 170.

34. See, e.g., G. DRAPER, supra note 25, at 14. This has been a prevailing practice between the U.S. and several SOFA signatories.

35. Lepper, supra note 14, at 176.

36. See also Japan SOFA, supra note 24, art. XVII, para. 3(c); Korea SOFA, supra note 24, art. NMI, para. 3(c).

37. For example, during the period from Dec. 1, 1993 to Nov. 30, 1994, the total number of U.S. military members subject to primary foreign jurisdiction was 5840, and a waiver was obtained by the United States in 4492 cases (or 89%). The bulk of these numbers occurred in Germany (3890), where the waiver rate was 99.9%. The waiver rate in other countries was Korea - 97%, Italy 50.3%, Japan - 34.9%, and United Kingdom - 30.7%. Release to the United States of civilians subject to exclusive foreign jurisdiction was 22.5% worldwide, with the majority of cases occurring in Germany (1153 of 1646). DoD Report, Statistics on the Exercise of Criminal Jurisdiction by Foreign Tribunals over United States Personnel (1 Dec. 1993 - 30 Nov. 1994) (prepared by the Department of the Army, Office of the Judge Advocate General, as DoD's Executive Agent).

38. G. STAMBUCK, supra note 25, at 110-11. United States military authorities have advanced several explanations for American success in securing waivers, including: growing confidence of host nation prosecutors and courts in the U.S. military justice system; better sending State-receiving State communications in these matters; the perception that U.S. military authorities deal more firmly with offenders than local courts; and the natural desire of receiving states to conserve judicial and law enforcement resources. United States Army, Europe & 7th Army, International Affairs Division, Recall Rate, Ten-Year Analysis: 1977-1986 (1986), *cited in* Davis, *Waiver and Recall of Primary Concurrent Jurisdiction in Germany*, THE ARMY LAW., May 1988, at 30.

39. See infra part II.D. for a discussion of contentious death penalty cases which change the rules and practice of primary concurrent jurisdiction. *See infra* part V.A. for a discussion of environmental offenses styled as official duty cases.

40. Despite the lack of U.S. military criminal jurisdiction over civilian employees, we have the authority to request host nation release of civilian cases where administrative sanctions provide a suitable corrective action. Army Reg. 27-50/ SECNAVINST 5820.4G/Air Force Reg. 110-12 (Jan. 14, 1990), Status of Forces Policies, Procedures, and Information, para. 1-7(b) (on file with U.S. Army, Navy, and Air Force Offices of The Judge Advocate General) [hereinafter SOFA Tri-Service Regulation]. *See* discussion infra part VI.A.

41. J. SNEE & K. PYE, supra note 32, at 30-3 1.

42. Senate Res., Ratification With Reservations, NATO SOFA, supra note 19, at 1828.
43. Id.

44. The DoD implemented the Senate's mandate in DoD Directive 5525. 1, Status of Forces Policies and Information (Jan. 20, 1966). Its standards and procedures are reproduced in the SOFA Tri-Service Regulation, supra note 40. The regulation provides that "[c]onstant efforts will be made to establish relationships and methods of operation with host country authorities that will maximize U.S. jurisdiction to the extent permitted by applicable agreements." Id. at para 1-7(a).
The Judge Advocate General of the Air Force cites another major reason behind this policy as the need to maintain morale and discipline in the armed forces. Letter from The Judge Advocate General to Staff Judge Advocates (Sep. 12, 1974), cited *in* Air Force Pamphlet 110-3, Civil Law, para. 19-17b, n. 92 (Dec. 11, 1987) [hereinafter AFP 110-3] (on file with the International and Operations Law Division, Office of the Judge Advocate General, U.S. Air Force). This policy to maximize jurisdiction has generally been adopted by Military Country Representatives. *See, e.g,* U.S. Sending State Office for Italy Instruction 5820.1B, Operating Procedures in Italy Under Article VII, NATO Status of Forces Agreement (Feb. 23, 1994) (on file with the U.S. Sending State Office, Rome, Italy), providing that waivers of primary and exclusive Italian jurisdiction shall be requested "when the commander believes the case has particular importance in maintaining proper standards of discipline." Id. at para. 15.

45. Williams v. Froehlke, 490 F.2d 998, 1004 (2d Cir. 1974) ("it was undoubtedly thought [by Congress] a boon to the accused to permit his trial in a court-martial rather than in a foreign court where a soldier might be subject to varying degrees of xenophobia"); Gallagher v. United States, 423 F.2d 1371, 1374, 191 Ct. Cl. 546 (1970), *cert. denied,* 400 U.S. 849 (1970) (judge took judicial notice that many servicemen are stationed in overseas areas, "some of which have a reputation for harsh laws and savagely operated penal institutions").

46 J. WOODLIFFE, supra note 33, at 182-83. See also S. LAZAREFF, supra note 6, at 194-95.
47 Agreement With Annex between the United States of America and the Netherlands regarding Stationing of United States Armed Forces in the Netherlands, Aug. 13, 1954, 6 U.S.T. 103, 251 U.N.T.S. 91. The Agreement recognizes "the primary responsibility of the United States authorities to maintain good order and discipline where persons subject to United States military law are concerned." Id. at 106.

48. J. WOODLIFFE, supre note 33, at 183.

49. Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with Respect to stationed in the Federal Republic of Germany, with Protocol of Signature, Aug. 3, 1959, 14 U.S.T. 531, 481 U.N.T.S. 262 [hereinafter German Supplementary Agreement].

50. The Germans have 21 days to exercise a recall after sending State notification of particular cases falling under the waiver provision. Id at an. 19, paras. 2 and 3.

51. Lepper, supra note 14, at 177.

52. J. WOODLIFFE, supra note 33, at 190. See also G. DRAPER, supra note 25, at 2.

53. Welton, supra note 20, at 114.

54. Welton Cites the example of Frances Withdrawal from the Military Structure of the NATO alliance in the 1960s as an illustration of sovereigntys contemporary political overtones. Id. at 88-89

55. While the basic **SOFA** framework remains Constant the particular rights and responsibilities within those agreements take on characteristics shaped by political changes occurring within the States that are parties to these agreements and by the greater international climate. These internal and non-security driven external factors gain more influence on evolving notions of sovereignty when the host nation perceives receding external security threats. *See* John E. Parkerson, Jr., *Book Review: The Peacetime Use of Foreign Military Installations Under Modern International Law,* 141 Mil. L. REV. 232, 234-35 (1993).

56. R. HARKAVY, GREAT POWER COMPETITION FOR OVERSEAS BASES: THE GEOPOLITICS OF ACCESS DIPLOMACY 9 (1982).

57. J. WOODLIFFE, supra note 33, at 324-25. Protests concerning sending State force activities is often directed at the host nation military authorities who strive to work with U.S. forces under the SOFA but are sometimes lumped together as "militaries" that are "self-regulating, arrogant speaking a different language, having a different culture, and making up their own rules." *See, e.g.,* John M. Broder, U.S. *Military Leaves Toxic* Trail *Overseas, L.A.* TIMES 18, 1990, at *Al* (quoting a member of the Green Party in the legislature of the German state of Rheinland-Pfalz).

58. Id. at 325-26. Even before these events leading to the perception of a reduced threat and reduced need for U.S. forces stationed there, Germany in the 1980s became more aware of visiting NATO forces' environmental, economic, and social impacts. *See, e.g.,* Apel, *The SPD Remains Firmly Committed to* NATO, 35 AUSSENPOLITIK 140, 144

(1984) ("we have to ask ourselves whether our country is today ... not already bearing an unduly heavy burden").

59. The Agreement to Amend the Agreement of 3 August 1959, as Amended by the Agreements of 21 October 1971 and 18 May 1981, to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces Stationed in the Federal Republic of Germany [hereinafter Revised Supplementary Agreement] was signed in Bonn, Germany, on Mar. 18, 1993, by representatives of the German Government and the six NATO sending States, including the United States. These amendments will not become effective until ratified by each signatory according to its constitutional requirements. The substance of these amendments as they pertain to U.S. forces! environmental compliance in Germany is discussed *infra* part III.B.4.

60. Any doubt about Germany's full Sovereignty Was finally dispelled legally in the 1990 Treaty on the Final Settlement with respect to Germany, September 12, 1990, 29 I.L.M. 1186 (1990). Specifically, art. 7(2) provides, "The united Germany shall have accordingly full sovereignty over its internal and external affairs." Id.

61 Parkerson, *supra* note 55, at 237.

62. Article 53, para. 1, of the Revised Supplementary Agreement *supra* note 59, provides that German law shall apply to the use of installations by sending State forces except as provided in the Revised Supplementary Agreement or other international agreements. In contrast, art. 53, para. 1, of the German Supplementary Agreement *supra* note 49, provides that sending State forces may apply their own regulations in the fields of public safety and order where such regulations prescribe standards equal to or higher than those prescribed by German law. The new art. 53, when it applies, seems to render moot the old controversy of the relationship between art. 53 and art. II of the NATO SOFA, which require a sending State's force to "respect" the law of the receiving State. Cf Welton, *supra* note 20, at 103-05. *See infra* part III.B.3.

63. See discussion *infra* part III.B.4.
64. See e.g, Welton, *supra* note 20, at 115. In analyzing the disconnect between emerging German sovereignty and the NATO SOFA/German Supplementary Agreement the Welton concludes, "[t]here is virtually no possibility that these agreements will be amended or abrogated in the foreseeable future, so they will most likely continue to regulate the activities of the sending states' forces.

65. John E. Parkerson, Jr. & Carolyn S. Stoehr, *The U.S Military Death Penalty* in *Europe: Threats from Recent European Human Rights Developments,* 129 MIL. L. REV. 41, 51 (1990).

66. See NATO SOFA, art. VII, para. 3(a)(I), supra note 30.

67. European Convention for the protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T. S. 221.

68. Short v. Kingdom of The Netherlands, Nos. 13,949, 13,950, *excerpted and translated in* 29 I.L.M. 1388 (1990) (The Dutch High court ruled that The Netherlands! obligation under the Convention must prevail over the conflicting allocation of SOFA jurisdiction). A more detailed summary of the *Short* case is found in John E. Parkerson & Steven J. Lepper, *Short v. Kingdom of the Netherlands, International* Decisions, 85 A.J.LL. 698 (1991). Short was later returned to U.S. authority after a delicate balancing

of sovereignty by U.S. military authorities who conducted an investigation to refer the case to trial as noncapital, and the Dutch authorities then receiving previously requested assurance that the death penalty would not be unposed. See, e.g, J. WOODLIFFE, supra note 33, at 189.

69. The EU was formerly called the European Community. It was first established as the European Economic Community by the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11. The Maastricht Treaty builds upon this treaty with more sophisticated efforts toward economic and monetary unification. Treaty on European Union, 1992 O.J. (C 224/1).

70. The Single European Act incorporated Title VII, the environmental title, into the Treaty of Rome with arts. 130r through 130t. O.J. L 169/1 (June 29, 1987) (adopted 1985, effective July 1, 1987).

71. For an excellent discussion of EU environmental law, *see* Turner T. Smith & Roszell D. Hunter, The European Community Environmental Legal System, 22 ENVTL L. REP. 10106 (Feb. 1992). This area is briefly discussed infra at part IV.

72. Council Regulation 259/93 on the Supervision and Control of Shipments of Waste within, into and out of the European Community, 1993 O.J. (L 30). This binding European Union regulation implements the provisions of the Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, 28 I.L.M. 649 (1989) [hereinafter Basel Convention].

73. Id.

74. The United States apparently took the position that the NATO SOFA was equivalent to a multilateral agreement under art. 11 of the Basel Convention, thus exempting U.S. forces' shipments from the requirements of the EC Regulation, although art. 11 recognized such agreements only if not derogating from the sound management of hazardous waste as required by the Basel Convention and no less environmentally sound than the Convention. *See* Letter from Col. Joseph O. Pflanz, Jr., Commander, Defense Reutilization and Marketing Region-Europe (Jul. 11, 1994) (on file with that office).

75. Paragraphs 4 and 5 of art. 4 of the Basel Convention, supra note 72, provide that illegal traffic in hazardous waste is criminal and that parties to the convention shall take action to enforce the convention, including punishment of conduct contravening the convention.

76 Cf. Parkerson & Lepper, supra note 68, at 701 (asserting that in the Short case the Dutch obligations under the Human Rights Convention and the NATO SOFA were not truly incompatible).

77. 213 U.S. 347, 356 (1909) (rejecting extraterritoriality as "an interference with the authority of another sovereign, contrary to the comity of nations").

78. Blackmer v. United States, 284 U.S. 421, 437 (1932) (the question is whether a contrary intent appears in the statute to rebut the territorial is only a presumption).

79. 336 U.S. 281 (1949).

80. Id. at 285.

81. 499 U.S. 244 (1991). Taken together, these cases comprise what has become known as the *Foley Bros./ARAMCO* presumption.

82. Id. at 248. *See also* Smith v. United States, 113 S. Ct. 1178 (1993).

83. Id, at 248. *See also Foley Bros.,* 336 U.S. at 285-87.

84. See Jonathan Turley, *""en in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality,* 84 N.W. UL. REV 598 (1990).

85. See, e.g., Jennifer A. Purvis, *The Long Arm of the Law? Extraterritorial Application of U.S Environmental Legislation in Outer Space, GEO* INT'L ENVTL. L. REV. 455, 464-65 (1994); Turley, supra note 84 at 608,627-34; Richard A. Wegman & Harold G. Bailey, *The Challenge of Cleaning Up Military Wastes "en U.S Bases are Closed,* 21 ECOLOGY L. Q. 865, 924-25 (1994).
86. National Environmental Policy Act of 1969, 42 U.S.C. Sec. 4332 (1994) [hereinafter NEPA].

87. Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S. C. Secs. 9601(8) and 9605(a)(8)(A) (1994) [hereinafter CERCLA].

88. Federal Water Pollution Control Act, 33 U.S.C. Secs. 1251(a) and 1362(7) (1994) [hereinafter CWA].

89. Clean Air Act 42 U.S.C. Secs. 7401(b) and 7407 (1994) [hereinafter CAA].

90. Resource Conservation and Recovery AM Secs. 6901 to 6992k (1994) [hereinafter RCRA].

91. 775 F. Supp. 668 (S.D.N.Y. 1991). The plaintiff had arranged for waste residues generated by the defendant to be shipped to the United Kingdom for recovery, but upon discovery that the shipment contained hazardous waste, the plaintiff attempted to bring an action under RCRA's citizen suit provisions alleging "imminent and substantial endangerment" to workers in the United Kingdom.

92. RCRA was passed to address the problem of waste disposal as "a matter national in scope"; and Congress found that "alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid disposal sites" Id. at 675-76.

93. Id. The Court further noted that the defendants polciy arguments that extraterritorial application of RCRA could create awkward foreign relations difficulties, though not determinative, were persuasive. Id. at 676, n. 11.
94. 911 F.2d 117 (8th Cir. 1990). The Eighth Circuit upheld a district courts decision which found that Congress had intended the Endangered Species Act requirements for interagency consultation to apply to federal activities without regard to the location of the activities. The Endangered Species Act of 1973, 16 U. S.C. Sec. 1536 (1994) [hereinafter ESA].

95. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992). In a concurring opinion, Justice Stevens disagreed with the majority's determination on standing, but concurred in the result since he believed that Congress did not express a clear enough desire for the ESA to apply outside the United States. Id. at 2147. *See also* David A. Mayfield,

The Endangered Species Act and its Applicability to Deployment of U.S. Forces Overseas (Dec. 1994) (on file at The Judge Advocate General's School, United States Army, Charlottesville, Va.).

96. 42 U.S.C. Secs. 4321, 4331(A), and 4332(2)(F).

97. Stryker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980).

98. 42 U.S.C. Sec. 4332(2)(C)

99. Exec. Order No. 12,114,44 Fed. Reg. 1957, (1979) [hereinafter E.O. 12,114].

100. Id. at para. 2-3 (b).

101. 986 F.2d 528 (D.C. Cir. 1993).

102. Id. at 534-35.

103. 837 F. Supp. 466 (D.D.C. 1993).

104. Id. at 467-68. Of particular relevance to the subject of this article is the Court's reliance on the Japan SOFA, supra note 24, governing the activities of U.S. forces and the concomitant foreign policy and sovereignty concerns in attempting to apply U.S. law extraterritorially under these circumstances.

105. See e.g., NATO SOFA, art. VII, para. 1 (a), supra note 27.

106. Uniform Code of Military Justice, 10 U.S.C. Secs. 801-946 (1994) [hereinafter UCMJ]. The UCMJ is also found in the MANUAL FOR COURTS-MARTIAL, app. 2 (1995) [hereinafter MCM].

107. 10 U.S.C. Sec. 805; MCM, supra note 106, art. 2, at A2-1 to A2-2.

108. United States v. Keaton, 41 C.M.R. 64, 66 (C.M.A. 1969) *citing* United States v. Bowman, 260 U.S. 94 (1922) (the U.S. Constitution does not prevent the exercise of extraterritorial criminal jurisdiction). The constitutional authority for Congress's extraterritorial application of the UCMJ is U.S. CONST. art. I, Sec. 8, cl. 14, granting Congress the power to "make Rules for the Government and Regulation of the land and naval Forces." *See* United States v. Schafer, 32 C.M.R. 83 (C.M.A. 1962).

109. United. States v. Bennett, 12 M.J. 463 (C.M.A. 1982)

110. O'Calahan v. Parker, 395 U.S. 258 (1969).

111. United States v. Solorio, 483 U.S. 435 (1987).
112. MCM, *supra* note 106, part IV, Punitive Articles. The use of the UCMJ for environmental prosecutions is discussed *infra* at Part V.

113. 10 U.S.C. Sec. 802; MCM, *supra* note 106, part II, Rule for Courts-Martial 202(a). *See also* United States v. Loving, 34 M.J. 956, 967 (C.M.A. 1992) (the test for jurisdiction is one of status under UCMJ, art. 2, not location, given the clear extraterritorial application of the UCMJ).

114. Article 2(a) 11 of the UCMJ provides for jurisdiction, subject to any treaty or accepted rule of international law, over persons serving with, employed by, or accompanying the armed forces outside the United States or its territories. 10 U.S.C. Sec. 802(a)(10). A discussion of jurisdiction over civilians during time of war is beyond the scope of this article. *See generally* Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem,* 148 MIL. L. REV. 114 (1995).

115. *See* G. DRAPER, *supra* note 25, at 51-52. *See also AFP 110-3, supra* note 44, at para. 19-13(a).

116. See Georges R. DeLaume, *Jurisdiction Over Crimes Committed 4broad.- French and American Law,* 21 GEO. WASH. L. REV. 179 (1952).

117. UCMJ, supra note 106.

118. 354 U.S. 1 (1957).

119. 361 U.S. 234 (1960).

120. UCMJ, *supra* note 106.

121. G. DRAPER, *supra* note 25 at 133.

122. 361 U.S. 281 (1960).

123. *See infra* part VI.

124. Such a conclusion flows from the language of most SOFAs that sending State jurisdiction emanates from its jurisdiction over persons under military law. *See, e.g.,* NATO SOFA, art. VII, para. 2(a), *supra* note 29. Interestingly, this result and the predicament of U.S. force authorities trying to maximize jurisdiction in the absence of concurrent jurisdiction runs contrary to the Senate's ratification of the NATO SOFA. It is also clear that the Senate, in consenting to ratification, believed that very few cases would be subject to exclusive foreign jurisdiction, and assurances were given that most violations would be punishable under the UCMJ. *See* Foreign Relations Committee Hearings, supra note 18, cited *in I* SNEE & K.PYE, *supra* note 32, at 33.

125. *See, e.g.,* Agreed Minutes to Korean SOFA, *supra* note 24, art. XXII, para. I (a).

126. The problem with respect to environmental offenses committed by civilian employees of U.S. forces overseas is further examined *infra* in part VI.

127. United States V. Flores, 289 U.S. 137, 155-57 (1933).

128. General Accounting Office, Some Criminal Offenses Committed Overseas by DoD Civilians Are Not Being Prosecuted: Legislation is Needed 5 (1979) [hereinafter GAO Report on Civilians].

129. 18 U.S.C. Sec. 7 (1994). *See also* Gregory A. McClelland, *The Problem of Jurisdiction Over* Civilians *Accompanying the Forces Overseas - Still With Us,* 117 MIL. L. REV. 153,174 (1987).

130. Id. Some courts have applied federal criminal law overseas even when Congress is silent on extraterritorial application. For example, in United States v. Layton, 855 F.2d 1388, 1395 (9th Cir. 1988), *cert. denied,* 489 U.S. 1046 (1989), the Ninth Circuit held that 18 U.S.C. Sec. 351, which prohibits the killing of a member of Congress, applied extraterritorially to conduct in Guyana. It is beyond the scope of this article to review all crimes in Title 18 with potential extraterritorial application. Moreover, a review of Title 18 readily reveals that very few provisions could apply to the environmental crimes discussed *supra* pan III.A.2.

131. The Statute provides:
Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers-up by any trick, scheme or device a material fact or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same could contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $ 10,000 or imprisoned not more than five years, or both.
18 U.S.C. Sec. 1001 (1994).

132. 783 F.2d 852 (9th Cir. 1986).

133. Substantive environmental obligations on U.S. forces overseas now exist in the form of country-specific final governing standards. *See infra* part III.B.2.

134. Should this provision apply, Congress has legislated venue to adjudicate extraterritorial offenses in the federal district court in the district where the offender is apprehended or first brought. 18 U.S.C. Sec. 3238 (1994). The application of any provision of U.S. federal criminal law besides the UCMJ does not, however, address issues of arrest, extradition, or conformity with SOFA procedures. *See infra* part VI.B.

135. E.O. *12,114, supra* note *99.*

136. Id. Even U.S. military officials have noted the overbreadth of E.O. 1*2,114* with respect to precluding the development of an EIS process when it would otherwise make sense. Specifically, "participation" by another nation is undefined, and therefore almost any official involvement by host nation officials could block preparation of an EIS. *See* General Accounting *Office, Improved Procedures Needed for Environmental* Assessments *of U. S. Actions Abroad 10 (1994).*

137. Exec. order *No. 12,088, 43* Fed. Reg. *47,707 (1978)* [hereinafter E.O. *12,088].*

138. Id. at Secs. *1-102,1-*
103.
139. Id.

140. DoD Directive *5100.50, Protection and Enhancement of Environmental Quality (1973)* (on
file with the Air Force Legal Services Agency, Environmental Law and Litigation Division, Rosslyn, Virginia).

141. Wegman & Bailey, *supra* note *85,* at *935.*
142. House *Armed Services Hearings,* 101st Cong., 1st Sess. *10 (1991)* (statement of Rep. Ray).

143. General Accounting Office, *Hazardous Waste: Management Problems Continue at Overseas Military Bases 45 (1991)* [hereinafter GAO Report on Overseas Bases]. This GAO Report examined ten bases in Germany, Italy, the United Kingdom, Japan, Korea, and the Philippines and found that the operations at these bases had violated both U.S. and host nation environmental laws. Id. at *28, 46-47.*

144. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, Sec. 342(b)(1), 104 Star. 1485, 1537 (1990) [hereinafter FY91 NDAA]. Considerable commentary exists about Congress and DoD being more concerned about environmental compliance at overseas bases than with cleanup of bases (particularly those to be closed). Section 342(b)(2) of the FY91 NDAA required DoD to establish a cleanup policy. The House version of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, Sec. 1301(e)(2)(A), 106 Star. 2315, 2545 (1992) called for the cost of environmental restoration at overseas military bases to be borne by the host nation. The Senate responded with an amendment for an "equitable division" of the restoration costs with the host country. H.R. CONF REP. No. 966, 102d Cong., 2d Sess. 683, *reprinted in* 1992 U.S.C.C.A.N. 1770, 1774. The DoD compliance policy is well underway (discussed *infra* in part III.B.2), but no restoration policy has yet been approved. A high level working group in, the Pentagon is attempting to finalize a draft "Environmental Remediation Policy for DoD Activities Overseas." Interview with Lt. Col. David Rathgeber, Director, Environmental Law Branch, Air Force Environmental Law and Litigation Division, in Rosslyn, Va. (July 3, 1995) [hereinafter Rathgeber Interview].

145. DoD Directive 6050.16, *DoD Policy for Establishing and Implementing Environmental Standards at Overseas Military Installations* (199 1) (on file with the Office of the Deputy Assistant Secretary of Defense (Environment)) [hereinafter DoDD 6050.16]. The directive codified DoD's representation to Congress that it was prepared to apply tough environmental standards to overseas facilities with ongoing operations. *See DoD Envtl Programs Hearings Before the Readiness Subcomm., the Envtl. Restoration Panel, and the Dep't of Energy Defense Nuclear Facilities Panel of the House Comm. on Armed Servs.,* 102d Cong., 1st Sess. 142 (199 1) (testimony of Thomas E. Baca, Deputy Assistant Secretary of Defense (Environment)).

146. Environmental executive agents (EAs) have been appointed by the Secretary of Defense for each foreign country where the United States maintains a substantial presence of forces. Such EAs are normally a military department for countries in Europe (e.g., the U.S. Army for Germany, the U.S. Navy for Italy, and the U.S. Air Force for the United Kingdom); in Asia, the EAs are usually subordinate unified commands (e.g., U.S. Forces Japan for Japan and U.S. Forces Korea for **South Korea).**

147. DoDD 6050.16, supra note 145, at paras. C. 1. and C.2.

148. DEPARTMENT OF DEFENSE ENVTL. OVERSEAS TASK FORCE OVERSEAS ENVIRONMENTAL BASELINE GUIDANCE DOCUMENT (1992) [hereinafter OEBGD].

149. Consideration included statutory provisions and regulations for RCRA, supra note 90; CWA, supra note 88; CAA, supra note 89; and ESA, supra note 94. OEBGD, supra note 148, at 1-4.

150. These are defined as "[c]ountry-specific substantive provisions, typically technical limitations on effluent discharges, etc., or a specific management practice, with which installations must comply." OEBGD, supra note 148, at 1-2.

151. Id. at 1.

152. Id.

153. Id. at chts. 2-19.

154. Id. at 1-1.

155. According to the OEBDG, "Military Departments and Defense Agencies will ensure compliance with the final governing standards established by the Executive Agent [and] DoD Installation commanders will comply with the final governing standards." Id. at 1-6. This directive has been Rather implemented by unified command regulations mandating compliance. *See, e.g*, EUCOM Directive 80-1, *Environmental Matters*, paras. 7b and 8b (1994) (on file with the U.S. European Command, Office of the Leo Advisor, Stuttgart, Germany). The final governing standards should not employ discretionary judgments but technically achievable concrete requirements. EUCOM Environmental Executive. Agent Steering Committee Report, *OEBGD Questions and Answers* (undated) (on file with the U.S. European Command, Office of the Legal Advisor, Stuttgart, Germany) [hereinafter EUCOM Report].

156. OEBGD, supra note 148, at 1-3, 1-5.

157. Id. at 1-8 to 1-9. Executive agents are to approve such waivers, unless the military department requesting the waiver is also the EA, in which case the waiver must be referred to the next higher command echelon. The EA may not waive treaty obligations. Id

158. Id. at 1-5 to 1-6.

159. Final governing Standards in final draft exist for Korea and Germany but have not yet been approved. The German Final Governing Standards [hereinafter German FGS] have not been approved by the EA (U.S. Army) because an issue exists as to how to fund and pay for the compliance mandated by the FGS, particularly at Army installations. Although other final governing standards, such as those for Italy [hereinafter Italy FGS], have been approved by the EA (U.S. Navy for Italy), the Navy Comptroller has taken the position that FGS requirements are not "legal requirements" for purposes of funding environmental compliance. Telephone interviews with Cmdr. Michael McGregor, U.S. European Command, Office of the Legal Advisor, Stuttgart, Germany (July 5, 1995), and Lt. Col. Richard Phelps, U.S. Air Forces in Europe, Office of the Staff Judge Advocate, Ramstein Air Base, Germany (July 6, 1995) [hereinafter Phelps Interview].

160. 0EBGD policy requires final governing Standards to include substantive criteria Without referring to the source of the U.S. or enforced host nation standard. The challenge in drafting many final governing standards was in determining the host government 's enforcement record on a myriad of host nation environmental laws. Telephone Interview with Lt. Col. Dean Rodgers, Staff Judge Advocate, Air Force Center for Environmental Excellence, Brooks Air Force Base, Texas (July 6, 1995) [hereinafter Rodgers Interview]. For example, The U.S. position was that if the host nation did not enforce standards on its own installations or exempted its military by law from those standards, then such standards were not enforceable against U.S. forces. EUCOM Report, supra note 155. *See also* Jody Meier Reitzes, *The Inconsistent Implementation of the Environmental Laws of the European Community*, 22 ENVTL. L. REP. 10523, 10524-25 (1992) (enforcement among EU Member nations varies considerably).

161. See, e.g., Air Force Instruction 32-7006, *Environmental Program in Foreign Countries,* para. 3.3. (CD-ROM Version, Mar. 1995) (on file at the Air Force Environmental Law and Litigation Division, Rosslyn, Virginia) [hereinafter AFI 32-7006].

162. OEBGD, *supra* note 148, at 1-5. The OEBGD is not likely to be updated until one year after the last final governing standards are approved (Germany or Korea), and when published, will likely require changes to every country's final governing standards., *See* Richard A. Phelps, *Environmental Law at USAFE Installations 3* (1994) (distributed at the Command Staff Judge Advocate Conference and on file with the U.S. AN Forces in Europe Office of the Staff Judge Advocate).

163. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 401-03, 115 cmt d(1986).

164. Article II of the NATO SOFA, *supra* note 19, provides: "[i]t is the duty of a force and its civilian component . . . to respect the law of the receiving State, and to abstain from any activity inconsistent with the spirit of the present Agreement" *See also* Japan SOFA, *supra* note 24, art. XVI, and Korea SOFA, *supra* note 24, art. VII. The word "respect" is vague and problematic in that it implies less than fall immunity from host nation law yet is not equivalent to obey. Compliance in specific contexts with host nation law on a particular subject has often been the subject of controversy and debate. *See* Welton, *supra* note 20, at 95-96, 107.

165. AIR FORCE JUDGE ADVOCATE GENERAL SCHOOL, INTERNATIONAL AND OPERATIONS LAW DESKBOOK VI-6 (1995) (on file with the Office of The Judge Advocate General, Air Force International and Operations Law Division, Washington D.C.) [hereinafter JAG INTERNATIONAL LAW DESKBOOK].

166. In Germany, for example, the existing volume and diversity of regulations, coupled with the fragmentation of German environmental laws in general, provide major obstacles to German implementation and enforcement leading to the creation of a commission by the German Federal Minister of the Environment to consolidate and restate German environmental law. *See* Hans D. Jarass & Joseph DiMento, *Through Comparative Lawyers' Goggles A Primer on German Environmental Law,* 6 GEO. INT'L, ENVTL L. REV. 47,69-70 (1994).

167. See discussion supra note 160.

168. See discussion supra note 162.

169. Host nation administrative procedures for environmental compliance are not required to be adopted in final governing standards. *See* EUCOM Report, *supra* note 155. Thus, a "notice of violation" or "report of findings" from host nation regulatory authorities is not generally considered enforceable. *See, eg., AFI* 32-7006 *supra* note 161, at para. 6.3.5.

170. Revixed Supplementary Agreement *supra* note 59.

171. Article 53 of the Revised Supplementary Agreement adds the following: German law shall apply to the use of such accommodation [i.e., installations of exclusive U.S. use] except as provided in the present Agreement and other international agreements ... and other internal matters which have no foreseeable effect on the rights

of third parties or on adjoining communities or the general public.

Id. Some U. S. officials do not believe this provision will cause a big impact on current compliance because current environmental obligations prescribed by German law apply under the current German Supplementary Agreement *supra* note 49, art. 53, either as more protective public safety standards or as encompassed in more protective U.S. public safety standards. *See, eg.*, Richard A. Phelps, *Impact of the 1993 Supplementary Agreement to the NATO SOFA on Environmental Requirements Applicable to USAFE Installations in the Federal Republic of Germany* (1994), *reprinted in* JAG INTERNATIONAL LAW DESKBOOK, *supra* note 165, at VI-31 [hereinafter, Phelps, Supplementary Agreement Impact].

172. Revised Supplementary Agreement, *supra* note 59, art. 54B.

173. Id.

174. Id. at art. 57.

175. Id. at an. 63.

176. The U.S. Army intends to incorporate the specific requirements into the Germany FGS. *See* Phelps, Supplementary Agreement Impact, *supra* note 171.

177. See infra Part IV.

178. Although Criminal provisions per Se do not exist in the final governing Standards, It Would be essential for the United States to have criminal provisions (and disciplinary provisions for civilian employees accompanying the forces) at its disposal in an effort to maximize U.S. jurisdiction over its forces committing environmental offenses. This assumes the United States would be successful in asserting its final governing standards as the "sole compliance standard" for its forces.

179. United Nations Convention on Biological Diversity, Jan. 5, 1992, 31 I.L.M. 818, 824.

180. In Europe, for example, public awareness of environmental issues has developed as a result of the nuclear accident at Chernobyl, oil spills in the North Seas and the Mediterranean, chemical spills in the Rhine and other rivers, the acid ram problem in Central and Eastern Europe, the greenhouse effect, and the depletion of the ozone layer. As public awareness has fostered greater political debate, often initiated by the Green Party, politics and legislation have followed. See, e.g., Mark Maremont, And Now, the Greening *of* Europe, Bus. WK., May 8, 1989, at 98D; David Marsh, Pollution Control: Lessons *of* the Rhine, FIN TIMES, Mar. 6, 1987, at 17; Tyler Marshall, Public Spurs Cleanup: West Europe Has Its Fill *of Toxic* Waste, L.A. TIMES, Feb. 28, 1989 at Al. William D. Montalbano, Focus on Environment Green Wave Surging Over West Europe, L.A. TIMES, May 11, 1989, at Al. In South Korea, public accusations of corporate dumping in a liver and a not protesting the construction of a waste dump were unusually new occurrences in 1990.
See David P. Hackett, Environmental Regulation in South Korea, INT'L ENVTL, L. SPECIAL RPT. 382,384 (1992).

181. GAO Report on Overseas Bases, supra note 143, at 45, 48.

182. Id. Legal officials at the U.S. European Command, U.S. Army Europe, U.S. Air Forces in Europe, and the Defense Logistics Agency-Europe all predicted such a reaction to GAO investigators due to continually growing environmental sensitivities.

183. Of the 251, 122 active duty military stationed in foreign countries, there are 87,955 in Germany, 45,398 in Japan, 36,796 in Korea, 13,781 in the United Kingdom, and 12,743 in Italy. DoD Military Manpower Statistics, tbl. 13 (Sept. 30, 1994). Of the 101,091 DoD civilian employees in foreign countries, there are 43,003 in Germany, 22,756 in Japan, 13,180 in Korea, 4,880 in Italy, and 2,301 in the United Kingdom. Of the 220,153 dependents overseas, roughly the same proportions apply in these countries. DoD Worldwide Manpower Distribution by Geographical Area, *supra* note 1.

184. Smith & Hunter, *supra* note 71, at 10117, 10135. *See* the Single European Am supra note 70, giving the EC substantial new authority in the field of environmental regulation. *See also* Gabrielle H. Williamson, *Environmental Enforcement and Compliance in the European Community*, INT'L ENVTL. L. SPECIAL REP. 34, 3840 (1992).

185. Id. It is anticipated, for example, that new EU environmental legislation May soon impact U.S. forces' activities at European bases in areas such as movement of hazardous materials. *See, e.g.*, Wolfgang H. Motz, *European Union and US Military Activities* (1994), *reprinted in* AIR FORCE JAG INTERNATIONAL LAW DESKBOOK, *supra* note 165, at 1-3 9, 1-40.

186. Williamson, *supra* note 184, at 45.

187. See Frederick M. Abbott *Regional Integration and the Environment: The Evolution of Legal Regimes*, 68 CHI.-KENT L. REV. 173,187 (1992).

188. Id. See also SUSAN ROSE-ACKERMAN, CONTROLLING ENVIRONMENTAL POLICY 110-11 *(1995).*

189. Smith & Hunter, supra note *71*, at 10 111; ROSE-ACKERMAN, supra note 188. The United States and its EU member nation allies would be well advised to monitor this development closely for its potential impact on SOFA obligations concerning environmental compliance.

190. Unwelthaftungsgestz [UGB]. *See* Jarass & DiMento, supra note *167*, at *65.*

191. Strafgesetzbuch [StGB]. For an analysis of these substantive provisions as they apply to US. forces in Germany, *see* Maxwell G. Selz, *German Environmental Law A Primer*, ARMY LAW. *(May 1992).*

192. Id. Secs. *324-26.*

193. Id

194. Telephone interview with Wolfgang H. Motz, Command Host Nation Leo Advisor, US. Air Forces in Europe (June *29, 1995)* [hereinafter Motz interview]. An example cited by Mr. Motz of the increasing sensitivity of the German government relates to compliance with discharge (particularly wastewater) permits obtained for US. forces by the German Ministry of Defense (a practice specifically required in the, Revised Supplementary Agreement supra note *59*, art. *53A).* Given **this** arrangement

Germans themselves are concerned about becoming targets of German prosecution for permit noncompliance by US. forces.

195. David P. Hackett, *Environmental Regulation in Japan,* INT'L ENVTL. L. SPECIAL RPT. *329 (1992).*

196. Id. at 333.

197. Hackett, supra note 180, at 382.

198. See supra part II.B.2. See, e.g., NATO SOFA, supra note 19, art. VII, para. 3(a)(ii); Japan SOFA, supra note 24, art. XVII, para. 3(a)(ii); and Korea SOFA, supra note 24, aft. XXII, para. 3(a)(ii).

199. J. SNEE & K. PYE, supra note 32, at 46.

200. The SOFA negotiators themselves disagreed on the meaning Of this language, although commentators assert they did agree that what constitutes official duty is a matter for determination by the sending State. See, e.g., S. LAZAREFF, supra note 6, at 175; J. WOODLIFFE, supra note 33, at 179.

201. Will H. Carroll, Official Duty Cases Under Status of Forces Agreements: Modest Guidelines Toward a *Definition,* 12 A.F. L. REV. 284 (1970).

202. See, e.g., AFP 110-3, supra note 44, para. 19-19d. The mechanism for communicating this determination to a host nation is an "official duty certificate" signed by a the commander or staff judge advocate of the offender's unit. Id.

203. See, e.g., German Supplementary Agreement supra note 49, art. 18 (stating this determination "shall be made in accordance with the law of the sending State"); Agreed Minutes to aft XVII, Japan SOFA, supra note 24 (stating this determination made on a certificate by a commander "shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved"); Agreed Minutes to Korea SOFA, supra note 24, art. XXII (stating this determination on a certificate by competent military authorities "shall be sufficient evidence of the fact for the purpose of determining primary jurisdiction").

204. J. SNEE & K. PYE, supra note 32, at 50-54; Stanger, supra note 9, at 235-38.

205. An exception exists in the Korea SOFA, supra note 24, Agreed Minutes to art. XXII, where the term official duty "is meant to apply only to acts which are required to be done as functions of those duties which the individuals are performing.

206. J. SNEE & K. PYE, supra note 32, at 49.

207. Perhaps the most famous example occurred with a guard in Japan who accidentally killed a Japanese woman with an empty shell from a grenade launcher. The commander issued an official duty certificate, but Japan resisted U.S. jurisdiction on the grounds that the guard had not acted within the purview of his duties. After a Japanese outcry, the United States waived whatever jurisdiction it had, creating an outcry in the U.S. Congress. The case resulted in a Japanese prosecution and denial of a writ of habeas corpus. See Wilson v. Girard, 354 U.S. 524 (1957).

208. Foreign Criminal Jurisdiction Historical Perspective, JAG INTERNATIONAL LAW DESKBOOK, supra note 165, at F-4; Carroll, supra note 20 1, at 287-88; AFP 110-3, supra note 44, para. 19-19j.

209. See J. SNEE & K. PYE, supra note 32, at 48; Carroll, supra note 201, at 285-86.

210. See discussion supra note 207.
211. See G. STAMBUK, supra note 25, at 73.

212. Virtually no policy or guidance exists for how Commanders and their Staff judge advocates are to charge and prosecute cases under the UCMJ for environmental offenses in the U.S. or overseas. There exists no policy letter from any of The Judge Advocates General of the three services concerning the charging of environmental crimes overseas. Telephone Interview with Loren Perlstein Deputy Chief Air Force Military Justice Division, Bolling Air Force Base Washington D.C. (Jul. 13, 1995). Moreover, some U.S. authorities are increasingly apprehensive about host nations asking (or being forced by political circumstances to ask) the United States for its statutory basis for concurrent criminal jurisdiction over its forces in environmental cases, fearing the answer could be embarrassing. Motz Interview, supra note 194.

213. J. SNEE & K. PYE, supra note 32, at 3 1. *See* supra part I.B.2. and note 36.

214. *See, e.g.*, German Supplementary Agreement supra note 49, art. 17, para. 1, providing that a German court or authority dealing with a case may request a certificate stating whether or not the act is punishable by the law of the sending State; U.S. Sending Office for Italy Instruction 5820. 1B, *Operating Procedures in Italy under Article VII, NATO Status of Forces Agreement* (on file with the US. Sending State Office, Rome, Italy), providing at para. 14c(2) that requests for waiver of jurisdiction must not imply the United States can exercise criminal jurisdiction if it cannot.

215. 10 U.S. C. Sec. 892, cl. 3.

216. MCM, supra note 106, pt. IV, Para. 16b.(3).,

217. Id. Para. 16c.(3).

218. Id.

219. See JAG INTERNATIONAL LAW DESKBOOK, supra note 165, at VI- 14. There are no reported cases in the military justice reporters discussing a treaty obligation alone as the basis for an Article 92 prosecution. Cf. UCMJ prosecutions under Article 92 for violating customs regulations promulgated to implement SOFA customs provisions. *See, e*.g., United States v. Kok 27 M.J. 710 (A.C.M.R. 1988).

220. OEBGD, supra note 148, at 1-3 (emphasis added).

221. Id.

222. A possible exception could be the Environmental Subcommittee established pursuant to the Korea SOFA, supra note 24, art. XXVI, to study issues and make recommendations to the U.S. Republic of Korea SOFA Joint Committee concerning environmental matters, specifically referenced in the Korea FGS Draft, infra note 224, para. 1-10a. Such a mechanism at least provides the vehicle for meshing FGS violations with allocations of criminal jurisdiction.

223. This author has been Unable in the Course of numerous interviews With DOD officials to ascertain the purpose of this exculpatory language in the OEBGD.

224. Korea FGS Draft, Para 1-4c (on file with U.S. Forces Korea, Assistant Chief of Staff, Engineer) (drafted by an Army-Navy-Air Force interservice committee).

225. Japan FGS, para 1-5 (Jan. 1995) (on Me with U.S. Forces Japan, Office of the Civil Engineer) (drafted by an Army-Navy-Air Force interservice committee).

226. Italy FGS, para. MD (Apr.27,1994) (on file with U.S. European Command, Office of the Legg Advisor) (drafted by the U. S. Navy as EA).

227. See supra note 159.

228. See, e.g., JAG INTERNATIONAL LAW DESKBOOK, supra note 165, at Vl-14.

229. The German FGS Draft, supra note 159, does not contain this disabling language. Phelps Interview, supra note 159.

230. The United Kingdom FGS, para. 1-3E (Jan. 1, 1994) [hereinafter UK FGS] and the Turkey FGS, para. 1-3E (Mar. 1, 1994) [hereinafter Turkey FGS] (on file with the U.S. Air Forces in Europe, Office of the Staff Judge Advocate) (drafted by the U.S. Air Force as EA) provide:
Individual members or employees of the Department of Defense will:
1. Take action to ensure their conduct, and that of their subordinates and dependents, results in no discharge, deposit or release of substances, or other effects that cause harm to the environment or the natural and cultural resources of [the host country] unless it is in conformance with these final governing standards.

231. Rogers Interview, supra note 160. Lt. Col. Rodgers also seems to have succeeded in including environmental violations not related to performance of duty, such as the case of a soldier dumping used oil down a sewer dram.

232. See. e.g., UK FGS, supra note 230, para. 1-3D.2.

233. Laurent R. Hourcle, Lecture at Federal Facilities Environmental Law Issues Course, National Law Center, George Washington University (Mar. 30, 1995). Accord Rathgeber Interview, supra note 144, discussing the most common reasons for Notices of Violation from the U.S. Environmental Protection Agency for DoD bases in the United States.

234. Id. See also Margaret K. Minster, Federal Facilities and the Deterrence Failure of Environmental Laws. The Case for Criminal Prosecution fo Federal Employees, 18 HARV. ENVTL. L. REV. 137 (1994).
235. AFI 32-7006, supra note 161, ch. 6.

236. UK FGS and Turkey FGS, supra note 230, para. 1-3E.2.

237. Another potential UCMJ Punitive article lending itself to false reporting is art. 107, UCMJ, for making false official statements.

238. 10 U. S.C. Sec. 892, cl. 1 [hereinafter art. 92(l)].

239. MCM, supra note 106, *Para.* 16b.(l).

240. Clause 2 of Article 92 likewise punishes the violation of "other" regulations if the defendant had knowledge of the regulation. While nonpunitive regulations incorporating portions of an FGS could be issued, Articles 92(l) and 92(3) are better suited as vehicles to ensure U.S. concurrent jurisdiction over environmental offenses.

241. MCM, supra note 106, Para. l6c.(l)(c).

242. See United States v. Sweitzer, 33 C.M.R. 251 (C.M.A. 1963).

243. MCM, supra note 106, Para. 16c.(l)(e).

244. See United States V. Nardell, 45 C.M.R. 101 (C.M.A. 1972).

245. MCM supra note 106, para. 16c.(1)(a).

246. Japan FGS, supra note 225, para. 1-9.3.

247. Rathgeber Interview, supra note 144.
248. Phelps Interview, supra note 159. Lt. Col. Phelps believes that the entire regulation should not be made punitive yet but that a prudent start would be the area of most problems in the U.S. and overseas - the handling of hazardous waste. Id

249. Perhaps the Simplest Way to make Standards punitive is to specifically provide that violations of certain requirements are punishable under Article 92 of the UCMJ. A country-wide regulation would be preferable to a patchwork of installation-by-installation regulations.

250. See J. SNEE & K. PYE, supra note 32, at 31. An example of such a concern would be the issuance of punitive military regulations for minor traffic infractions committed off an installation when the U.S. interest in exercising jurisdiction is relatively slight.

251. 10 U.S.C. Sec. 934, *cl. 2.*

252. MCM supra note *106,* Para. *60c.(3).*

253. Id.

254. *See J.* SNEE & K. PYE, supra note *3 2,* at *25; 1 WOODLIFFE,* supra note *33,* at 177.

255. *See, e.g.,* United States v. Hughes, *7* C.M.R-*803, 811* (A.F.B.R. *1953)* (violations of British vehicle registration laws without an allegation of circumstances showing injury to the reputation of the armed forces by these minor misdemeanors was not a violation of art. *134);* United States v. Singleton, *15* M.J. *579, 581-582* (A.C.M.R. *1983)* (although every breach of an allied country's law is not an offense under art. *134,* violation of German law on the importation of illegal drugs does cause the services to suffer a loss of esteem and is an art. *134* offense).

256. The OEBGD "applies to DoD installations" overseas and also specifically excludes the application of its provisions to "operational and training deployments

off-base." OEBGD, supra note *148*, at 1-1. Following this lead, every FGS applies only to DoD installations in that particular country and also excludes any off-base deployments. Such deployments are to be governed by an environmental annex to the deployment plan which could, of course, include provisions enabling the application of Article *92*, but such deployment plans are not drafted under the compliance umbrella of the FGS.

257. An excellent example of such a case that occurred in Germany is discussed infra in part V.C., notes *272, 277* and accompanying text.

258. 10 U.S.C. Sec. 909.

259. MCM, supra note 106, Paras. 33c.(I) and (2).

260. There has been one known court-martial relating to environmental offenses in the United States. In United States v. Woodward, an unreported case, the defendant was convicted of falsifying documents regarding the disposition of hazardous waste and improperly disposing of such waste into a dumpster (receiving a sentence of 75 days of confinement forfeiture of $500 pay per month for two months, and a reduction of two enlisted grades). *See* Orval Nangle, *Marine Corps Officer and Employee Liability for Environmental Noncompliance,* 3 FED. FACILITIES ENVTL. 1433, 442 (1992-93).

261. Motz Interview, supra note 194.
262. Id. *See also* GAO Report on Overseas Bases, supra note 143, at 47.

263. Motz Interview, supra note 194. The criminal investigation was dropped when U.S. officials responded to the German request to comply.

264. Id Mr Motz opined that the case might have been different if the Germany FGS had
existed, and noted that this case is a classic example of the host government not asking for the basis
of concurrent jurisdiction (he dunks none really existed then) and why the United States did
nothing to the commander or anyone else after its efforts to seek jurisdiction of the case. Fortunately, the Germans in that case were satisfied with eventual compliance.

265. GAO Report on Overseas Bases, supra note 143, at 47. Letter from Maj. R. Philip Deavel, Staff Judge Advocate, to Aviano Air Base Commander (Oct. 5, 1992) (on file with the U.S. Sending State Office Rome Italy).

266. Id; Motz Interview, supra note 194.

267. Letter from Aviano US. Commander to Aviano Italian Commander (Oct. 7, 1992) (on file with the U.S. Sending State Office, Rome, Italy). No record exists in this pre-OEBGD/FGS case of the basis for assuming the United States possessed concurrent jurisdiction for dereliction of duty if a culpable person would have been found.

268. Telephone Interview with Maj. William Gampel, Deputy Officer in Charge, U.S. Sending State Office, Rome, Italy (Jun. 27, 1995) [hereinafter Gampel Interview]. According to Maj. Gainpel, such a request by the Italian government is very rare, particularly when the request was made almost six years after the incident.

269. Letter from Maj. S. Lane Throssell, U.S. Sending State Office, to Ministry of Grace and Justice (Apr. 26, 1995) (on file with U.S. Sending State Office, Rome, Italy).

270. 10 U.S.C. Sec. 815. This procedure provides a commander authority to nonjudicially punish members in her command for violations of the punitive articles of the UCMJ. The offender has the right to request a trial by court-martial to consider the charges.

271. Telephone Interview With James Marlow, 17th Air Force, Chief of International Law, Sembach Air Base, Germany (July 10, 1995).

272. See Air Force Office of Special Investigations (AFOSI) Report 9454lD26-S750142 (on file at AFOSI Investigative Operations Center, Environmental Crimes Division, Boiling Air Force Base, Washington D.C.) [hereinafter AFOSI Environmental Crimes Division].

273. Id.

274. Telephone Interview With Maj. William Groves, Deputy Staff judge Advocate, Ramstein Air Base, Germany (July 6, 1995) [hereinafter Groves Interview].

275. A proper and thorough investigation of environmental violations is a key component to prosecution. Unfortunately, the few reported overseas environmental cases investigated by AFOSI in the UK since the beginning of 1994 apparently failed to consider the impact of the UK FGS, supra note 230, on investigations for art. 92(3) violations (cases on file at AFOSI Environmental Crimes Division).

276. A similar conclusion was reached in a pre-trial investigative hearing conducted pursuant to Article 32, UCMJ, at Tyndall AFB, Fla., in 1992. The investigating officer recommended that the case not be disposed of by court-martial partly because of the lack of any meaningful training or education program, as well as the lack of command emphasis on hazardous waste disposal requirements. Report on file with Investigating Officer, Lt. Col. P. Micheal Cunningham, Staff Judge Advocate, Dover AFB, Del..

277. Groves Interview, supra note 274. This case would have been a suitable set of facts for the use of art. 134(2) (if any German law had been violated)or for the use of art. 109 (if the draining was wrongful under German law).

278. The Aberdeen case is perhaps the most famous prosecution of a federal employee for environmental violations. United States v. Dee, 912 F.2d 741 (4th Cir. 1990), cert. denied, 499 U.S. 919 (1991). In that case, an employee informed the installation environmental coordinator of the violations that ultimately formed the basis for the indictment and when the violations continued, this whistleblower went to the Baltimore Sun and Maryland State Police. See generally James P. Calve, Environmental Crimes. Upping the Ante for Noncompliance with Environmental Laws, 133 MIL. L. REV. 279, 325 (1991). United States forces overseas are clearly not exempt from this source of disclosure, thereby creating additional pressure on U.S. authorities to exercise criminal jurisdiction themselves.

279. An analysis of Civilian dependents and host nation civilian employees working for U.S. forces is beyond the scope of this article. Civilian dependents are covered by SOFA provisions and fall within the U.S. policy of maximizing its jurisdiction. Local

national employees are not covered by SOFAs and remain fully subject to host nation laws.
280. See, e.g., G. DRAPER, supra note 25, at 140; J. SNEE & K. PYE, supra note 32, at 41; J. WOODLIFFE, supra note 33, at 176; Lepper, supra note 14, at 180.

281. See, e.g., NATO SOFA, art. VII, paras. 1(a) and 2(a), supra notes 27 and 29.

282. See eg., G. DRAPER, *supra* note 25, at 53. See also AFP 110-3, *supra* note 44, para. 19-19i ("There being no concurrent jurisdiction, there is no longer a basis in the SOFA provisions for the issuance of a duty certificate for a civilian employee.").

283. Gampel Interview, supra note 268; Motz Interview, *supra* note 194. The SOFA Tri-Service Regulation, *supra* note 40, provides: "In all cases in which the local commanders determine that suitable corrective action can be taken under existing administrative regulations, they may request the local foreign authorities to refrain from exercising their jurisdiction." Asa practical matter, this charter has meant virtually any caw. See discussion *supra* note 40.

284. Occasionally, Commanders and their legal advisors Will attempt to assert the Position that the language "criminal and disciplinary jurisdiction" in SOFAS (see, e.g., NATO SOFA, art. VII, para. *I (a), supra* note 27) implies actual concurrent jurisdiction. Rodgers Interview, *supra* note 160.
Even cominentators occasionally confuse the issue by speaking of U.S. requests for "waivers in civilian cases, where the receiving state has the Primary right" Parkerson & Stoehr, *supra,* note 65, at 48, n.32. In fact, they are simply requests to the receiving state to refrain from the exercise of its exclusive right by not prosecuting at all. See J. SNEE & K. PYE, *supra* note 32, at 3 1, and discussion *supra* note 213.

285. Technically Speaking, Under the SOFAS, the only options are the relinquishment by the receiving State of its exclusive jurisdiction to prosecute. Regardless of whether US. forces Like administrative action or not the exercise of such action may as a practical matter influence the host nation's decision. G. DRAPER, *supra* note 25, at 26.

286. See Lepper, s*upra* note 14, at 180.

287. Motz Interview, *supra* note 194.

288. Government Trial Brief 79, McElroy v. United States, 361 U.S. 281 (1960). See also G. DRAPER, *supra* note 25, at 28.

289. The disciplining of U.S. civilian employees is governed by the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), codified as amended in scattered sections of 5, 10, 15, 28, 31, 39 & 42 U.S.C. (1994). This Act creates two types of disciplinary actions for a federal agency to take against federal employees: Chapter 43 actions for unacceptable performance (5 U.S.C. Secs. 4301-15) and ch. 75 actions for misconduct to promote the efficiency of the service (5 U.S.C. Secs. 7501-14).

290. Motz Interview, *supra* note 194.

291. As discussed in the context of the UCMJ, FGSs should be changed to remove exculpatory language for individual responsibility or supplemented by regulations. Moreover, supervisors of civil employees with environmental duties would be well advised to incorporate any FGS standards into those employees' performance plans

(creating the basis for their appraisal and any performance-based administrative actions).

292. GAO Report on Overseas Bases, supra note 143, at 46.

293. Motz Interview, supra note 194.

294. Phelps Interview, supra note 159.

295. Nangle, supra note 260, at 442-43. Cf Statement of Breckenridge L. Willcox, United States Attorney, Baltimore, Maryland: "Federal employees are not above the law." *ARMY TIMES,* Mar. 6, 1989, at 10.

296. GAO Report on Civilians, supra note 128, at 2.

297. Id. at 6-8.

298. Id. at 11-12.

299. Id. at 6.

300. S. 2007, 90th Cong., 1st Sess. (1967) (creating extraterritorial jurisdiction over civilians accompanying the forces overseas and subjecting them to some of the substantive provisions of the UCMJ); S. 1, 94th Cong., 1st Sess. (1975) (subjecting U.S. citizens overseas to the general jurisdiction of the United States if the crime fell within one of nine categories of major offenses such as treason or espionage); H.R. 255, 99th Cong., 1st Sess. (1985) (expanding special maritime and territoral jurisdiction to cover U.S. citizens accompanying U.S. forces outside the *U.S.). See* also S. 1630, 97th Cong., 2d Sess. (198 1) and RR 4531, 103d Cong., 2d Sess. (1994).

301. S. 74, 104th Cong., 1st Sess. (1995). H.R. 808, 104th Cong., 1st Sess. (1995) provides for the identical provisions as S. 74.

302. 18 U.S.C. Sec. 7 defines such jurisdiction.

303. S. 74 and H.R. 808, supra note 301, Sec. 992(a).

304. Id. Sec. 993(a).

305. S. 3, 104th Cong., 1st Sess. (1995).

306. Id. Sec. 3261(a).

307. Id. Sec. 3262(a).

308. Such legislation is Still subject to implementation difficulties, Such as Coordinating the arrest and return of U.S. civilians with the host country, and the attempted extraterritorial reach being at odds with the provisions of SOFAs on allocation of jurisdiction to sending States only under military law. *See* McClelland, supra note 129, at 199-200.

309. 18 U.S.C. Secs. 1111, 213, 2111 (1994).

310. False reporting of environmental activities and compliance by U.S. civilian employees could subject them to criminal liability under 18 U.S.C. Sec. 1001, as noted supra in part III.A.4. FGSs, containing specific recordkeeping requirements could well provide the basis for such liability *See, e.g.,* Italy FGS, ch. 6.

311. Senate Resolution, supra, note 42.

312. SOFA Tri-Service Regulation, supra note 40.

313. G. DRAPER, supra note 25, at 120.

314. See, e.g., SOFA Tri-Service Regulation, supra note 40.

315. Id. at chs. 1, 2, and 3.

316. See *supra* note 68 and accompanying text.

317. Id.

318. "Former Secretary of Defense Richard Cheney has said, "This Administration wants the United States to be the world leader in addressing environmental problems and I want the Department of Defense to be the Federal leader in agency environmental compliance and protection." OEBGD, supra note 148, Introduction at 1-1.

Environmental Law for Overseas Installations

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/*/

1. INTRODUCTION

Although the concepts are similar, the "environmental law" which applies to Department of Defense (DoD) installations and facilities overseas is quite different than the well developed and clearly structured regulatory system which governs our operations in the U. S. In the context of environmental requirements which apply to DoD operations in foreign countries, the tongue-twisting acronyms you've struggled to memorize are replaced by a whole new set.

Environmental requirements for our overseas installations reflect the peculiar balance of sovereignty inherent in the basing of foreign forces within a host nation. These requirements represent a unique synthesis of executive orders, U.S. domestic and host-nation environmental standards, DoD policy, and international agreements. Our obligations are often self-imposed as a matter of policy rather than as a matter of law. However, far from being inconsequential, noncompliance is potentially damaging to our relations with the host-nation. Noncompliance may subject our employees to local criminal sanctions, and in extreme cases could even affect our continued access to the installation. Indeed, the principle of "environmental security,"' as it is applied overseas, espouses sound environmental stewardship as a means to ensure our continued access to installations and facilities vital to U.S. national security.

II THE ORIGIN OF THE SPECIES

Environmental requirements for DoD installations and facilities overseas reflect U.S. domestic law, Presidential Executive Orders, General Accounting Office audits, DoD policy, and international agreements. These divergent sources have shaped and influenced the development of "overseas environmental law. /2/

A. Applicability of U.S. Law

Two categories of U.S. environmental law apply to the operation of DoD installations and facilities overseas. The first category involves laws where application to DoD activities overseas is coincidental to their general application to DoD activities. For example, the asbestos abatement requirements reflected in the, Asbestos School Hazard Abatement Act of 1984 /3/ apply to "any school of any agency of the United States," /4/ including DoD Dependent Schools overseas. Another example is found in the Lead-Based Paint Poisoning Prevention Act of 1971, /5/ which applies to residential dwellings constructed or rehabilitated by the DoD worldwide.

The second category involves laws where the issue of general extraterritorial applicability has been the subject of judicial scrutiny. Generally, the legislation of Congress is presumed to "apply only within the territorial jurisdiction of the United States," unless the "language in the

relevant Act gives [an] indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control. /6/ Such clear expressions are exceptional, however, and two major environmental statutes have been the subject of litigation in which the question of their extraterritorial application was a central issue - the National Environmental Policy Act (NEPA) /7/ and the Endangered Species Act (ESA). /8/

The litigation concerning NEPA arose in Antarctica. The National Science Foundation (NSF) operated the McMurdo Station research facility in Antarctica. Food wastes generated at the facility were burned in an open landfill. The NSF decided to improve its environmental practices in Antarctica, and in early 1991, halted the burning of food waste. The wastes were subsequently stored from February to July 1991, when a delay in the planned delivery of a state-of-the-art incinerator to McMurdo Station compelled the NSF to resume burning in an "interim incinerator." /9/

The Environmental Defense Fund brought an action seeking injunctive relief, alleging that the NSF violated NEPA by failing to prepare an environmental impact statement before going forward with its plans to incinerate food wastes. The district court in *Environmental Defense Fund, Inc. v. Massey /10/* dismissed for lack of subject matter jurisdiction, finding that the statute did not contain the requisite "clear expression of legislative intent through a plain statement of extraterritorial statutory effect." /11/ However, in a case of first impression, /12/ a three-member panel of the D.C. Circuit Court of Appeals concluded otherwise. /13/

Based in large measure on the uniqueness of Antarctica as a continent without a sovereign and the area's consequent treatment as a "global common, " /14/ the circuit court found that since NEPA controls government decision making and imposes no substantive requirements which could be interpreted to govern conduct abroad,/15/ and since the federal decision making process which resulted in the use of an "interim incinerator" at McMurdo Station took place almost exclusively within that country, /16/ the presumption against extraterritoriality did not apply. /17/ Nevertheless, the court was careful to note that its decision did not extend to the possible application of NEPA "to actions in a case involving an actual. foreign sovereign or how other U.S. statutes might apply to Antarctica. /18/ Indeed, the court made a point of limiting the application of its decision to the facts of the case before it. /19/ The administration sought neither rehearing nor appeal of the court's decision, implicitly accepting the applicability of NEPA to federal activities in Antarctica. /20/

The extraterritorial application of the Endangered Species Act (ESA) has also been litigated. The ESA requires the Secretaries of the Interior and Commerce Departments to consult to ensure that any action is not likely to jeopardize the continued existence or habitat of any endangered or threatened

species. In 1979, the Secretaries promulgated a joint regulation limiting this requirement to actions taken "in the United States or upon the high seas. /21/ Several organizations challenged the regulation, asserting that the ESA applied extraterritorially, and in the 1990 case of *Defenders of Wildlife, Friends of Animals v. Lujan, /*22/ the Eighth Circuit Court of Appeals agreed. The three member panel ruled "that Congress intended the consultation obligation [of the ESA] to extend to all [federal] agency actions affecting endangered species, whether within the United States or abroad." /23/ A 1992 plurality opinion /24/ of the U.S. Supreme Court in *Lujan v. Defenders of Wildlife /25/* reversed that decision, but based on lack of standing, not a finding that the ESA does not apply extraterritorially. /26/ As a consequence, the issue of extraterritorial application of the ESA remains something of an open question. Nevertheless, current Interior Department regulations continue to limit the consultation requirement to federal actions "within the United States or on the high, seas. /27/

B. Executive Orders

Presidential interest in environmental protection at federal facilities in the U.S. has been reflected in executive orders (E.O.) dating back to 1948. /28/ However, not until E.O. 12088, signed on 13 October 1978 by President Jimmy Carter, was a similar level of presidential interest shown regarding protection of the environment at federal facilities outside the U.S. /29/ The primary purpose of the order was to subject the pollution control efforts of federal facilities in the U.S. to oversight by federal, state, and local environmental regulators /30/ in order "to ensure Federal compliance." /31/ However, in its short reference to "facilities outside the United States," the order created the first environmental protection requirements for federal facilities overseas. It reads as follows:

> *The head of each Executive agency* that is responsible for the construction or operation of Federal facilities outside the United States *shall ensure* that such construction or operation *complies with the environmental pollution control standards of general applicability* in the host country or jurisdiction. /32/

Although the order mandates compliance with host-nation substantive /33/ "pollution control standards," U.S. federal facilities overseas are bound only by those standards which are generally applied within a particular country to its own industry and military. In addition, the obligation is subject to further implementation ("shall ensure") by "the head of each Executive agency." Implementation by the DoD did not occur for some time, and consequently the order was not uniformly reflected in the operations of DoD installations and facilities overseas.

Seventeen months later, President Carter signed E.O. 12114, /34/ which requires consideration of environmental impacts in federal decision making overseas. Although the order did not export the requirements of NEPA overseas, it "further[ed] the purpose" /35/ of that Act by creating NEPA-like environmental impact analysis requirements applicable to specific categories of "major federal actions ... having significant effects on the environment outside the geographical borders of the United States, its territories and possessions. /36/ Depending on the category of impact, /37/ the order requires decisionmakers to document their consideration of environmental impacts through the use of environmental impact statements, studies, and reviews./38/ Specific actions are exempted /39/ and agencies are authorized to establish additional categorical exclusions. /40/ Like E.O. 12088, this order also

required further implementation by federal agencies, but this time agencies were given eight months to effect that implementation. /41/ Department of Defense implementation occurred on 31 March 1979 through DoD Directive 6050.7. /42/

C. Department of Defense Policy

Department of Defense implementation of the environmental impact analysis requirements in E.O. 12114 came only three months after the executive order was signed. In the context of the need to respect "treaty obligations and the sovereignty of other nations," /43/ DoD Directive 6050.7 defines key terms, establishes review procedures, and describes documentation requirements.

The DoD began to develop a comprehensive compliance policy only after deficiencies in overseas environmental management were highlighted by a General Accounting Office (GAO) audit /44/ and development was mandated by Congress . /45/ The policy was ultimately promulgated in 1991 in DoD Directive 6050.16. /46/ Although this directive did not specifically refer to E.O. 12088 /47/ it had the practical effect of implementing the executive order's mandate to comply with the host country's "pollution control standards of general applicability. /48/ The directive accomplishes that implementation by first creating a minimum environmental protection standard applicable to DOD installations and facilities overseas. /49/ That minimum standard is embodied in an cc overseas environmental baseline guidance document" (OEBGD) /50/ which is based on "generally accepted environmental standards" applicable to DOD facilities in the U.S. /51/ It then designates DoD executive agents (EA) for nations with a significant DOD presence and directs them to prepare "final governing standards" (FGS) /52/ based essentially on a comparison of the OEBGD and host nation environmental standards of general applicability to determine which is more protective of the environment." On "final development and distribution," the FGS becomes the applicable environmental protection standards for DoD installations. The standards reflected in the OEBGD and FGS do not, however, apply to the operations of naval vessels or military aircraft, /55/ operational deployments, /56/ or cleanup or remedial actions ./57/

In *1990,* Congress also directed the DoD to develop an overseas cleanup policy. /58/ The cleanup of past contamination at overseas installations was first addressed in the context of installations and facilities designated for closure. In a December *1993* policy message /59/ the Secretary of Defense prohibited the expenditure of any U.S. funds on cleanup following the decision to return an installation or facility "beyond the minimum necessary to sustain current operations or eliminate known imminent and substantial dangers to 'human health and safety." /60/ The policy deals with environmental contamination within the context of subsequent residual value negotiations. It limits DoD funding of cleanups to those circumstances which impact on operations or which rise to the level of "imminent and substantial danger" to human health. /61/

The publication of a comprehensive DoD policy for overseas 'cleanup took nearly two more years. The *Environmental Remediation Policy for DoD Activities Overseas, /62/* signed on 18 October *1995,* superseded the *1993* message from the Secretary of Defense. The new policy applies "to remediation of environmental contamination on DoD installations or facilities overseas (including DoD activities on host nation installations or facilities) or caused by DoD operations ... that occur within the territory of a nation other than the U.S" /63/ However, the policy does not apply to remediation actions required by the FGS or OEBGD, nor to "operations connected with actual or threatened hostilities, peacekeeping missions or relief operations. /64/

Like its precursor, the *1995* policy is human health risk based and requires commanders to act promptly to remediate "known imminent and substantial endangerments to human health and safety" caused by DoD operations, whether on or off the installation. But unlike its precursor, the *1995* policy provides local commanders wide discretion in determining whether to fund remediation.

Commanders may, in consultation with the EA, conduct cleanups "required to maintain operations," "to protect human health and safety," /65/ or required by international agreement. /66/

D. International Agreements

The conduct of DoD activities in other countries is generally governed by one or more previously concluded agreements between the U.S. and the host nation. By their nature, these documents provide for specific waivers of the privileges and immunities enjoyed by one sovereign vis-a-vis the other as the nations agree to a course of conduct they would otherwise have no duty under international law to do.

An agreement affecting DoD activities may be broad in scope, such as a status of forces agreement (SOFA), or a narrowly drafted basing agreement. Whatever the form, the agreement defines the rights and responsibilities of both nations with regard to the presence of DoD personnel in that country and may reflect agreement by the U.S. to comply with host-nation environmental protection requirements.

Although such agreements have not typically included specific provisions regarding environmental protection or remediation, other obligations are often sufficiently broad enough to encompass some environmental issues. Status of Forces Agreements may include claims and residual value provisions which apply to environmental contamination and, less often, may define our responsibility with regard to host-nation laws. In Japan /67/ and the Republic of Korea /68/ the host-nation has relieved the U.S. of any obligation to restore facilities and areas to their previous condition in exchange for a U.S. waiver of any obligation by the host-nation to pay residual value. The Federal Republic of Germany (Germany) has waived any claims for damage to property it owns and makes available to U.S. Forces as long as the damage is not caused willfully or by gross negligence /69/ and does not arise "from non-fulfillment of the accepted responsibility for repair and maintenance." /70/

The NATO SOFA /71/ obligates U.S. Forces to "respect the law of the receiving State." /72/ The obligation to "respect" the law of the host-nation is not defined in the agreement, but in practice has been interpreted by the sending States (including the U.S.) to require that they avoid actions which would derogate host-nation law - not that the sending States have made themselves subject to, or have agreed to specifically comply with, the laws of the host nation. /73/

The 1993 supplementary agreement (SA) with Germany' goes much further. When effective, the SA will require sending State forces to apply German law to their use of an installation or facility (otherwise referred to as an accommodation), except in "internal matters which have no foreseeable effect on the rights of third parties or on adjoining communities or the general public." /76/ This general obligation is specifically manifested in several SA requirements: to

cooperate with German authorities as they seek permits on our behalf for regulated activities

on the accommodation; /77/ for the use of low pollutant fuels and compliance with emissions limitations; /78/ and in the transportation of hazardous material . /79/ The SA also obligates the force to "bear the costs" of assessing, evaluating, and remediating environmental contamination which it caused. /80/ That obligation could be fulfilled through SOFA claims provisions, residual value off-sets, or directly, subject to "the availability of funds and the fiscal procedures of the Government of the sending State." /81/

II. ENVIRONMENTAL IMPACT ANALYSIS

A. Executive Order 12114

Just before leaving office, President Jimmy Carter signed E.O. 12114, /82/ which directs the consideration of environmental impacts in federal decision-making overseas. Although the order does not export the requirements of NEPA, it "further[s] the purpose /83/ of that Act by creating NEPA-like environmental impact analysis requirements. In addition, it requires "responsible officials of Federal agencies . . . to be informed of pertinent environmental considerations and to take such considerations into account" in authorizing and approving "major Federal actions having significant effects on the environment outside the geographical borders of the United States." /84/

The order encompasses actions which affect the global commons, ecological resources of global importance, /85/ the environment of a non-participating foreign nation or actions which result in a toxic (by U.S. standards) or radioactive emission or effluent to a foreign nation. /86/ An environmental impact analysis is not required, however, when the foreign nation is "participating" or "otherwise involved. /87/ Depending on the category of impact, /88/ the order requires decision-makers to document their consideration of environmental impacts through the use of environmental impact statements, environmental studies, and environmental reviews. /89/ Specific actions are exempted, /90/ and agencies are authorized to establish additional categorical exclusions. /91/

B. DoD Directive 6050.7

The **DOD** implemented E.O. 12114 through DOD Directive 6050.7. /92/ In addition to providing key definitions, /93/ the directive also sets forth documentation requirements for environmental impact statements, environmental studies, or environmental reviews. By definition, the environmental impact analysis requirements of the directive are limited to a federal action /94/ "of considerable importance involving substantial expenditures of time, money, and resources, that affects the environment on a large geographic scale." /95/ The deployment of ships, aircraft, or other mobile military equipment is specifically excepted from the application of the directive. /96/ The directive also provides exemptions for many actions, including:

- Actions that a DOD component determines do not do significant harm to the environment outside the U.S. or to a designated resource of global importance.

- Actions taken by the President. /97/

- Actions taken by or pursuant to the direction of the President or a cabinet officer in the course of armed conflict. /98/

- Actions taken by or pursuant to the direction of the President or a cabinet officer when national security or a national interest is involved. /99/

- The activities of the intelligence components utilized by the Secretary of Defense under E.O. 12036, 43 Fed. Reg. 3674 (1978). /100/

- The decisions and actions of the Office of the Assistant Secretary of Defense (International Security Affairs), the Defense Security Assistance Agency, and the other responsible offices within DoD components with respect to arms transfers to foreign nations. /101/

- Votes and other actions in international conferences and organizations. /102/

- Disaster and emergency relief actions.

- Actions involving export licenses, export permits, or export approvals, other than those relating to nuclear activities. /103/

- Actions relating to nuclear activities and nuclear material, except actions providing to a foreign nation a nuclear production or utilization facility, as defined in the Atomic Energy Act of 1954, as amended, or a nuclear waste management facility.

- Case-by-case exemptions, under emergency or other circumstances, and class exemptions established by the DoD.

- Categorical exclusions established by the DoD. /105/

Major federal actions which significantly harm the environment of the global commons require the completion of an environmental impact statement (EIS). /106/ The "global commons" are geographical areas that are outside the jurisdiction of any nation and include the oceans outside territorial limits and Antarctica, but do not include contiguous zones and fisheries zones of foreign nations. /107/ Although the term EIS is the same as that applied under NEPA, the administrative and procedural requirements under the directive are quite different.

The EIS required under the directive must be "concise and no longer than necessary to permit an informed consideration of the environmental effects of the proposed action on the global commons and the reasonable alternatives." /108/ The statement must include consideration of the purpose and need for the proposed action, the environmental consequences of the proposed action and reasonable alternatives, a succinct description of the affected environment of the global commons, and a comparative analysis of the proposed action and reasonable alternatives. /109/ A draft statement is "made available to the public, in the United

States, for comment." /110/ At least 45 days are allowed for comments. /111/ Although not required, the directive encourages public hearings "in appropriate cases." /112/ Substantive comments received from the public are considered in the preparation of a final statement, which is also made available to the U.S. public. A final decision cannot be made concerning the proposed action until the later of either 90 days after the draft statement has been made available or 30 days after the final statement has been made available. /113/

Far less rigid documentation is required for other major federal actions contemplated by the directive, including those which affect ecological resources of global importance or the environment of a non-participating foreign nation or which provide a toxic or radioactive emission or effluent in a foreign nation. This environmental documentation includes environmental studies (ES) or environmental reviews (ER).

An ES is an analysis of the likely environmental consequences of a major federal action. /114/ It is prepared by the DoD in conjunction with one or more foreign nations or with an international body or organization in which the U.S. is a member or participant. /115/ Because an ES is a cooperative undertaking, it may be best suited for use with respect to proposed federal actions that affect a protected global resource and actions that provide strictly regulated or prohibited products to a foreign nation. /116/ The precise content of a study is flexible due to the sensitivity of obtaining information from foreign governments, the availability of useful and understandable information, and other factors. /117/ Nevertheless, a study will always include a general review of the affected environment, the predicted effect of the proposed action on the environment, significant environmental protection or improvement actions taken by governmental entities with respect to the proposed action, and whether the affected foreign government or international organization made a decision not to take such, environmental mitigation measures. /118/ Subject to limitations regarding confidentiality, foreign relations, and sovereignty, the completed study is generally made available to the Department of State, the Council on Environmental Quality, other interested federal agencies, and, on request, to the U.S. public and interested foreign governments. /119/

The determination of whether a proposed action would do significant harm to a protected environment is normally made in consultation with concerned foreign governments or organizations. /120/ A decision that the proposed action would not result in significant harm is documented in a record which identifies the participating decision makers. /121/ If the decision is to conduct an ES, generally "no action concerning the proposal may be taken that would do significant harm to the environment until the study has been completed and the results considered." /122/ However, distribution of the document is not required prior to taking the action that is the subject of the Study. /123/

An ER is a survey of the important environmental issues involved in a proposed major federal action. /124/ It may be prepared unilaterally by the DoD or in conjunction with another federal agency. /125/ Because it is prepared unilaterally by the U.S., an ER "may be uniquely suitable ... to actions that affect the environment of a nation not involved in the undertaking." /126/ The review must include a description of the proposed action, an identification of the important environmental issues, aspects of the proposed action which ameliorate or minimize the impact on the environment, and any actions taken or planned by a participating foreign government that will affect environmental considerations. /127/ Subject to limitations regarding confidentiality, foreign relations, and sovereignty, the

completed review is generally made available to the Department of State, the Council on Environmental Quality, other interested federal agencies, and, on request, to the U.S. public and interested foreign governments. /128/

Prior to completion of an ER, information is gathered and reviewed to determine whether the proposed action would do significant harm to a protected environment. When a proposed action would not result in significant harm, that decision and the basis for the decision is documented. /129/ If the decision is to conduct an ER, then generally "no action concerning the proposal may be taken that would do significant harm to the environment until the review has been completed." /130/ However, distribution of the document is not required prior to taking the action that is the subject of the review. /131/

C. Overseas Environmental Baseline Guidance Document/ Final Governing Standards

The environmental. impact analysis requirements of DoD Directive 6050.7 are virtually duplicated in chapter 17 of the OEBGD. Because those requirements are procedural /132/ and not substantive, chapter 17 is the only portion of the OEBGD which does not consider host-nation laws in the drafting of the FGS. As a result, all FGSs reflect the same environmental impact analysis requirements.

The FGSs define and generally identify the actions which require an environmental impact analysis and the appropriate documentation. However, chapter 17 is not a complete restatement of DoD Directive 6050.7. That directive should be referred to for detailed guidance regarding overseas environmental impact analysis requirements.

III. COMPLIANCE

On 20 November 1991, the DoD effectively implemented the requirement of E.O. 12088 that the heads of each executive agency comply with host nation "environmental pollution control standards of general applicability" in the "construction and operation of federal facilities" overseas. /133/ Department of :Defense Directive 6050.16, *DoD Policy for Establishing and Implementing Environmental Standards at Overseas Installations,* established implementation "guidance, and, standards to ensure environmental protection" /134/ in "the operations of the DoD components at installations and facilities /135/ outside the territory of the United States." /136/ The directive mandates the publication of a baseline guidance document, /137/ provides for the identification of an environmental executive agent (EA) for "each foreign country where DoD operations are conducted at installations or facilities," /138/ and requires EAs to issue FGS for each country. /139/

A. Final Governing Standards

One year later, in October 1992, the OEBGD was published. It contains nineteen chapters oriented toward compliance. It is not, however, a compilation of all U.S. laws and regulations in those areas. Rather, it provides a baseline - a minimum standard of environmental protection to be observed at DoD installations and facilities overseas. Like the DoD directive it is based on, the OEBGD does not apply to the operation of U.S. naval vessels or U.S. military aircraft, operational and training deployments, facilities or activities covered under the Naval Nuclear

Propulsion Program, or to the determination or conduct of remedial or cleanup actions to correct environmental problems caused by the DoD's past activities. /140/

Host-nation standards which are "adequately defined and generally in effect or enforced against host-government and private sector activities" /141/ are evaluated by EAs, along with the OEBGD baseline standards, to determine "the governing standard for a particular environmental medium or program. /142/ The standard which is the most protective of the environment becomes the final governing standard. /143/

The published FGS are "the sole compliance standards at [DoD] installations in foreign countires." /144/ In countries where no FGS have been published, the OEBGD provides the compliance standards for the installation or facility. /145/ The standards apply to the "operations of the DoD components at installations or facilities" overseas, and the heads of the DoD components are obligated to ensure compliance, /146/ This implies that operations controlled by the, DoD component at its overseas installations or facilities, but which have been contracted out (e.g., base maintenance or hazardous waste disposal contracts), are also subject to the FGS. In addition, at joint-use (with host-nation or multi-national forces) or leased installations or facilities, the standards apply where the instrumentality to be regulated by the FGS is controlled, either directly or through contract, by the DoD component. /147/ Standards which are more protective than those reflected in the FGS may not be adopted by a component unless concurred in by the EA. /148/

The EA is the ultimate "regulatory" authority for DoD components, installations, and facilities in the host-nation. In addition to responsibility for initial publication of the FSG, the EA must revalidate it annually, /149/ interpret its provisions as required, and update as necessary. The need to update the FGS may result from significant changes in either the OEBGD or host-nation law. However, the EA is not obligated to update the FGS every time host-nation law changes. The EA also acts on requests for waivers to the FGS. /150/ Waivers to FGS may only be granted if compliance would seriously impair operations, adversely affect relations with the host nation, or require substantial expenditure of funds not available for such purpose. /151/

A request for a waiver is made by a DoD component to the EA. If a standard is derived from the OEBGD, the EA has independent waiver authority./152/ If a standard is derived from host-nation law, the EA must consult with the responsible host-nation authority through the appropriate U.S. diplomatic mission before a waiver may be granted./153/ Finally, it is important to note that a waiver may not be granted if the standard is derived from a treaty obligation. /154/ Since the directive clearly contemplates compliance as its desired result, waivers should be rare. A DoD installation or facility should be: 1) in compliance with the FGS; 2) out of compliance, but working toward compliance (including planning, programming, and budgeting for requirements); or 3) authorized by a waiver to be out of compliance with the FGS. /155/ Under emergency circumstances, the unified commander with geographic responsibility may authorize a waiver if "essential to the accomplishment of an operational mission directed by the National Command Authorities." /156/

The FGS is self-enforced. Military departments and defense agencies are required to conduct environmental compliance audits of their overseas installations and facilities to ensure that compliance with FGS is achieved and maintained. /157/ The compliance audits can become an invaluable tool, not only to identify non-compliant activities, but also to assist in planning, programming, and budgeting for projects required to achieve compliance.

B. Operational Deployments

The DoD overseas compliance policies reflected in the OEBGD and FGS do not apply to operational deployments, including peace-keeping missions, relief operations, and actual or threatened hostilities, /158/ Nevertheless, such operations are subject to environmental requirements which originate in executive orders, U.S. law, international agreements, and policy. These requirements are defined in an operations plan (OPLAN). For example, the environmental annex to the U.S. European Command's OPLAN /159/ for Operation Joint Endeavor, /160/ synthesized environmental requirements found in status of forces agreements, DoD policy directives and manuals, joint staff publications, and E.O. 12114. /161/

Operation plans must contain an environmental annex /162/, to provide guidance to protect the health and welfare of U.S. personnel and the environment during the conduct of operations resulting from implementation of [the] plan." /163/ The annex for Operation Joint Endeavor is comprehensive and balanced. It begins with major assumptions /164/ and includes environmental protection responsibilities for service components, the Defense Logistics Agency, and deployed commanders, /165/ as well as a concept of operations . /166/ It also includes specific operational requirements in the areas of drinking water, /167/ wastewater, /168/ solid waste management, /169/ medical waste management, /170/ hazardous materials management, /171/ hazardous waste management, /172/ *Spill* prevention and control, /173/ NBC waste management, /174/ natural resources, /175/ and historic and cultural resources. /176/

However, the annex's environmental protection requirements are "balanced against the requirements of force protection and military necessity for mission accomplishment." /177/ In meeting the requirements under the annex, the deployed force is required to apply "the best practical and feasible environmental engineering and sanitary practices for the protection of human health and the environment," tempered by the operational constraints "of existing conditions, force protection, and mission accomplishment." /178/ To ensure uniformity among the participating components, the annex also identifies an environmental executive agent, /179/ who will be primarily responsible for ensuring compliance with the OPLAN's requirements and for developing more detailed guidance and standards if necessary. /180/

C. Host-Nation Environmental Law

Although the active duty members of the U.S. military service, the civilian employees of these services, and their dependents are subject to the law of the host-nation, /181/ the U.S. has generally been very conservative in ceding any degree of its sovereignty in agreements regarding the status of its forces in foreign countries. /182/ We nevertheless comply with host-nation environmental requirements incidental to many of our operations.

Pursuant to agreements with some host-nations, major construction at DoD installations and facilities overseas is often accomplished pursuant to "indirect contracting" procedures." /183/ Under those procedures, a DoD component will program the project and may prepare a statement of work and a project design. That information', with a funding commitment, is provided to host-nation officials, who complete the design and prepare, advertise, and administer the construction contract in the host nation's name. The contract provisions and specifications, as well as contractor performance, will comply with host-nation "legal provisions and administrative regulations in force. /184/ Consequently, a new wastewater treatment

facility, heating plant, or similar structure would be designed and constructed with host-nation environmental protection requirements in mind.

With construction projects, direct contracting reaches essentially the same result. A DoD component designs the project and drafts the specifications and statement of work in accordance with the applicable FGS. A local bidder must be able to obtain the necessary permits and comply with host-nation law, including environmental law. As a result, DoD component designers must ensure that the project does not require a potential offeror to violate host-nation law during the construction of the facility. Furthermore, designers must ensure that when the DoD component operates the facility, it can do so in a conforming manner.

Similarly, service contractors are also obligated to comply with host-nation environmental law. A contractor who re-paints buildings must apply the paint and dispose of waste paint in accordance with both FGS and local requirements,. and those requirements will be reflected in both the contractor's performance and in the contract price. The contractor who receives hazardous waste for disposal must transport, store, and dispose of it in accordance with local requirements. Indeed, the 1989 Basel Convention /185/ imposes significant restrictions on the transboundary movement of hazardous waste for disposal. it has substantially impacted the waste disposal industry; including the disposal of hazardous waste generated by DoD's overseas activities -- both at installations and during operational deployments.

The Basel Convention encourages the disposal of wastes in the nation of generation in order to improve and achieve environmentally sound management of hazardous and other wastes. /186/ Party states may, under limited circumstances, send to or receive hazardous waste for disposal from other Party states with pre-notification and approval, but are prohibited from sending to or receiving hazardous waste from non--Parties /187/ absent "bilateral, multilateral, or regional agreements or arrangements" which "do not derogate from the environmentally sound management of hazardous wastes" required by the Convention. /188/ The Convention requires Parties to enact criminal sanctions and to punish violations of its provisions. /189/

As of January 1996, 97 nations have ratified the convention. /190/ It has been entered into force by 94 of these nations. Although the U.S. was one of the original signatories /191/ and, as such, is obligated not to take any action which would derogate from the convention's purposes, the U.S. has not ratified it. /192/ As a result, the U.S. is not a party to, and does not comply with, the convention.

Nevertheless, recognizing the risk of liability to our employees and the potential for an international incident, the convention's discouragement of the transboundary shipment of hazardous waste for disposal is embodied in 0EBGD/FGS restrictions applicable to hazardous waste generated on DoD's overseas installations and facilities. /193/ Recent OPLANs have contained similar restrictions on the disposal of hazardous waste I generated during contingency operations. /194/ Disposal in an environmentally-sound manner within the host nation is preferred. If this is not possible, the waste may be retrograded (returned) to the U.S. or, with the approval of the DoD, transported to another country for disposal. /195/

Since the U.S. is not a party to the Basel Convention and most of DoD's overseas installations and facilities are located in countries which are, retrograde usually involves the transboundary shipment of hazardous waste from within the geographical borders of a Party to a non-Party, which is prohibited by the convention

absent a separate "agreement or arrangement." However, the U.S. has espoused the position /196/ that the retrograde of waste generated or managed exclusively by a DoD installation or facility overseas, accomplished solely aboard sovereign immune vessels or aircraft, is not subject to the Convention. /197/ Alternatively, the U.S. argues that existing SOFAs, basing agreements, and other implementing arrangements constitute "agreements or arrangements" under Article 11 of the convention which allow the retrograde of waste to the U.S. /198/

The transport of DoD generated hazardous waste to another country for disposal clearly violates the Basel Convention. Absent an "agreement or arrangement" which specifically allows the import of hazardous waste for disposal, the transport of the waste by a DoD component to a third country aboard a military aircraft, vessel, vehicle, or a contract carrier, would violate the Convention's restrictions on transboundary shipment, and potentially invoke criminal sanctions against those involved. However, if the transport of hazardous waste to a third country is arranged by a contractor who accepted the waste from the component or DRMO for disposal, /199/ the contractor is obligated to comply with the convention's pre-notification and other requirements reflected in host-nation law prior to the transboundary shipment.

Although the U.S. for the most part has not agreed to seek or comply with host-nation environmental permits, /200/ practical considerations encourage our compliance with their provisions. Installations and facilities made available for our use are usually either the property of host-nation federal authorities, or those authorities have obtained a leasehold interest in the property. In either case, a host-nation agency, often the ministry of defense or the ministry of finance, acts as our landlord and secures, in its own name, any permits required by host-nation law. Since the host-nation landlord agency and its employees are required to comply with host-nation laws, they are vulnerable to any civil or criminal sanctions associated with noncompliance with permits issued in its name. Although the DoD installation or facility would not directly feel the impact of such sanctions, we are motivated to comport our operations to the requirements of the permit in order to maintain good relations and to avoid losing access to the installation or facility as a consequence of the sanctions imposed on our landlord agency or its employees.

D. The Consequences of Noncompliance

The FGS carries no specific sanctions, /201/ nor are they mandated by international agreement with the host-nation. The FGS simply reflect DoD policy. Nevertheless, failure to comply with these environmental protection standards is not without consequence.

When properly communicated through training to the individual whose actions are regulated by the FGS, the standards create a duty to perform. A dereliction of that duty by military personnel could form the basis for disciplinary action under Article 92 of the Uniform Code of Military Justice. 202 Similarly, a breach of that duty by DOD civilian personnel could form the basis for adverse personnel action. /203/

A violation of host-nation environmental requirements could also subject the offender to criminal sanctions imposed by local authorities. Although the U.S. could avoid locally-imposed sanctions for violations of host-nation environmental protection laws by asserting its sovereignty, individual members of the force, the civilian component, and local national employees are subject to local law. /204/ Status of Forces Agreements provide some protection to members of the force, generally granting the U.S. primary jurisdiction /205/ over all persons subject to its "military law" /206/ for

"offenses arising out of any act or omission done in the performance of official duty, /207/ However, that protection does not extend to the civilian component /208/ or local national employees, making them particularly vulnerable to prosecution by local authorities /209/ for violation of environmental protection requirements. /210/ Recognizing that vulnerability, policies have been established which direct that military members sign environmental documentation in an effort to insulate civilian employees from potential liability associated with the performance of their duties. /211/

Of course, the ultimate consequence for noncompliance would be to jeopardize our continued access to an accommodation (installation or facility). Our use of accommodations is, of course, at the pleasure of the host government. Concern that the DoD is environmentally irresponsible could lead a host-nation to conclude that the benefits of our continued presence are outweighed by our destructive environmental practices.

IV. CLEANUP

Like other environmental protection requirements, clean-up rules for DoD installations and facilities overseas have a mixed lineage. They reflect a combination of DoD policy, obligations under international agreements, and the limited remediation provisions of the compliance-oriented FGS. In the absence of FGS, the OEBGD applies. The levels of cleanup, funding, and even the obligation to conduct remediation actions, vary significantly depending on the basis for cleanup.

A. Final Governing Standards

Generally, FGS "do not apply to remedial or cleanup actions to correct environmental problems caused by the DoD's past activities. /212/ Cleanup of past activities is conducted "in accordance with applicable international agreements, Status of Forces Agreements, and U.S. government policy." /213/

Nevertheless, the OEBGD does provide for cleanup in two circumstances spill response and leaking underground storage tanks.

> The obligation to respond to spills specifically includes uncontained releases /214/ of petroleum, oil, and lubricants; /215/ polychlorinated biphenyls; /216/ and /217/ hazardous substances. In addition to containment and dispersal, DoD components are also required to cleanup spills. /218/ The obligation to remediate applies regardless of whether the spill occurs on or off an installation or facility, /219/ and would, for example, include spills off an installation resulting from accidents involving an Army fuel truck or an Air Force aircraft. /220/
>
> The cleanup of spills is performed by the DoD component in "cooperati[ion] with national, regional and local government agencies." /221/ Although the FGS provides no numerical standard to determine appropriate levels for the remediation of a spill, it requires cleanups to be performed to the risk-based level of "ensur[ing] that public health and welfare are adequately protected. Since the cleanup is conducted in cooperation with local authorities, that risk-based cleanup level would necessarily be determined in coordination with those authorities. However, absent some other international legal obligation or political imperative when local authorities demand a more protective level of cleanup than we

believe is needed to adequately protect health and welfare, we are under no obligation to comply. Rather, we would invite the local authorities to either perform or fund the additional cleanup they desire, use SOFA claims provisions, or identify the contamination as an off-set to residual value.

The FGS also mandates the remediation of "soil and groundwater contaminated by [a] release" from a leaking underground storage tank (UST). /223/ However, while the obligation to remediate is clearly stated, no guidance is offered by the FGS regarding the appropriate cleanup standard to apply. Rather, the FGS specifically defers to international agreements, SOFAs, and other DoD policy to "determin[e the] cleanup actions [required] to correct the environmental problems, /224/ caused by the "past activity" of leaking USTs.

Those cleanup actions would include both the specific technology to be employed and the cleanup standards to be applied. We would therefore look to applicable international agreements (i.e., SOFAs) and DoD policy to determine the cleanup standards to be applied to remediation of "soil and groundwater contaminated by the release" from a UST.

Again, absent some other international legal obligation or political imperative, if the local authorities demand a more protective level of cleanup than is necessary under DoD policy, we are under no obligation to comply. Rather, we would invite the local authorities to either perform or fund the additional cleanup they desire, use applicable SOFA claims provisions, or identify the contamination as an off-set to residual value.

Finally, it is important to note that hazardous or solid waste generated as a result of any remediation action, whether based on the FGS, DoD policy, or international agreement, is subject to the storage and disposal requirements of the FGS.

B. Department of Defense Policy

The first overseas DoD cleanup policy, published in December 1993, only applied to closing bases. /225/ That policy allowed cleanup of environmental contamination under two circumstances. Cleanup was mandated if the contamination posed a "known imminent and substantial danger to human health and safety," and was permitted if necessary to "sustain current operations." /226/ in either case, the component was required to consult with the environmental executive agent before implementing any remediation. /227/ Additional contamination beyond that which was subject to remediation under the policy was documented, and the information provided to the host-nation upon return of the site. /228/ The policy was clearly designed to both limit the expenditure of funds for cleanup at installations and facilities designated for closure /229/ and to ensure consistency of remediation decisions among components in a host-nation.

On 18 October 1995, the DoD published a comprehensive environmental remediation policy for all DoD installations and facilities /230/ overseas. /231/ The new policy does not apply to cleanups under the FGS (spill responses or remediation of leaking USTs) or to operations connected with actual or threatened hostilities, peacekeeping missions, or relief operations. /232/ The policy provides for cleanup of contamination "caused by DoD operations" on or off an installation or facility, and

applies to open installations as well as installations designated for return. /233/ Like the former policy for closing installations, it mandates prompt cleanup action if the contamination poses a "known imminent and substantial endangerment to human health and safety," and permits cleanup if necessary to "maintain operations." Additionally, the new policy permits cleanup to "protect human health and safety" or if required by international agreement.

Notwithstanding its similarity to standards used in U.S. environmental law, /234/ policy drafters were purposefully ambiguous in not defining the phrase "known imminent and substantial endangerment to human health and safety" to allow decisionmakers maximum flexibility. However, by its terms, this basis for cleanup contemplates "known" contamination, reflecting a policy aversion to excessive and expensive investigations or site studies. At the same time, it does not limit the appropriate study of a known site to properly characterize it for purposes of designing a remedy. /235/

In addition, the new DoD policy relating to permissive cleanups does not expand upon the language, "to protect human health and safety." Since the remediation of almost any contamination which poses some risk to human health and safety could be justified under its rubric, it provides a very broad basis for cleanup. However, unlike the other three bases for cleanup, it is only available to justify the cleanup on a DoD installation or facility. Although not required by the policy, it may be prudent to determine cleanup standards in consultation with local authorities in order to avoid adverse relations with the host nation and future demands for additional cleanup. Nevertheless, absent some other international legal obligation or political imperative, if the local authorities demand a more protective level of cleanup than required under the DoD policy, we are under no obligation to comply. Rather, we would invite the local authorities to either perform or fund additional cleanup they desire, use SOFA claims provisions to recoup remediation costs, or identify the contamination as an off-set to residual value.

The term "maintain operations" also provides a very broad basis for cleanup. Undefined by the policy, it could be used to justify cleanup under circumstances ranging from remediation incident to a construction project, to remediation demanded by host-nation authorities because the failure to do so would impact future access to the installation or facility. Cleanup standards would be determined based on the circumstances of the remediation and would range from the minimum necessary to complete the construction project, /236/ to a robust cleanup where significant human exposure to the site is anticipated. /237/

The new policy also authorizes, somewhat unnecessarily, cleanups that the U.S. is obligated to perform by international agreement. /238/

Implicit in every cleanup conducted pursuant to the policy is a measure of remediation - a determination of "how clean is clean" - based on the level of remediation required to achieve the goals of the action. Contamination is abated, not removed, and remediation may range from institutional responses, such as restricting access, to permanent remedies. /239/ The cleanup is complete when the contamination: no longer poses an imminent and substantial endangerment to human health and safety; no longer poses a threat to human health and safety; does not impair operations; or has been remediated as required by international agreement.

The in-theater commander of the service component or defense agency is the decision authority for all cleanups under the Policy, /240/ but the decision as to

whether a contaminated site poses an "imminent and substantial endangerment" may be delegated to the installation commander. /241/ In all cases, however, the decision authority must first consult with the EA before any cleanup pursuant to the policy is begun.

The EA is empowered by the policy to define the extent of remediation at contaminated sites /242/ in order to maintain consistency of remediation efforts by the services within a host-nation. This effectively gives the EA veto power over component remediation decisions which are too expansive or too limited when compared to the EA's country-specific remediation policy. /243/ Appeal to the unified commander and the Deputy Under Secretary of Defense (Environmental Security) is provided for in the event of a dispute between the component and the EA. /244/ The EA also establishes procedures for negotiating with the host nation and for furnishing documentation of contamination /245/ on DoD installations or facilities to the host-nation. /246/

Finally, the policy requires components and defense agencies to collect and maintain existing information, and permits them to develop additional information, regarding environmental contamination at DoD installations and facilities. /247/ The information is maintained until the location is returned to the host nation and all claims or other issues relating to contamination are finally resolved. /248/ Subject to security requirements, the information is provided to host-nation authorities, if requested, upon return of the installation or facility. /249/

The new DoD policy gives decisionmakers wide flexibility and discretion in making remediation decisions, constrained by the need for consistency between the services in a given host-nation or theater. However, the policy does not provide any additional funds for remediation, and cleanup projects would compete for scarce operations and maintenance funds. Nor does the policy alter our obligations under international agreements, including SOFA claims provisions.

C. International Agreements

Our SOFA and other agreements with host-nations are generally silent regarding any obligation to remediate environmental contamination caused by DoD operations. /250/ Indeed, our agreements with some nations where DoD installations and facilities are located relieve the U.S. of any obligation to restore property provided for its use to its original condition upon return. /251/ Other agreements include a waiver of claims by the host-nation, under certain circumstances, for damage to host-nation property made available for the use of the DoD. /252/ When the 1993 Revisions to the German Supplementary Agreement (SA) becomes effective, /253/ the U.S. will, for the first time, become obligated to "bear costs arising in connection with the assessment, evaluation and remedying of hazardous substance contamination caused by it and that exceeds then-applicable legal standards." /254/ Nevertheless, that obligation is specifically subject to SOFA claims provisions, residual value, and "the availability of funds." /255/

Claims provisions included in our SOFAs generally obligate the U.S. to compensate third parties who are damaged as a result of the acts or omissions of members of our forces or civilian component done in the performance of official duty. /256/ Claims are received and adjudicated by the host-nation in accordance with its local law, and damages are determined with reference to any legally mandated maximum contaminate levels. If approved, the U.S. is normally obligated

to contribute 75% of the amount awarded. The host-nation pays the remaining 25%. "Third parties" are generally described in these agreements as parties other than the "contracting parties" /257/ - the national authorities who are parties to the agreement - and could include local governmental, quasi-governmental, or private water authorities in whose district groundwater was contaminated by our operations.

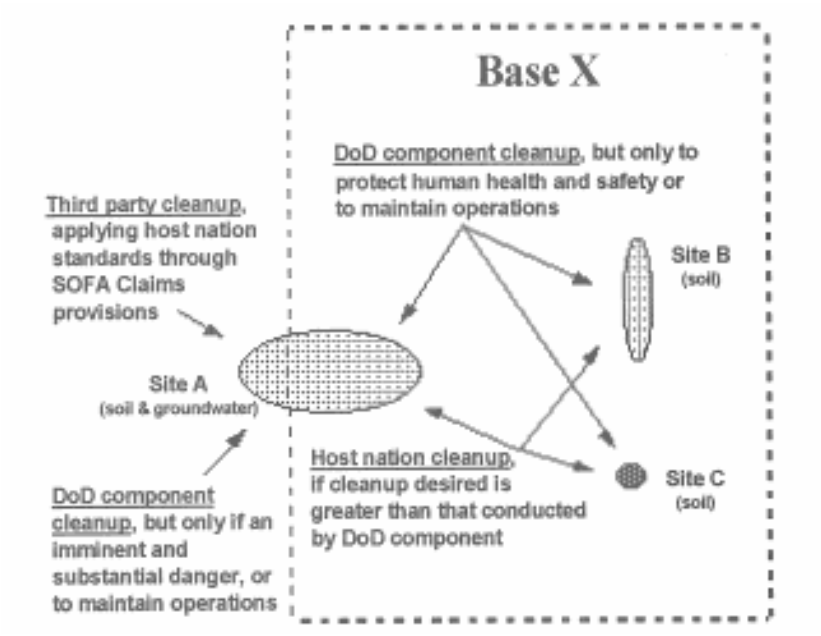
Unless a DoD component determines, in consultation with the EA, that it would be more fiscally prudent for the DoD to conduct and fund 100% a cleanup ourselves pursuant to DoD policy (because of spreading contamination and consequent projected increase in remediation costs), third parties should be referred to the SOFA claims provisions. Cleanup standards for contamination which are the subject of a SOFA claim are generally determined both through reference to any applicable host-nation law, and as a result of negotiation with the claimant and appropriate host-nation regulator by the host-nation claims commission and the DoD claims authority.

D. Application of Cleanup Requirements: A Hypothetical

Assessing our cleanup responsibility for a DoD contaminated site overseas requires the application of the requirements reflected in the FGS (for spills), DoD policy (for past activities), and applicable international agreements. The cleanup decision also requires a realistic assessment of political imperatives and their implications for our continued access to the installation or facility. Depending on the circumstances, that assessment may prove the most important consideration in making the cleanup decision. The following hypothetical involving cleanup requirements is presented in an apolitical vacuum, without benefit of such an assessment. It also assumes the lack of any remediation obligation under applicable international agreements.

Assume there's been soil contamination on a DoD installation or facility overseas at site B or C which are located on the base proper. Further assume it is 100% funded by the component in consultation with the EA. We also assume the contamination poses an imminent and substantial endangerment to human health or safety, or remediation is required to maintain current operations or to protect human health or safety. If the host-nation desires a level of cleanup above the level which is required or authorized by DoD policy, the host-nation authority should either be invited to bear the costs of the additional cleanup, permitted access to the site to conduct additional cleanup,

or be expected to identify the contamination as an off-set to residual value when the installation or facility is



Next, assume that on-base groundwater contamination has occurred at site A. It represents damage to a third party under the SOFA (typically a local water authority or private water company). The component, in consultation with the EA, must conduct cleanup if the contamination poses an imminent and substantial endangerment to human health and safety. If the contamination does not pose an imminent and substantial danger, the component may, in consultation with the EA, choose to either conduct a cleanup required to protect human health and safety or to maintain operations, or to refer the third party to the SOFA's claims provisions. As a claim, the DoD would bear a 75% share of the costs awarded to the claimant by the host-nation claims commission.

Finally, assume there has been soil or groundwater contamination off a DoD installation or facility (site A, off-base). This contamination must be remediated by the component, in consultation with the EA, if the contamination poses an imminent and substantial danger to human health and safety. Like an on-base site, if the contamination does not pose an imminent and substantial danger, the component may, in consultation with the EA, choose to conduct cleanup necessary to maintain operations. If the host-nation desires a level of cleanup above the level which is required, or authorized, by DoD policy, the host-nation authority should be invited to bear the costs of the additional cleanup. If remediation pursuant to DoD policy is not required or necessary, and the contamination represents damage to a third party under the SOFA, the third party should be referred to the SOFA claims provisions.

V. ON THE HORIZON

Looking toward the horizon is always a risky undertaking, but it is important to look beyond the environmental requirements of the here and now to see what may lie ahead for DoD installations and facilities overseas.

Since early 1993, consideration has been given to the possible modification of E.O. 12114 to apply NEPA-like environmental impact analysis requirements to major federal actions overseas. /259/ In an effort to escape the potentially onerous outcome of such a consequence, the DoD will expand the environmental impact analysis requirements of the current executive order to effectively eliminate the "participating nation" exception. Major federal actions involving a participating nation, which would heretofore have been exempt from the requirements of DoD Dir. 6050.7, /260/ will be subject to the same environmental impact analysis requirements as major federal actions not involving a participating nation.

The generally self-imposed environmental protection obligations at DoD installations and facilities overseas reflect a, commitment to provide, subject to funding constraints, our personnel and the host-nation environment with a level of protection equivalent to that afforded by U.S. standards. The FGS, as derived from the baseline standards of the OEBGD, embodies that policy.

The update of the OEBGD, scheduled for completion in late 1996, will precipitate a review of every FGS to determine if modification is necessary to comport with the changes made in the baseline standards. /261/ While the changes occasioned by this update promise to be disruptive to installations and facilities where the internalization of FGS is relatively new, it will not be the last such experience. Proposed changes to DoD Dir. 6050.16 would not alter the current requirement to revalidate FGS "on a periodic basis." /262/ but would add a biennial review of the OEBGD.

The process of recurrent review and update of OEBGD and FGS is a resource-intensive, and perpetual, effort to comport our operations with the substantive environmental protection requirements of host-nation law, where those requirements are more protective of the environment than the OEBGD's baseline standards. Yet because those reviews are not on-going, our governing standards will never reflect the current state or sophistication of host-nation environmental protection requirements. Indeed, as currently applied, the policy effectively misses installations and facilities located in host-nations where DoD's presence is too small to justify the formulation of FGS. /263/

Environmental protection in many nations has progressed dramatically in the last decade. Legislatively mandated standards in such fundamental areas as air, drinking water, hazardous materials, hazardous waste, and wastewater, as well as protections for natural and cultural resources, are becoming more and more common. As nations hosting DoD forces become increasingly sophisticated in their environmental protection requirements, and the disparity between those requirements and baseline U.S. environmental protection standards diminishes, the justification for FGS is effectively eroded.

As host nations generally adopt standards as protective as the OEBGD baseline, the natural evolution of environmental protection requirements at DoD installations and facilities overseas will be to comply, as a matter of policy, with the host-nation's substantive "pollution control standards of general applicability. /264/ Executive agents will be authorized to compare the OEBGD /265/. as a whole system of compliance with the host-nation's regulatory scheme for environmental protection, evaluate the host-nation scheme in the national context in which developed (not strictly in terms of a quantitative comparison of numerical values), and defer to the host-nation's system if it is as protective of the environment as the OEBGD. Compliance at installations and facilities will be achieved by direct reference to the

substantive requirements of host-nation law, not through application of derivative FGS generated at great expense by EAs. While the broad ceding of sovereignty such as that reflected in the 1993 Revisions to the German Supplementary Agreement /266/ may be duplicated in other countries, our self-imposed efforts to practice good environmental stewardship - as defined by host-nation law - may avoid the perceived need for such extreme measures.

The restrictions on transboundary movement of hazardous waste reflected in the 1989 Basel Convention have been adopted by 97 of the world's 185 nations. Those restrictions have routinely created vexing obstacles to the disposal of hazardous waste generated during contingency operations. The obstacles have been overcome, and waste appropriately disposed of, but generally not without some difficulty and strained interpretation of existing agreements. Such difficulties could be avoided through the conclusion of an "agreement or arrangement" with the host-nation under Article I I of the Convention. /267/

As the U.S. becomes increasingly involved in contingency operations worldwide, and as those operations require the conduct of operations in countries which are parties to the Basel Convention, we will come to include hazardous waste shipment and disposal considerations in our initial basing or status of forces negotiations in order to explicitly conclude an Article II agreement or arrangement.

Department of Defense policy regarding the cleanup of contaminated sites at both open and closed installations and facilities overseas has the potential to generate significant controversy in the future. As host-nations become more environmentally aware and more sensitive to contamination of their soil and groundwater, contaminated sites on our installations will receive more public and political interest.

Contamination on installations which are returned to a host-nation are potentially the greatest source for controversy. In Germany alone, the DoD components have returned nearly 650 installations or facilities since 1990. /268/ The waiver of claims provisions in SOFAs often leave host-nations with no option but to treat the cost of cleanup as an off-set to residual value. However, depending on the number of such sites in a given country and the cleanup standards which the host-nation seeks to apply to the sites, those off-sets could far out-strip the residual value of improvements. The host-nation is thus left to bear a substantial remediation expense before the property may be reused.

Nevertheless, given the practical realities of fiscal constraints on the availability of funds, significant changes in current policy are not likely. The claims provisions of SOFA agreements will likely be used more often by affected third parties, generally local water authorities. Cleanups will be performed at open installations by the DoD components, motivated in no small measure by the political imperatives existing at the installation or facility. The cleanup will be done in accordance with reasonable risk-based standards which are most often determined in negotiation with host-nation authorities in an effort to ensure that human health is adequately protected.

The DoD has proclaimed its leadership role in environmental compliance and protection. That philosophy is fundamental, and the continued focus on environmental stewardship by DoD components at their installations and facilities worldwide will ensure the access our country needs to accomplishment its national security objectives.

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1. Coined by Mr. Gary Vest, Principal Assistant Deputy Under Secretary of Defense (Environmental Security), the term "environmental security" means to "strengthen national security by integrating environmental, safety, and health considerations into defense policies." Address by Mr. Vest, entitled Environmental Security, to Joint Environmental Conference, Washington, D.C. (27 Sept. 1994).

2. This term describes that body of environmental requirements, whether self-imposed or imposed as a matter of domestic or international law, applicable to DoD installations and facilities overseas.

3. 20 U.S.C.A. Secs. 4011-22 (West 1990 & Supp. 1996).

4. Id. at Sec. 4020(5)(B).

5. 42 U.S.C.A. Secs. 4821-46 (West 1995).

6. E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991), citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949).
7. 42 U.S.C.A. Secs. 4321-70d (West 1994 & Supp. 1996).

8. 16 U.S.C.A. Secs. 1531-43 (West 1985 & Supp. 1996).

9. Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528, 530 (D.C. Cir. 1993).

10. 772F. Supp. 1296 (D.D.C. 1991).

11. Id. at 1297, citing E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244 (1991).

12. The D.C. Circuit Court of Appeals once before considered the application of NEPA overseas, but did not decide the issue. Sierra Club v. Adams, 578 F.2d 389, 392 (D.C. Cir. 1978).

13. 986 F.2d at 528.

14. Id. at 529, citing Beattie v. United States, 756 F.2d 91, 99 (D.C. Cir. 1984).

15. 986 F.2d at 533.

16. Id. at 532.

17. Id. at 533.

18. Id. at 536.

19. Id.

20. The broader issue of the potential application of NEPA-like requirements to other federal actions overseas became the subject of Presidential Review Directive 17. That on-going review has not resulted to date in any change in existing policy regarding the environmental impact analysis process for major federal actions overseas. This policy is found in E.O. 12114, Environmental Effects Abroad of Major Federal Actions (Jan. 4, 1979).

21. 50 C.F.R. Sec. 402.01 (1986).

22. 911 F.2d 1 17 (8th Cir. 1990).

23. Id. at 125.

24. Justice Scalia delivered that portion of the opinion which concluded that the respondents lacked the standing element of "actual or imminent" injury. Justices Rehnquist, White, and
Thomas joined his opinion. Justices Kennedy and Souter concurred.

25. 504 U.S. 555 (1992).

26. Id. at 564, 568.

27. 50 C.F.R. Sec. 402.01 (1995).

28. See, e.g., Exec. Order (E.O.) 11752, Prevention, Control, and Abatement of Environmental Pollution at Federal Facilities (Dec. 19, 1973); E.O. 11507, Prevention, Control, and Abatement of Air and Water Pollution at Federal Facilities (Feb. 5, 1970); E.O. 11288, Prevention, Control, and Abatement of Water Pollution by Federal Activities (July 7, 1966); E.O. 11282, Prevention, Control, and Abatement of Air Pollution by Federal Activities (May 28, 1966); E.O. 11258, Prevention, Control, and Abatement of Water Pollution by Federal Activities (Nov. 19, 1965); E.O. 10779, Directing Federal Agencies to Cooperate with State and Local Authorities in Preventing Pollution of the Atmosphere (Aug. 22, 1958); and E.O. 10014, Directing Federal Agencies to Cooperate with State and Local Authorities in Preventing Pollution of Surface and Underground Waters (Nov. 3, 1948).

29. E.O. 12088 (13 Oct. 1978). Paragraph 1-1 of the order obligates the head of each executive agency to ensure its facilities and activities comply with the same substantive, procedural, and other pollution control requirements that would apply to a private person.

30. E.O. 12088 at paras. 1-2 and 1-3.

31. Id. at preamble.

32. Id. at para. 1-801 (emphasis added).

33. Paragraph 1-103 of the order defines "applicable pollution control standards [as] the same substantive, procedural, and other requirements that would apply to a private person." However, both the definition and the term are used in the order to describe the environmental compliance obligations of federal facilities located in the United States. Although similar, the clause "environmental pollution control standards of general applicability" is only used to describe the environmental compliance obligations of federal facilities outside the United States. While the former phrase specifically includes, by definition, procedural as well as substantive requirements, the latter is limited by its terms (pollution control standards of general applicability) and general principles of sovereignty to compliance with substantive, not procedural, requirements.

34. E.O. 12114, Environmental Effects Abroad of Major Federal Actions (Jan. 4, 1979); 44 Fed. Reg. 1957 (1979), reprinted in 42 U.S.C.A. Sec. 4321, at 515 [hereinafter E.O. 121141.

35. Id. at para. 1-1.

36. Id. at para. 2-1.

37. Id. at para. 2-3(a)-(d). The order extends to major federal actions which significantly affect a) the global commons (e.g., the oceans or Antarctica); b) the environment of a foreign nation which is not participating or involved in the action; c) the environment of a foreign nation by generating a U.S.-regulated toxic or radioactive product; or d) ecological resources of global importance designated for protection by the President or international agreement.

38. Id. at para. 24(a).

39. Id. at para. 2-5(a).

40. Id. at para. 2-5(c). The order provides that "[a]gency procedure may provide for categorical exclusions . . . as may be necessary to meet emergency circumstances, situations involving exceptional foreign policy and national security sensitivities and other such special circumstances." Id

41. Id. at para. 2-1.

42. DoD Dir. 6050.7, Environmental Effects Abroad of Major Department of Defense Actions (Mar. 3 1, 1979).

43. Id. at para. D. 3.

44. At the request of the Subcommittee on Environment, Energy and Natural Resources, House Committee on Government Operations, the GAO audited hazardous waste management practices at DoD facilities overseas. In reports published in September 1986 and in October 1988 the GAO concluded that

confusion existed at base-level regarding the standards applicable to hazardous waste storage and disposal at overseas bases. The GAO attributed that confusion to a lack of clear DoD policy guidance regarding the applicability of U.S. and host-nation law to hazardous waste management, as well as problems with inconsistent guidance issued by the services and limited information at base-level regarding host-nation law. GAO/C-NSIAD-86-24, Hazardous Waste Management Problems at DoD Overseas Installations (Sept. 1986); GAO/NSIAD-91-23 1, Hazardous Waste Management Problems Continue at Overseas Military Bases (Aug. 199 1).

45. National Defense Authorization Act for Fiscal Year 199 1, Pub. L. No. 10 1-5 10, Sec. 342 para. (b)(1), 104 Stat. 1485, 1537-38 (1990) [hereinafter National Defense Authorization Act for FY 1991]. The Act provides that

The Secretary of Defense shall develop a policy for determining applicable environmental requirements for military installations located outside the United States. In developing the policy, the Secretary shall ensure that the policy gives consideration to adequately protecting the health and safety of military and civilian personnel assigned to such installations.

46. DoD Dir. 6050.16, DoD Policy for. Establishing and Implementing Environmental Standards at Overseas Installations (20 Sept. 199 1) [hereinafter DoD Dir. 6050.16].

47. A 4 Mar. 1996 draft revision (DoD Instr. 4715.HH) does specifically reference E.O. 12088.

48. E.O. 12088, para. 1-801.

49. The directive, and the standards derived therefrom, do not apply to the operations of U.S. naval vessels, U.S. military aircraft, or operational deployments.

50. DEPT. OF DEFENSE ENVT'L. OVERSEAS TASK FORCE, OVERSEAS ENVIRONMENTAL BASELINE GUIDANCE DOCUMENT (1992) [hereinafter OEBGD].

51. DoD Dir. 6050.16, supra note 46, at para. C. 1.

52. Id. at para. C.2.b. The EA is required to a) identify host-nation environmental standards; b) determine their applicability to DoD installations under current international agreements; c) consider whether the host-nation standard is adequately defined and generally enforced against host-government and private sector activities; and d) consider whether construction, maintenance, and operation of the facility is a U.S. or host-nation responsibility.

53. Id. at para. C.2. Although the standard "most protective of the environment" does not appear in the directive, it commonly refers to the process of comparing the OEBGD to hostnation standards in the formulation of final governing standards (FGS). See, e.g., OEBGD, supra note 50, at 1-7, and Draft Revised DoD Instr. 4715.HH, DoD Policy for Management of Environmental Compliance at Overseas Installations, para. F. 3.b. (2) (4 Mar. 1996).

54. Id. at para. C. 3.

55. Id. at para. B.3.

56. OEBGD, supra note 50, preamble.

57. DoD Dir. 6050.16, supra 46, at para. B. 5.

58. National Defense Authorization Act for Fiscal Year 1991, supra note 45, sec. 342, para. (b)(2). Specifically, the Act provided

The Secretary of Defense shall develop a policy for determining the responsibilities of the Department of Defense with respect to cleaning up environmental contamination that may be present at military installations located outside the United States. In developing the policy, the Secretary shall take into account applicable international agreements (such as Status of Forces agreements), multinational or joint use and operation of such installations, relative share of the collective defense burden, and negotiated accommodations.

59. Message from Secretary of the Defense, SECDEF MSG 142159Z DEC 93, DoD Policy and Procedures for the Realignment of Overseas Sites [hereinafter SECDEF policy].

60. Id. at para. 4.E. The Air Force quickly adopted the SECDEF policy for all its overseas installations, either open or designated for closure. See Air Force Instr. 32-7006, Environmental Program in Foreign Countries, para. 2.2 (29 Apr. 1994).

61. Id.

62. Memorandum from Deputy Secretary of Defense John P. White, Environmental Remediation Policy for DoD Activities Overseas (18 Oct 1995) [hereinafter DoD Cleanup Policy].

63. Id. at para. 1.

64. Id.

65. Id. at para. 2.c. Protection of human health and safety is not available as a basis for cleanup off an installation.

66. The policy, which applies "to all DoD overseas activities pending promulgation of an instruction on the same subject," was adopted for the Air Force by Letter from USAF/CE to All Major Commands (30 Nov. 1995).

67. Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, 19 Jan. 1960, art. IV, 11 U.S.T. 1652, 373 U.N.T.S. 248 [hereinafter Japan SOFA]. Specifically, the Japan SOFA states:

The United States is not obliged, when it returns facilities and areas to Japan on the expiration of this Agreement or at an earlier date, to restore the facilities and areas to the condition in which they were at the time they became available to the United States armed forces, or to compensate Japan in lieu of such restoration.

68. Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, 9 July 1966, art. IV, 17 U.S.T. 1677, 674 U.N.T.S. 163 [hereinafter Korea SOFA]. Specifically, the Korea SOFA states:

The Government of the United States is not obliged, when it returns facilities and areas to the Government of the Republic of Korea on the expiration of this Agreement or at an earlier date, to restore the facilities and areas to the condition in which they were at the time they became available to the United States armed forces, or to compensate the Government of the Republic of Korea in lieu of such restoration.

69. Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces with Respect to Foreign Forces Stationed in the Federal Republic of Germany, 3 Aug. 1959, art. 41, para. 3(a), 14 U.S.T. 531, 481 U.N.T.S. 262 [hereinafter German Supplementary Agreement].

70. Id. at re art. 4 1, para. 4.

71. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, 19 June 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

72. Id. at art. II.

73. Although receiving States are not known to have asserted it in practice, the NATO SOFA arguably obligates the sending States to conform to a higher level of compliance with local law than implicit in the obligation to respect the law of the receiving State. The specific provision provides that "[i]n the absence of a specific contract to the contrary, the laws of the receiving State shall determine the rights and obligations arising out of the occupation or use of the buildings, grounds, facilities or services." Id. at art. IX, para. 3.

74. Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces With Respect to Foreign Forces Stationed in the Federal Republic of Germany, 18 Mar. 1993 [hereinafter 1993 Revision of the German Supplementary Agreement]. To date, Germany and the sending States of Canada, Great Britain, The Netherlands, and the U.S. have ratified the agreement. The sending States of France and Belgium have not.

75. The "[a]greement shall enter into force thirty days following the deposit of the last instrument of ratification or approval." Id. at art. 83, para. 2.

76 Id. at art. 53, para. 1. Within the installation or facility, made available for its exclusive use, a force or civilian component may take all the measures necessary for the satisfactory fulfillment of its defense responsibilities.

German law shall apply to the use of such accommodation except as provided in the present Agreement and other international agreements, and as regards the organization, internal functioning and management of the force and its civilian component, the members thereof and their dependents, and other internal matters which have no foreseeable effect on the rights of third parties or on adjoining communities or the general public."

Id. (emphasis added)

77. Id. at art. 53A, para. 1. The provision states:

Where German law applies in connection with the use of accommodation covered by Article 53 of the present Agreement, and requires that a special permit, license or other form of official permission be obtained, the Germany authorities shall, in co-operation with the authorities of a force and following consultation with them, submit the necessary applications and undertake the relevant administrative and legal procedures for the force.

78. Id. at art. 54B. The provision states:
The authorities of a force and of a civilian component shall ensure that only fuels, lubricants and additives that are low-pollutant in accordance with German environmental regulations are used in the operation of aircraft, vessels and motor vehicles, insofar as such use is compatible with the technical requirements of such aircraft, vessels and motor vehicles. They shall further ensure that, with respect to passenger and utility motor vehicles, especially in the case of new vehicles: the German rules and regulations for the limitation of noise and exhaust gas emissions shall be observed to the extent this is not excessively burdensome.

79. Id. at art. 55, para. 3.

80. Id. at re art. 63, para. 8bis.(a). The provision states:
A force or a civilian component shall in accordance with this paragraph bear costs arising in connection with the assessment, evaluation and remedying of hazardous substance contamination caused by it and that exceeds then-applicable legal standards. These costs shall be determined pursuant to German law as applied in accordance with paragraph 1 of Article 53 or, where applicable, in accordance with Articles 41 or 52. The authorities of the force or of the civilian component shall pay these costs as expeditiously as feasible consistent with the availability of funds and the fiscal procedures of the Government of the sending State.

81. Id.

82. E.O. 12114, supra note 34,

83. Id. at para. 1-1.

84. Id.

85 Id. at para. 2-3(d). "Ecological resources of global importance" are so designated for protection "by the President, or, in the case of such a resource protected by international agreement binding on the United States, by the Secretary of State." Id.

86. Id. at para. 2-3.

87. Id. at para. 2-3 (b).
88. Id. at para. 2-3(a)-(d). The order extends to major federal actions which significantly affect: a) the global commons (e.g., the oceans or Antarctica); b) the environment of a foreign nation which is not participating or involved in the action; c) the environment of a foreign nation by generating a U.S.-regulated toxic or radioactive product; or d) ecological resources of global importance designated for protection by the President or international agreement.

89. Id. at para. 2-4(a).

90. Id. at para. 2-5(a).

91. Id. at para. 2-5(c). "Agency procedure may provide for categorical exclusions ... as may be necessary to meet emergency circumstances, situations involving exceptional foreign policy and national security sensitivities and other such special circumstances."

92. DoD Dir. 6050.7, supra note 42. Air Force Instr. 32-7061, The Environmental Impact Analysis Process (24 Jan. 1995) further implements the requirements.

93. Unfortunately, the executive order and directive do not define the key terms "participating" or "otherwise involved."

94. Id. at para. C.2. Federal action is defined as "an action that is implemented or funded directly by the United States Government."

95 Id. at para. C.5. This provision defines a major action as an action of considerable importance involving substantial expenditures of time, money, and resources, that affects the environment on a large geographic scale or has substantial environmental effects on a more limited geographical area, and that is substantially different or a significant departure from other actions, previously .analyzed with respect to environmental considerations and approved, with which the action under consideration may be associated. Deployment of ships, aircraft, or other mobile military equipment is not a major action for purposes of this directive.

96. Id.

97. Id. at encl. 2, para. C.3.a.(2). These include: signing bills into law; signing treaties and other international. agreements; the promulgation of Executive Orders; Presidential proclamations; and the issuance of Presidential decisions, instructions, and memoranda. This includes actions taken within the Department of Defense to prepare or assist in preparing recommendations, advice, or information for the President in connection with one of these actions by the President. It does not include actions taken within the Department of Defense to implement or carry out these instruments and issuances after they are promulgated by the President.

98. Id. at encl. 2, para. C.3.a.(3). The term armed conflict refers to: hostilities for which Congress has declared war or enacted a specific authorization for the use of armed forces; hostilities or situations for which a report is prescribed by section 4(a)(1) of the War Powers Resolution, 50 U.S.C.A. Section 1543(a)(1)
(Supp. 1978); and other actions by the armed forces that involve defensive use or introduction of weapons in situations where hostilities occur or are expected. This exemption applies as long as the armed conflict continues.

99. Id. at encl. 2, para. C.3.a.(4). "The determination that the national security or national interest is involved in actions by the Department of Defense must be made in writing by the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics)."

100. Id. at encl. 2, para. C.3.a.(5). These components include: the Defense Intelligence Agency, the National Security Agency, the offices for the collection of specialized intelligence through reconnaissance programs, the Army Office of the Assistant Chief of Staff for Intelligence, the Office of Naval Intelligence, and the Air Force Office of the Assistant Chief of Staff for Intelligence.

101. Id. at encl. 2, para. C.3.a.(6). The term "arms transfers" refers to: "the grant, loan, lease, exchange, or sale of defense articles or defense services to foreign governments or international organizations, and the extension or guarantee of credit in connection with these transactions."

102. Id. at encl. 2, para. C.3.a.(7). This includes: "all decisions and actions of the United States with respect to representation of its interests at international organizations, and at multilateral conferences, negotiations, and meetings."

103. Id. at encl. 2, para. C.3.a.(9). This includes:
advice provided by DoD components to the Department of State with respect to the issuance of munitions export licenses under section 38 of the Arms Export Control Act, 22 U.S.C. Section 2778 (1976); advice provided by DoD components to the Department of Commerce with respect to the granting of export licenses under the Export Administration Act or 1969, 50 U.S.C. App. Sections 2401-2413 (1970 & Supp. V 1975); and direct exports by the Department of Defense of defense articles and services to foreign governments and international organizations that are exempt

from munitions export licenses under section 38 of the Arms Export Control Act, 22 U.S.C. Section 2778 (1976). The term "export approvals" does not mean or include direct loans to finance exports.

104. Id. at encl. 2, para. C.3.b.

105. Id. at encl. 2, para. CA. To date, the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) has not promulgated any categorical exclusions. However, a 25 Jan. 1996 draft revision of the DoD Directive currently under consideration does include some categorical exclusions.

106. Id. at encl. 1, para. B. An environmental assessment may assist in determining whether an EIS is required. Id. at encl. 1, para. C.9.

107. Id. at para. C.4.

108. Id. at encl. 1, para. D. 1.

109. Id. at encl. 1, para. D. 5.

110. Id. at encl. 1, para. D.2.

111. Id. at encl. 1, para. D. 9.

112. Id. at encl. 1, para. D.7. Factors to consider in determining whether to hold a public hearing include: [F]oreign relations sensitivities; whether the hearings would be an infringement or create the appearance of infringement on the sovereign responsibilities of another government; requirements of domestic and foreign governmental confidentiality; requirements of national security; whether meaningful information could be obtained through hearings; time considerations; and requirements for commercial confidentiality.

113. Id. at encl. 1, para. D.9. A notice of the availability of the draft and final statements must be published in the Federal Register. However, "the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) may, upon a showing of probable important adverse effect on national security or foreign policy, reduce the 30-day, 45-day, and 90-day periods." Id.

114. Id. at encl. 2, para. D. 1a.

115. Id. at encl. 2, para. D. 1b.

116. Id.

117. Id. at encl. 2, para. D4.

118. Id.

119. Id. at encl. 2, paras. D. 5. and 6.

120. Id. at encl. 2, para. D.3.

121. Id.

122. Id. The restriction is somewhat flexible. National security and foreign government involvement considerations may require prompt action before completion of an ES. Id. at encl. 2, para. DA

123. Id. at encl. 2, para. D.5.

124. Id. at encl. 2, para. E.1a.

125. Id. at encl. 2, para. E.1b.

126. Id.

127. Id. at encl. 2, para. E4.

128. Id. at encl. 2, para. E.5.

129. Id. at encl. 2, para. E.3.

130. Id. The restriction is flexible. Considerations of national security and foreign government involvement may require prompt action before completion of an ER. Id. at encl. 2, para. EA

131. Id.

132. OEBGD, supra note 50, at ch. 17, preamble.

133 The directive does not specifically refer to E.O. 12088. However, a 4 Mar. 1996 draft revision of the directive (DoD Instr. 4715.HH) currently under consideration does specifically reference the E.O.

134. DoD Dir. 6050.16, supra note 46, at para. A. 1.

135. Although "installation and facility" are not defined by the directive, the term "military installation," is expansively defined in the National Defense Authorization Act for FY 1991, supra note 45, as "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department which is located outside the United States and outside any territory, commonwealth, or possession of the United States." That definition is included in the 4 Mar. 1996 draft revision of the directive.

136. DoD Dir. 6050.16, supra note 46, at para. B.2. The directive does not apply to the operations of vessels or aircraft, facilities and activities covered by the Naval Nuclear Propulsion Program, or to the determination or conduct of remedial or cleanup actions. Id.

137. Id. at para. C. 1.

138. Id. at paras. C.2. and D. Lb.

139. Id. at paras. C.2.b. and C.2.d.

140. OEBGD, supra note 50, at 1-1.

141. DoD Dir. 6050.16, supra note 46, at para. C.2.a. However, because of the potential liability of DoD civilian employees, particularly local national employees, some EAs chose to include host-nation requirements that historically had not been enforced against host government and private sector activities.

142. Id. at para. C.2.c.

143. OEBGD, supra note 50, at 1-7 (Implementation).
144. Air Force Instr. 32-7006, Environmental Program in Foreign Countries, para 3.3 (29 Apr. 94).

145. DoD Dir. 6050.16, supra note 46, para. C. 1.b.

146. Id. at para. D.2.

147. The following hypothetical illustrates these concepts. Assume drinking water at an overseas Air Force base is drawn from wells on the installation, treated, and then delivered to the base via an Air Force-managed water distribution system. This system services the on base military family housing and dormitories. Many personnel live in nearby communities some in housing leased by the Air Force. Routine testing of the water detects levels of trichloroethylene (TCE) at 10 ppb, well in excess of the FGS standard of 5 ppb. The FGS mandates public notification when a DoD water system is out of compliance with its provisions. Assume, however, that the local host-nation drinking water standard for TCE is 30 ppb, three times what was detected in the sample tested. Even if the FGS is more restrictive than the host nation's standards, the Air Force's is still obligated to comply with the FGS notification requirements. In addition, the Air Force must still plan, program, and budget for necessary corrective actions. Nevertheless, the existence, of the host nation's less stringent standard should be considered in drafting the public notification. Note also that the FGS notification requirements apply only to DoD-operated water distribution systems. Therefore, while notification must be made to base residents (and any others to whom water is distributed to through the base system), the Air Force would not have to notify DoD personnel residing off-base who do not receive water from the base system. However, when off-base housing (or any other facility) is leased by the Air Force, and the Air Force has the authority or responsibility to operate and maintain the water distribution system servicing the facility (and so controls the means necessary to comply with the FGS), the FGS drinking water standards would apply. Notwithstanding the inapplicability of the FGS in situations where the DoD does not have the authority or responsibility to operate the water distribution system, other safety and readiness considerations apply. DoD Dir. 4165.63-M, para. 2.D.3.d.(l), requires that off-base housing must "not pose a health, safety, or

fire hazard" in order to be included on the installation's housing referral listing. If concerns exist concerning poor water quality (or the presence of radon, friable asbestos, peeling lead-based paint, etc.) which may pose a health hazard to DoD personnel who occupy off-base housing, the installation commander is authorized to test to determine the existence and nature of the hazard. If a hazard is identified, the installation commander could remove the housing from the referral listing (or threaten the landlord with that consequence unless the condition is remedied) and even move the DoD occupants to another house at government expense. See Air Force Instr. 55-60 1, Vol. I, Budget Guidance and Procedures, para. 10. 5 1.

148. OEBGD, supra note 50, at 1-7 (Implementation).

149. Id. at 1-5, para. h.

150. Id. at p. 1-8.

151. Id. The draft of DoD Inst. 4715.HH, supra note 133, would substantially restrict waivers based upon lack of funds. The draft states that waivers could only be granted when compliance would "require substantial expenditure of funds for physical improvements at an installation that has been identified for closure or at an installation that has been identified for realignment that would remove the requirement."

152. OEBGD, supra note 50, at 1-9.

153. Id.

154. Id. "For such a request, the Executive Agent shall consult with the relevant Military Department and Defense Agencies and the commander of the unified command with geographic responsibility."

155. USEUCOM Environmental Executive Agent Steering Committee Policy Paper, Waivers to Final Governing Standards in the European Theater, para. Lb (22 Aug 95). The EUCOM waiver policy provides specific guidance on waiver requests for theater components. The draft of DoD Instr. 4715.HH, supra note 133, allows a component commander to appeal a disapproved waiver to the combatant commander and, ultimately, to the Deputy Under Secretary of Defense for Environmental Security.
156. DoD Dir. 6050.16, supra note 46, para. D.2.c.
OEBGD, supra note 50, at 1-6, paras. b. and c.

158. Id. at 1-1.

159. USCINCEUR OPLAN 4243(U), Environmental Considerations and Services (U), tab B to app. D, p. 1-1 (2 Dec. 1995) [hereinafter EUCOM Environmental Annex].

160. The U.S. element of the NATO peace implementation force (IFOR) deployed to Bosnia Herzegovina, Croatia, and Hungary in Dec. 1995 in support of the Dayton Peace Accord.

161. EUCOM Environmental Annex, supra note 159.

162. JCS Pub. 4-04, Joint Doctrine for Civil Engineering Support (22 Feb. 1995).

163. EUCOM Environmental Annex, supra note 159, at para. 1a.

164. Id. at para. 1b.

165. Id. at para. 2.

166. Id. at para. 3.

167. Id. at para. 3.c.(1).

168. Id. at para. 3.c.(3).

169. Id. at para. 3.c. (4).

170. Id at para. 3.c.(5) and (6).

171. Id. at para. 3.c. (7).

172. Id. at para. 3.c.(8).

173. Id. at paras. 3.c.(7)(d) and (8)(e).

174. Id. at para. 3.c. (9).

175. Id. at para. 3.c.(10).

176. Id. at para. 3.c. (11).

177. Id. at para. 3.a.(2).

178. Id. at para. 3.a.(3). For example, "dumping or abandonment shall be avoided but may be justified under combat or other hostile conditions." Id. at para. 3.a.(4).

179. USAREUR (Fwd)/COMNSE Environmental Engineer is the EA.

180. Id. at para. 2.c.

181. See, e.g., NATO SOFA, supra note 71, art. II; Japan SOFA, supra note 67, art. XVI; and Korea SOFA, supra note 68, art. VII.

182. See, e.g., NATO SOFA, supra note 71, art. II (United States agreed that its forces have a duty to respect the law of the receiving State). See generally Mark R. Ruppert, Criminal Jurisdiction Over Environmental Offenses Committed Overseas: How to Maximize and When to Say "No," 40 A.F. LAW REV. 1 (1996) (this issue) (discussing how, our policy of maximizing jurisdiction may not be supportable as it applies to environmental criminal offenses).

183. See, e.g., Principles for Construction Contracting (I Oct. 1982) (implementing art. 49 of the 1959 German Supplementary Agreement, supra note 69).

184. 1959 German Supplementary Agreement, supra note 69, art. 49, para. 2.

185. 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 649 (1989) [hereinafter Basel Convention]. The Basal Convention is found at the United Nations Environmental Programme, Geneva, Switzerland, Home Page http://www.unep.ch/sbc.html.

186. Id. (preamble).

187. Id. at art. 4, para. 5.

188. Id. at art. 11.

189. Id. at art. 9, para. 5.

190. The European Union adopted and expanded upon the provisions of the Basel Convention in EU Regulation 259/93, On the Supervision and Control of Shipments of Waste Within, Into and Out of the European Community (1 Feb. 1993) making the convention, as expanded, directly applicable to all EU member States.

191. The United States signed the convention on 22 Mar. 1989.

192. Although the U.S. Senate gave its advice and consent to ratify, additional statutory authorities needed for implementation have not been obtained, and, as a consequence, the United States has not ratified the convention. 61 Fed. Reg. 8323 (1996).

193. OEBGD, supra note 50, at 1-1.

194. See, e.g., EUCOM Environmental Annex, supra note 159; Letter from HQ USAFE/CEV, Hazardous Waste Disposal in Zakho, Iraq (Operation Provide Comfort).

195. OEBGD, supra note 50, ch. 6, sec. 11, para. 2.a.; DoD Dir. 6050.16, supra note 46, at para. 4.

196. Agreed Text, Applicability of the Basel Convention to U.S. Military Facilities Overseas (undated) (reflecting the consensus position of representatives of the military departments, DoD, Department of State, Defense Logistics Agency, and the Environmental Protection Agency).

197. Id.

198. Id. The United States has to date concluded only one Article 11 agreement (with Malaysia), although it "is developing agreements with several other Basel Parties." 61 Fed. Reg. 8323 (1996).

199. The disposal contract should require the contractor to use environmentally-sound disposal methods and. to provide the agency with a certificate of disposal, but it would not specify where to dispose of the waste. A contractor's decision to transport the waste to another country for contract-compliant disposal would be his/her business decision.

200. But see 1993 Revision of the German Supplementary Agreement, supra note 69, art, 53A, para. 3., where the United States agrees to "act in strict conformity with the terms and requirements" of any "special permit, license or other form of official permission" obtained by the German landlord agency for our operations.

201. Indeed, the OEBGD, supra note 50, provides that it "does not create any rights or obligations enforceable against the United States, DoD or any of its services or agencies, nor does it create any standard of care or practice for individuals." Id. at p. 1-3.

202. 10 U.S.C.A. Sec. 892 (West 1983). Article 92 can also be found in the MANUAL FOR COURTS-MARTIAL, pt. IV, Para. 16 (1995). The offense requires proof that the accused had certain duties, that the accused knew or reasonably should have known of the duties, and that the accused was willfully or through neglect or culpable inefficiency derelict in the performance of those duties. Id. Duties may be imposed by standard operating procedure. Id. at Para. 16c.(3)(a). Proof of actual knowledge of duties can be shown by circumstantial evidence, and "[a]ctual knowledge need not be shown if the individual reasonably should have known of the duties." This may be demonstrated by regulations, training or operating manuals, . . . testimony of persons who have held similar or superior positions, or similar evidence." Id. at Para. 16c.(3)(c).

203. 5 CFR 752, Subpt. A - D; Air Force Instr. 36-704, Discipline and Adverse Actions (22 July 1994).

204. NATO SOFA, supra note 71, art. VII, para. 1.(b).

205. See e.g., Japan SOFA, supra note 67, art. XVII, para. 3.(a)(ii); Korea SOFA, supra note 68, art. XXII, para. 3.(a)(ii); NATO SOFA, supra note 71, art. VII, para 3. (a).

206. Id. at para. 1. (a).

207. Id, para. 3. (a)(ii). Our ability to assert primary jurisdiction requires the existence of facts that could constitute an offense under U.S. law, including the Uniform Code of Military Justice.

208. Arguably, art. VII, para. 1.(a), of the NATO SOFA, supra note 71, grants the United States primary "disciplinary jurisdiction" over civilian employees who commit offenses in the performance of their official duty. Although not generally recognized, this argument has had limited success in some countries. See also Japan SOFA, supra note 67, art. XVII, para. 1.(a); Korea SOFA, supra note 68, art. NMI, para. 1.(a).

209. U.S. authorities are always at liberty to ask the host-nation to not exercise, or to relinquish, jurisdiction in a given case, and may do so where the facts demonstrate that a U.S. or local national civilian employee's conduct was in conformity with established procedures, or under other meritorious circumstances.

210. For example, the wastewater treatment facility at Rhein-Main AB, Germany, is operated pursuant to a discharge permit obtained from local regulatory authorities by the Federal Ministry of Finance, Superior Finance Directorate, the installation's landlord German agency. The facility was staffed by two local national employees, a plant manager, and an assistant. The permit required periodic monitoring for compliance with specific limits on oil and grease, BOD, COD**,** and suspended solids. Test results reflecting exceedences of permit limits for oil and grease were provided to the Superior Finance Directorate, which, in turn, reported them to the regulatory agency. Local installation operating procedures existed, and if followed, the procedures would have ensured compliance with permit limits. In response to the reported exceedences of permit limits, the regulator referred the violation to the local prosecutor. At the request of the prosecutor, the Frankfurt District Court issued penal orders (similar to citations) on 22 Apr. 1994 to the two facility workers for negligently polluting the environment. Both men contested the penal orders. The penal order against the subordinate was dismissed. The manager accepted the court's offer to dismiss the order against him if he paid a "settlement fee" of 350ODM (approximately $2,500 US). Although attorney's fees for the two employees (totaling 8677DM) were

payable, reimbursement of the "settlement fee" by the Air Force was prohibited by AR 27-50/SECNAVINST 5820.4G/AFR 110-12, Status of Forces Policies, Procedures, and Information, para. 2-7a (14 Jan. 1990).

211. For example, it is USAREUR's policy to have military personnel, rather than civilian employees, sign hazardous waste manifests whenever possible.

212. OEBGD, supra note 50, at 1-1.

213. Id.

214. Id. at 18-2, para. 7.

215. Id. at Ch. 9.

216. Id. at Ch. 14.

217. Id. at ch. 18. The term "hazardous substances" is defined by reference to a multi-page table which includes hundreds of chemicals.

218. Id. at ch. 18..

219. Id. at 18-1, para. 2 ("on or near the installation") and at 18-6, para. 5.e. ("outside of a DoD installation").
220. Neither the OEBGD, supra note 50, nor DoD Dir. 6050.16, supra note 46, specifically mentions off-base activities such as these. The conclusion that the requirements would apply is the author's, based on his interpretation of chapter 18 of the OEBGD.

221. Id. at 18-1.

222. Id.

223. Id. at 19-3.

224. Id. at 1-1.

225. SECDEF MSG, supra note 60. The Air Force adopted the policy in April 1994 and applied it to all its overseas installations.

226. Id. at para. 4.E.

227. Id.

228. Id.

229. Id.

230. The term "installation and facility" includes "DoD activities on host nation installations or facilities," id at para. 1, but is not further defined by the directive. However, the term "military installation" is expansively defined in The National Defense Authorization Act for Fiscal Year 199 1, supra note 44, as "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department which is located outside the United States and outside any territory, commonwealth, or possession of the United States."

231. DoD Cleanup Policy, supra note 62. The Air Force adopted the policy on 30 Nov. 1995 by HQ USAF/CE letter pending the update of Air Force Instr. 32-7006.

232. Id. at para. 1.

233. "After return of an installation or facility, DoD shall not fund any environmental remediation beyond that required by binding international agreement or that which is pursuant to a ... remediation scheme" approved by the service component prior to return of the facility. Id. at para. 2.b.(1) and (4).

234. See, e.g., 42 U.S.C.A. Sec. 9606(a) (West 1995 & Supp. 1996); EPA Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions (Mar. 13, 1990); EPA Enforcement Authority Guidance Under Section 122(r) (9) of the Clean Air Act, 56 FR

24393 (May 30, 1991); B.F. Goodrich Co. v. Murtha, 697 F.Supp. 89 (D. Conn. 1988); United States v. Conservation Chem. Co., 619 F.Supp. 162 (W.D. Mo. 1985); United States v. Ottati and Goss, Inc., 630 F.Supp. 1361 (D. N.H. 1985); United States v. Northeastern Pharm. and Chem. Co., 579 F.Supp. 823 (W.D. Mo. 1984), aff'd in part and rev'd in part on other grounds, 8 10 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 1008 (1987); and United States v. Reilly Tar & Chemical Corp., 546 F.Supp. 1100 (D. Minn. 1982).

235. Although available since Dec. 1993, to date "imminent and substantial endangerment" has not been used by any component as a basis for cleanup within the European theater.

236. For example, in a remediation effort conducted incidental to a runway extension, the cleanup standards would likely be based on the protection of the construction worker's health during his/her short-term but direct exposure, and the impact the contaminate may have on the construction materials.

237. For example, in a remediation incident to the construction of a child development center, the cleanup standards would likely be based on the anticipated duration and nature of the exposure to young children.

238. DoD Cleanup Policy, supra note 62, at paras. 2.a.(3), 2.b.(3), and 2.c.(3).

239. Id. at para 3.

240. Id. at paras. 2.a.(2), 2.b.(2), 2.c.(2), and 3. Decisions would be based on the recommendations of the commander's engineering, medical, legal, and other advisors. The policy specifically requires consultation with the appropriate medical authority before the taking action to remediate a known imminent and substantial endangerment to human health and safety.

241. Id. at para. 3.

242. Id. at para. 6.

243. Id However, in order to avoid conflicts among the components, USEUCOM has established an Environmental Executive Agent Working Group. The group is developing a consensus implementation of the new DoD policy. It will also coordinate cleanup strategies and approaches and encourage consistency within host nations and the theater of operations.

244. Id.

245. Id.

246. Id.

247. Id. at para. 7.

248. Id. "Information on contamination not on a DoD installation or facility but that was caused by U.S. operations shall be collected and maintained until issues relating to the contamination are finally resolved with the host nation."

249. Id. The information is provided to host-nation authorities through the DoD environmental executive agent and the embassy.

250. A notable exception is our obligation in the Republic of Panama to take all measures to ensure insofar as may be practicable that every hazard to human life, health and safety is removed from any defense site or a military area of coordination or any portion thereof, on the date the United States Forces are no longer authorized to use such site. Prior to the transfer of any installation, the two Governments will consult concerning: (a) its conditions, including removal of hazards to human life, health and safety; and (b) compensation for its residual value, if any exists.

Agreement in Implementation of Article IV of the Panama Canal Treaty Between the United States of America and The Republic of Panama with Annexes, Agreed Minute and Exchange of Notes, 7 Sept. 1977 (entry into force for the U.S. on I Oct. 1979), art. IV, para. 4.

251. See, e.g., Japan SOFA, supra note 67, art. IV; and Korea SOFA, supra note 68, art. IV.

252. See, e.g., NATO SOFA, supra note 71, art. VIII, para. 1; 1993 Revision of the German Supplementary Agreement, supra note 69, art. 41, para. 3.(a) and re art. 41, para. 4.

253. 1993 Revisions to the German Supplementary Agreement, supra note 69, re art. 63, 8bis.(b).

254. Id.

255. Id. The Supplementary Agreement provides:
These costs shall be determined . . . in accordance with Articles 41 [claims provisions of Art VIII of the NATO SOFA] or 52 [residual value off-sets]. The authorities of the force or of the civilian component shall pay these costs as expeditiously as feasible consistent with the availability of funds and the fiscal procedures of the Government of the sending State.
Id. Depending on the size of the remediation project, availability of funds could be measured by Congress' willingness to provide funding. Id.

256. See, e.g., NATO SOFA, supra note 71, art. VIII, para. 5; Japan SOFA, supra note 67, art. XVIII, para. 5; Korea SOFA, supra note 68, art. XXIII, para. 5.

258. Conversely, DoD residual value negotiators must insist upon receiving indemnification for sites where off-sets are granted. The consequence of failing to secure such indemnification could be that the United States "pays" for the damage (environmental contamination) with an off-set to residual value now, and "pays" again later when a thirdparty presents a claim.

259. Presidential Review Directive/NSC-23, U.S. Policy on Extraterritorial Application of the National Environmental Policy Act (NEPA) (8 Apr. 1993).
260 DoD Dir. 6050.7, supra note 42, which implements E.O. 12114.

261. OEBGD update proposals currently under consideration include the addition of baseline standards for flood plains, coastal zones, wetlands, lead-based paint, unexploded ordnance, non-point source wastewater discharges, pollution prevention, training ranges, and restoration.

262. DoD Dir. 6050.16, supra note 46, para. C.2.e.

263. OEBGD, supra note 50, 1-2.

264. E.O. 12088, supra note 29, para. 1-8.

265. Exclusive of environmental impact analysis requirements and other requirements that do not reflect standards of operational compliance for protection of human health or the environment.

266. See 1993 Revision of the German Supplementary Agreement, supra note 69, at art. 53 (application of German law to the use of the accommodation); art. 53A (strict conformity with conditions of permits or licenses, subject to enforcement); art. 54B (use of low-pollutant fuels, submission to noise and gas emission limitations); art. 57 (observation of regulations on transport of hazardous materials); re art. 63 (bear the costs of assessment, evaluation, and remedying of hazardous substance contamination).

267. Basel Convention, supra note 185, at art. 11. Notwithstanding the general requirement that Parties "not permit hazardous wastes or other wastes to be exported to a non-Party or to be imported from a non-Party,"
Parties may enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes with Parties or non-Parties provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention. Id.

268. Telephone Interviews with William Nichols, HQ USAREUR, ODCS ENGR, AEAENENVR (5 Mar. 1996) and Michael Gargano, HQ USAFE/CEPR (5 Mar. 1996).

The Role of Alternative Dispute Resolution in Resolving Air Force Contract Disputes

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I. INTRODUCTION

Since the enactment of the Administrative Dispute Resolution Act of 1990, /1/ the Air Force has undertaken a number of initiatives to incorporate alternative dispute resolution (ADR) techniques into contracting disputes. Although ADR is still in its infancy, it is carving out a niche for itself in appropriate cases. This is due to a sustained emphasis on ADR as an economical alternative to litigation, coupled with successful resolution of a number of recent Armed Services Board of Contract Appeals (ASBCA) disputes through ADR. Although much has been written about why ADR is (or is not) preferable to resolving disputes through litigation, /2/ this article avoids that battlefield. Federal law and policy /3/ and Air Force policy /4/ have made the use of ADR techniques a viable option to resolve Air Force contract disputes.

Donald R. Rice, former Secretary of the Air Force, urged the use of ADR in appropriate cases to resolve issues in controversy "at the earliest stage feasible." /5/ Consistent with this direction, the Air Force General Counsel's Office (SAF/GC) has encouraged the use of ADR options to resolve contract disagreements before they, ripen into formal claims or appeals. /6/ As ADR becomes a more common phenomenon for resolving contract disputes, and the application of ADR expands to disputes arising before a final decision has been rendered by the contracting officer (CO), base level contract attorneys will become increasingly involved in ADR issues. The Federal Acquisition Reform Act of 1996 will further reinforce the likelihood of base level exposure to ADR by encouraging the use of ADR to resolve bid protests. /7/

The purpose of this article is to provide base level attorneys with sufficient information to consider and implement ADR solutions in appropriate cases. This article examines the genesis of the Air Force ADR program, explains how to successfully pursue ADR, identifies particular types of cases that would be most suitable for ADR, and discusses some recent success stories. As a preliminary matter, however, it is important to define the term "ADR."

II. DEFINITION

Alternative dispute resolution is broadly defined as any method of resolving a dispute short of adjudication on the merits. /8/ The most familiar method of ADR is settlement negotiations between the parties. In the context of Air Force contract disputes, by far the most numerous settlements occur when the contractor and the CO agree to resolve a claim amicably, before the CO renders a final decision. It is only when the CO and the contractor cannot negotiate an acceptable settlement that a final decision is rendered denying a contractor's claim.

It is important to note that the ADR initiatives discussed in this article are not meant to supplant the CO's discretionary authority to settle disputes with the contractor directly. Two-party resolution by those most familiar with the facts of the case prior to litigation remains the most favored method of resolving disputes. /9/ ADR should be considered only when this process breaks down. /10/ This article focuses on ADR options involving a neutral third party. /11/ Because the introduction

of a third party could add additional expense or inconvenience, ADR goals are not fostered by the use of these techniques unless traditional attempts to settle the dispute amicably between the parties were not fruitful. /12/

III. ADR OPTIONS

A. Mediation

Mediation is a process by which a neutral (mediator) assists the parties in the negotiation process. /13/ A mediator does not make findings, but assists the parties in determining their interests and the interests of the other parties. /14/ The mediator then assists the parties in determining how to satisfy these interests through a mutually acceptable resolution of the issue in controversy. /15/

B. Factfinding

The fact-finding process involves "the investigation of issues specified by a third-party neutral who is selected by the parties for his or her subject matter expertise." /16/ The factfinder may be charged with conducting an independent investigation or with receiving a presentation of the facts by the parties in a formal or informal setting. /17/ Factfinding is intended to (1) narrow factual or technical issues in dispute or (2) provide an evaluation of the likely outcome of the dispute. /18/ The parties may develop factfinding procedures which usually result in a written or oral report by the factfinder. /19/

C. Minitrial

A minitrial is a structured settlement process in which the parties agree to a procedure for presenting their case in an abbreviated version (usually no more than a few hours or days) to senior officials for each side who have authority to settle the dispute. /20/ The process allows those in senior positions to see "how their case and that of the other party play out, and can serve as a basis for more fruitful negotiations." /21/ Often a third-party neutral presides over the hearing and may subsequently mediate the dispute or help parties evaluate their case. /22/ The parties develop procedures for a minitrial that normally results in a written ADR process agreement.

D. Arbitration

Arbitration involves the use of a third-party neutral to hear each side's case and then to render a decision. /23/ The parties can submit all, or a portion *of* the issues, whether factual, legal, or remedial. /24/ Because arbitration is less formal than a courtroom proceeding, "parties can agree to relax the rules of evidence and use other time-saving devices. /25/ The decision of the arbitrator may be binding or non-binding, depending upon the agreement *of* the parties. /26/ A word *of* caution: The Air Force "may participate in an arbitration that eventually results in a binding decision by the arbitrator, *but only if* the Secretary *of* the Air Force is provided an opportunity to reject the arbitrator's decision before it becomes a binding decision." /27/

E. Settlement Judge

A settlement judge is an "administrative judge or hearing examiner who will not hear or have any formal or informal decision-making authority in the appeal and who is appointed for the purpose of facilitating settlement." /28/ Often "settlement

can be fostered by a frank, in-depth discussion of the strengths and weaknesses *of* each party's position with the settlement judge." /29/ Meetings with the settlement judge will be flexible to accommodate the requirements *of* the individual appeal. /30/ The settlement judge may meet with the parties either jointly or individually to further the settlement effort. /31/ A settlement judge's recommendations are nonbinding.

F. Summary Trial With Binding Decision

A summary trial with a binding decision is a "procedure whereby the scheduling of the appeal is expedited and the parties try their appeal informally before an administrative judge or panel of judges." /32/ In some cases, upon the conclusion of the trial, a summary "bench" decision is issued. /33/ In other cases, "a written decision is issued no later than ten days following the conclusion of the trial or receipt of a trial transcript, whichever is later." /34/ ASBCA guidance on this procedure further states:

> The parties must agree that all decisions, rulings, and orders by the Board under this method shall be final, conclusive, not appealable, and may not be set aside, except for fraud. All such decisions, rulings, and orders *will* have no precedential value. The length of trial and the extent to which the scheduling of the appeal is expedited *will* be tailored to the needs of each particular appeal. Pretrial, trial, and post-trial procedures and rules applicable to appeals generally will be modified or eliminated to expedite resolution of the appeal. /35/

G. Other Agreed Methods

The key to ADR is flexibility. The parties and the neutral may agree upon other informal methods that are structured and tailored to suit the requirements of the individual case. Because all ADR methods are consensual and voluntary, the parties must first agree to submit to ADR and then must define the ADR procedure they desire. Combinations or permutations of the above methods provide infinite choices to the parties, subject only to their joint agreement.

IV. BACKGROUND

On 15 November 1990, President Bush signed the Administrative Dispute Resolution Act (the ADRA) /36/ which provides explicit authority for agencies to resolve controversies through ADR. /37/ It was enacted based upon Congressional findings that:

> (1) administrative procedure, as embodied in Chapter 5 of title 5, United States, and other statutes, is intended to offer a prompt, expert, and inexpensive means of resolving disputes as an alternative to litigation in the Federal courts;
>
> (2) administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes;
>
> (3) alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious;
>
> (4) such alternative means can lead to more creative, efficient, and sensible outcomes;

(5) such alternative means may be used advantageously in a wide variety of administrative programs;

(6) explicit authorization of the use of well-tested dispute resolution techniques will eliminate ambiguity of agency authority under existing law;

(7) Federal agencies may not only receive the benefit of techniques that were developed in the private sector, but may also take the lead in the further development and refinement of such techniques; and

(8) the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public. /38/

The Contract Disputes Act was modified to provide express authority to agencies to engage in ADR proceedings for resolving contract disputes. /39/ The Federal Acquisition Regulation (FAR) was similarly modified. /40/

The ADRA encourages Federal agencies to use ADR and directs the agencies to develop and adopt a policy that considers ADR techniques, including, but not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration. /41/ The scope of the ADR mandate to develop agency ADR policy included all formal and informal adjudications, rulemaking, enforcement actions, contract administration, and litigation brought by or against the agency. /42/ This article deals only with ADR initiatives pertaining to contract disputes. /43/

The Secretary of Defense delegated authority to the General Counsel of the Department of Defense (DoD) to designate a senior official to be the dispute resolution specialist within DoD. /44/ All military departments were urged to support the ADRA and increase the use of ADR to avoid the high cost of litigation. /45/ The General Counsel of DoD further requested that each Military Department General Counsel designate a dispute resolution specialist. /46/ The Air Force General Counsel (SAF/GC) designated the Deputy General Counsel as the dispute resolution specialist. /47/

An April 1996 DoD Directive encourages the expanded use of ADR within the DoD. /48/ The directive requires each DoD component to establish and implement ADR policies and programs and to use ADR techniques whenever appropriate. /49/ Because the Air Force has previously established ADR policies and programs, this directive merely supports continued ADR efforts and is not expected to have monumental impact on the Air Force ADR program. /50/

V. AIR FORCE INITIATIVES

In early 1993, the Secretary of the Air Force issued a memorandum directing the development of an ADR implementation plan within 180 days. /51/ The Secretary urged use of ADR procedures in appropriate cases to resolve all or part of an issue in controversy "at the earliest stage feasible, by the fastest and least expensive method possible and at the lowest organizational level." /52/

The implementation plan forwarded by the SAF/GC to the Secretary of the Air Force on July 1, 1993 required ADR awareness training of Air Force contracting personnel and contract attorneys. /53/ This training is designed to increase the understanding and awareness of ADR options and promote the use of ADR. As of

April 1996, more than 3000 contracting personnel and more than 300 Air Force attorneys have received ADR awareness training. /54/ Additionally, approximately 350 contracting personnel and 150 attorneys have received intensive two-day ADR training. /55/

In 1994, the Deputy Assistant Secretary of the Air Force for Acquisition signed a pledge to expand the use of ADR in resolving contract disputes. /56/ The Alternative Dispute Resolution Pledge states:

> We, the undersigned agency officials and the Administrator for Federal Procurement Policy, recognize that using alternative dispute resolution (ADR) techniques can considerably reduce the cost and time devoted to resolving contract disputes. ADR techniques have been used to resolve disputes in a matter of days that otherwise might have taken years to resolve, if formally handled by courts or boards of contract appeals. Moreover, ADR techniques can be used in appropriate circumstances to make contract administration more efficient and increase the likelihood that acquisitions will be completed on schedule and on or under budget. Accordingly, we pledge to:
>
> - review existing contract disputes for appropriate use of ADR techniques and consider using such techniques in at least one existing contract dispute;
> - consider the use of partnering and similar ADR techniques in at least one acquisition;
> - identify and eliminate impediments to appropriate use of ADR techniques in contract , administration and resolution of existing contract disputes;
>
> participate on interagency teams to expand the use of ADR techniques in government contracting; and
>
> cooperate with each other and the Office of Federal Procurement Policy to share experiences relevant to expanded use of ADR techniques in government contracting. /57/

Additionally, the Air Force Directorate of Contract Appeals /58/ more commonly referred to as the Trial Team agreed to screen all proposed contracting officer final decisions valued at more than $50,000 to see if ADR was appropriate. /59/ Consistent with the guidance from the Secretary of the Air Force, the screening efforts hoped to identify suitable cases for ADR before extensive resources had been committed to litigation and before the parties became entrenched in a litigation position. A two-day ADR training program was provided in November of 1993 to all Trial Team attorneys. /60/ The focus of this training was implementing ADR solutions as an alternative to litigation. /61/ One objective was training the trial attorneys to determine when ADR techniques are best suited to assist in resolving contract disputes. /62/

VI. IDENTIFYING CASES FOR ADR

The Trial Team began assessing proposed final decisions for the appropriateness of ADR in January 1994. As of December 31, 1995, the Trial Team had reviewed 217 proposed final decisions. /63/ The Trial Team recommended that ADR be considered in 51 casesm /64/ approximately 25% of the total cases. /65/ While this may not seem to be an overwhelming percentage, it is important to realize that certain types of cases, such as terminations for default, are oftentimes unsuitable for ADR /66/

VII. FACTORS PRECLUDING ADR

The first consideration in deciding whether or not ADR is appropriate is to screen and exclude cases from consideration where one or more factors make the case unsuitable for resolution by ADR. The ADRA states that an agency shall consider not using a dispute resolution proceeding if

> (1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;
>
> (2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;
>
> (3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;
>
> (4) the matter significantly affects persons or organizations who are not parties to the proceeding;
>
> (5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and
>
> (6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement. /67/

Obviously, if the case presents a legal issue of first impression, and a decision with precedential value is needed, ADR is not appropriate. In general, ADR would not be appropriate in an area where the law is unsettled, when neither the parties nor the neutral would have a stable framework for assessing the likely outcome of the case. There is a danger in recommending ADR in such circumstances because, without such a framework, neither party could have any expectation that the results of the ADR process would parallel the expected outcome if the case was litigated.

Arriving at a comparable outcome is critical to the success of ADR. The paramount concern is in serving the best interests of the Government. It is doubtful that anyone would seriously argue that saving litigation expenses through ADR would justify paying more money to resolve a dispute through ADR than we would expect to pay if fully litigated. If the outcome of ADR is not comparable to the outcome of litigation, it is impossible to assess whether or not there really were any savings from employing the ADR process.

Therefore, where the dispute concerns an unsettled legal issue or where a precedential decision is needed, ADR is not appropriate regardless of the expected expense, inconvenience, or duration of the litigation. Similarly, ADR may not be appropriate when significant policy questions are involved, when a public record of the proceedings is important, or when the outcome would significantly affect nonparties. /68/ Any of these factors, alone or in combination with each other, may be dispositive in deciding not to use ADR.

Fraud is another factor which weighs heavily against the use of ADR. If there is evidence that the contractor is unable to support its claim due to misrepresentation or fraud, the CO is without authority to settle, compromise, or pay the claim. /69/

Although the decision to use ADR ordinarily rests with the contracting officer, this authority does not extend to resolving fraudulent claims. /70/

VIII. PRACTICAL CONCERNS WEIGHING AGAINST ADR

When none of the aforementioned factors precluding ADR are present, the decision to use ADR involves a balancing test. If the costs of ADR (in time and money) would probably exceed the costs of litigation, ADR is not recommended. /71/ One example is where the case can be dismissed in a motion for summary judgment. Where the facts are undisputed and either party is entitled to judgment as a matter of law, it would most likely be quicker and less expensive to resolve the issue by summary judgment than by ADR.

Alternative dispute resolution is not likely to be successful where there is no bona fide dispute and the other side's case is wholly without merit /72/ (i.e., there is no middle ground). Although contractors may request ADR in such situations in the hope that the Government will be convinced to pay something for nothing, the Government should not enter unto ADR when the Government has nothing to gain. When there is no basis whatsoever for the contractor to recover, the contractor would have to be convinced to forfeit its claim altogether for ADR to be successful. Unless this occurs, ADR would simply add another layer of prelitigation expense and inconvenience. This is not to say that when the parties are in dispute over a number of different issues, and one or more is nonmeritorious, ADR cannot be used to address and dispose of these issues while resolving the meritorious claims.

The Air Force should not enter into ADR when we will not get an even playing field. Alternative Dispute Resolution is not recommended where there is a need for continuing court or board supervision of the opposing party. /73/ If the opposing party does not cooperate and the board or court is constantly compelling it to secure compliance during discovery, or is forced to sanction it for noncompliance, there is little hope that it will be cooperative and forthcoming during ADR. Alternative dispute resolution is less likely to be successful where the parties are not even willing to cooperate in discovery. When ADR could give an uncooperative contractor an unfair advantage it should be avoided. Additionally, ADR should be avoided where there is a question of contractor dishonesty (versus reluctance or laziness), since the other side might not be forthright in its ADR presentation. /74/

IX. FACTORS FAVORING THE USE OF ADR

As a corollary to the above considerations, certain factors favor the use of ADR, including: the law concerning the determinative legal issues in the case is well settled; the dispute is primarily factual; avoiding an adverse precedent is desirable; or the parties wish to avoid a public forum. /75/ Several practical considerations also tilt the scales in favor of ADR.

The first factor is found when the position of each party has merit, but the value is overstated. /76/ For example, if the contractor has a meritorious claim, but fails to provide evidence to substantiate the magnitude of its desired recovery, the Government might be willing to pay, but is unable to pay because the amount sought exceeds the perceived damages. In situations where the Government owes the contractor some money, but the parties can't agree on how much, ADR can help the parties reach a mutually agreeable settlement.

A second important consideration is when limited discovery is needed to crystallize the facts prior to ADR. /77/ If additional facts could be found through discovery which would cause a party to reevaluate or abandon a particular position, this information should be obtained prior to ADR. This is not to say that ADR cannot be pursued after extensive discovery (including interrogatories, production of documents, requests for admission, or even depositions) has taken place. However,, the payoff from ADR - reducing the time, expense, and inconvenience of litigation -diminishes the closer you get to trial. Of course, where the factors clearly favor ADR, it may still be advantageous to opt for a two- or three-day ADR proceeding, versus a two- or three-week trial.

When litigation is expected to be costly and protracted, /78/ ADR should be seriously considered. In the same vein, if trial preparations are expected to be costly and protracted, there is a greater incentive to use ADR to avoid traditional discovery. For example, if you expect to have to depose fifty witnesses, including some experts, to find out what the other side is contending and what testimonial evidence they have to support it, costs to prepare for trial would be extensive. Avoiding these costs could be a powerful inducement to opt for ADR. Position papers with supporting affidavits and documentary evidence could be exchanged with the opposing party (and the neutral) as part of the ADR process in order to short circuit discovery expense. Obviously, with a voluntary exchange of positions, the opposition will give us their strengths, not their weaknesses. This approach would be ideal when we simply do not understand the other side's position. It would not be appropriate where we think they have weaknesses we have not already discovered. In this respect, we need to be cautious. The Air Force should not agree to ADR unless sufficient discovery has been obtained and we are certain we have a complete understanding of the facts and will not be blindsided by the opposing party.

Another factor counseling for ADR is when participation of a neutral is desirable. /79/ A neutral can help break a stalemate. If both parties see the neutral as fair and credible, the neutral's perception of a compromise position may jolt both parties from their "all-or-nothing" view of the case. Often a neutral can help diffuse the hostility or emotion which has polarized the parties. /80/ Remember, these are situations where, settlement between the parties has been impossible - typically when traditional settlement negotiations are no longer bringing the parties closer together or where the parties have stopped communicating altogether. When the dispute will not likely be resolved absent intervention by an outside force, ADR is an expedient alternative to a court or a board.

Alternative dispute resolution is also appropriate when neither side really wants to litigate. /81/ If both sides want speedy resolution of the case, ADR is preferable to litigation. Also, when the parties have a continuing relationship, both parties may want to get the dispute resolved short of litigation, so as to preserve a good working relationship. In these cases, settlement may be desirable, but traditional settlement negotiations may have failed, for example, due to one or both sides having an unrealistic attitude about the merits of the case. In these situations, ADR can be valuable by actually forcing the parties to listen carefully to the position of the other side. A strong presentation by the opposing, party or indications from the neutral regarding strengths and weaknesses of the case may encourage a more realistic outlook. /82/

Finally, ADR is appropriate when there is a middle ground. Nonbinding ADR is more likely to succeed when both parties consider themselves a winner. In contrast to a typical termination for default, for example, when either the default was proper

or it wasn't, ADR succeeds in cases where there is room for compromise. The ideal situation occurs when there are several issues in controversy. While each side may win some and lose some, both sides save face and both sides save the costs of litigation.

X. BALANCING THE FACTORS

Alternative dispute resolution is appropriate where the Air Force is in a better position to resolve the dispute through negotiation than to have a decision imposed upon it by adjudication. Obviously, each case needs to be analyzed individually on its merits. Because the principles underlying ADR are the same as those underlying settlement versus litigation, ADR should not be used in cases when settlement is not appropriate. As a rule of thumb, therefore, we should not submit to ADR when the opposing party is not acting in good faith, when we don't have enough information to arrive at a reasonable settlement, or when the law is clearly and decisively in favor of the Government.

XI. IMPLEMENTATION

The contracting officer and the advising attorney are in the best position to analyze the suitability of the case for ADR. Because the CO is most knowledgeable about the facts of the case and the attorney is most knowledgeable about contract law, they need to work together to get an accurate appraisal of the merits of the case. When the attorney and the CO believe ADR is appropriate, the close working relationship will continue as ADR is implemented - through negotiations on ADR procedures, the drafting of an ADR agreement, the selection of a neutral, preparation for the ADR proceeding, and the ADR proceeding itself

After the attorney has recommended ADR and the CO has decided that ADR should be pursued, how do the parties go about doing it? Federal Acquisition Regulation 33.214 identifies the following "essential elements" of ADR. /83/

(1) Existence of an issue in controversy;
(2) A voluntary election by both parties to participate in the ADR process;
(3) An agreement on alternative procedures and terms to be used in lieu of formal litigation;
(4) Participation in the process by officials of both parties who have the authority to resolve the issue in controversy; and
(5) Certification by the contractor in accordance with 33.207. /84/

If the contractor is unwilling to participate in ADR, will not agree with the CO on ADR procedures, refuses to certify its claim, or will not allow an official with authority to resolve the dispute to participate, then ADR is no longer an option. The CO and the attorney can attempt to convince the contractor (and the contractor's counsel) that ADR is desirable, however, the Government cannot require the contractor to submit to ADR, no matter how well suited the case may be for resolution through ADR. Assuming the contractor consents to ADR, there are still a number of issues that need to be addressed.

XII. TIMING

The first step is deciding whether to pursue ADR before rendering a CO final decision. According to the FAR, " ADR procedures may be used at any time that the contracting officer has authority to settle." /85/ In addition, the FAR notes that when "ADR procedures are used subsequent to issuance of a contracting officer's final decision, their use does not alter any of the time limitations or procedural requirements for filing an appeal of the contracting officer's final decision and does not constitute a reconsideration of the final decision." /86/

In situations where the contractor appeals to the Court of Federal Claims, there is no opportunity for the Air Force contracting officer to participate in ADR without the concurrence of the Department of Justice (DOJ) trial attorneys. This is because - for cases appealed to the Court of Federal Claims - the DOJ is the settlement authority (as opposed to the contracting officer). /87/ In appeals to the ASBCA, on the other hand, the CO retains settlement authority. /88/ For this reason, the CO can consider ADR at any point in the dispute resolution process - prior to final decision, after final decision but prior to appeal, or at any time during litigation of an ASBCA appeal.

Alternative dispute resolution prior to the final decision has the advantage of resolving the dispute most expeditiously and with minimal processing costs, thereby attaining the goal of "[r]esolution of a dispute at the earliest stage feasible, by the fastest and least expensive method possible." /89/ Disadvantages of using ADR prior to the final decision include: little opportunity for discovery, no formal ASBCA involvement (so no guarantee that the board will appoint a settlement judge or neutral), /90/ and, no possibility that the contractor, through inaction or change of heart, will forgo an appeal. If the CO decides ADR is appropriate prior to rendering a final decision, the CO can contact the Office of the General Counsel for assistance in finding a qualified neutral. /91/ The General Counsel's office currently monitors lists of recommended neutrals, including former judges, members of the private bar with expertise in government contracting, academicians, and current board judges from other agency contract boards. /92/

If the CO waits to pursue ADR until after a final decision has been rendered, there seems to be no reason to suggest ADR prior to the contractor filing a notice of appeal. If the contractor fails to timely appeal, the dispute will have been resolved at no cost to the Government (either procedural cost or settlement cost).

When the contractor appeals to the ASBCA, once the notice of appeal is filed, the parties can request that proceedings be suspended, pursuant to Board Rule 30, to pursue settlement discussions. /93/ Proceedings can be suspended before either side incurs any litigation expense. Also, once the ASBCA is involved, the parties can request that a board judge be assigned as a mediator, factfinder, settlement judge, neutral for a minitrial, or a variation thereof /94/ The board held its first formally designated ADR proceeding in March 1987. Since that time, ADR has been a tool available to parties at the board to resolve disputes. /95/

The advantage of having a board judge as a neutral is immense. The judge brings to bear a wealth of expertise regarding Government procurement law and is in the best position to accurately assess the strengths and weaknesses of the parties' positions if the appeals were to be litigated. /96/ The ASBCA judges are also ideal neutrals because both parties realize that it will be board judges who resolve the case if it is litigated. Therefore, the opinion of the judge regarding the merits of the case carries tremendous weight. The judges are also flexible, adapting their role to whatever procedure the parties propose.

XIII. DRAFTING THE ADR AGREEMENT

The ADR agreement is crucial in defining the nature of the ADR proceeding, the ground rules that will apply, and the obligations of the parties (prior to, during, and after the ADR proceeding). The Air Force attorney should draft the agreement to accommodate the desires of both parties, while ensuring that it protects Air Force interests. Both the Trial Team and the General Counsel's office have model ADR agreements. While each ADR agreement must be tailored to fit the particular needs of the case, there are certain factors that should be addressed in all ADR agreements.

A. Scheduling

At a minimum, the agreement must identify the date, time, and location of the ADR proceeding and its duration. If the parties have already confirmed an available neutral, the scheduling section will merely confirm what has been previously arranged. If the parties are requesting an ASBCA judge as a neutral, they should propose alternative dates for the ADR in their request. A Board Scheduling Order (usually following a conference call between the parties and the settlement judge) will then confirm the ADR scheduling particulars. If the parties have not yet decided upon a neutral, a scheduling supplement to the ADR agreement should be completed once the parties and the selected neutral have confirmed their availability.

B. Outstanding Discovery

When the parties agree they have each enjoyed sufficient discovery to prepare adequately for the ADR proceeding, the ADR agreement should acknowledge that fact and agree to stay all further discovery. If one or both parties requires additional discovery, the parties should agree to the nature and scope of additional discovery, as well as its timing. Specific deadlines will increase the chance that these items will be closed out in time to meet the agreed ADR schedule.

C. Exchange of Information

Pre-ADR statements of position can be exchanged with the opposing party and the neutral. The parties could further agree to exchange documentary evidence that they will offer in the ADR proceeding. An exchange of information assists each side in preparing its case for, the proceeding and enables it to meet the opponent's arguments. This information can also make the neutral quickly aware of the parties' positions and streamline the information that will need to be presented at -the proceeding itself If agreed upon, the parties should also agree to the timing of the exchange and the page limits of information to be exchanged.

D. Confidentiality

Because ADR is a method of attempting to reach settlement, matters submitted for the ADR proceeding are protected by Rule 408 of the Federal Rules of Evidence as matters submitted in compromise negotiations and are inadmissible to prove or disapprove liability for a claim or its amount. /97/ The ADRA protects from disclosure "dispute resolution communications," including all oral or written communications prepared for the purposes of a dispute resolution proceeding. /98/ These communications and any communication provided in confidence to the neutral cannot be disclosed by the neutral. /99/ Nor can they be disclosed by the opposing party. /100/ Any dispute resolution communication

disclosed in violation of 5 U.S.C. Sec. 574(a) and (b) shall not be admissible in any proceeding relating to the issues in controversy. /101/ Except for that, nothing in 5 U.S.C. Sec. 574 prevents discovery or admissibility of any evidence that is otherwise discoverable or admissible, merely because the evidence was presented pursuant to an ADR proceeding. /102/ To ensure that both parties fully understand the confidential nature of the ADR proceedings, a statement similar to the following should be included:

> Written material prepared specifically for use in the ADR proceeding, oral presentations made at the ADR proceeding, and all discussions in connection with such proceeding are confidential and inadmissible in any pending or future proceeding involving the parties or the matter in dispute. However, evidence otherwise admissible, is not rendered inadmissible because of its use in this ADR proceeding.

E. Obtaining a Neutral

The parties need to identify an agreed upon neutral or specify a process which will be used to select a neutral. A number of methods are available to select a neutral, including: exchanging lists of names until a neutral is agreed upon, choosing a third party to pick the neutral; or agreeing to accept as a neutral anyone from a specified government agency as designated by that other government agency. /103/ The parties also need to agree on how the neutral will be compensated (if applicable). The Air Force normally agrees to split the cost of hiring a neutral with the contractor. /104/ Where an ASBCA judge has already been involved in a case, the parties should discuss whether they prefer that judge to be appointed as the ADR neutral. if so, a conference call should be held with the judge to confirm availability.

F. Recusal

When requesting an ASBCA judge as a neutral for an ASBCA appeal, the parties must decide up front whether they want to preserve the opportunity to have the case heard before the same judge. The ASBCA notice of ADR methods states that a judge who has been involved in an ADR procedure ordinarily will not participate in a restored appeal, "unless the parties explicitly request to the contrary" and the board chairman approves the request. /105/

XIV. PREPARING FOR THE ADR PROCEEDING

Needless to say, "[a]n intensive preparatory effort is required to present and negotiate effectively." /106/ Parties will need to finish discovery and prepare and exchange prehearing statements or documentary evidence in accordance with their executed ADR agreement. Additionally, the Air Force attorney must prepare witnesses who will testify during the ADR proceeding. The attorney must discuss negotiation goals and objectives with the "principal," who will be a warranted contracting officer with authority to bind the Government. The attorney and the CO most familiar with the case will decide whether that CO or another CO in the chain of command will act as the Air Force principal. The attorney must prepare the principal for his or her role. Finally, the attorney and the principal will allocate duties and responsibilities for the conduct of the proceeding itself

XV. CONDUCTING THE ADR HEARING

The parties will follow the procedures agreed upon in their ADR agreement or as mutually modified during the proceeding itself. Any negotiated settlement of the dispute(s) should be memorialized in writing and signed by both principals before they leave the ADR proceeding. Any written justification, such as a price negotiation memorandum or a settlement memorandum explaining the basis of the negotiated settlement, should be drafted contemporaneously with the ADR proceedings or as shortly thereafter as possible. Accomplishing these tasks up front will result in less follow-up work.

XVI. RESULTS

As of April 1996, Trial Team participation in ADR proceedings has been basically limited to situations where the contractor has appealed to the ASBCA. /107/ The Air Force has only submitted to ADR with an ASBCA judge as a neutral. */108/* As of April 1, 1996, the Trial Team has attempted to use ADR to resolve sixty-two docketed ASBCA appeals. /109/ Fifty-six were. successfully resolved, primarily through the use of board-assisted ADR. /110/ The Air Force has had only three appeals that have gone through a board-assisted ADR proceeding where the dispute was not fully resolved. /111/ A couple of "war stories" may help explain the utility and flexibility of board-assisted ADR.

For example, in one case of board-assisted ADR, the judge functioned as a mediator and as a neutral presiding over a minitrial. The judge caucused privately with both sides after hearing both presentations, provided input on the strengths and weaknesses of the parties' positions, and evaluated the probabilities of success at litigation and expected damages. The biggest factor fostering settlement of this appeal was the judge's candid, private discussions with the parties. Because of the private communications, the judge insisted upon being recused from further involvement in the proceedings if ADR failed.

In another case with equally positive results, the parties and the judge insisted that there would be no ex parte communications with the judge'. Both parties wanted the ADR judge to be the trial judge for litigation on the merits if the ADR failed. /112/ The judge functioned as a factfinder and settlement judge. Each party presented documentary and witness testimony (unsworn) on a particular issue. Each party then had a chance to rebut the opposing party's presentation. The judge presented an oral evaluation of the strengths and weaknesses of each side's case and left the room. The parties attempted to resolve each issue by settlement. The judge was not involved in the give-and-take of the settlement negotiations between the parties. If the parties were unable to negotiate a settlement, the judge would provide an assessment of the likely outcome of the dispute. Ultimately, all of the issues were resolved by negotiation of the parties.

As these examples illustrate, board involvement is flexible to meet the needs of the parties and the case. Paul Williams, Chairman of the ASBCA, has noted, "As we approach an era where DoD personnel and resources will be stretched to the limit, litigation parties must look to new and creative ways to resolve their disputes. The Board is committed to helping the parties meet the challenge." /113/

While there is no requirement to use ASBCA judges as neutrals in cases docketed with the ASBCA, there appears to be no reason to avoid them. In fact, there are many reasons why it makes sense to use ASBCA judges. Contractors participating in these proceedings have wanted ASBCA judges as neutrals, and the judges have been willing to travel to accommodate the parties' choice of hearing location. In

addition, the board funds the judges' travel (and salary), so there is no expense to the parties for these neutrals. Most importantly, the board judges have been successful in helping resolve these disputes to the mutual satisfaction of the parties.

For cases not docketed with the ASBCA, one can expect that ADR will be just as successful, provided tile parties agree upon a knowledgeable and credible neutral and the cases themselves are appropriate for ADR. Presumably, the Air Force will not agree to a neutral who is not knowledgeable or credible. Further, in any form of nonbinding ADR, the Air Force should not agree upon a settlement where the ADR proceeding itself has demonstrated that the neutral is unfair or incredible.

XVII. CONCLUSION

The key to a successful ADR program is properly identifying appropriate cases for ADR. It will never replace litigation, which remains the tip of the sword in ensuring continued fair dealings between the contractor and the Government. Most cases, however, are suitable for settlement. When a case should be settled, but the parties have been unable to do so on their own, ADR is a useful tool for the attorney and the CO. As attorneys and COs become more comfortable with ADR and more adept at pairing appropriate cases with ADR solutions, use of ADR will continue to gain momentum.

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1. Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (codified at 5 U.S.C.A. Secs. 571-83 (West 1977 & Supp. 1996)) [hereinafter the ADRA].

2. Compare Eldon H. Crowell & Charles Pou, Jr., Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques, 49 MD. L. REV. 183 (1990) (advocating ADR to avoid the increasingly judicialized Boards of Contract Appeals and the concomitant expense, delay, and complications of contract litigation) with R. Philip Deavel, Rethinking Civil Litigation: The Potential for Alternative Dispute Resolution in the Air Force, THE REPORTER (June 1994) (concluding that the costs to the local installation commander and legal staff are too high and the benefits too few to create a proper incentive for the use of ADR).

3. The ADRA requires agencies to designate an ADR specialist and develop an agency ADR policy. The Civil Justice Reform Act of 1990, Pub. L. 101-650, 104 Stat. 5089 (codified at 28 U.S.C.A. Secs. 471-82 (West 1993 & Supp. 1996)), encourages the use of ADR in appropriate cases to reduce the demands on district court resources. Exec. Order No. 12988 requires Federal agencies and litigation counsel who conduct or otherwise participate in civil litigation on behalf of the United States Government in Federal court to consider use of ADR in all appropriate cases. 61 Fed. Reg. 4,729 (1996). See also Report of the National Performance Review, Creating a Government that Works Better & Costs Less (Sept. 7, 1993) (Vice President Al Gore advocates increased use of ADR).

4. Memorandum from Donald B. Rice, Secretary of the Air Force, to ALMAJCOM-FOA DRUs and Distribution C, Implementation of the Administrative Dispute Resolution Act of 1990, (Jan. 12, 1993) [hereinafter Rice]. This policy letter encourages the use of ADR in appropriate cases. See also Alternative Dispute Resolution Pledge, 61 Fed. Cont. Rep. (BNA) No. 20, at 697 (May 23, 1994) (various Federal agency officials pledging to expand the use of ADR techniques).

5. Rice, supra note 4.

6. Telephone interview with Joseph McDade, Air Force Deputy Dispute Resolution Specialist (Apr. 25, 1996).

7. Public Law 104-106, The National Defense Authorization Act for Fiscal Year 1996, Div. D, The Federal Acquisition Reform Act of 1996, Sec. 4104, amends 10 U.S.C.A. Sec. 2305 (b) to include a paragraph stating:

> The Federal Acquisition Regulation shall include a provision encouraging use of alternate dispute resolution techniques to provide informal, expeditious, and inexpensive procedures for an offeror to consider using before filing a protest, prior to the award of a contract, of the exclusion of the offeror from the competitive range (or otherwise from further consideration) for that contract.

Pub. L. No. 104-106, 110 Stat. 186 (1996) (to be codified at 10 U.S.C. Sec. 2305(b)). See also Exec. Order No. 12979, 60 Fed. Reg. 55,171 (1995) (directing agencies "to the maximum extent practicable, [to] provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, including, where appropriate and as permitted by law, the use of alternate dispute resolution techniques, third party neutrals, and another agency's personnel").

8. 5 U.S.C.A. Sec. 571 defines "alternative means of dispute resolution" as "any procedure that is used, in lieu of adjudication ... to resolve issues in controversy, including, but not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination thereof."

9. Federal Acquisition Regulation [hereinafter FAR] 33.204 states: "The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level." 48 C.F.R. Sec. 33.204 (1996) (All FAR citations are current as of Apr. 12, 1996). The Contract Disputes Act of 1978 (CDA) "provides a fair, balanced, and comprehensive statutory system ... to induce resolution of more contract disputes by negotiation prior to litigation." Historical and Statutory Notes to 41 U.S.C.A. Sec. 601 (West 1987).

10. Exec. Order 12988, signed by President Clinton on Feb. 5, 1996, addresses ADR in the context of Civil Justice Reform. Section 1, Guidelines to Promote Just and Efficient Government Civil Litigation, states: "Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding.... It is appropriate to use ADR techniques ... after litigation counsel determines ... that such use will materially contribute to the prompt, fair, and efficient resolution of the claims." Exec. Order No. 12988, 61 Fed. Reg. 4,729 (1996).

11. FAR 33.204 encourages agencies to use ADR procedures to the maximum extent practicable in accordance with the ADRA. Under 5 U.S.C.A. Sec. 571 of the ADRA, "dispute resolution proceeding" is defined as any ADR process "in which a neutral is appointed and specified parties participate."

12. FAR 33.214(a) states: "The objective of using ADR procedures is to increase the opportunity for relatively inexpensive and expeditious resolution of issues in controversy."

13. Memorandum from the Air Force Directorate of Contract Appeals, Trial Team ADR Memorandum (1994) (on file with author). The mailing address for the directorate is HQ AFMCLO/JAB, Wright-Patterson AFB, OH 45433-7112.

14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id.

22. The ASBCA provides each party a document entitled Notice Regarding Alternative Methods of Dispute Resolution [hereinafter ASBCA Notice of ADR Methods] (undated) (on file with author) with each docketed ASBCA appeal at the time the appeal is docketed. The ASBCA Notice of ADR Methods defines minitrials as:

> Minitrial: The minitrial is a highly flexible, expedited, but structured, procedure where each party presents an abbreviated version of its position to principals of the parties who have full contractual authority to conclude a settlement and to a Board-appointed neutral advisor. The parties determine the form of presentation without regard to customary judicial proceedings and rules of evidence. Principals and the neutral advisor participate during the presentation of evidence in accordance with their advance agreement on procedure. Upon conclusion of these presentations, settlement negotiations are conducted. The neutral advisor may assist the parties

in negotiating a settlement. The procedures for each minitrial will be designed to meet the needs of the individual appeal. The neutral advisor's recommendations are not binding.

23. Memorandum from the Air Force Directorate of Contract Appeals, Trial Team ADR Memorandum, supra note 13, at 2.

24. Id.
25. Id.
26. Id.

27. Id. See 5 U.S.C.A. Sec. 580(c).

28. ASBCA Notice of ADR Methods, supra note 22.

29. Id.
30. Id.
31. Id.

32. Id. The ASBCA cites 41 U.S.C.A. Sec. 607(e) ("An agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes") as the general authority for allowing this type of binding arbitration. This procedure is not to be confused with the expedited procedure for resolution of disputes concerning small claims at the sole election of the contractor, authorized by 41 U.S.C.A. Sec. 608 (West 1987 & Supp. 1996).

33. ASBCA Notice of ADR Methods, supra note 22.

34. Id.
35. Id.

36. 5 U.S.C.A. Secs. 571-83 (West 1977 & Supp. 1996).

37. Id.

38. Historical and Statutory Notes to 5 U.S.C.A. Sec. 571 (West 1996).

39. 41 U.S.C.A. Sec. 605(d) and (e). Note that while the ADRA contained a termination date of Oct. 1, 1995, Sec. 2352(a) of Pub.L. 103-335 amended Sec. 605(e) of Title 41, Public Contracts, by extending agency authority to engage in ADR to 1 Oct. 1999. See Effective and Termination Date, Historical and Statutory Notes to 5 U.S.C.A. Sec. 571 (West 1996). Note also that Sec. 4322(b)(6) of the Federal Acquisition Reform Act of 1996 preserves the applicability of the provisions of the ADRA "as in effect on September 30, 1995" to the use of ADR for resolving Contract Disputes Act claims under 41 U.S.C. Sec. 605. Pub. L. No. 104-106, 110 Stat. 186 (1996) (to be codified at 41 U.S.C. Sec. 605(d) and (e)).

40. FAR Subpt. 33.2 - Disputes and Appeals; FAR 33.214 - Alternative Dispute Resolution.

41. Pub. L. 101-552, Section 3(a), Congressional Findings, Historical and Statutory Notes to 5 U.S.C.A. Sec. 571 (West 1996).

42. Id.

43. Air Force Policy Directive 36-12, Personnel - Dispute Resolution (Sept. 27, 1993) addresses ADR considerations in resolving personnel and labor disputes. Air Force ADR initiatives include three pilot ADR projects which were funded as part of the Air Force ADR Implementation Plan. These include test programs at: (1) the Sacramento Air Logistics Center to use ADR to resolve all disputes at the installation; (2) the USAF Academy program to use ADR to resolve contract and labor disputes; and (3) the Kirtland AFB Mediation Center to resolve labor and personnel disputes throughout the base. Information on these ADR initiatives may be obtained from the Air Force Deputy Dispute Resolution Specialist, Joseph McDade, DSN 227-3900/commercial (703) 697-3900.

44. Memorandum from Donald J. Atwood, Secretary of Defense, to the Secretaries of the Military Departments, Administrative Means of Dispute Resolution (Jan. 10, 1992) (on file with author).

45. Id.

46. Memorandum from Terrence O'Donnell, DoD General Counsel, to the General Counsels of the Military Departments, Administrative Dispute Resolution Act, Pub. L. No. 101-552 (1990) (Jan. 31, 1991) (on file with author).

47. Letter from Ann C. Petersen, SAF General Counsel to The Honorable Marshall J. Breger, Chairman of the Administrative Conference of the United States (Feb. 12, 1991) (on file with author).

48. DoDD 5145.5, Alternative Dispute Resolution (Apr. 22, 1996).

49. Id.

50. Telephone interview with Joseph McDade, Air Force Deputy Dispute Resolution Specialist (May 2, 1996).

51. Rice, supra note 4.

52. Id.

53. Air Force ADR Program Status and Implementation Plan, FY 1994 and 1995 (July 1, 1993) (on file with author).

54. Telephone interview with Joseph McDade, Air Force Deputy Dispute Resolution Specialist (Apr. 25, 1996).

55. Id.

56. ALternative Dispute Resolution Pledge, 61 Fed. Cont. Rep. (BNA) No. 20, at 697 (May 23, 1994). The pledge was signed by 24 agencies.

57. Id.

58. The mailing address for the directorate is HQ AFMCLO/JAB, Wright-Patterson AFB, OH 45433-7112.

59. The Air Force Supplement to the Federal Acquisition Regulation (AFFAR) requires that final decisions of claims of more than $50,000 to be reviewed by the Directorate of Contract Appeals prior to being issued. AFFAR 33.211(a) and (b); 48 C.F.R. Sec, 5333.211; 6 Govt. Cont. Rep., at 28,582 (CCH) (1995).

60. Training Conference, Air Force ADR Program: Contract Disputes Training for Air Force Attorneys, Wright-Patterson AFB, OH (Nov. 16-17, 1993).

61. Id.
62. Id.

63. Col. Michael I Hoover, ADR Lessons Learned and the Air Force Trial Team's View as to ADR's Appropriate Role and Effective Use, Presentation to the Office of the Air Force General Counsel Acquisition Law Seminar (Jan. 30, 1996) [hereinafter Trial Team Statistics].

64. Id.

65. Note that many cases where ADR was recommended did not result in actual ADR proceedings. As a member of the Trial Team in June 1995, the author gathered data from paralegals and attorneys to determine why ADR was not pursued in cases where it had been recommended, resulting in the following information. Thirty-two percent were resolved at the CO level short of ADR. In 5% of the cases the contractor would not agree to ADR . In 17% of the cases the CO did not believe ADR was appropriate. Five percent resulted in CO final decisions against the contractor which were never appealed. Two percent resulted in appeals to the Court of Federal Claims. Seventeen percent concerned final decisions where the time to file an appeal - 90 days for the ASBCA or one year for the Court of Federal Claims - had not yet expired, or cases where an appeal had been docketed and the parties were still considering ADR. Twenty-two percent were successfully resolved with ADR.

66. Id. Nearly 30% of final decision reviews concerned terminations for default.

67. 5 U.S.C.A. Sec. 572(b).

68. Joseph McDade, Interim Guidelines For Using Alternative Dispute Resolution Techniques to Resolve Contract Disputes [hereinafter SAF/GCQ Interim Guidelines for ADR] (Nov. 1993), atch. 1, Alternative Dispute Resolution Case Evaluation Worksheet [hereinafter ADR Case Evaluation Worksheet]. This guidance was distributed at the Nov. 16-17, 1993 ADR Training Conference, supra note 60.

69. FAR 33.210(b).

70. FAR 33.210.

71. ADR Case Evaluation Worksheet, supra note 68.

72. Id.
73. Id.
74. Id.
75. Id.
76. Id.
77. Id.
78. Id.
79. Id.
80. Id.
81. Id.
82. Id.
83. FAR 33.214.

84. FAR 33.207 provides the same claim certification requirements when using ADR as required for contractor claims over $100,000.

85. FAR 33.214(b).
86. Id.

87. 28 U.S.C.A. Secs. 516 and 519 (West 1993 & Supp. 1996).

88. FAR 33.210.

89. ASBCA Notice of ADR Methods, supra note 22.

90. The unenacted House of Representatives version of the Federal Acquisition Reform Act of 1995 would have required board assistance for ADR regardless of the stage of litigation "for any disagreement regarding a contract or prospective contract upon the request of all parties to the disagreement." H.R. 1670, 104th Cong., 1st Sess., 141 CONG. REC. H5366 (May 18, 1995). If passed, this bill would have consolidated the Government Boards of Contract Appeals and the Government Accounting Office bid protest section, allowing board-assisted ADR to be employed even before contract award. Additionally, the bill would have required the parties and the board to consider and reject ADR before the dispute could go forward to litigation when there is a formal CDA appeal. 63 Fed. Cont. Rep. (BNA) No. 20, (Special Supp. at S-22) (May 22, 1995).

91. The address is: Assistant General Counsel (Acquisition), ATTN: ADR Program, SAF/GCQ, Room 4D980, 1740 Air Force Pentagon, Washington DC 20330-1740. FAX: DSN 224-8846 or (703) 614-8046. Phone: DSN 227-3900.

92 Telephone interview with Joseph McDade, Air Force Deputy Dispute Resolution Specialist, (Apr. 25, 1996). Mr. McDade indicated that the chairman of the ASBCA has expressed a willingness to devote, on a case-by-case basis, an ASBCA judge as an ADR neutral prior to an appeal being docketed. The General Counsel's office also has funding available, in appropriate cases, to pay for the cost of obtaining a third-party neutral.

93. Board Rule 30 states: "The Board may suspend the proceedings by agreement of counsel for settlement discussions, or for good cause shown."

94. ASBCA Notice of ADR Methods, supra note 22.

95. "Memorandum from Paul Williams to The Secretary of Defense, Report of Transactions and Proceedings of the Armed Services Board of Contract Appeals for the Fiscal Year Ending 30 September 1993 (Oct. 31, 1993), 61 Fed. Cont. Rep. (BNA) at 286 (Feb. 28, 1994) [hereinafter ASBCA Report of Transactions].

96. The ASBCA Report of Transactions notes:

> Though the use of formal ADR has not been extensive, the role of the administrative judge in assisting issue identification during the prehearing phases of the appeal process often has the effect of the judge serving as a settlement judge, facilitator, or mediator. Indeed, with the assistance of the judge explaining the strengths and weaknesses of the parties' positions, it is not uncommon for appeals to be settled during or after a hearing.

Id. at 287.

97. FED. R. EVID. 408 states: "Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." 28 U.S.C.A. Rules 1-700 (West 1984 & Supp. 1996).

98. 5 U.S.C.A. Secs. 571(5), 574.

99. 5 U.S.C.A. Sec. 574(a) identifies the general rule and its exceptions.

100. 5 U.S.C.A. Sec. 574(b) identifies the general rule and its exceptions.

101. 5 U.S.C.A. Sec. 574(c).

102. 5 U.S.C.A. Sec. 574(f).

103. SAFIGCQ Interim Guidelines for ADR, supra note 68.

104. Id.

105. ASBCA Notice of ADR Methods, supra note 22.

106. Crowell & Pou, supra note 1, at 209.

107. Telephone interview With Col. Michael G. McCormack Trial Team ADR focal point, (Apr. 30, 1996). Col. McCormack indicated that the Trial Team is willing to engage in ADR discussions with contractors (with the concurrence of the CO) prior to an ASBCA appeal. In fact, Trial Team attorneys have discussed ADR with contractors under such circumstances on several occasions, but none have yet materialized into an ADR proceeding.

108. Id.
109. Id.
110. Id.
111. Id.

112. The ADR agreement specified the desires of the parties, but stipulated that either party or the judge could subsequently request recusal.

113. ASBCA Report of Transactions, supra note 95, at 287.

Charging Post-Offense Obstructive Actions

MAJOR DAVID D. JIVIDEN, USAF*

1. INTRODUCTION

Nothing strikes at the heart of the military justice system more deeply than post-offense actions which either "frustrate" or "obstruct" justice. Generally, acts which constitute offenses that "frustrate" justice prevent an accused's crimes from ever seeing the light of day, whereas those actions which obstruct justice interfere with the administration of military justice. /1/ Although often subtle, the distinction between these types of offenses is critical-the survival of a post-offense charge at trial or on appeal could turn on the military justice practitioner's ability to make the correct call early in the trial process. Indeed, no less authority than the United States Supreme Court recently reversed an obstruction of justice conviction against a federal district judge who lied to the Federal Bureau of Investigations about his disclosure of a wiretap authorization, finding the facts relied upon by the Government too speculative to support an obstruction of justice conviction. /2/

This article's purpose is to assist the military justice practitioner in determining the existence or absence of a military obstruction of justice offense. Specifically, this article examines current and past precedent on obstruction of justice offenses, identifies an approach to address obstruction of justice issues derived from evidentiary factors, and concludes with a short comment regarding the wisdom of charging obstruction of justice actions under federal obstruction of justice statutes.

II. HISTORY AND ELEMENTS OF THE MILITARY OBSTRUCTION OF JUSTICE OFFENSE

Unlike the current obstruction of justice offense found in the 1995 Manual for Courts-Martial under Article 134, previous *Manuals for Courts-Martial* did not identify obstruction of justice as a specific Article 134 offense. Nevertheless, when interpreting the then newly passed Uniform Code of Military Justice in *United States v. Long /3/* the Court of Military Appeals in 1952 held that a disorder which amounted to "the obstruction or interference with the administration of justice in the military system," but not meeting the elements of the federal obstruction of justice statute, was criminalized by clause I of Article 134, namely those "disorders and neglects to the prejudice of the armed forces. " /4/ Reasoning that "courts-martial, summary, special and general, are an inherent and important part of the military judicial system," the court noted that "it is important to the good order and discipline of the armed services that they, in no way, be influenced improperly by any means, including intimidation of witnesses. /5/

Currently, the offense of obstruction of justice found in the 1995 *Manual for Courts-Martial* has four elements:

> (1) That the accused wrongfully did a certain act;
>
> (2) That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending;

(3) That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice; and,

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. /6/

III. INTERPRETING THE ELEMENTS OF OBSTRUCTION OF JUSTICE

Elements one and four of an obstruction of justice offense are rather straightforward. With regard to the first element, the issue is simply whether an accused did or did not commit the post-crime act in question. With regard to the fourth element, it is practically a given that conduct involving obstruction of justice is prejudicial to good order and discipline, and service discrediting. /7/ In contrast, the second and third elements have often been the subject of considerable appellate review and commentary. Element two raises the issue of what constitutes a "criminal proceeding" for purposes of the obstruction of justice offense, while the third element involves the difficult task of discerning and proving the accused's intent to obstruct justice from his acts.

A. What is a Criminal Proceeding?

The second element of the obstruction of justice offense requires that an accused had reason to believe his actions involved a past /8/, current, or prospective "criminal proceeding." For purposes of this element, the term criminal proceeding has been given a broad interpretation, encompassing not only special and general courts-martial proceedings, but also criminal investigations, /9/ summary courts-martial, /10/ and Article 32 hearings." In fact, prior to the 1984 Manual for Courts-Martial, the Army Court of Military Review specifically held that "to obstruct the administration of Article 15 punishment necessarily is an interference with the administration of military justice" and thus constitutes obstruction of justice. /12/ The drafters of the 1984 Manual for Courts-Martial, /13/ and subsequent military appellate decisions, /14/ have reaffirmed that an Article 15 proceeding is a "criminal proceeding" within the context of the obstruction of justice provision.

Also falling within the ambit of the term "criminal proceeding" with regard to an obstruction of justice offense are state proceedings. The Army Court of Military Review in *United States v. Smith /15/* held that interfering with a state criminal proceeding can be charged as a military obstruction of justice offense. The court noted that "nothing restrains the military from deterring its members from interfering with a state criminal proceeding ... [such] acts are clearly the discreditable conduct that Article 134 was intended to prohibit." /16/

One limitation to the otherwise broad definition of a "criminal proceeding" is a military inspection. Highlighting the difference between a military "inspection," defined as a commander's tool for insuring "the overall fitness of [his] unit to perform its military mission," (the interference of which could result in "admonitions or adverse administrative action,") and a "search," defined as "a tool for the collection of evidence solely for criminal prosecution," the Court of Military Appeals in *United States v. Turner /17/* found that presenting a false urine sample during a command-directed urinalysis inspection did not constitute the offense of obstruction of justice./18/ Instead, such an act by an accused to preclude discovery of drug use impeded an inspection rather than an investigation. Thus, there was no attempted

impediment of the "due administration of the processes of justice"' /19/ as required for an obstruction of justice charge. /20/

B. Finding the Intent to Obstruct Justice

Establishing the third element of the obstruction of justice offense, that of intent to obstruct the administration of justice, is relatively more difficult compared to proving the other elements of the offense. Because of the myriad factual scenarios which could manifest an accused's subjective intent to obstruct justice, the United States Court of Appeals for the Armed Forces has refused to establish a bright-line standard demarcating acts which constitute this offense and those which do not. Indeed, like Justice Potter Stewart's tongue in-cheek guidance for identifying pornography, the United States Court of Appeals for the Armed Forces has consistently taken a similarly fact specific "I know it when I see it" approach to obstruction of justice. /21/ This approach was recently reaffirmed in *United States v. Lennette /22/* where this court held that the difference between those actions which serve to obstruct justice and those which seek to avoid detection must be discerned "on a case by case basis, considering the facts and circumstances surrounding the alleged obstruction and the time of its occurrence with respect to the administration of justice." /23/ Accordingly, the ability to analyze a given fact pattern and compare it to those found in precedent is a must when evaluating and litigating an obstruction of justice charge. The following two sections present a survey of cases in which appellate courts were called upon to determine whether the evidence was sufficient to sustain an obstruction of justice conviction.

IV. PRECENDENT

A. Interfering with Witnesses

1. Attacks and Threats

The threatening of, and violent interference with, witnesses by an accused is the typical example of an obstruction of justice offense. Physically threatening a witness constitutes obstruction of justice, whether the witness is expected to testify /24/ at the accused's court-martial or merely had the potential to testify. /25/ Attempting to force a witness to lie to an investigator by threatening the witness also constitutes obstruction of justice. /26/ Threatening to cash the check of a witness who is expected to testify before an Article 32 officer and thus jeopardizing the witness' job also constitutes obstruction of justice. /27/ In fact, according to the Air Force Court of Military Review in *United States v.* Wall, /28/ even comments made by an accused during the course of a friendship, while replying to his friends assurance that he would remain silent, that "he was glad . . . because he'd hate to see any bloodshed," constituted obstruction of justice. /29/ The Air Force court observed that

> we attribute little significance to the circumstance that the accused's statement would not have deterred [his friend] from cooperating with law enforcement authorities; otherwise, a witness could be harassed with impunity if that individual simply ignored the remark or refused to be frightened by it ... the friendship with [the witness] does not lessen the impact of the remark or the nature of the threat. /30/

It is this line of cases, where there is an obvious nexus between the accused's menacing statements or actions towards a witness and the intent to obstruct justice, that such wrongful statements or actions are clearly "per se prejudicial to good order and discipline and inimical to the effective functioning of military justice." /31/

2. Requests

Whether contacting and asking a witness to engage or refrain from performing certain actions, including making or not making a statement, constitutes obstruction of justice initially depends on whether the request was made by an accused who "at least surmised that there was a possibility that, at some time, a criminal proceeding might take place and he wished to prevent such a proceeding." /32/ Thus, the Court of Military Appeals in *United States v.* Athey /33/ reversed an obstruction of justice conviction in a case where the accused advised a sexual assault victim to lie about the offense where the accused did not know that investigators had commenced an investigation, nor had reason to suspect that an investigation would be commenced against him.

Asking a witness to do or say certain things must also be done with the intent to prevent a criminal proceeding as that term has been broadly defined. Failing to find the requisite intent on the part of the accused has led to reversals in cases where an accused simply requested that the victim not press charges or report the accused's offense. In *United States v. Kirks, /34/* the United States Army Court of Military Review reversed an obstruction of justice conviction which was predicated on the accused "begging [the parents of a sexual assault victim] not to press charges and that if they would withdraw their complaint he would tell them everything about the three sexual assaults and seek medical treatment." /35/ The court reasoned that the accused in *Kirks:*

> did not ask them to lie, nor did he threaten them, offer bribes, harass them with repeated telephone calls, or indulge in any other unlawful conduct. Had [the parents] acceded to the appellant's request, they would have done nothing unlawful. At most, they would have informed the authorities that they did not desire to pursue a criminal investigation of the appellant's conduct. We hold that the appellant's conduct was not unlawful. /36/

Similarly, in an earlier case, *United States* v. Asfeld, /37/ the same court reversed an obstruction of justice conviction based on an accused's anonymous request to the victim of his anonymous obscene phone calls not to report him. The Army court reasoned that the statement was intended only to forestall or preclude discovery of his offense, and that on its face the statement, "don't report me," did not request an affirmative act which would amount to interference with or obstruction of the due administration of justice. Additionally, the statement was not uttered in a tone of voice which promised some unlawful inducement or threatened retaliatory action, but, rather, the accused's action "amounted to no more than a request that the prosecutrix do a lawful act which, had she had acceded to the request, would have had no impact on the administration of justice. /38/

Likewise, in a case of first impression, the Air Force Court of Criminal Appeals in *United States v. Sorbera /39/* reversed an obstruction of justice conviction based on an accused's telephone conversation with his ex-wife regarding the potential testimony of his daughter who had leveled charges of sexual abuse against him. The accused's telephone call to his ex-wife was based on advice of civilian defense counsel, who assumed that the abuse allegations might relate to a custody battle. /40/ During the telephone call, the accused discussed child support and custody; described the ramifications to his daughter and his ex-wife if his daughter testified against him; urged his ex-wife to prevent his daughter from continuing to lie; and asked his ex-wife to keep his daughter from coming to Germany to testify against him. /41/

When reversing the obstruction of justice conviction, the Air Force court cautioned that it "stop[ped] short of holding that an accused may not be held accountable for criminal misconduct, including obstruction of justice, solely because he relies upon and follows his attorney's advice." /42/ Nevertheless, the court in *Sorbera* was persuaded that the accused "was unaware of the legal consequences of following his attorney's advice and had no reason to believe that adhering to that advice would result in additional charges." /43/ Accordingly, the court found that accused was denied effective assistance of counsel and dismissed the obstruction of justice charge. /44/

In contrast to the above cases, the Court of Military Appeals in United States v. Guerrero /45/ affirmed an obstruction of justice conviction where the accused told the occupants of a car he had used to intentionally run into three victims to lie to the military police and "say -that the car had been stolen." /46/ Notable from the standpoint of establishing the accused's intent to obstruct justice was the fact that the accused at trial had specifically stipulated that he had made the aforementioned statements in the vehicle because he believed that some law enforcement official of the military, such as the military police or the Criminal Investigation Command, would be investigating his actions. Similarly, the Army Court of Military Review in United States v. *Latimer /47/* easily found intent to obstruct justice by an accused when he used his subordinates to violate regulations pertaining to the sale of rationed cigarettes, then asked them to help conceal his misconduct by requesting they recant their stories and providing them with proposed false excuses for doing so. /48/ In fact, the Army court quickly dismissed the accused's argument that he was merely "'seeking sympathy from his accomplices," finding that his actions "clearly constitute[d] conduct prejudicial to good order and discipline and [were] of a nature to bring discredit upon the armed forces," and that "his contacts with those individuals [were] blatant and transparent attempts to persuade them to help him impede the ongoing investigation and thereby ultimately frustrate the due administration of justice." /49/

B. Other Actions

As noted earlier, the threshold question when determining whether an accused's actions other than attacks, threats, or requests constitute obstruction of justice is whether his acts occurred within the context of a criminal investigation or proceeding, or whether his actions related to inspections or administrative actions. If the latter, then the proper charge is not obstruction of justice but rather the Article 134 offense of "Wrongful Interference with an Adverse Administrative Proceeding" /50/ or the Article 92 offense of "Violation of an Order." /51/ As with interfering with witnesses, the second question a military justice practitioner should answer is whether an accused's intent to obstruct justice reasonably can be determined by his or her actions. For example, the Court of Military Appeals in *Finsel /52/* found that staging a firefight to account for an improper loss of a weapon during an unauthorized visit to a Panamanian bar constituted an obstruction of justice offense:

> where a weapon is missing under the circumstances shown here-particularly where the missing weapon is on loan from a superior-the record is sufficient from which a reasonable factfinder could conclude beyond a reasonable doubt that the appellant 'had reason to believe there were or would be criminal proceedings pending' and that his actions were done 'with the intent to ... obstruct' those proceedings. /53/

An accused's actions in destroying stolen, blank, I.D. cards when his accomplice was taken into custody and questioned was sufficient evidence to base an

obstruction of justice conviction according to the United States Court of Appeals for the Armed Forces in *United States v. Lennette. /54/* The *Lennette* court observed that the accused's knowledge that: "his cohort in crime had been arrested ... he was personally implicated by his presence at the scene. . . he [might be] implicated during the questioning of his co-actor, [his] access to blank cards would become known to investigating agents," all indicated "his conduct fell squarely within the elements of the military offense of obstruction of justice. " /55/ Also finding sufficient intent from the evidence at trial, the Army Court of Military Review in *United States v. Ridgeway* /56/ rejected an accused's appeal that his throwing marijuana seized from his room from a window was the result of panic and not the result of a specific intent on his part to obstruct justice. The court found that his admissions that he "knew that the marijuana possibly would be used against him in a criminal proceeding and that his intent in removing it was to keep himself 'out of trouble,' was sufficient to sustain the conviction. " /57/ Similarly, an accused driving a witness to the airport for a flight out of the state 51 or country /59/ was sufficient to sustain convictions for obstruction of justice, as was the act of a military policeman in concealing money which came into his possession which was possible evidence of a crime by another .60 Destroying a witness' property constituted an obstruction of justice offense in one early Air Force Board of Review case, *United States v. Le Sage* . /61/ The *Le Sage* court found that an accused's post-trial actions in damaging the tires on a witness's car clearly constituted an obstruction of justice, reasoning that the "due administration of justice is possible only where those having powers or duties in connection therewith, or participating therein, are protected against violence to their persons or property, or other improper influences." /62/

An obstruction of justice offense predicated on the accused lying to Korean police about who was driving a vehicle when the car struck a Korean /63/ child was upheld on appeal in *United States v. Bailey.* The Army Court of Military Review held that giving Korean police false information intended ultimately for United States military authorities obstructed the military justice of the United States and was service discrediting and prejudicial to good order and discipline:

> It can hardly be gainsaid that it brings discredit upon the armed forces of the United States when a soldier makes false statements to foreign law enforcement officials regarding an offense in which the soldier is involved with a citizen of the host country. Further, it is obviously prejudicial to good order and discipline when a soldier relates false information which he knows or reasonably should know will ultimately come to the attention of responsible military authorities of the United States. /64/

Communications with accomplices or co-conspirators can also be the basis for an obstruction of justice charge. /65/ In *United States v. Williams,* /66/ the Court of Military Appeals held that asking an acquaintance to "keep an eye on" the victim prior to a stabbing and then urging the cohort to leave the country "because of the ongoing investigation" may be charged as a military obstruction of justice offense. The court rejected the accused's argument that the court must base its interpretation of Article 134 on the interpretation given by Federal courts of the federal obstruction of justice statutes. /67/ Similarly, the Army Court of Military Review held that advising an accomplice to a larceny to "take five or six aspirin in order to 'mess up' a scheduled polygraph examination the next day" constituted obstruction of justice. /68/

V. A SUGGESTED APPROACH

The above survey of available obstruction of justice precedent lends itself to a three-prong approach a military justice practitioner can use when confronted with

an accused's post-offense obstructive conduct. Assuming the identity of the accused as the person who committed the obstructive act can be established, the military justice practitioner should ask himself or herself the following three questions:

1. In what context did the actions occur? If the allegedly obstructive actions occurred in the context of a potential military, state, or foreign criminal investigation, an Article 15 proceeding, an Article 32 investigation, a summary, special, or general court-martial, or a state or foreign criminal proceeding, the "criminal proceeding" element of the offense is satisfied. In contrast, if the obstructive behavior occurred in the course of an administrative inspection or civil proceeding, then the obstruction of justice offense might be subject to challenge. Note, however, if "other criminal proceedings or other official acts" were taking place "that would lead to disciplinary action" a conviction defensible on appeal could result, /69/ even if the immediate context is an administrative or similar proceeding.

2. What did the obstructive action consist of? Assaults and threats directed at "witnesses, a person acting on charges or an Article 15, an investigating officer, or a party" /70/ are obvious manifestations of an accused's intent to obstruct justice, and thus will likely be found to constitute obstruction of justice. Other less obvious acts need to be analyzed with respect to whether the accused's intent to obstruct justice can be established from the acts in question. For example, "using bribery, intimidation, misrepresentation, or force or threat of force" to delay or "prevent communication of information relating to a violation of any criminal statute of the United States to [persons] authorized to conduct or engage in investigations or prosecutions of such offenses" is specifically recognized in the *Manual for Courts-Martial* as illustrative of acts constituting obstruction of justice . /71/ However, at least one court has held that the "drafters' explanation exceeds the permissible limits of the military offense of obstruction of justice, /72/ and that although a "list of obstructionist conduct [is] set forth in the Manual ... the Manual nonetheless contemplates an act done without legal right or for some other sinister purpose." /73/ Thus, an act charged as obstructing justice requires proof that it is "an act which tends to corrupt or subvert the administration of justice." /74/

3. Does the accused's act manifest his subjective /75/ intent to "obstruct the due administration of justice" as that term has been broadly defined? The key to analyzing the accused's intent in this regard is to examine two issues. First, whether the evidence is sufficient to show beyond a reasonable doubt that the accused had reason to believe that criminal proceedings were, or would be, pending. Second, whether the evidence establishes that accused's acts were intended to "influence, impede, or otherwise obstruct the due administration of justice." /76/ Quite often, the same facts in a case can be utilized to address both issues.

Establishing that an accused's acts occurred after the accused or the accused's co-conspirator had been arrested could aid in proving that the accused had reason to believe that there were criminal proceedings pending. /77/ Likewise, so would the fact that the accused was aware that damning evidence of a criminal act would likely be linked to the accused, especially if the accused then acted to destroy the evidence /78/ or attempted to get his or another's "story straight " /79/ Conversely, the lack of these factors could hinder the government's ability to prove an accused had reason to believe that a criminal investigation or proceeding was imminent or in progress.

Similarly, with regard to the second issue of determining whether the charged acts were committed with obstructive intent, asking witnesses /80/ coconspirators, /81/ or other parties to lie or mislead judicial or law enforcement officials, destroying or tampering with evidence, /82/ and driving a witness out of the state /83/ or country /84/ are compelling evidence of intent to obstruct the administration of justice. In

contrast, merely "begging" or asking someone to withdraw a complaint, or engaging in a similarly passive or legal act which does not impact the administration of justice, provides little evidence of obstructive intent on the accused's pan and would thus make a conviction difficult, /85/ especially if such actions were the result of advice from counsel. /86/

Just as each case is unique, so is the multitude of facts which could conceivably constitute a military obstruction of justice charge. By analyzing the facts of a particular case within the context of the above three questions the military justice practitioner can begin to evaluate any given fact pattern to determine the relative strength or weakness of an obstruction of justice charge and, perhaps more importantly, identify what issues and facts need further exploration in order to prove or disprove the charge. Such a resourceful analysis is crucial when examining an accused's actions for a viable obstruction of justice charge. As the Court of Appeals for the Armed Forces noted, "[w]ith minimal creativity, one can easily conjure up factual circumstances in which, in particular contexts, the culprit's actions might be simply covering his tracks or, instead, might fall within the scope of obstruction of justice." /87/

VI. THE FEDERAL STATUTORY OFFENSE

There are primarily three federal statutes dealing with the interference of the judicial process: 18 U.S.C.A. Sec. 1505, /88/ for the obstruction of proceedings before departments, agencies, and committees; 18 U.S.C.A. Sec. 1512, /89/ for witness tampering; and, 18 U.S.C.A. Sec. 1503, /90/ for the threats, intimidation and retaliation against grand and petit jurors and judicial officers. Although obstruction of justice military jurisprudence is replete with references to the federal statutes, /91/ the "broad scope of the offense of obstructing justice under Article 134, UCMJ," /92/ exists "independent of other Federal obstruction of justice offenses." /93/ Moreover, "a facial similarity between a military offense and a federal crime does not mean that the offense must be brought under the third clause of Article 134. /94/

Accordingly, only when a federal statute is used as the basis for charging an obstruction of justice offense under the third clause of Article 134, /95/ UCMJ, are the elements of the federal statute controlling as to the definition of the offense alleged. /96/ The additional constraints and elements accompanying the federal statute, when used as the basis for a military obstruction of justice charge under clause 3 of Article 134, make such an approach inadvisable at best in most cases. /97/ For example, in United States v. Aguilar, /98/ the Supreme Court reversed a 15 U.S.C Sec. 1503 obstruction of justice conviction based on uttering false statements to an investigative agent who was only a potential witness. The court reasoned that "it cannot be said to have the 'natural and probable effect' of interfering with the due administration of justice" that lying to an unsubpoenaed investigating agent would result in the false statement being "provided to the grand jury." /99/ Because of the UCMJ's different statutory milieu, /100/ the same fact pattern, would likely result in a sustainable Article 134 obstruction of justice offense conviction. /101/

VII. CONCLUSION

The Court of Appeals for the Armed Forces' current fact-specific approach to obstruction of justice offenses, as exemplified in *United States v. Lennette,* /102/ is well reasoned. Such a standard is appropriate for an Article 134 offense and is consistent with precedent. Ultimately, a military prosecutor, using an accused's actions or statements, I must prove that an accused intended to "obstruct the due

administration of justice," as that term has been expansively defined in the military context, in order to secure an obstruction of justice conviction at trial or on appeal. Absent such a fact-specific approach , the government's ability to prove an obstruction of justice charge would be considerably diminished. In light of the pernicious and disruptive nature of this conduct in the military environment, a more rigid approach to obstruction of justice offenses would handicap the prosecution of those who would undermine the integrity of the military justice process.

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1. See United States v. Lennette, 41 W. 488, 489 (C.A.A.F. 1995), where the United States Court of Appeals for the Armed Forces makes this distinction between post-crime actions.

2. United States v. Aguilar, 115 S.Ct. 2357 (1995).

3. 6 C.M.R. 60 (C.M.A. 1952).

4. Id. at 65. See also United States v. Williams, 29 M.J. 41 (C.M.A. 1989).

5. 6 C.M.R. at 65. Surprisingly, despite the Long case, and the well-reasoned opinion in United States v. Favors, 48 C.M.R. 873 (A.C.M.R. 1974) (the court held restricting obstruction of justice to cases where charges have been preferred is contrary to military law and would be seriously detrimental to the orderly administration of justice in the armed forces), the issue of whether formal charges were a legal prerequisite to a military obstruction of justice charge remained unsettled in military jurisprudence. See, e.g., United States v. Daminger, 31 C.M.R. 521 (A.F.B.R. 1961) (stating that the offense of obstruction of justice must relate to a "proceeding pending," such as the preferring of formal sworn charges). See also Bryson, Obstruction of Justice: The Federal and Military Offenses, 29 THE ARMY LAW. 1 (19715), where the author discusses the concern over the earliest point in time at which military proceedings could be considered pending for an obstruction of justice offense, yet fails to clearly note how this issue's resolution is not tied to federal statutory law because, as the author himself admits, "separate and apart from the offense of obstruction of justice as defined by federal statutes is the military offense of obstruction of justice alleged under clauses one and two of Article 134, UCMJ." Id. at 3, 4. Twenty-nine years after Long, the Air Force Court of Military Review, in United States v. Chodkowski, 11 M.J. 605, 606-07 (A.F.C.M.R. 1981), finally adopted the Army analysis and observed that "obstruction or interference with the administration of military justice has long been recognized as an Article 134 offense independent of other federal statutes ... [t]he impact of [wrongfully influencing, threatening or impeding a witness or potential witness] is equally pernicious and disruptive whether or not formal charges are pending. To hold otherwise would permit the integrity of the court-martial process to be compromised on the eve of its birth." Accord United States v. Jones, 20 M.J. 38 (C.M.A. 1985); United States v. Ridgeway, 13 M.J. 742 (A.C.M.R. 1982). See also United States v. Tedder, 18 M.J. 777 (N.M.C.M.R. 1984) (adopting Chodkowski's rationale when finding that obstruction of justice is a cognizable offense under Article 134, regardless of the pendency of a judicial proceeding).

6. MANUAL FOR COURTS-MARTIAL (1995), Pt. IV, para. 96(b). Considering the elements of this offense "as recognized and prescribed by the President in the Manual for Courts-Martial, [as opposed to merely the statutory elements of Article 134]." the court in United States v. Oatney, 41 M.J. 619, 628-29 (N.M.Ct. Crim. App. 1994), found that communicating a threat was not multiplicious for findings or sentencing with the offense of obstruction of justice based on the same threat. In short, the court reasoned that the elements of communicating a threat and the elements of obstruction of justice required proof of different elements, and that each addressed a separate evil or societal harm. See also United States v. Benavides, 43 M.J. 723 (A. Ct. Crim. App. 1995) (obstruction of justice charge, when communicating a threat is its actus reas, requires additional elements).

7. Any act improperly influencing military justice is per se prejudicial to good order and discipline according to some courts. United States v. Long, 6 C.M.R. 60 (C.M.A. 1952); United States v. Caudill, 10 MJ 787 (A.F.C.M.R. 1981). Notwithstanding this per se prejudice to good order and discipline, one court has analyzed the fourth element of the obstruction of justice offense from the perspective of the service discrediting prong and apparently found it is met if the accused's act lacked integrity. United States v. Smith, 32 M.J. 567 (A.C.M.R. 199 1) reversed on other grounds, 34 M.J. 319 (C.M.A. 1992).

8. In one of its earliest decisions regarding this offense, the Court of Military Appeals upheld an obstruction of justice conviction based on a physical assault on a witness in Long, 6 C.M.R. 60 (C.M.A.

1952). See also United States v. Le Sage, 22 C.M.R. 853 (A.F.B.R. 1956). Although the rationale for specifically including post-trial obstructive actions within the obstruction offense is left unenunciated in these decisions, one possible reason could be the stark contrast between civilian and military justice post-trial procedures. Contrary to civilian verdicts, military findings and sentences are not approved and finalized until a lengthy review process is completed. See Articles 60-70, Uniform Code of Military Justice [hereinafter UCMJ] (codified at 10 U.S.C.A. Secs. 860 870) (West Supp. 1995). Under this reasoning, an accused who intimidates or injures a witness after his court-martial but before his conviction is final is still impeding the administration of military justice.

9. United States v. Athey, 34 M.J. 44 (C.M.A. 1992); United States v. Guerrero, 28 M.J. 223 (C.M.A. 1989). See also United States v. Zaccheus, 31 M.J. 766 (A.C.M.R. 1990), where the Army Court of Military Review held that obstructing the investigation of an accused's actions was sufficient to constitute an obstruction of justice offense despite the failure of the specification to allege the criminal nature of the investigation and its relation to a proceeding under the UCMJ).

10. Long, 6 C.M.R. 60 (C.M.A. 1952).

11. United States v. Daminger, 31 C.M.R. 521 (A.F.B.R. 1961).

12. United States v. Delany, 44 C.M.R. 367 (A.C.M.R. 1971).

13. MANUAL FOR COURTS-MARTIAL (1984), Pt. IV, para. 96(c), notes that the "the term criminal proceeding includes nonjudicial punishment proceedings"

14. Approximately 22 years after the Army Court of Military Review reached the same conclusion in Delany, 44 C.M.R. 367 (A.C.M.R. 1971), the Air Force Court of Military Review in United States v. Larson, 39 M.J. 516, 517 (A.F.C.M.R. 1993), specifically held that the "nonjudicial punishment procedure in the United States Air Force is a criminal procedure for the purpose of the offense of obstruction of justice."

15. United States v. Smith, 32 M.J. 567, 569 (A.C.M.R. 1991). Although the Court of Military Appeals reversed this case due to a factual error by the lower appellate court, it noted that an obstruction of justice offense can arise from interfering with state criminal proceedings, specifically finding that the "impact of the charged conduct on the later, but nonetheless probable, military investigation brought it within the intended scope of Article 134. " United States v. Smith, 34 M.J. 322 (C.M.A 1992). See also the concurring comments of Judge Cox in Smith, who stated that "in light of Solorio v. United States , 483 U.S. 435 (1987), there can be no distinction between obstructing federal or military prosecutions on one hand and obstructing state prosecutions on the other hand, and there are no 'strictures' in the Manual for Courts-Martial that purport to so limit the scope of the offense." Id. at 325.

16. Smith, 32 M.J. 567,570 (A.C.M.R. 1991).

17. 33 M.J. 40 (C.M.A. 1991).

18. Id. at 41-42.

19. Id. at 42-43. Accord United States v. Armstead, 32 M.J. 1013, 1015 (N.M.C.M.R. 1991) (substitution of urine during urinalysis following unauthorized absence was a "collateral administrative result, not part of the military justice processing of the absence offense ... the inspection itself was not pan of the administration of military justice.").

20. MANUAL FOR COURTS-MARTIAL (1995), Pt. IV, para. 96a, identifies another Article 134 violation which could be charged in this situation, "Wrongful Interference with an Adverse Administrative Proceeding." The explanation under this section notes that the administrative proceeding "includes any administrative proceeding or action, initiated against a servicemember, that could lead to discharge, loss of special or incentive pay, administrative reduction in grade, loss of a security clearance, bar to reenlistment, or reclassification." The intent remains the same as one charged with obstruction of justice, "the person had reason to believe that there were or would be an adverse administrative proceeding pending." Id

21. Compare Jacobellis v. Ohio, 378 U.S. 184 (1974) with United States v. Lennette, 41 M.J. 488 (C.A.A.F. 1995).

22. Lennette, 41 M.J. 488 (C.A.A.F. 1995).

23 Id. at 490 citing United States v. Finsel, 36 M.J. 441, 443 (C.M.A. 1993).

24. United States v. Rossi, 13 C.M.R. 896 (A.F.B.R. 1953) (witness threatened with assault when accused stated he knew where the witness lived and sooner or later would get him if he testified). See also United States v. Chodkowski, 11 M.J. 605, 606 (A.F.C.M.R. 1981) (accused threatened witness by stating that if witness "knew what was good for him, he would not testify.")

25. United States V. Caudill, 10 M.J. 787 (A.F.C.M.R. 1981) (accused's threat to witness, "If I go down, there will be some bodies floating in the bayou," when done for purpose of affecting testimony, constituted obstruction of justice, even if accused was not on notice that witness would be called at a future trial); United States v. Rosario, 19 M.J. 698, 699 (A.C.M.R. 1984) (although the Government did not intend to call the witness to testify, telling the witness's friend that "his buddy" was "f --- king up" and advising him to speak to the witness while making a "gesture of drawing his finger across his throat," constituted obstruction of justice.) See also United States v. Standifer, 40 M.J. 440, 445 (C.M.A. 1994) where the court held that although an accused could not be legally convicted of subordination of prejury where accused did not call a witness to testify, accused could be convicted of obstructing justice for having earlier approached the witness and asked her to testify falsely.

26. United States v. Oatney, 41 M.J. 619 (N.M.Ct.Crim. App. 1994) (threatening a witness and the witness's wife with injury unless he provided false information to the Naval Investigative Service Agents during investigation constituted obstruction of justice).

27. United States v. Daminger, 31 C.M.R. 521 (A.F.C.B.R. 1961).

28. 13 M.J. 964 (A.F.C.M.R. 1982).

29. Id. at 965.

30. Id. Similarly, the "[o]bstruction of justice does not require proof of an individual communicating a present threat to injure, and in certain situations may not require proof of any underlying offense." United States v. Oatney, 41 M.J. 619, 628-29 (N.M.Ct. Crim. App. 1994).

31. United States v. Caudell, 10 M.J. 787, 789 (A.F.C.M.R. 1981). See also United States v. Rossi, 13 C.M.R. 896 (A.F.B.R. 1953) citing United States v. Long, 6 C.M.R. 60 (C.M.A. 1952) that "it is axiomatic that courts-martial would be unduly hampered and influenced adversely if witnesses were not free to testify without fear of molestation."

32. United States v. Athey, 34 M.J. 44, 49 (C.M.A. 1992).

33. Id.

34. 34 M.J. 646 (A.C.M.R. 1992).

35. Id. at 650.

36. Id. at 651.

37. 30 M.J. 917, 928-29 (A.C.M.R. 1990).

38. Id. at 928-29. Similarly, in United States v. Smith, 39 M.J. 448 (C.M.A. 1994), the Court of Military Appeals reversed a finding of guilty where an accused contacted the boyfriend of his underage daughter and promised to give his consent to the marriage if the boyfriend "would contact" his daughter regarding the accused's sexual abuse of his daughter. The court reasoned that:

> the promise of future parental consent to marry was allegedly made to the third party as consideration for his contacting the witness. Moreover, there was no allegation left in the specification as to when the third party was required to contact the witness, or whether such contact should entail any communications including the promise of future marital consent by appellant.
>
> Id. at 452.

39. 43 M.J. 818 (A.F. Ct. Crim. App. 1996).

40. Id. at 820.

41. Id.

42. Id. at 822.

43. Id. The court in obiter dictum distinguished the facts in Sorbera from those situations where an accused "knowingly" commits a criminal act:

> When an attorney advises an accused to act in a manner the accused knows is criminal, the accused should not escape responsibility because his attorney's advice was bad. For example, acting on advice of counsel would not afford an accused any protection if he were to injure someone, violate a lawful regulation or take property belonging to someone else. The criminality of these acts are self evident. Similarly, when an accused receives deficient advice which might result in criminal prosecution and chooses to follow that advice after having the legal consequences fully explained, he does so at his own peril.

Id. Upon reflection, the result in Sorbera is probably consistent with Army Court of Military Review precedent reversing obstruction of justice convictions because accuseds in those cases did not threaten, offer bribes, or request unlawful or affirmative acts which would interfere with or obstruct the due administration of justice. See United States v. Kirks, 34 M.J. 646 (A.C.M.R. 1992); United States v. Asfeld, 30 M.J. 917 (A.C.M.R. 1990). For example, United States citizens cannot be compelled to travel by subpoena from the United States to testify at courts-martial, United States v. Bennett, 12 M.J. 463 (C.M.A. 1982), and requesting someone not to lie is even more innocuous than asking someone not to press charges. Accordingly, the court in Sorbera could likely have reversed the obstruction of justice conviction on the grounds of legal insufficiency and avoided the constitutional question of ineffectiveness of counsel. See, e.g., United States v. McCaukley, 37 C.M.R. 345, 350 (C.M.A. 1967), where the court observed "[g]rave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication . . ." quoting United States v. Rumely, 345 U.S. 41, 48 (1953).

44. United States v. Sorbera, 43 M.J. 818, 822 (A.F.Ct. Crim. App. 1996).

45. 28 M.J. 223 (C.M.A. 1989).

46. Id. at 225.

47. 30 M.J. 554 (A.C.M.R. 1990).

48. Id. at 558.

49. Id. See also United State v. Simpkins, 22 M.J. 924, 925 (N.M.C.R. 1986) (obstruction of justice conviction affirmed where accused asked one witness, "Did NIS talk to you? Don't say anything about me taking the camera," as well as when he told a second witness, "Keep quiet or lie about me stealing the camera.); United States v. Tedder, 18 M.J. 777,778 (N.M.C. M.R. 1984) (Accused, a naval legal officer, obstructed justice by informing witness with whom he had engaged in fraternization that the crime "would not be discovered if they kept their 'stories' straight!). Accord United States v. Gomez, 15 M.J. 954 (A.C.M.R. 1983) (affirming conviction for attempted obstruction of justice where accused approached witness with proposed alibi in exchange for money).

50. MANUAL FOR COURTS-MARTIAL (1995) Pt. IV, para. 96a.

51. Id. at para. 16, See, e.g., United States v. Turner, 33 M.J. 40 (C.M.A. 1991).

52. 36 M.J. 441 (C.M.A. 1993).

53. Id. at 444-45 (cites omitted). in light of the court's holding that an obstruction of justice offense can be affirmed where the accused's had reason to believe either "there were or would be criminal proceedings pending" against a certain person, it is doubtful that the Air Force Court of Criminal Appeals would follow its precedent in United States v. Kellough, 19 M.J. 871 (A.F.C.M.R. 1985), where the court found that the act of planting marijuana in the well wheel of his former wife's car in an attempt to make it appear she violated the UCMJ and cause disciplinary action to be taken against her was not an obstruction of justice because "criminal charges were not pending against his [former wife] at the time the accused planted marijuana on her car." Clearly, at the time the accused in Kellough planted the evidence (to improve his chances of receiving custody of his minor child), he had reason to believe that there would be criminal proceedings pending against his wife for drug possession, and that his actions were done with the stated intent to obstruct those proceedings, misleading the commander and the court about the cause of the marijuana in his wife's car. This is the only way his admitted motive of receiving custody of his child would have succeeded.

54. 41 M.J. 488 (C.A.A.F. 1995).

55. Id. at 490-91.

56. United States v. Ridgeway, 13 M.J. 742 (A.C.M. R. 1982).

57. Id. at 747. Should the element of intent to obstruct justice be lacking, under the 1995 Manual an accused could still be convicted of the Unlawful Destruction, Removal, or Disposal of Property to Prevent Seizure, MANUAL FOR COURTS-MARTIAL (1995), Pt. IV, Para. 103, as the only intent required under that offense is intending to prevent seizure of property others were authorized and endeavoring to seize.

58. United States v. Morris, 40 M.J. 792 (A.F.C.M.R. 1994) (finding that the actions of an accused, being aware of "imminent possibility of criminal justice proceedings," who "went to his unit to get leave, returned to the house, packed the children's bags," and took them to a "nearby commercial airport," and telling one of the witnesses "not to tell anybody about having sex with him" constituted obstruction of justice).

59. United States v. Zaccheus, 31 M.J. 766 (A.C.M.R. 1990).

60. United States v. Favors, 48 C.M.R. 873, 875 (A.C.M.R. 1974).

61. United States v. Le Sage, 22 C.M.R. 853 (A.F.B.R. 1956).

62. Id. at 855.

63. 28 M.J. 1004 (A.C.M.R. 1989).

64. Id. at 1007.

65. As a general proposition, some courts have observed that an obstruction of justice charge based on a communication between accomplices or co-conspirators is based on the first clause of Article 134, those offenses which involve disorders or neglects to the prejudice of good order and discipline in the armed forces, rather than on the second clause, which involves conduct of a nature to bring discredit upon the armed forces. See, e.g., United States v. Latimer, 30 M.J. 554, 558 at n.5 (A.C.M.R. 1990).

66. 29 M.J. 41 (C.M.A. 1989).

67. Id. at 42.

68. United States v. Rehak, 25 M.J. 790, 791 (A. C.M.R. 1988).

69. See, e.g., United States v. Turner, 33 M.J. 40, 43 (C.M.A. 1991) (distinguishing a pure inspection from other events, citing, United States v. Jones, 20 M.J. 38, 40 (C.M.A. 1985). For those obstructive acts committed within the context of an inspection or other administrative action, the proper charge would probably be the Article 134 offense of Wrongful Interference with an Adverse Administrative Proceeding. MANUAL FOR COURTS-MARTIAL (1995), Pt. IV, para. 96a.

70. See, e.g., Para 96(c), Part IV, MCM 1995. (Explanation of offense).

71. Id. In United States v. Simpkins, 22 M.J. 924, 927 (N.C.M.R. 1969), the court concluded that the acts of bribery, intimidation, misrepresentation, force or threat of force, as illustrated in paragraph 96c, are not exclusive but only examples of obstructing justice.

72. United States v. Asfeld, 30 M.J. 917 (A.C.M.R. 1990).

73. Id. at 928.

74. Id.

75. United States v. Finsel, 36 M.J. 441,445 (C.M.A. 1993); United States v. Athey, 34 M.J. 44, 49 (C.M.A. 1992). See also United States v. Benavides, 43 M.J. 723 (A. Ct. Crim. App. 1995) (where actus reas of obstruction of justice offense is communicating a threat, two additional elements complete the offense: the specific mens rea to "influence impede or otherwise influence the due administration of justice," and communicating the threat in the case of a person against whom an accused had reason to believe there were or would be criminal proceedings pending).

76. See, e.g., Finsel, 36 M.J. at 445.

77. See, e.g., United States v. Lennette, 41 M.J. 488, 490 (C.A.A.F. 1995).

78. United States v. Ridgeway, 13 M.J. 742 (A.C.M.R. 1982).

79. See, e.g., United States v. Tedder, 18 M.J. 777 (N.M.C.M.R. 1984).

80. See, e.g., United States v. Guerrero, 28 M.J. 223 (C.M.A. 1989).

81. See, e.g., United States v. Williams, 29 M.J. 541 (C.M.A. 1989).

82. See, e.g., United States v. Lennette, 41 M.J. 488; United States v. Ridgeway, 13 M.J. 742 (A.C.M.R. 1982).

83. United States v. Morris, 40 M.J. 792 (A.F.C.M.R. 1994).

84. United States v. Zaccheus, 31 M.J. 766 (A.C.M.R. 1990).

85. See, e.g., United States v. Kirks, 34 M.J. 1646 (A.C.M.R. 1992); United States v. Asfeld, 30 M.J. 917 (A.C.M.R. 1990), see also United States v. Smith, 39 M.J. 448 (C.M.A. 1994).

86. United States v. Sorbera, 43 M.J. 818 (A.F.Ct. Crim. App. 1996).

87. United States v. Lennette, 41 MI 488, 490 (C.A.A.F. 1995).

88. 18 U.S.C.A. Sec. 1505 (West Supp. 1995) states:

> Whoever, with the intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand, duly and properly made under the Anti-Trust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand, or attempts to do so, or solicits another to do so; or
>
> Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of power of inquiry under which any inquiry or investigation which is being had by either House, or any committee of either House or any joint committee or the Congress, shall be fined under this title or imprisoned not more than five years, or both.

89. 18 U.S.C.A. Sec. 1512 (West Supp. 1995) states in pertinent part:

(a)(1) Whoever kills or attempts to kill another person with intent to

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge Of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole or release pending judicial proceedings, shall be punished as provided in paragraph (2).

This statute also prohibits attempting the above by means less then murder, such as by intimidation, physical force, threats, or harassment. 18 U.S.C.A. at Secs. 1512(b) and (c).

90. 18 U.S.C.A. Sec. 1503(a) (West Supp. 1995) states:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate, judge, or other committing magistrate, in the discharge of his duty, or

injures any such grand or petit juror in his person or property on account of any verdict or indictment Assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).

91. See, e.g., United States v. Asfeld, 30 M.J. 917, 927n.10 (A.C.M.R. 1990) (referencing the overlap between the United States Code and military precedent).

92. United States v. Rosario, 19 M.J. 698,700 (A.C.M.R. 1984).

93. United States v. Williams, 29 M.J. 541,542 (C.M.A. 1989); See also United States v. Long, 6 C.M.R. 60 (C.M.A. 1952); United States v. Le Sage, 22 C.M.R. 853 (A.F.B.R. 1956).

94. Id. Accord United States v. Dowlat, 28 M.J. 958 (A.F.C.M.R. 1989) (affirming an obstruction of justice conviction based upon communications between a military training instructor and trainees to "get their stories straight"). But see United States v. Chasteen, 17 M.J. 580 (A.F.C.M.R. 1983) (obstruction of justice charge based upon 18 U.S.C. 15 10 dismissed because accused's black marketing activities which included communications between accomplices not proscribed by the statute which was designed to deter interference with potential witnesses prior to initiation of judicial proceedings).

95. Clause 3 offenses involve noncapital crimes or offenses which violate federal law, including law made applicable through the Federal Assimilative Crimes Act. Paragraph 60c, Part IV, MCM (1995).

96. United States v. Rosario, 19 M.J. 698, 700 (A.C.M.R. 1984); United States v. Ridgeway, 13 M.J. 742, 746 (A.C.M.R. 1982).

97. For an excellent overview of the myriad of limiting issues faced in prosecutions based on federal statutes, which are absent in military prosecutions based on the first 2 clauses of Article 134, See Fitzpatrick & Parker, Ninth Survey of White Collar Crime Obstruction of Justice, 31 AM.CRIM.L.REV. 747 (1994).

98. 115 C.Ct. 2357 (1995).

99. Id. at 2363.

100. See, e.g., United States v. Le Sage, 22 C.M.R. 853 (A.F.B.R. 1956) wherein the court stated:

> But apart from, the federal statutes denouncing it as an offense, obstruction of justice has long been recognized as a military offense in violation of Clauses 1 and 2 of Article 134 (and its antecedent Article of War), denouncing as offenses all disorders and neglects to the prejudice of good order and discipline in the armed forces, and all conduct of a nature to bring discredit upon the armed forces (Winthrop's Military Law and Precedents, 2d ed, p 728).

Id. at 855. (Citations omitted).

101. See United States v. Zaccheus, 31 M.J. 766 (A.C.M.R. 1990); See also United States v. Simpkins, 22 M.J. 924 (N.M.C.R. 1986); United States v. Bailey, 28 M.J. 1004 (A.C.M.R. 1989).

102. 41 M.J. 488 (C.A.A.F 1995).

National Performance Review and Reinvention: Should It "Reinvent" Our Federal Labor Management Relations?

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I. INTRODUCTION

No politician has ever lost an election for bashing the federal bureaucracy. For many Americans, the last two decades have been a period of uncontrolled government spending resulting in persistent budget deficits and a perception that the government is out of control and unresponsive to the public. So it is not surprising that over this same time period, three "outsider" Presidents- Carter, Reagan, and Clinton, were elected saying they were going to change the way the government "works." This article reviews the round of reform introduced by the Clinton administration, known as "reinvention" or the National Performance Review (NPR) and its impact on the Federal labor management relationship. It will be argued that legislation governing our federal labor relationship should not be amended based on proposals introduced under NPR.

Since 1990, Congress has enacted several bills designed to improve the management of the federal government. In 1993, President Clinton initiated the National Performance Review (NPR) in order to "reinvent" the government, so that it would "work better and cost less." Collectively, as the initiatives and enactments are implemented, they are reshaping our federal labor relationship. Some advocates for NPR argue that further significant changes are necessary to achieve the "entrepreneurial, customer-oriented" organization needed to take the federal bureaucracy into the next century; but there are reasons to be concerned about this headlong rush, especially as it seeks to reinvent our federal labor relations. For several reasons, the changes being urged by the National Partnership Council (NPC) and Office of Personnel Management (OPM) could lead to a less efficient and less responsive federal government. This article concludes that changes to our federal labor relationship should be built on a solid consensus after careful consideration of the direction being taken - not as a result of reinvention proposals derived from piecemeal reform, which are taken for political expediency, or based on isolated antedotes of short-term success. Even though NPR has had a positive influence on labor relations, this does not justify implementing or enacting the recommendations of the NPC or the legislation proposed by the OPM.

The "reinvention" effort has suggested savings of billions of dollars /1/ in federal programs and better service to the American people. /2/ There is no question that there has been real streamlining and productive gains following NPR recommendations. Still, any tinkering of a government program can result in savings of million of dollars, whether it is through labor-management partnership, an Inspector General's investigation, /3/ or through a manager's personal involvement and direction. Each method has different political and collateral consequences. While, the dollar savings from reinvention. may sound impressive, /4/ there are significant issues associated with the reform in labor relations. To consider the consequences of NPR, this article will focus on three areas where the impact of NPR can be seen - expanded bargaining rights for public employee unions, compensation, and privatization.

Every reform effort has an underlying agenda, but it would be misleading to picture the current process as a coordinated reform initiative. It probably makes more

sense to understand the process if it is seen as a free-for-all for ideas and a give-and-take by various interest groups, with uneven implementation of competing, sometimes contradictory, management reforms. Despite the lack of coordination, the goal of NPR reform is a strengthening of political authority over the bureaucracy and a greater involvement of the public employee unions in decision-making, at least in the short run. There are also several long term consequences which will be difficult to reverse, even if "reinventing government" falls short during its twelve year course. Some of these residual changes are positive and productive for the future of labor relations, while others have a negative repercussions. On the negative side, because previously unconventional possibilities for reform have been thrown open for consideration and there has been a slackening of centralized control, when a contrary party succeeds the current administration, there could be bureaucratic "gridlock" and greater inefficiency in public service as the new party attempts to change the direction or methods of reform and governance. On the positive side, "partnership" has been accepted by many career managers and union leaders; also, many managers have seen the positive change that innovative management styles can bring to some public agencies, and obsolete regulations and controls have been reexamined. Despite the NPR's promotional literature, there are some problems with NPR reform.

The success of "reinvention" reform is uncertain. Vice-President Gore estimated it would take ten to twelve years. /5/ Meanwhile, our civil service and labor relations will undoubtedly be shaped by other events as the years and administrations pass. It is even possible that the reinvention effort may be overcome by events, such as budget cuts, a radical change in the administration, or an new wave of reform spirit with a different name. Because local administrations and personnel change, concepts we espouse today (such as partnership) will have an uneven application in the federal government, and at times even the parties who embrace the concept may agree not to use partnership principles in negotiating certain issues. There is no question that in the next decade significant changes will occur in our civil service and labor- management relations. The predominant question for us should be, Why are we making these changes? Regardless of consequences to NPR, the seeds planted by the current reform will grow and they can never be pruned back to their roots. We should insure that the reform efforts truly lead to a more efficient and democratically responsive government. This can be done by empowering the individual employees, allowing management the flexibility to effectively lead the government agencies, and recognizing that elected representatives must steer its course. But this does not require us to codify the recommendations of the NPC or the Administration's most recent proposal for labor relations reform.

H. OVERVIEW OF THE NATIONAL PERFORMANCE REVIEW AND THE FEDERAL LABOR MANAGEMENT RELATIONSHIP

A. The National Performance Review

In an influential "call to arms," *Reinventing Government, /6/* David Osborne and Ted Gaebler preached "decentralizing" the, decision-making process in organizations as a means to increased productivity in government operations. The way to decentralize decision-making, they wrote, is to encourage employee participation in the management of the organization. Their book provided antedotes to show the success of empowering employees, leading to two observations: (1) the public employees unions are eager to help make changes, and (2) the most serious obstacle to participatory management is middle management. One of their conclusions is that middle management is superfluous once employees are making decisions and solving problems. /7/ Their call for decentralization was adopted wholeheartedly by the National Performance Review (NPR). The one concession

Osborne and Gaebler make to the unique institution of government is that employees cannot simply be turned free if they are to remain accountable to the citizens. /8/ This is solved by imposing accountability for results and creating institutions where the employees share the values and the missions of the organizations.

Decentralized organizations are advocated for four reasons. They are more flexible and respond quicker to changes and customers' needs; they are more efficient because front-line workers craft the solutions; they are more innovative; and they generate higher morale, more commitment, and greater productivity. /9/ Osborne and Gaebler argue that centralized control only causes waste, which results in more micromanagement and centralized control, saying "[t]he waste is not being created by inadequate controls. It is being created by removing the sense and fact of control from the only people close enough to the problem to do something about it." /10/

On September 23, 1993, Vice-President Gore released a report for "reinventing" the federal government. With the help of Osborne and about 200 federal employees, the NPR team reviewed the federal bureaucracy and entrepreneurial characteristics, and distilled four essential principles that can be transferred to a public agency: (1) cut red tape; (2) put the customers first; (3) empower employees to get results; /11/ and (4) cut back to basics. Vice-President Gore said:

> We will invent a government that puts people first, by: cutting unnecessary spending; serving its customers; empowering its employees; --Helping communities solve their own problems; fostering excellence... Here's how. We will: create a clear sense of mission; steer more, row less; delegate authority and responsibility; replace regulations with incentives; develop budgets based on outcomes; expose federal operations to competition; --search for market, not administrative solutions; measure our success by customer satisfaction /12/

B. Federal Labor Management Relations

To put the recommended changes in context, it is necessary to digress for a discussion of the short history of federal labor relations. Federal sector employees began organizing among themselves in the 1800s, /13/ and in 1912 Congress recognized their right to join labor organizations. /14/ They were specifically excluded from the coverage of the National Labor Relations Authority (NLRA) in 1935, and there was no government-wide policy concerning their bargaining power until 1962, /15/ when President Kennedy issued Executive Order [hereinafter E.O.] 10988, /16/ acknowledging the right of unions to represent the employees and negotiate agreements. /17/ One reason given for the new policy was a determination that employee participation in the formulation and implementation of policies and procedures affecting their conditions of employment would lead to improved employee-management relations within the Federal service. /18/ Still, sections 6 and 7 of the E.O. limited the ability of a union to bargain by reserving broad management rights. In 1969, President Nixon rewrote federal management-labor relations through E.O. 11419. /19/ There were major changes under E.O. 11419, such as binding arbitration of disputes and the creation of a third party to oversee the relationship, but management retained its right to exclude certain areas from bargaining.

From 1969 until 1979, labor-management relations in the federal government developed through amendments to E.O. 11419. /20/ Federal labor relations adopted the "exclusive representation" and adversarial "collective bargaining" relationship developed in the private sector, but with more limitations on the scope of bargaining. Labor was dissatisfied with this system. As part of the Civil Service Reform Act of 1978 (CSRA), Congress enacted the

Federal Service Labor-Management Relations Statute (the Statute), also known as Title VII of the CSRA /21/ The Statute codified the labor-management relationship along the fines of the NLRA, supplemented with rights, benefits, and limitations previously determined in the executive orders.

The rights reserved to management in the executive orders were listed in the statute at 5 U.S.C. Sec. 7106. /22/ During the late 1970s, as hearings and debate were held on labor relations reform, there was an effort to broaden the scope of bargaining and include a union security arrangement. But in the end, while the scope of bargaining may have been widened some, the statute retained a scope of bargaining which is narrower when compared to private sector standards and "fair share" was not included in the statute. /23/ The result was a management rights clause which listed categories of bargaining subjects. Those listed in section 7106(a) were not subject to bargaining, while those listed in section 7106(b)(1) were permissive subjects, /24/ which could be bargained at the election of the agency.

C. Recent Changes and Proposed Reform

The NPR Report released in September 1993 contained hundreds of recommendations to make the federal government "work better and cost less. " /25/ There were 14 recommendations directed exclusively at Human Resource Management, /26/ and in a 97-page accompanying report, /27/ the NPR expanded on these 14 recommendations with specific actions to be taken to achieve the recommended reforms. There were also several recommendations directed at leadership, management controls, and the OPM. /28/

In making its recommendation to empower the employees, the NPR said,

> No move to reorganize for quality can succeed without the full and equal participation of workers and their unions. Indeed, a unionized workplace can provide a leg up because forums already exist for labor and management exchange. The primary barrier that unions and employers must surmount is the adversarial relationship that binds them to noncooperation. Based on mistrust, traditional union-employer relations are not well-suited to handle a culture change that asks workers and managers to think first about the customer and to work hand-in-hand to improve quality. /29/

Based on a premise that federal labor-management relations under the statute is not working, the NPR recommended the creation of the National Partnership Council (NPC) to champion the cause of "partnership" and reform in federal labor relations. The NPR offered the NPC the following guidance, "Power won't decentralize of its own accord. It must be pushed and pulled out of the hands of the people who have wielded it for so long. It will be a struggle." /30/

The NPC was created on October 1, 1993, by E.0 12871. /31/ The NPC released its first report /32/ in January 1994, which presented a range of proposals to reform federal labor-management relations. /33/

Some of the proposals were: /34/

1. Permit consensual agreements between the parties involving any management rights;

2. Broaden the scope of bargaining;

3. Allow bargaining on operational matters protected by Sec. 7106(a)(2);

4. Eliminate agency review of the collective bargaining agreements;

5. Submit negotiability issues to arbitration;

6. Use consensus or ADR to establish agency rules that limit negotiation; and,

7. Rely more on alternate dispute resolution for a variety of disputes. /35/ The standard of review recommended for resolving disputes was one of "good government /36/

If these proposals seem pro-union, it should be understood that the NPC was initially composed of 4 labor leaders, 4 labor relations or personnel political appointees, and 3 executive agency political appointees. In January 1996, a Senior Executive Service representative and a Federal Managers Association representative were added to the NPC. /37/ Besides creating the NPC, E.O. 12871 also expanded the scope of bargaining between the federal agencies and the unions by directing agency heads to negotiate the permissive subjects listed in Sec. 7106(b)(1). /38/

The Office of Personnel Management (OPM) became a natural place to begin implementing the recommendations of the NPR and NPC. The OPM began a process of decentralizing and destroying regulations, such as "sunsetting" the 10,000 page Federal Personnel Manual. The move to deregulate the bureaucracy had consequences in the labor-management relationship because the statute prevented negotiation of proposals when it concerned a government-wide regulation. /39/ By deleting a government-wide regulations, OPM removed a barrier to bargaining. /40/

The OPM delivered on the administration's promise to deliver legislative reform to reinvent the civil service and labor relations. In May 1995, the OPM floated draft legislation entitled the Federal Human Resource Management Reinvention Act of 1995 [hereinafter 1995 HRM Reinvention Act]. Hearings were held in September and October 1995 before the Committee on Government Reform and Oversight. The proposed legislation, touted as "the most significant change in civil service law in a century," /41/ was criticized by both management and the unions. On review, the proposed legislation was actually a rehash of the NPR and NPC recommendations and not a vehicle for producing long-term labor relations reform.

Most of the 1995 HRM Reinvention Act addressed the personnel, system and the decentralization of many personnel functions. The legislation would codify proposals to decentralize the bureaucracy and insure union participation in any change. For example, one section of the proposed legislation gave the agencies the authority to design and implement their own incentive award and performance management programs. However, it also required the agencies to include represented and non-represented employees in the program design and operation. The agencies already had received substantial freedom to design their own programs and most of the proposed decentralization was already possible under current laws, but legislation was required to insure collective bargaining in the design of the programs. /42/

Significant reform in classification of personnel was also included. It would allow "broad banding" classification and allow OPM to establish the grade level criteria and salaries. The agencies could implement the broad banding in part or all of their organizations, without prior approval, so long as their plan conformed to the OPM criteria.

The 1995 HRM Reinvention Act adopted the recommendation of the NPC that a "Good Government" standard be established in the bargaining relationship. The Good Government standard requires all parties engaged in substantive bargaining to pursue solutions that promote "increased quality and productivity, customer service, mission accomplishment, efficiency, quality of work life, employee empowerment, organizational performance, and, in the case of the Department of Defense, military readiness; while considering the legitimate interest of both parties." /43/

Finally, the 1995 HRM Reinvention Act codified the provisions of E.O. 12871 by providing statutory authority for the NPC, requiring the establishment of labor-management partnerships throughout the executive branch and making the permissive subjects of bargaining listed in 5 U.S.C. Sec. 7106(b)(1) mandatory subjects of bargaining. The proposed legislation would have inserted another layer in the federal bureaucracy by authorizing agency level partnership councils to develop agency level policies and regulations affecting conditions of employment that would be binding on those components and bargaining units subordinate to the council.

The 1995 FIRM Reinvention Act is essentially dead. The criticism from labor and management and the unlikely prospect that it 'would be enacted by Congress shelved the proposed legislation.

III. IS THERE A NEED FOR THE REFORM PROPOSED UNDER REINVENTION"?

Recurring reform has been described as a necessary lubricant for our constitutional system, /44/ alternatively emphasizing either popular representation, neutral expertise, or executive leadership at various times in American history. It is difficult to place the current reform effort in such a clear pigeon-hole because of its broad character and scattered implementation.

At the time the NPR reinvention reform was initiated, federal labor relations was already naturally evolving to employee empowerment and partnership. Since the 1970s, federal agencies have experimented with TQM, quality, and other innovative managerial practices. /45/ This was occurring without the assistance of legislation or a demand for amending the federal labor relations statute. In a recent report on the "reinvention laboratories", which were instituted by the NPR, the General Accounting Office (GAO) asked the laboratories when their efforts actually began, regardless of when they were officially designated as "reinvention labs". The lab start dates varied widely, ranging from as early as 1984 to as recently as March 1995. /46/ Forty percent of the responding labs said their reinvention efforts originated in the agencies' quality programs and were an outgrowth from efforts begun in the late 1980s and early 1990s. /47/

One manager put the reinvention process in perspective when he described the "pony express" strategy of reform. He saw NPR reform as just another "flavor of the month" following a long list of previous management reforms. He also saw each reform effort as another opportunity to continue a preconceived agenda, using each one much like a Pony Express rider would use a fresh horse. /48/

On February 14, 1996, Vice-President Gore presented, for the first time, four National Partnership Council awards. One of the recipients was the Dept of Army Red River Depot, where partnership between union and management saved the depot from certain extinction. /49/ The Red River Depot was highlighted in

September 1994 in a NPR status/ progress report. /50/ The NPR perused several success stories on employee empowerment, and said:

> In *From Red Tape to Results*, NPR defined the 'basic ingredients of a healthy, productive work environment' as 'managers who innovate and motivate, and workers who are free to improvise and make decisions.' And, as illustrated by Red River, a key step to finding those managers and workers is transforming the labor-management relationship from adversarial to cooperative. /51/

But the NPR was not the catalyst to developing partnership at the Depot. In 1992, the Red River Army Depot had a tradition of labor-management strife. Prior to his arrival, the new commander went through plants like the Saturn Corporation and other plants where labor-management cooperation was being tested. At the same time, like other unions, the union at Red River depot recognized that down-sizing was going to proceed, with or without their cooperation. With a shift in attitude by both parties, management and labor committed to labor-management cooperation. The Depot began working partnership principles and developed a model, known as HEARTS (Honesty, Ethics, Accountability, Respect, Trust, and Support). In 1993, they reorganized into self-managed work teams, agreed to share decision-making, and adopted gain-sharing /52/ through incentive awards. Since the change, productivity at the Depot has increased, costs are down, and there are fewer complaints of unfair labor practices (ULPS), grievances, and appeals to the Merit Systems Protection Board. But again that process had begun before the NPR initiatives.

It is generally acknowledged by most observers and parties that employee participation in the federal workplace is desirable and brings an increase in productivity. Also, it has been generally accepted and shown in studies /53/ that employee participation is more productive when an independent representative for the employees, such as a union, is present in the workplace. As the natural evolution already occurring in the workplace indicates, employee empowerment does not require statutory reform of the labor management relationship. The long standing labor policy that employee participation be coordinated through the "exclusive representative" for those employees represented by unions naturally requires that the unions be recognized as prime players in any managerial reorganization.

There is a natural contradiction inherent in partnership councils between management and union. The partnership works only when management and labor are headed in the same direction and there is trust between the parties. It will not work if either party has an uncompromising or a confrontational attitude in negotiations. At the Red River Depot, both management and labor recognized that without partnership the depot literally faced extinction. In another recent partnership success story at Kelly AFB, Texas, it was reported that $2 million in litigation costs were saved between 1992 and 1994, with a reduction in grievances from 47 to 12 and a reduction in ULPs from 192 to 1. /54/ But it should be pointed out that Kelly AFB was on the short list of maintenance depots being considered for closure. In both Red River and Kelly AFB, management and labor had common uniting goals. It was their common interest that brought them together, not reform legislation.

Another experiment which shows that it is the communication process that improves labor relations and not regulatory or statutory changes, is found in a pilot program introduced by the Federal Labor Relations Authority (the Authority) to reduce grievances and ULPs. Under the program, frequent filers of ULPs were targeted for special dispute resolution. Under one part of the program, a judge unconnected with the case would conduct settlement negotiations with the parties prior to hearing. Since the project started, 76% of the cases in the program were

settled /55/ and a survey of the frequent filers showed that ULP filings dropped nearly 35 percent at those agencies that were targeted. /56/

Trust is the essential ingredient to partnership and cooperation. /57/ Carol Ban put it simply when she listed "credibility" as one problem facing union and management in establishing a nonadversarial relationship. She said,

> Credibility is an issue in two ways. First, both credibility and trust are necessary for creation of genuine labor-management partnerships. Unions need to know that management's promises of cooperation are not just lip service, and that they will not find themselves cut out of the tough decisions, while management needs assurance that unions will use their new power responsibly. /58/

The encouragement of partnership has been beneficial to federal labor relations. However, the change is really only superficial in the overall relationship. If the proposals envisioned by the NPC and 1995 HRM Reinvention Act are enacted, labor will be established as a primary player in the federal decision-making process at the expense of management and the elected representatives. A party which generally favors a labor-oriented, expansive government will be entrenched in the decision-making processes of the federal bureaucracy. This arrangement can be effective as we struggle through our current downsizing. However, in the long run, it will not lead to an efficient and effective government without some way to insure continued cooperation and trust between the parties.

This is not to say that NPR reform is irrelevant to bringing long-lasting reform to federal labor relations. NPR has encouraged federal agencies to more quickly adopt productive programs which were already naturally evolving. NPR cleared some of the obstacles and legitimized the innovative methods of management. But it is important to distinguish the evolution of federal labor relations and the NPR reform for two reasons. First, NPR reform has some serious handicaps and the evolution of federal labor management relations should not be tied to the success or failure of NPR. Second, NPR is advocating changes in management-labor relations which raise legitimate opposition from concerned stake-holders, and which should not be imposed without a detailed debate on the future of our labor-management relationship. While the NPR is trying to change the work culture in the Federal Government, the future of federal labor relations should not be steered by antidotes of selected success stones or visions of "labor peace." The facts show that employee participation, reinvention, and partnership do not work everywhere. There has been a great deal of criticism of NPR for its failure to obtain a consensus from the Congress, /59/ develop a sustainable vision, /60/ reconcile its contrary themes, /61/ or recognize the need to include democratic accountability in the reform picture. /62/ The Federal Government can reform itself and adopt innovative management styles which empower the employees without amending the foundations of the current labor relationship as proposed by NPC and the 1995 HRM Reinvention Act.

IV. THE POLITICS OF REFORM

"Reorganization is nothing more than the continuation of politics by other means." /63/ The ability to politicize the federal bureaucracy through reform and reorganization has been reviewed by several writers. /64/ Peri Arnold, a professor of government studies, has categorized the current reform as the same political promise made by every outsider president since 1970, a promise to transform the government into something it is not- a down-sized, customer friendly. service provider. /65/ He points out that every reform indicts government as having failed to serve the people, and every reform claims that repairing administrative processes and organizations

will transform the government. He finds specific fault with NPR reform in its failure to recognize or acknowledge its own political consequences. He says the goals of NPR must be understood as being deeply political, touching on government's fundamental aspects; and the apolitical facet presented by the NPR shows a naive or disingenuous understanding of interest group politics. The following is a simple attempt to identify the three principal interest groups in labor management reform, the unions, the Congress, and the executive branch, and what their interests might be in NPR reform.

A. The Union

There are approximately 2,000,000 employees /66/ in the executive branch of the Federal Government, excluding the 845,000 employees of the postal service. More than 2,000 local bargaining units represent approximately 1,300,000 federal employees, with the locals of four national unions representing 80% of the employees. /67/ It is unknown how many represented employees are actually members of the unions, but two relatively recent articles report union membership for the AFGE and NFFE at about 25 per cent and 50 percent for the NTEU. /68/ The unions have consistently pushed a number of themes since their recognition which can be distilled down to (1) expanded bargaining rights with third party arbitration and (2) "fair share" dues. Like any other interest group, they had always lobbied for their membership with varying success. /69/ Recognizing they have entered an era when the Federal Government will inevitably be reduced, the union leaders believe cooperation with a amicable, like-minded administration is essential to protecting their members. /70/

While cooperation is the course taken by the union leaders, they have their dissenters who criticize them for "putting the AFGE label on the [employees'] pink slip." /71/

At first glance, the interests of the unions and the politics between the unions and the Clinton administration appears obvious. Some observers cynically attribute the administration's motive for generally supporting the unions to a pay-off for support during the election, union silence during the NAFTA debate, or, looking specifically at the public employee unions, as an inducement for not effectively resisting the inevitable federal employee drawdown. This ignores an actual shift in strategy by the labor leaders and the executive branch. Labor could have fought downsizing through ULPs, grievances, and lobbying. The executive branch could have bashed the unions as obstructionists. Instead, both sides agreed to negotiate the inevitable downsizing, as opposed to the customary posturing found in the adversarial relationship. Regardless of whether it is due to politics or common-sense, the empowerment of the federal employee unions signals a political change which goes beyond the short-term objectives, of protecting the employees during the current downsizing. The unions want to be involved in management's decision-making process on "how will the government be run"; and just as importantly, they want to be involved in deciding, "what the government will do". They hope their "partnership" with the White House will give them a voice and a hand in directing which operations are farmed out to privatization. /72/

B. The Congress

The legislature is conspicuously absent from the NPR reform, even though the NPR staff acknowledges that 173 of their 384 recommendations require legislative action in order to be implemented. /73/ Legislative action is particularly important in reforming the federal personnel system, because it is covered by comprehensive statutes on pay, classification, fringe benefits, and due process. Congress and the

Presidency each attempt to control the bureaucracy and impose their policies through the agencies and the civil service. Congress exerts its control through committee oversight, personnel or organizational legislation, or the budgetary process. While Congress has been conspicuously absent from the NPR process, there are several recent acts which were passed to rein in and better manage the government. /74 Two of them, the Chief Financial Officers Act of 1990 (CFOA) /75/ as amended /76/ by the Government Management Reform Act of 1994 (CMRA), and the Government Performance and Results Act of 1993 (GPRA), /77/ have the potential for significantly enhancing the strength of Congress in its control over the agencies. The CFOA imposes fiscal accountability, while the GPRA imposes performance accountability.

A distinguished professor of public administration, David Rosenbloom, says, "Politically [the GPRA] is connected to the NPR, but institutionally it is at odds with it. It is likely to last because it will be in Congress' interest to embrace GPRA's opportunities for steering federal administrative activity (micromanagement)." /78/ In the NPR's view, and the view of the executive branch, Congress should authorize and fund programs and then step back. If the Presidency and the Congress remain divided and controlled by the current incumbents, the GPRA is a tool for micromanagement and policy steering that is just waiting for Congress.

While the change in the control of Congress in the 1994 elections may have ended a run of reform legislation, it did not lessen the reform spirit. /79/

Conflicting philosophies over the direction of the Federal Government forced the political parties to divert their energies to budgetary battles and grand changes in the organizational landscape. Distracted by these broader efforts, Congress is currently paying little attention to the CFOA or GPRA. However, depending on the outcome of the election, these acts could assume a more prominent role in steering the federal bureaucracy.

C. The Executive Branch

It is difficult to lay out the interests of the Clinton Administration in labor relations reform. Politically, the Clinton Administration is committed to reducing the federal workforce, reducing the budget deficit, and maintaining the strength and services of the Federal Government. Like every administration before it, strengthening the Executive branch will be on its agenda, but there is also something unique here that was not attempted by previous administrations. It is conceivable that the current administration wants to "burrow" the public employee unions into the decision-making process of the government in the same way every administration has burrowed its like-minded employees into the bureaucracy. At the same time, instead of strengthening the executive office *per se,* it is actually strengthening the control of the political appointees. /80/

Most every reform effort in this century has strengthened the executive branch. Generally the executive branch is able to pursue its policies through career bureaucrats, directed by a cadre of political appointees. An accumulation of these appointees in the upper echelons of the government began with the creation of the Schedule C employee under President Eisenhower. /81/ It was followed by President Nixon, and taught in the Malek Personnel Manual /82/ of that administration. Political appointments were legitimized in the Civil Service Reform Act of 1978 when President Carter established the Senior Executive Service, 10% of which could be political appointees. The process was masterfully managed by President Reagan, who had a say in every appointment made in his administration, /83/ and today partisan appointments continues unabated.

When the call came to cut 272,900 full-time equivalent employees, /84/ with special focus on the managers of the bureaucracy, Vice-President Gore and the NPR excepted the political appointees from these cuts, concluding that the career middle managers were the problem in the federal government. This has two impacts on the federal bureaucracy. First, it shows a lack of confidence by the leadership in the middle managers. These proposed cuts placed their jobs in jeopardy, with an obvious demoralizing effect on them. An almost intuitively obvious second result, is its further concentration of political appointments in the bureaucracy as management positions are deleted. /85/ To date, 15,000 or 23% of all supervisory positions have been deleted. /86/

The executive branch also has significant interest in maintaining control over the reform effort. Despite NPR's optimism, a knowledgeable NPR observer, Donald Kettl, made the following observation,

> The NPR report talked about the need for central management agencies to divest themselves of many of their powers, to decentralize those powers to the agencies, and thereby to empower the workers. Although this tactic is a sensible beginning, it is no basis on which to build long-term success. Practical politics suggests that, when problems or embarrassments arise from the behavior of empowered managers, as inevitably they will, demands will surface that they be prevented from ever occurring again. In the absence of stronger forces to the contrary, someone at some central office will be charged, by the President or Congress, with doing just that. Practical management also suggests that it is unlikely that the accumulated decisions of millions of empowered workers will be consistent with each other, the law, or the public interest. /87/

Any embarrassment resulting from the reinvention effort would be a setback for the Administration. There are several approaches available to through the executive branch for maintaining control over the federal bureaucracy. The executive branch maintains managerial control through Office of Management and Budget (OMB), Office of Personnel Management (OPM), two executive agencies, and the agency heads and other political appointees. It has been said of OMB, that the "M" in OMB has generally been subsumed by budgetary considerations, and its ability to provide sustained management leadership, even after being reorganized under "OMB 2000", is uncertain. /88/ OMB is responsible for overseeing the CFOA and GPRA and providing guidance to several pilot programs and the agencies. OMB has a formidable task turning these statutory programs into functional management tools. Meanwhile OPM is becoming a shell of its former self /89/ and under NPR, is pushing responsibility down to the agency level. The National Partnership Council (NPC) and the President's Management Council (PMC), are two advisory committees which provide guidance on federal labor-management relations and reforming the executive branch's management systems, respectively. While they appear to be paper tigers now, they are in place and can be strengthened and "empowered" if needed. With no central control in the executive branch, the future of NPR's reform falls to the political appointees, the federal employees, and the Vice-President. The unions become an important factor in this equation.

President Clinton occupies a unique position. For political and practical reasons he must maintain the support of the unions as the administration pursues an agenda which adversely affects the unions. As a Democratic president, he was able to maintain the trust and cooperation of the public employee unions during the downsizing, despite a number of set-backs for the unions and their employees. One

union official said, the unions' disputes with the administration are fought underground because the administration is Democratic. Had the Republicans proposed the same reforms, "everything would have hit the fan." /90/ As NPR enters its second phase, which looks at privatizing or terminating governmental functions, Vice-President Gore recently announced the creation of Performance Based Organizations (PBO). OPM revealed its use of contracting out to Employee Stock Ownership Plans (ESOPs) to privatize its investigative function. These are alternatives concepts which are more favorable to the protection of unions and their employees than what might be considered under previous paths of privatization. So while the unions might show increasing frustration with the administration, the Clinton administration has been able to continue to offer incentives for their continued cooperation.

V. APPLICATION OF NPR REFORM TO LABOR MANAGEMENT RELATIONS

Having considered the players and the reform initiatives, it is time to actually, consider some of the proposed changes and see how the reinvention reform has or will affect federal labor relations. The expansion of the scope of bargaining is a lightening rod whenever management and labor discuss reform issues. This really might be "much ado about nothing". If the parties truly espouse partnership in their relationship there should be little difficulty discussing issues of mutual concern, whether they are permissive or mandatory subjects of bargaining. It is when the parties are working under an adversarial arrangement that the issue is a real concern, or when management has a concern, legitimate or not, that it is losing too much control over its priorities and budget. But in these situations holding the managers accountable, choosing agency heads who agree to the administration's position, and allowing them the flexibility to bargain or not to bargain should be the most productive scheme. The real issues that need to be discussed are should we reclassify the subjects of bargaining to better define what is or is not a management prerogative; and what is a proposal's impact on the agency's budget and organizational priorities.

Ignoring the expansion of bargaining topics under the management rights section, NPR initiatives can have a significant effect in expanding the scope of bargaining on pay and compensation issues. The case law was already changing to allow negotiation on gainsharing and incentive pay and OPM has revised the rules in this area, but NPR will allow further negotiation on pay and compensation. Decentralization by OPM and enactment of the 1995 HRM Reinvention Act proposals could potentially allow negotiation of "salaries" among the agencies. There is a concern as to the reach of the changes, and, real adjustment of the statute is needed to address the impact of the changes if the NPR initiatives are implemented. The official literature and proposals fail to even acknowledge the difficulties ahead, much less address them.

The most significant impact of NPR and labor-management partnership could be in the area of privatization, which is at forefront of innovative change. This is also the area that can be driven by policy, although it is supposed to be driven by economic efficiency, and is the least settled in law or proposed legislation and rules.

A. Expanding the Scope of Bargaining

Like the federal government, every state that has enacted legislation covering public sector collective bargaining has elected to exclude some topics from mandatory bargaining. When public sector labor legislation is being considered the prevalent

view is that "the determination of appropriation subjects of bargaining in the public sector involves problems of the first magnitude. /91/ However, one recognized authority in public labor relations, Donald Wollet, has said, "the vast literature concerning the scope of bargaining is much ado about nothing and that pre-occupation with the subject is mischievous as well as mistaken ... ." /92/

There are many different approaches to handling the scope of bargaining but the reinvention literature provides no discussion on this issue. Rather there is a top-down direction to the agencies to discuss all possible issues under a belief that partnership requires us to ignore the long standing distinctions that once existed, and that only illegal and mandatory subjects of bargaining should be recognized. Three months after issuance of E.O. 12781, the NPC advocated extending the scope of bargaining even beyond the permissive subjects listed in 5 U.S.C. Sec. 7106(b)(1) /93/ and allow bargaining over the agencies' operational matters such as their right to hire, assign, direct, layoff, and retain employees, or to take disciplinary action against an employee; to assign work, to make determinations whether to contract work out, to determine the personnel who will conduct the agency's operations; and to fill positions. /94/ After the 1994 election it became obvious this was not a realistic tack to tanke. /95/ Also, there are two concepts the NPC totally ignores in pushing its union agenda. First, partnership already induces expanded bargaining without the need for legislation or direction. Second, the Federal Labor Management Relations Statute /96/ was created as one whole cloth. Changing the scope of bargaining requires reconsideration of the balance between the agency's priorities and its control over its budget versus the union's right to have its proposal negotiated and implemented. It is not a simple matter of changing "may" to "shall".

When Wollett said that arguing over the scope of bargaining is "much ado about nothing" he was taking a pragmatic view of the bargaining process, one that fits well with our current partnership arrangement. The parties should be allowed to discuss any subject they agree to discuss because it is the process of communication that is important, and the interchange of interests that matters. Under partnership, it can be argued, that is what really happens now.

Some prominent practitioners and researchers have suggested that the legal doctrine relating to scope of bargaining described briefly above have been unduly emphasized. They point to many instances where the legal doctrine rarely determined what was actually bargained. For these pragmatists, there is little practical difference between a mandatory and a permissive demand because bargaining depends upon bargaining power and pressures and not upon technical legal distinctions. This does not mean, however, that the law which defines scope is irrelevant to the bargaining process. At the very least legal scope doctrines may be used tactically by one or both parties during the bargaining process to manipulate timing and secure delays.

The partnership councils and the relationships present at the various worksites are essentially unregulated and there is no central repository to record the subjects discussed by the principals in these arrangements, /97/ but it is easy to understand that a collaborative approach to solving problems can easily lead to a blurring of the boundaries surrounding issues of negotiability. What unions and management will find is that they can discuss permissive, and even illegal subjects, if there is trust and an atmosphere of cooperation. Whether or not these subjects will ever appear in a written agreement can become irrelevant to the parties if there is sufficient trust. By legislating the bargaining relationship suggested by the NPC, the incentive for unions to engage in partnership is lost. There are union leaders who still refuse to accept partnership or cooperation as a labor strategy. As to encouraging agencies to

expand their scope of bargaining, executive orders, top-down direction, and accountability for results should persuade management to engage in partnership and discuss permissive subjects of bargaining where it will lead to increased efficiency and effectiveness of the mission. Another reason to maintain permissive subjects of bargaining is found in one tenet behind the NPR reform, that "one size does not fit all agencies." Vice-President Gore, the NPR, and the NPC have repeatedly emphasized that flexibility is essential to improving performance in the government. Mandating a broader scope of bargaining, through legislation, may be counter-productive to a true "partnership" relationship and does not insure an "entrepreneurial" organization. It also reduces the flexibility of negotiations for the agencies.

The legislature must also consider what happens when the administration changes. Partnership under E.O. 12871 will continue regardless of who controls Congress or the Presidency, but broadening the scope of bargaining will shift the tactical advantage in the labor relationship. This could lead to a further infusion of politics into the appointment of members on the Federal Labor Relations Authority and the Federal Service Impasse Panel, and perhaps countervailing legislation. None of this is necessary and a legislative expansion in the scope of bargaining is not needed.

It also raises an issue that deserves discussion, but has received no consideration. The NPR initiatives have been criticized for ignoring the politics involved in its initiatives. It is somewhat easy to accept the short-sighted approach of NPR as it relates to improving employee performance in better serving the customer, but the bargaining relationship between the government agencies and their respective unions is an eminently political issue. The balance found in the statute was reached after lengthy debate and represents a compromise reached between competing interest groups. To assume that the relationship can now be adjusted by simply opening the scope of bargaining without recognizing the compromises and concerns that inhered in the existing order is irresponsible and blind to the underlying bases of our democratic institutions.

B. Executive Order 12871

The real issue in dealing with permissive subjects of bargaining is not whether to enter into negotiations, but what will happen when the parties reach impasse; and if the matter goes to a third party what standards will guide the third party in settling the impasse. E.O. 12871 directs the agencies to negotiate over the permissive subjects listed in Sec. 7106(b)(1), but what does that mean? If an impasse exists, the federal sector allows interest arbitration at the request of either party, through the Federal Services Impasse Panel. /98/ However, the federal sector also follows the private sector rule that it is an unfair labor practice to force a party to negotiate to impasse over permissive subjects of bargaining. /99/ This means there is no third party arbitration of permissive subjects of bargaining, absent an agreement from both management and labor to submit the issue to arbitration.

At this date, there is no decision which addresses E.O. 12871 directly, but on October 1995, the Federal Labor Relations Authority (the Authority) did change its analysis of proposals which fall within Sec. 7106(b)(1). Prior to that date the Authority's position was that Sec. 7106(a) limited the reach of proposals under Sec. 7106(b)(1); but in NAGE *and Veterans Affairs Medical Center, Lexington, Kentucky,* /100/ the Authority changed its reasoning to bring it into accord with the decision of the D.C. Circuit in *Association of Civilian Technicians, Montana 'Air Chapter No. 29 v. FLRA*> /101/ As a result, the Authority held:

> In view of the foregoing conclusion that matters encompassed by the terms of section 7106(b)(1) constitute exceptions to the rights set forth in section 7106(a), a determination that a proposal is negotiable at the election, of the agency under section 7106(b)(1) obviates the need to also analyze the proposal under section 7106(a). Therefore, where, as in this case, parties disagree about which of these sections govern the negotiability of a particular proposal, the Authority will determine initially whether the proposal concerns matters within the subjects set. forth in section 7106(b)(1). If it does, we will not address contentions that those matters also affect, the exercise of management's authorities under section 7106(a). Conversely, if we conclude that a proposal does not concern matters within the subjects set forth in section 7106(b)(1), we will then proceed to analyze it under the appropriate subsection of section 7106(b). In determining whether a proposal concerns a matter within the subjects set forth in section 7106(b)(1), we will analyze whether the proposal falls within one of the two categories stated in that section. The first category relates to: i) the numbers, types, and grades; ii) of employees or positions; iii) assigned to any organizational subdivision, work project, or tour of duty. The second category relates to the technology, methods, and means of performing work. The case now before the Authority involves proposals asserted to be within the subjects in the first category. Finally, section 2424. 10(b) of the Authority's Regulations pertinently provides: if the Authority finds that the duty to bargain extends to the matter proposed to be bargained only at the election of the, agency, the Authority shall so state and issue an order dismissing the petition for review of the negotiability issue. Consistent with this regulation, we will dismiss the petition for review as to any proposal that is found negotiable at the election of the Agency under section 7106(B)(1). (footnotes omitted)

Thereupon, the Authority dismissed the petition of the union and left unanswered the consequences of E.O. 12871. /102/ Undoubtedly labor lawyers and management counsel have already drafted legal briefs outlining their respective arguments on the obligations imposed by E.O.12871; but it appears to the author that nothing has changed the long standing legal position that it is an unfair labor practice to require bargaining to impasse on a permissive subject. Also, E.O. 12871 requires the agency to negotiate proposals covered by Sec. 7106(b)(1), but nothing in the executive order requires the agency to enter into an agreement. Another long standing rule in federal labor relations is that even if management elects to negotiate a permissive subject, it may cease negotiations any time before an agreement. The duty imposed under the definition of "collective bargaining" does not compel either party to agree to a proposal or to make a concession. /103/

When the benefits of partnership are reviewed, the opened lines of communication have generally been cited by management and labor as the stimulus for finding new ways to solving problems and improving the relationship between the parties. When presented with a proposal which may fall within Sec. 7106(b)(1), many practitioners immediately suggest taking a hardline on the proposal; but Wollett suggests that management first determine what interests are driving the union representatives to present the proposal and see how the union expects the proposal to work. /104/ This will give management three benefits: first, the union may drop the proposal once its implications are understood; second, management may learn about a problem that needs to be addressed, even if it is not an appropriate subject for

negotiation; or third, the union may revise its proposal to express its real concern. This is the intent of Executive Order 12781, to establish the practice of communicating and negotiating when appropriate and to prevent shutting down the lines of communication as an initial instinct.

In summary, it appears E.O. 12871 expands the scope of negotiability by requiring the agencies to bargain over the permissive subjects listed in Sec. 7106(b)(1), but it does not relinquish the right of management to discontinue negotiating prior to impasse. Prior to the reinvention initiative or E.O. 12871, federal agencies were experimenting with partnership, customer satisfaction, and employee empowerment, following examples found in the private sector. The NPC and the 1995 HRM Reinvention Act propose legislation that would further expand, the mandatory subjects of bargaining, mandate. the creation of partnership councils at all levels of government, legislate alternative personnel systems and require their negotiation by the agencies, and introduce a new standard of review for labor negotiation. The proposals would shift the balance in negotiating power in favor of the unions without giving appropriate consideration to the long-term consequences on budgets, organizational priorities, or the future of labor relations. None of the proposals need to be enacted to continue reform under NPR or to continue improving the federal bureaucracy through normal processes. They would add to uncertainty, could discourage partnership by the unions, and encourage unreasonable proposals.

C. Pay and Compensation

Whether the union is in the public sector or private sector, the basic issues of concern to the employees are still job enhancement, job security, compensation, and fringe benefits. In the past, job enhancement constituted a majority of the union's bargaining issues. Job security was of little concern, since the CSRA insured significant protection from arbitrary removals and provided a weighty and comprehensive due process path for "just cause" removals. The Federal unions were usually prevented from negotiating wages and fringe benefits because these are established by law for most employees. /105/ To the extent workplace issues are specifically provided for by Federal statute, they are not included in the term, "condition of employment", /106/ and thereby excluded from negotiation. /107/ Additionally, the duty to bargain does not extend to matters subject to government-wide rules and regulations, such as GSA or OPM regulations and many of the Federal Personnel Manual provisions. /108/ However, as OPM repeals the FPM and slackens its regulatory control over the agencies under the reinvention process, it thereby further expands the scope of bargaining between the agencies and unions. Likewise, if changes are made to the grade structure and performance appraisal system as proposed in the 1995 HRM Reinvention Act, the changes would allow bargaining over subjects which will indirectly impact pay and compensation.

Incentive compensation is a high interest item in the reinvention of government, especially profit-sharing or gainsharing. The NPR made it clear that it believes these incentives must be encouraged in public agencies. /109/ While encouraging incentive programs, the NPR also understood that pay for performance programs had produced mixed results in both public and private sectors, and that there is insufficient empirical evidence to show that pay for performance programs are effective. /110/ Noting the difficulties with pay for performance programs, it pointed to 18 gainsharing programs in DOD which reported cost savings and indirect savings, such as less sick leave and overtime. The gainsharing programs were called a "promising but relatively little-used approach to linking awards with improved performance." /111/

In the past, federal regulations made a distinction between performance awards, covered in 5 C.F.R. Part 430, and incentive awards, covered in 5 C.F.R. Part 451. This distinction was removed by recent revisions, but it is useful to remember the distinction to understand past union proposals and the place for NPC recommendations. The NPC recommended the establishment of incentive programs which rewarded employees who meet performance expectations, as well as gainsharing programs. /112/ In the past, unions often proposed that performance awards be granted on the achievement of a particular performance rating, for example, a "fully successful" employee would receive $200. Nondiscretionary performance awards have been generally found nonnegotiable by the Authority.

The regulations covering incentive and performance award plans was decentralized in August 1995, as part of the "reinvention" process. /113/ OPM deleted the 5 C.F.R. Part 430, Subparts D and E, /114/ dealing with performance awards based on an employee's performance rating and integrated these sections into the 5 C.F.R. Part 451. It decentralized the rules and explicitly acknowledged gainsharing plans, /115/ giving authority to the agencies to establish the plans and allow awards up to $10,000 per employee with approval at the agency level. The regulation encourages negotiation of the plans with the affected employees. /116/

The case law regarding negotiation of performance and incentive plans /117/ has been evolving since the 1980s to allow greater negotiation. Initially finding the proposals non-negotiable, the Federal Labor Relations Authority (the Authority) has altered its position over time and now generally finds these subjects negotiable, even in direct defiance of the Fourth Circuit. At first, agencies argued that performance and incentive awards were "pay" or otherwise provided for by Federal statute and therefore not a "condition of employment" as defined in Sec. 7103(a)(13)(C), or within its management, prerogative to direct employees and assign work because the awards would set levels of performance for the work assigned by the agency. /118/ The Authority decided these issues in favor of negotiation in NTEU and IRS, /119/ after its contrary ruling was reversed by the D.C. Circuit. /120/

The agencies' arguments then shifted to limitations imposed by government-wide regulations and the effect the proposals would have on the agency's right to determine its budget. Prior to the 1995 revision of the regulations, both Part 430 and Part 451 contained provisions which required the awards to be reviewed and approved at a management level higher than the level recommending the award. /121/ The Authority relied on these "review and approve" provisions to find mandatory performance awards nonnegotiable. /122/ Over time the refuge given to the agencies by these arguments contracted as the D.C. Circuit rejected the Authority's interpretation of OPM regulations /123/ and the Authority restricted the reach of its own tests, refusing to follow the Fourth Circuit. /124/ In NTEU v. FLRA, /125/ the D.C. Circuit disagreed with the Authority's interpretation of the "review and approve" regulations and found a union, proposal negotiable, even though it proposed that all employees receiving "fully successful" in their annual appraisals would get a $250.00 award, at a minimum, with amounts increasing to $500 and $1,000 for higher performance ratings. This issue has been overcome by the new regulations which do not have the "review and approve" restrictions.

Of more interest, and the one on which we should focus, is the issue of management's control over its budget and its determination of the agency's priorities. The Authority's decisions on the "review and approve" regulations began with a Fourth Circuit decision, *Dept. of the 4ir Force, Langley 4ir Force Base v. FLRA, /126/*

which reversed the Authority's finding of negotiability concerning a union proposal which mandated cash awards of varying salary percentages to employees dependent on the employee's performance ratings in a five-step performance rating system. The Fourth Circuit found the proposal violated a government-wide regulation, */127/* but for our purposes its alternative, and first stated basis, for the reversal was the reasoning:

> We think it clear that NAGE's proposed mandatory payments for performance ratings bear on the right of the Air Force management to determine its own budget... . It is clear that management's reserved right to establish its own budget is constrained by the separate mandatory expenditures required by the performance rating bonuses. On oral argument before this Court, counsel for the FLRA even agreed that reallocation of sums budgeted to hardware, such as aircraft, might be required in order to meet the mandatory bonus payments. For these reasons the proposal would "directly interfere" with the Air Force's determination of its budget a right reserved to it by Section 7106.1 /128/

In AFGE and 4FMC, Wright-Patterson AFB, /129/ the Authority developed a two-prong test to determine whether a union proposal directly interfered with management's right to determine its budget. Under the Wright-Patterson test, to avoid negotiating a union proposal, the agency must show the proposal either (1) results in a requirement that the program or amount be included as a separate item in the agency's budget; or, (2) it causes an increase in costs that is significant and unavoidable and not offset by compensating benefits. The test was revisited in NAGE Local R14-52 and Dept of Army, Red River Depot, /130/ where the Authority plainly stated that it would refuse to follow the Fourth Circuit's interpretation of the Wright-Patterson test. The Authority then restated the test so that the first prong would require the proposal to directly require a specified amount in the agency's plan to fund its programs and operations during a fiscal year. /131/ In essence the first prong is written out of the test except for inartful unions negotiators. The Authority said,

> As an illustration of this distinction, a proposal requiring that an agency pay a specified amount toward health benefits premiums for bargaining unit employees would not be inconsistent with the first part of the budget test. However, a proposal requiring that the agency place a specified amount in its budget for the purpose of funding health benefits premiums for bargaining unit employees would. /132/ (supporting citations omitted and included in footnote).

In *Red River Depot*, the union proposed that labor savings over the fiscal year be divided 50/50 between management and the employees. In the first round, the agency argued that since it no longer has a gainsharing program, the proposal would require its establishment and therefore, directly interfere with the agency's right to determine its budget. The Authority noted that while the proposal would require the Agency to reestablish gainsharing as an administrative program, the proposal did not, by its terms, mandate any budgetary action. On remand, an issue arose over the establishment of the baseline because a baseline which was not based on actual costs and adjusted each year could require a separate accounting for the profit sharing. /133/ The Authority was able to avoid having to decide this issue by finding that the Authority had unilateral discretion to set the base-line based on past performance of the employees. "As long as a proposal leaves the agency with the discretion to determine how any necessary funding relating to an administrative or operational program will be addressed in its budget, that proposal is not inconsistent with the first part of the budget test." /134/

It has to be remembered that the Fourth Circuit disagrees with a narrow interpretation of the first prong, which reduces it to a legalistic shield useful only against proposals submitted by unions who have inartfully failed to correctly phrase their proposal. The dispute between the Fourth Circuit and the Authority really relates to the balancing reached by the two tribunals. Every observer has to acknowledge that most proposals submitted by a union will impact the agency's budget and draw funding from other programs or projects. The Authority's view is that an expansive view of management's right to determine its budget would sharply curtail the scope of collective bargaining, while the Fourth Circuit believes the narrow test ignores the practical economic realities of these proposals.

This is not unlike the problem faced by state legislatures which have enacted an expansive scope of bargaining, State agencies will often negotiate an obligation of funds, usually on pay raises or fringe benefits, which later are not appropriated by the state legislatures. There are several alternatives adopted among the states on how to handle this problem; but there is no solution satisfactory to all parties, especially when it is realized the solutions still, require distributing the same limited tax receipts to several competing programs and priorities, and someone's program or priority must lose. The NPR initiatives totally ignore this dilemma when they urge expansion of bargaining rights and slackening the control over the compensation of employees to provide more market-oriented incentives for performance. The *Wright-Patterson* test is not an adequate solution to settle the disputes after expanding the scope of bargaining.

Whether or not the proposal requires a "line item" in the agency's budget can become meaningless in making priority and allocation determinations, and this is recognized by the second prong of the Wright Patterson test, which makes a balancing determination. In NTEU and NRC, /135/ the Authority acknowledged that the second-prong requires an examination of the merits of the proposals. /136/ The union had made an argument that the second prong be "jettisoned" in its entirety; but the Authority recognized some balancing test is needed and it responded to the union's argument by concluding that the second prong "continues to offer a reasonable solution to the tension that exists between the management rights provisions of the Statute and the promotion of genuine collective bargaining over meaningful issues." Under the second prong, the Authority weighs the cost to the agency against the compensating benefits received in return, without considering those intangible nonmonetary benefits, such as positive employee morale. The "tangible" monetary benefits considered by the Authority in *NTEU and NRC,* included a reduction in employee turnover, a lower number of grievances, improved employee performance, and increases in productivity.

The second prong recognizes that some proposals have, costs ramifications of such significance that they, in effect, determine the agency's budget. /137/ What is missing in this equation are the "costs" associated with shifting funds from a priority program to fund the union proposal. If the Authority is going to allow jockeying of the budget, then the parties should be required to determine where the funds for the proposal exist and what programs Will have less funds and how that will impact the mission of the agency. Realistically, this may be impossible, but it would show not only how the proposals affect the budget, but how it affects the mission of the agency and management's ability to conduct its operations. The agency argued, in *NTEU and NRC* that the pay proposal infringed on the agency's ability to determine its mission. The Authority answered that the impact was not caused by the union's proposal but by some future action:

> As to the Agency's concerns that the FSIP may issue decisions that infringe on its management right to determine its mission, we note that if, as a consequence of future negotiations, the FSIP issues a decision that imposes a provision that the Agency believes is inconsistent with its management right to determine its mission, there are avenues available for challenging such action. /138/

However, this also reduces the balancing test to a arbitrary exercise if all the Authority does is calculate the cost of the proposal as a percentage of the agency budget, without making a realistic assessment of the proposal's true impact on the agency. Attempting realistic assessments may inmesh the Authority in the affairs of the agencies, but it is too late to withdraw from that responsibility which began when it introduced the Wright-Patterson test.

There are other problems associated with profit-sharing, besides their negotiability. A few considerations the parties must address in their negotiations are: the effect incentive pay will have on base rates for overtime calculations, the baselines that will be used and how these baselines can be manipulated; the employees who will be covered; whether the top performers deserve more than the worker who just did his or her job; when the entitlement will be determined; what percentage must be allowed to account for returned work or other risks; and what programs and priorities will not be funded. The agencies and unions will need training to develop the expertise. In times of tight budgets, this may easily be ignored as a "nice to have", when in reality this training is essential. These issues should not be proposed and negotiated causally.

Determining the employees who will be covered by the proposal becomes significant following the Authority's decision in AFGE and OPM. /139/ In AFGE and OPM, the Authority found that a union proposal is outside the duty to bargain if it does not concern conditions of employment of bargaining unit employees. The Authority considered three types of bargaining proposals: (1) those that directly implicated unrepresented employees and nonemployees; (2) those that directly implicated employees in other bargaining units; and (3) those that directly implicated supervisory personnel. In the first category, the Authority has applied the "vitally affects" test. With regard to proposals directly implicating employees in other bargaining units or supervisory personnel, the Authority concluded that the "vitally affects" test does not apply and, accordingly, that such proposals are outside the duty to bargain. The Authority also decided, in reviewing the inconsistent proposals, it would no longer rely on what the union seeks to accomplish, rather than, what the proposal would in fact accomplish, in determining whether a proposal concerns a condition of employment of non-unit employees. This raises some issues concerning a profit-sharing plan which covered all employees in the organization, such as the one considered in Red River Depot. But limiting the proposal solely to the bargaining unit members ignores the "me too" attitude of unions and employees and the foreseeable probability that an incentive pay proposal will be expanded to all the employees in the affected unit. Currently the "me too" argument is not persuasive with the Authority.

The issues discussed above show that Federal labor relations was evolving on its own to expand the negotiability of topics through the adoption of innovative management practices, as shown by the 18 DoD incentive award programs or the change at Red River Depot when the new commander arrived at his station impressed with private sector innovations. NPR made the risk taking acceptable and actually encouraged it, but it is legitimate to wonder whether the NPC's proposals are needed. The OPM has revised its regulations on awards and incentive pay to encourage these programs. /140/ All of this diverts our attention to encouraging the agencies to negotiate incentive pay programs with the unions, before addressing the underlying

issue, what are management's rights in determining its budget and setting its priorities, which ultimately determine the mission of the agency.

There are other areas of compensation which remain closed to union negotiation and it is only through the reinvention initiatives that these areas may be opened. /141/ The Federal employee unions have always lobbied for pay comparability, and achieved some success through the years with enactment of corrective legislation, such as the Federal Employee Pay Comparability Act of 1990 (FEPCA). The FEPCA required the government to close the Federal/nonFederal pay gap within a certain time period and institute locality pay for high labor cost areas. It also allowed special recruitment and retention bonuses. /142/ However, there has never however been agreement on comparable rates. This has resulted in a constant upward pressure on other determinatives of pay as the employees and the unions seek what they believe is a comparable rate.

One phenomena has been grade inflation. Ronald Johnson and Gary Libecap, contend there is a prevalent practice in the civil service for supervisors to inflate the grade levels of their employees in respond to pressure from the employees to compensate for departures from pay comparisons in the local area. /143/ They cite studies by OPM and Congressional Budget Office (CBO) which acknowledge the problem of grade inflation and other data which shows a creep of the average GS level for federal employees from an average GS grade of 8.16 in 1980, to 8.39 in 1984, to an average grade of 8.69 in 1989. /144/ While, some of the grade creep for the period can be attributed to the growing professional layer in the Federal Government which generally groups in the higher GS levels; Paul Light gathered raw data for the GS I 1-10 employees, and it showed a grade creep from 8.06 to 8.53 to 8.91 for the period from 1983 to 1989 to 1992, respectively. /145/ The contention that grade inflation exists is further supported by a recent GAO study which was conducted to determine if women and other minorities were being classified at lower grades than the general workforce for the same work. The study found some discriminatory differences, /146/ but it also found that generally everyone's grade, including minorities and women, was overrated,

The implementation of the FEPCA also shows the same upward pressures. To retain specially qualified employees, the FEPCA authorized the agencies to pay retention allowances to these employees. The retention allowance was intended to be used only to retain highly skilled employees who would otherwise resign to take a higher paying job in the private sector. Since 1990 five agencies have used the benefit, with increasing numbers each year. In 1991 four employees in the entire Federal government received the retention allowance; by 1994, 374 employees were receiving it. /147/ This would be a minuscule number and unremarkable except for the situation found at the Export-Import Bank (Ex-Im Bank). From 1990 to 1993, Ex-Irn Bank did not use the allowance; then in 1994, it provided the allowance to 100 employees and by August 1995, 200 employees or 45% of the bank's employees were receiving the allowance. In doing further research, OPM found Ex-Im Bank not only improperly paid the retention allowances, but also failed to properly handle its cash awards, pay raises, and recruitment. bonuses. /148/ As a result the Ex-Im Bank hired an outside expert to correct the problem. There is nothing wrong paying 45% of the employees a retention allowance, if it is justified; /149/ but over time there will be an upward pressure to grant pay raises through FEPCA allowances. And the situation is not an isolated one. Recently President Clinton ordered greater oversight of bonuses awarded to executives of federal corporations after learning of plans to award hundreds of thousands of dollars to its top executives. /150/

As the administration attempts to regulate the pay of its top employees, it is also controlling the raises normally due to the employees. In the 1997 budget, President Clinton provided the federal employees a pay raise of 3%, well below the 7 to 8 % which would have been required by the FEPCA. Administration officials argued that "it makes no sense, in tight budget times, to strictly follow the law when the government is downsizing and the pool of applicants for federal jobs is plentiful." /151/ The administration is now considering a new total compensation approach when comparing federal pay with private pay, because the current approach only looks at salaries, and ignores the favorable fringe benefits given the federal employee, such as the retirement plan. /152/ A GAO study noted that academic studies have found that pay levels for the federal employees are higher than those for employees in the private sector with comparable characteristics, such as education and work experience, and the government's methodology is generally criticized as being defective. /153/ One academic study focusing on locality pay showed that private sector pay had little effect on entry levels, promotion grades or current grades of the federal employees, and that there was little empirical evidence to show a significant connection between locality pay and recruiting or retaining employees.

The bottom line after reviewing studies on grade inflation and pay comparability is that employees are attracted or deterred from federal service for reasons other than the salary, as shown by the pay comparability studies; however, promotions and salary increases are used by supervisors as an incentive to possibly motivate their employees or out of peer pressure. What does this mean for federal labor relations? There is an NPR initiative to allow agencies to utilize broad-banding of the GS classifications. A potential classification system allowing agency-specific broad banding is outlined in the 1995 HRM Reinvention Act. Under that proposal, the GS grade classification system established by statute would be abolished, but the present pay structure would be retained. OPM would have authority to establish grade level criteria by regulation. A new subchapter would also be inserted in Title 5 to authorize OPM to establish government-wide broad-banding criteria. OPM would then have the authority to approve broad banding programs submitted by the agencies for all or part of their organizations, provided they met the government-wide criteria.

Extrapolating from past experience with grade inflation and pay comparability, there are some legitimate questions regarding the benefits of broad-banding. The general consensus is that the employees will begin to congregate at the top of their pay bands relatively quickly, unless there is some external control or internal discipline. GAO's review of past broad-banding experiences has caused concern about the implementation of broad-banding government-wide. /154/ The GAO was concerned because salary costs tended to be higher under a broad-banded system; the tests were too limited to, lead to a conclusion that broad-banding is appropriate government-wide; and no controls had been adopted to insure that federal employees doing the same work in the same local area will receive essentially the same pay, regardless of the agency at which they work.

Legislation to allow broad-banding was proposed in the past, but never enacted. While NPR raised several faults arising from the rigidity of the current classification system; NPR also recognized that broad-banding does not appear to be the panacea for every organization. "[Broad-banding] carries its own set of challenges and may not be a good fit for every organization or every occupational group." /155/ The NPR acknowledged that the concerns of GAO are real. Broad-banding can lead to increased salary costs unless the organization has managers skilled at managing employee's pay, an effective performance management system, and budget controls. But obtaining classification and pay flexibility can be a tremendous temptation for an agency, which believes it can discipline its managers in managing the pay and control the salary

creep, especially if it is being pressured by the unions and innovative political appointees to adopt the new system. Whether Congress will trust this classification system to the agencies remains to be seen. Our focus now is what are the consequences to our labor relations.

E.O. 12871 directs the agencies to negotiate the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work projects, or tour of duty. The Authority has yet to define the union's ability to determine the "numbers, types, and grades of employees" under Sec. 7106(b)(1). Although there are cases defining the terms, these cases generally determined the boundary protecting management's rights from interference, not how far the union's negotiating rights extend. /156/ These two lines are not the necessarily the same.

A additional complication in this area is found in the definition of "condition of employment" which excludes any policy, practice, and matter relating to the classification of any position. Peter Broida in his treatise on Federal Labor Relations indicates:

> Congress intended to remove from the scope of bargaining threshold determinations of what duties and responsibilities constitute a given position and the characterization of that position for purposes of personnel and pay administration. The bargaining exclusion was intended to ensure uniformity of position classification throughout the federal service. For that reason, bargaining proposals directly relating to the classification of positions do not concern "conditions of employment" and they are not within the duty to bargain. /157/

If broad-banding is introduced, it remains to be seen how this exclusion from bargaining will be addressed. The government-wide criteria for the classifications will be made at the OPM, with the agencies permitted to develop their own broad-banding programs, presumably allowing some flexibility to create bands appropriate for their organizations. Generally, agency level rules and regulations are bargainable; unless the agency cart show a compelling need for the rule or regulation. /158/ This is an elevated standard which is infrequently met by the agencies. If the agency relies on the exclusion under Sec. 7103(a)(.14) for matters related to classifications, it is uncertain how this issue will be decided.

Once broad-band classification becomes optional, unions who believe it is advantageous to their employees will want to negotiate its implementation. When all of the consequences are considered, federal employee unions may soon be negotiating the employees' salaries with the agencies. If the recommendations of the 1995 HRM Reinvention Act are enacted, the unions will be able to negotiate manning and staffing, incentive pay, performance standards, and a broad-band classification system. While these components do not legally constitute "pay", they do set salaries indirectly. It remains to be seen at what level bargaining over these issues will occur, but the majority of the agencies and the unions have no experience in either creating these programs or bargaining over issues related to them. As the GAO and the NPR acknowledge, there are a number of difficulties here.

The piecemeal and politically-driven approach of the reinvention initiatives to labor relations reform is injurious to long term stability in labor relations. The case law identifies the real tensions developing in labor relations; one of which is the ability of the agencies to prioritize funding and determine their budgets versus the unions' ability to negotiate proposals which necessarily impact the agency's budgetary decisions. This is especially important as funding for the operations of some agencies becomes more

scarce each year. Merely opening the subjects listed in Sec. 7106(b)(1), such as manning and staffing, for mandatory negotiation does not address these tensions or introduce efficiency in government operations. It may appease the unions for a short time during this period of downsizing, but it shows no fore-thought to the long-term consequences.

The boundaries meant to protect management from negotiating proposals to impasse should not translate into the same boundaries which show the breadth of the union's ability to negotiate issues. If the bargaining boundaries in federal labor relations are going to be adjusted, then Sec. 7106 should be reviewed in its entirety, not in a piece-meal approach; and perhaps the entire Statute should be reviewed. Efficiency in the government is advanced by certainty in the rights of the parties. Unsettled definitions of the parties' rights will breed litigation, or lead to extreme bargaining positions hoping for a compromise in the uncertain areas of the law.

A Downsizing - Privatization, Contracting-Out, and Other Options

A great deal has been written about the "shadow government" which his been created to provide federal government services. Mark Goldstein put it simply when he said, "both Republican and Democratic presidents have become adept at political sleights of hand: They have provided programs demanded by voters while holding federal employment steady so that no one might accuse them of making government bigger. Shadow Government is the sorcery that allows administrations to manage this feat." /159/ The "sleight of hand" is performed through privatizing and contracting-out, which are often jumbled -together as privatization. Fredrick Mosher estimated that only 5 to 7 percent of all federal spending was spent on activities that the federal government performed itself, after excluding funds allotted to the armed forces. /160/ John Sturdivant, National Vice-President of the AFGE, estimated the shadow employee workforce to be equal in size to the two million federal employee workforce. /161/

In December 1994, the administration announced the beginning of NPR Phase 2, bringing the focus to cutting the government back to its essential services. To have influence on which services are retained within the government or spun out is a valuable privilege for the unions. When Robert Tobias, National President of the NTEU, was confronted regarding the union's continued cooperation with the administration, he responded that the employee cuts were inevitable and it better to be inside, helping to steer and brake the train, rather than outside standing in front of it. /162/ He understood another administration would not give the unions the same access or influence that they are given today. This access is extremely valuable when one stated objective of the current administration, and the purpose behind NPR Phase 2, is cutting programs. Employee involvement has also been found to be a major factor in the eventual success of privatization. "If the employees believe that management is at least considering their interests, then they will 'buy in' to the process to a greater extent which in turn ensures that the privatization has a greater chance for success." /163/

Basically there are five ways to downsize the federal government. /164/ These basic ways are: Service Termination; /165/ Privatization; /166/ Quasi-Government Corporations; /167/ Public/Private Partnerships; /168/ and Competition/Contracting-out. /169/ One out of several unique features of the reinvention effort is the breadth of the innovative ideas being considered in the efforts to reorganize and consolidate the bureaucracy, such as Franchising, Performance Based Organizations (PBOs) and Employee Stock Ownership Plans (ESOPs). The first two do not involve the termination

of federal involvement, except perhaps as an initial step to privatization. The third is a method for privatizing or contracting-out a government commercial service.

It is understandable why unions feel they need to get involved in the reinvention process. Although there are persuasive arguments and studies showing a lack of return or benefits in some instances of privatization; /170/ the political realities are that the trend to privatize or reorganize government's functions will not slacken over the next few years. This section will focus on the various options and NPR's effect on the labor relationship. Adding to the volumes written over the years regarding privatization and contracting-out; hearings on the subject were held in March 1995 before the Committee on Government Reform and Oversight. /171/ While the unions blamed poor management and arbitrary personnel levels (among other restrictions) as a hindrance to employee productivity eventually leading to wasteful privatization; pro-privatizing speakers criticized minimum manning levels and protection for core governmental functions as barriers to more efficient contracting-out. These arguments will continue to rage because each side has the facts to support its case; but what are the alternatives and how do they involve our labor relations?

"Contracting-out" is listed at 5 U.S.C. Sec. 7106(a)(2)(B) as one of management's operational rights not subject to negotiation. The NPC has recommended three options to expand bargaining over union proposals, two of which affect this right. /172/ Under Option 1, E.O. 12871 would be codified and bargaining would be required on any union proposal unless the agency can show the proposal "substantially interfered" with its remaining managerial rights. /173/ Option 2 would add a gradual three-phased implementation of mandatory bargaining over the operational subjects found in Sec. 7106(a)(2), such as contracting-out. There would be a "no-fault" period allowing cancellation of agreements for a limited time as the parties experiment with the new rights of bargaining, but in the end the operational subjects would be fully negotiable.

Option 3 would immediately expand bargaining rights to include the operational subjects. None of these options was included in its entirety in the 1995 OPM Reform Act.

The courts have held that the federal unions do not have standing to challenge decisions made under Circular A-76 to contract out work that was or could have been performed by the employees represented by the unions. /174/ The history of negotiability of union proposals dealing with contracting-out shows the uncertainty in law that can exist in federal relations. Again, we see another instance when the Authority decided its cases contrary to decisions issued by the appellate courts. The disagreements intensified following a remand from the Supreme Court /175/ until 1993 when the Authority finally, accepted the reasoning of the appellate courts. /176/

The Authority was always concerned with the consequences that contracting-out had on the employees and their inability to address these effects up-front in the decision-making process. Therefore, it ruled several proposals regarding the contracting-out process to be negotiable. However, 5 U.S.C. Sec. 7117(a)(1) excludes bargaining over proposals which are inconsistent with a government-wide rule or regulation. OMB Circular A-76, /177/ which regulates the contracting-out process, is a government-wide rule or regulation and the circuit courts have limited the negotiability of union proposals on that basis; holding, generally, that Circular A-76 has established procedures for resolving any disputes regarding its implementation and forbids negotiation and arbitration over its processes or decisions. /178/ Allowing collective

bargaining, which could eventually lead to arbitration, over the implementation of A-76 and its decisions would be inconsistent with OMB Circular A-76. In AFGE Local *1345 and Dept. of Army, Ft. Carson,* the Authority finally agreed, holding, "We adopt the Court's conclusion that Circular A-76 is a government wide regulation and that proposals subjecting disputes over compliance with the Circular to resolution under a negotiated grievance procedure are nonnegotiable. Previous decisions to the contrary will no longer be followed." /179/

It is interesting to consider that even if option 2 or 3 as proposed by the NPC were enacted, the reasoning of the case law is that OMB Circular A-76 is a government-wide regulation and proposals which could subject disputes over compliance with the Circular to a negotiated grievance procedure are nonnegotiable because Circular A-76 provides for an exclusive route of appeal. Even though Circular A-76 was recently revised the provisions dealing with the exclusivity of appeals were not changed. Circular A-76 still states:

> This Circular and its Supplement shall not establish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular, except as specifically set forth in Part 1, Chapter 2, paragraph I of the Supplement, "Appeals of Cost Comparison Decisions." /180/

Although the appeals procedures have been moved to another section, they still state: "The procedure does not authorize an appeal outside the agency or judicial review, nor does it authorize sequential appeals. / 181/

"Unfortunately, the NPC proposal to expand the scope of bargaining to include the operational functions, such as contracting-out, would create sufficient uncertainty so as to encourage litigation to delay. a proposed contracting-out decision. If the administration wanted to allow negotiation over this subject, it could do this now by revising Circular A-76 to address the case law. Since that hasn't happened, it can be reasoned that an expansion of the subjects of bargaining was not meant to change the existing case law on this issue. Also, if the unions proposed bargaining over the contracting-out decision, but waived its right to appeal to an arbitrator or outside party, would that proposal be negotiable under the case law. After all, it is the communication process which produces the results, even if the union cannot force an agreement. This ability may become more important when the agency has different contracting-out options to consider, and can choose to award the contract without competition. /182/

On a related issue, on March 18, 1996, AFGE filed suit /183/ to prevent the contracting-out of aircraft maintenance and other functions at three Air Force bases, McClellan AFB, California; Kelly AFB, Texas; and Newark AFB, Ohio. /184/ The complaint alleges that the Department of Defense violated federal statutes which require (1) 60% of the "core" maintenance be performed by federal employees /185/ and (2) bidding for non-core work to include other depots and DOD facilities, not just private sector contractors. The Department of Defense (DoD) have been advocating greater privatization of the maintenance depots /186/ and the Administration, for its own political reasons, /187/ supports the repeal of the statutes inhibiting privatization. Aligned with the AFGE are those legislators who want the workload to flow to the surviving depots in their states.

In April 1996, DoD released a memorandum where Deputy Secretary of Defense John White directed the agencies to make outsourcing and privatization a

priority to acheive crucial savings. /188/ Secretary White explained that DoD must increase procurement funding in the future to maintain it technological superiority, but the current fiscal climate is such that DoD cannot expect any increased funding. The solution is found by savings created through procurement reform, base closures, and outsourcing and privatization where competition can show savings.

This is not a labor management problem, it is a political issue. According to DoD between 13 and 15 billion dollars is spent annually on depot maintenance, which provides employment for 89,000 federal employees at 30 depots and also 1,300 private firms. As Secretary White explained these "budget" issues directly impact mission priorities, and it is not unrealistic to see the link between "technological superiority" and "competitive outsourcing and privatizing". Should issues such as this really be determined by local area bargaining?

This matter will eventually depend on the lobbying power of the unions, their power of access, and the ability of the unions to negotiate in the political arena. If the statutes and law are on their side, then their negotiating position improves. On March 28, 1996, the Administration announced a grant of 14.5 million dollars to assist 6,000 -maintenance workers at Kelly AFB who will lose their job, /189/ and a bill has been introduced in Congress to allow the employees taking jobs with the private contractor to also take their retirement plans. The AFGE expressed approval of the job training grant, but also said it will not affect their suit to stop the drive towards privatization. Although this matter involves fundamental labor-management employment issues, and the basic issues might be subject to negotiation under a expanded scope of bargaining, such as proposed by the NPC, it is obvious these issues go beyond labor-management bargaining at a local level, and the solution is a political one which will be resolved without involving the Federal Service Labor-Management Relations statute.

As part of "reinvention", the Supplemental Handbook to Circular A-76 was revised on I April, 1996 to make it more user friendly for the agencies. /190/ Among several changes, the revised Handbook to Circular A-76 modifies or eliminates some cost comparison requirements, provides for enhanced employee participation; eases the transition requirements to facilitate employee placement, and expands the scope of appeals available to affected parties. It also seeks to improve accountability and oversight to ensure that the most cost effective decision is implemented. The flexibility provided to the agencies can inhibit or encourage contracting-out depending on the predilection of the agency.

Regarding the philosophy behind Circular A-76 and the Revision, OMB said,

> Industry and trade group commentators, generally, sought a 'reinvigorated' policy statement of strict reliance on the private sector. In their view, the Revision should require or, at a minimum, permit the direct conversion of all commercial activities to contract performance, without cost comparison. Objections were made to the proposal to permit agencies to continue their existing interservice support agreements for commercial activities, without cost comparison. OMB is not, at this time, considering changes to the Circular A-76 itself. The Circular requires reliance on the private sector when shown to be economically justified. It does not require, the conversion of in-house work to contract, as a matter of policy, unless a cost comparison, conducted in accordance with its Supplement, demonstrates it to be in the best interests of the taxpayer. /191/

Some of the more interesting revisions are that it: a) expands the list of functions exempted from cost comparison and gives the agencies greater leeway to

determine core activities; /192/ b) encourages agencies to consult with the employees and involve them at the earliest possible stages of the competition process, subject to the restrictions of the procurement process and conflict of interest statutes; c) authorizes conversion of functions involving 11 or more FTE to contract performance, without cost comparison, if fair and reasonable prices can be obtained from qualified commercial sources and all directly affected Federal employees serving on permanent appointments are reassigned to other comparable Federal positions for which they are qualified; /193/ and d) expands the appeal process to permit appeals not only. of costing questions, as permitted under the 1983 Supplemental Handbook., but also general compliance issues, such as appeals based on factual information contained in agency waiver justifications, information denials, and instances of clear A-76 policy violations. /194/

The revisions have been in existence for less than a month at the time this article is being written, and it remains to be seen how the changes will affect labor management relations. It is obvious OMB tried to accommodate the interests of the employee and unions while also giving the agencies expanded flexibility. The unions must still process the appeals through the agency, and although still denied the right to negotiate or arbitrate its disputes through the grievance process, the expanded appeal rights are still a significant empowerment for the unions.

Another interesting development in this area is the possibly of shiffing governmental functions over to an Employee Stock Ownership Plan (ESOP). In April 1996, OPM announced the first ESOP privatization initiative to be tried by the federal government, which occurred when OPM's Office of Investigative Services (OIS) closed in July 1996. /195/ The functions of OIS is contracted to a new company called U.S. Investigative Services, Inc., an ESOP. Under the ESOP service contract, employees of OIS perform their same jobs--but as employees of a private contractor, not as federal employees.

An ESOP is a voluntary association of the employees who band together to control the corporation for which they work. They obtain a loan to purchase a controlling interest of the stock of the corporation, which will be held in trust for the employees, Additional purchases can be made until the corporation is 100% employee-owned. The employees who accept employment with the ESOP will maintain their same salary, switch to a 401(k)-type savings plan, and receive stock in the company. Eventually 100% of the company will be owned by the employees. There are incentives for the employees to immediately join the ESOP and its is expected that 90 to 95% of OIS employees will switch. The contract was awarded without competition and government offices, furniture, computers, and vehicles will be furnished to the ESOP as part of the contract; otherwise, it appears the ESOP was privately financed.

The ESOP's CEO said, "the government would save money because it would avoid future pension payments to workers. The company steadily will lower the price of its work to the government by reducing the number of vacation and sick days granted employees, by using a smaller management team and by acquiring new business from state and local governments." /196/

Roger Neece, President of ESOP Advisors, Inc. and an investment banker familiar with ESOPs, conducted feasibility studies for OPM/OIS, as well as the Army Management Engineering College, the Air Force Guidance and Meteorology Center, and other DoD operations. /197/ Neece says employee-owned businesses tend to have higher revenues, less absenteeism, and less turnover than other private companies

because of the economic incentives and psychological differences associated with employee ownership.

The current expectation is that after the initial contract period the function or service being performed will be opened for competitive bid and it is hoped the ESOP will be sufficiently diversified and financially viable to branch into the private sector, if necessary. It is unknown how these arrangements will impact future labor-management relations, but certainly given a choice between contracting-out as has occurred in the past and contracting-out to a ESOP, it appears the employees and the unions would want to bargain for the latter. As discussed above in Contracting-out, the unions have limited ability to negotiate the contracting-out decisions. /198/ Here is one area the union may desire to bargain with the agency over the possible options. It appears that ESOPs will receive favorable treatment in many ways and will be assured an initial contract. Once the, case law prohibitions are addressed, proposals requiring that the agency award the contract to an ESOP may be negotiable if the managerial right of contracting-out becomes a mandatory subject of bargaining. This could be an amazing opportunity for the unions, if the function is going to be contracted out in any event and the union foresees itself becoming the exclusive representative in the eventual ESOP. It could also be a tar patch of litigation for all of the parties concerned. One issue that may be of interest in the future is the duty of the union regarding ESOP privatization, when they are not assured of continued representational status. That issue will probably have to be addressed at some later date.

The administration is also experimenting with various entrepreneurial organizations, which will remain federal entities but operate under unique personnel and acquisition rules. /199/ Several examples abound, such as: a) the FAA legislation (HR 2276/S1239) which overhauls the personnel and procurement rules of the FAA, as it makes it an independent agency; b) the conversion of the Patent and Trademark Office to a government corporation (S1458), giving the Commissioner sole and exclusive discretion over the system for job qualifications and procedures, as well as for compensation based on performance, but also allowing bargaining over the issues; c) performance Based Organizations, which are federal organizations using existing administrative flexibilities and the demonstration project authority in 5 U.S.C. Chapter 47, allowing changes to its personnel and compensation systems. On April 1, 1996, OPM released a template for PBOS. /200/

All of these organizations have some common characteristics. They hold the manager accountable; they encourage employee participation and partnership with the unions; and they relax the rules on personnel systems and methods of compensation with an emphasis on providing flexibilities and incentives. The new organizations will bargain over subjects not previously considered in the federal sector. Along with the reinvention laboratories, these entrepreneurial organizations are prototypes and experiments, perhaps eventually transferring their successful practices government-wide. One concern will be NPR's announcement of success before a true test has been made, and its embrace of successes which cannot be transferred government-wide. Still, these innovations will continue to be in the news and presented as models for future organizations and changes in the federal government, and at a minimum will provide case studies for further federal innovations.

VI. THE REINVENTION PROCESS IS NOT THE APPROPRIATE VEHICLE FOR REFORMING FEDERAL LABOR RELATIONS

The purpose of this article has been to show that the reinvention process, as proposed by NPC and the 1995 HRM Reinvention Act, does not provide an appropriate vehicle for reforming our federal labor management relationship, and there are a number of reasons for this.

First, the NPR, has a number of problems. The NPR has no fundamental concept holding it together and instead builds on short-term successes. It does not provide a deliberative reform process, especially when it comes to labor relations. NPR has also been criticized on other grounds, such as its default in addressing the tension between necessary control and employee empowerment, its questionable sustainability, and its failure to involve Congress or the middle managers. NPR's focus on customer service, employee empowerment, and downsizing; results in labor relations being the afterthought. This is not the way we should reform our federal labor relations.

Second, NPR detracts the parties from perceiving labor reform as an evolutionary process, to be taken in steps after an exchange of ideas and viewpoints. It should be built with an eye to lasting reform and it should instill certainty that can last through administrations. So long as there are positive changes occurring under NPR, it is easy to dismiss the faults; but by setting the agenda, NPR prevents reform that would naturally evolve but which doesn't pass the NPR test. In addition, if NPR should fail or be overcome by the next administration's initiatives, its associated reform could be jettisoned. Labor relations should not amended based on the latest fad in public administration.

Third, other mechanisms exist to encourage positive changes in the federal bureaucracy. The Chief Financial Officers Act (CFOA) and Government Performance and Results Act (GPRA) are significant legislative tools which can be used to steer the bureaucracy. Any labor reform should be integrated into the development of these two acts.

In the end, the Federal Labor Management Relation statute involves questions of fundamental power at the political level; and at the local level, it determines the balance of power at the workplace. Changes to the statute should not rest on changing definitions, such as customer satisfaction, which may not be a legitimate goal of the government in all cases anyway. NPR simply should not be the vehicle used to reform our federal labor relations.

Four critical problems with NPR were identified by Donald Kettl in his contribution to *Inside the Reinvention Machine. /201/* He identifies the four problems as: built-in tensions or conflicts, a potential lack of capacity or resources to do the job, the absence of a central idea or philosophy, and the failure to identify the glue that will hold the empowered bureaucracy together, but he believes each of these problems can be overcome.

Other public administration scholars have raised more basic criticisms of NPR. The increasing use of best management practices to reform public agencies, such as NPR's reinvention process, has led to a classification in management development known as "Best Practice Research" (BPR). A simple definition for BPR would be that a management researcher studies the practices of several successful organizations to find the common thread in their success. The common thread becomes a principle of success and is then applied to all organizations seeking similar success.

Two scholars, Overman and Boyd, have criticized BPR for creating the delusion of learning from experience. "Actually, BPR has a bias toward very short term

experiences only and does not look at the longer term and unintended consequences of reform efforts identified as best practices." /202/ An example of this practice is NPR's belief that employee empowerment and customer service are essential principles which must be embraced by every federal organization. Likewise every organization must establish engage in partnership with its union. This ignores several consequences which may be peculiar to some federal organizations. First, in some government organizations, identifying the customer or determining the priority that a customer will receive may be a political decision that should be made from the top-down, not the bottom-up. The mission or direction of the organization cannot be determined through employee empowerment and customer service. Second, not every union leader is receptive to partnership and cooperation. Removing the tactical advantage associated with permissive bargaining could hinder a peculiar manager's ability to achieve results in the organization. That flexibility would be lost because NPR found a common thread in "partnership".

Also, NPR reform works in many places because there is trust between management and the unions. Partnership and bargaining over permissive subjects when both sides have common interests does not draw out the antagonism that may occur with a change in administrations. That is why focusing on the short-term success stories of partnership at Red River Depot or Kelly AFB may not be productive in the long run. If current efforts continue, the unions will become more enmeshed in the decision-making process of the federal agencies, having more and more impact on the budget and organizational priorities. The short term objective may have been political, as suggested by Donald Kettl; /203/ or a practical understanding by the parties of the evitable, but the long term consequence may be more litigation and less efficiency with the next administration. /204/ In fact, the lawsuit by AFGE regarding the privatization at Kelly AFB shows partnership will not resolve all of the problems, and it may only take one contentious problem to destroy the trust and common interest needed for partnership.

Another delusion of BPR identified by Overman and Boyd is that it supposedly treats all managers similarly, but actually BPR reacts to only a select group of managers. This causes two problems. One, competent managers are banished because they do not embrace the latest management theory, and two, it distorts the research. Those who embrace the new management theory and advocate innovative practices receive more money, training, and attention, and the organizational success is as much a consequence of this increased attention as the change in management practices. This is seen in the establishment of pilot programs, which receive attention, training, and resources which are not otherwise available to other organizations.

BPR is also criticized for its propensity to avoid probing and critical analysis of its case studies and avoiding scientific validation of its successes. Demonstration of this fault is found in recent articles covering past BPR territory. In Entrepreneurial Government, Rob Gurwitt /205/ reported on the disestablishment of entrepreneurial government in Vitalia, California, which, while under the management of Gaebler, had been labeled "the most entrepreneurial city in America." The empowerment of the city's employees and their ability to try innovative ideas led to an unintended investment of 20 million dollars by the city in a hotel project, and subsequently to a shift in the political winds and the election of a conservative city council that demanded tighter control over the city's budget. Gurwitt also wrote of shifting political fortunes in Minnesota, where the state's STEP program, an award winning program which seeded management-reform projects throughout the state, was discontinued, without a word of dissent, by the new Republican administration because it was distracting government from its responsibilities. /206/ The demise of

the entrepreneurial programs in Minnesota was also noted by Paul Light, who said:

> Of the 35 Minnesota Programs lauded in *Reinventing Government,* 8 are now dead, including two that barely got off the ground in the first place. Another two are no longer fully in the public sector, spun-off into the non profit, quasi-government world. Another three are so close to death, so imperiled by political circumstance and controversy, that it may be time to put in a call to Dr.Jack Kevorkian. ... Statewide, then, Minnesota's reinvention projects have a survival rate of about three in five. That's not bad - private sector innovation efforts go belly up roughly half the time - but it may be intolerable all the same.
> /207/

Politics also figured prominently in an article by Barton Wechsler which examined Florida's civil service reform, which like NPR, was based on the BPR of Osborne and Gaebler's Reinventing Government. /208/ Weschler concludes Florida's reform effort foundered on a misunderstanding of the problems and the proper remedies, and the failure to reconcile basic philosophical differences between the executive branch, the agencies, and the legislature.

Each. of these articles provided insights into reform efforts based on the BPR of Osborne and Gaebler which deserve repeating because they are relevant to the NPR reinvention initiative. Regarding legislative cooperative, Wechsler says, "The Legislature, not surprisingly, was not eager to give up budget authority or to cede large amounts of management discretion and control to agencies." /209/

Light focuses on the possibility that political appointees would introduce real reform, especially considering the high turnover rates at the top of the federal hierarchy. He believes political appointees have short-term agendas because they enter their jobs expecting to leave once they build their resume. Light sees our reliance on political appointees to manage bureaucratic reform to be counterproductive. This view is shared by James Sundquist, who sees the establishment of chief operating officers (COO) at each agency as potentially one of the most important and constructive recommendations of the NPR, but for the fact that the COO is a political appointee. /210/ He says the COO should be a career executive who can bring competence and continuity to the position. Each had a different, but similar, perspective of the political control of the bureaucracy, which is strengthened by NPR. There is also another practical consideration, that has not been raised. Certainly, strengthening the political control of the executive branch over the bureaucracy is nothing new. However, the Clinton Administration is also attempting to include the unions in the decision-making process of the agencies, even if their achievements are not yet substantial. A question that should be considered is, what will happen when the political appointees from a future administration have an agenda which is contrary to the interests of the unions? The NPR proposals set the stage for this confrontation, by enmeshing the unions in the bureaucracy and strengthening the political control over the bureaucracy. This is a potent mixture for future administrations.

Somewhat related to these issues is a quote included in Gurwitt's article, "The purpose of government is to serve the needs of the community and to provide a forum for resolving community disputes as well as providing the public services that the community needs, and those aren't the primary purposes of entrepreneurial activity as it's generally understood in our society." /211/ The same sentiment is eloquently repeated by James Carroll:

> The primary purpose of the federal government stated in the Preamble to the Constitution is not to provide services. The primary purpose is to establish and

> maintain a legal and institutional framework for reconciling differences among individuals and groups in the pursuit of national values and objectives, such as a more perfect union, the common defense, justice, domestic tranquillity, liberty, and the general welfare. /212/

The two themes examined above, the need for technical competence in the management of the government; and, the purpose of government is politics, to reconcile differences of the interest groups, are each accurate. Managerial competence should be a prerequisite for the appointment of the senior manager or administrator of any agency, not political affiliation or connections. At. the same time, it is politics, not professional competence, that turns the gears of government and steers its course. Labor relations is also determined by politics, as a reconciliation of competing interest groups. It was not constructed to necessarily deliver the most efficient workforce, but to resolve legitimate competing interests. It should not be amended to support management theories based on "threads" found in short-lived successes or to achieve professional competence at the expense of democratic control. Labor relations addresses central core issues of governance which require political consensus, such as budgets, organizational priorities, as well as equity, fairness, and due process. If it is inefficient in some respects, it is because these values and rights must protected, even if it requires a cost in efficiency.

> It would be useful to return to an observation of Donald Kettl, who said, [t]he NPR largely ignored fundamental differences between public and private management as well as centuries-old thinking about how to hold bureaucratic power democratically accountable. In particular, the NPR dealt poorly with both the political and the constitutional roles of Congress, in American bureaucracy. Finally, the critics struck a telling blow in pointing to the fundamental political causes at the root of many administrative problems. /213/

Kettl then counters the same critics by essentially saying the reinventers would have little need to introduce reform if the old theories continued to work and the pragmatic approach of the reinventers has simply outpaced the theory in the field of public management. These are the two views.

Evolutionary change in federal labor relations is stifled by channeling reform through the reinvention process. Federal labor relations is flexible enough to incorporate changes to encourage employee empowerment and partnership, without requiring the blessing of "reinvention" The federal agencies were already studying the private sector's experience with employee participation and several agencies had proceeded down the quality path prior to NPR. Like the commander of the Red River Depot in 1992, managers were considering different methods of management and considering, or engaged in, partnership with the union, although they may not have realized it.

But the real problem that needs to be addressed when we discuss the scope of bargaining is not whether the subjects listed in Sec. 7106(b)(1) or Sec. 7106(a)(2) should be mandatory subjects of bargaining, but whether the entire section needs to be rethought. The focus should not be on Sec. 7106, but on management's right to determine its budget and set its organizational priorities. The difficulty in finding the appropriate line will become more difficult as agencies experiment with performance standards, incentives, and alternate classification schedules. Considering the current status of the law, what is needed is more certainty for the agencies and unions. Certainty in responsibilities and obligations will result in less litigation, and is as essential to a productive federal bureaucracy as partnership.

Following a separate course of reform would allow consideration of alternatives not directly associated with NPR. What are "appropriate levels of bargaining" can receive diversified attention following a different route of reform. For example, there is no provision for multi-union bargaining over common issues, although NPR might consider agency level partnership councils as a substitute. As personnel issues are pushed down to the agencies, the question will be whether agency-wide regulations will be greater deference or the agencies can reach an agreement with different unions on an agency-wide level. The 1995 OPM Reform Act proposed to legislate multi-union bargaining by allowing the agency-level partnership council to reach agreements which would bind all subordinate units. The problem with this approach is that it introduces another level of bureaucracy in the federal government, a political evel. Of more concern is the removal of negotiations from the employees to an agency bargaining unit created as a political concession. It is the beginning of a union-management bureaucracy that will eventually result in employee alienation as decisions affecting their working conditions are made between the unions, and the agencies at levels beyond their reach. NPR limits the ability to consider other approaches or consider the practical advantages of allowing the agency to implement its proposals after consultation with the employees.

At the other extreme in a consideration of the "appropriation level of bargaining" is the potential for unions to empower their individual members to bargain over conditions at their individual worksites. Like the NLRA, the statute recognizes exclusive representation for appropriate bargaining units and prohibits the by-pass of the unions in dealing with employees. /214/ However, the federal agencies are burdened with one other handicap- the requirement to give the union an opportunity, to be present at formal discussions between the agency and any employee. This, rule was created in E.O. 11491, Section 10(e) /215/ and' was incorporated into the statute at Sec. 7114(a)(2)(A). Understandably, NPR reform would never consider deleting this section but it should receive reconsideration under a true reform effort.

Since its inception, the definition. of "formal discussion" has been expanded so that the rule now goes far beyond a union shield to prevent "bypass" of the unions, and it has become a snare for the supervisor who fails to know its wide ranging application. /216/ It applies to quality circles /217/ and similar organized meetings which involve any discussion of the conditions of employment. In a Memorandum addressed to the Regional Directors, the General Counsel (GC) of the Authority explained his views on the rights of agencies and unions in establishing and implementing employee participation plans (EPP), such as quality circles. /218/ One practical observation was that when the union and the agency are working cooperatively and collaboratively under partnership principles there are usually no disputes, because "the parties are intent on obtaining the best solutions and not focusing on rights and obligations under the statute." /219/

While the rules in this area are clear, the difficulty is in the practice. Consider a supervisor enthused with employee empowerment who holds frequent meetings with his employees to discuss working conditions and include his employees in all the decisions, but doesn't understand his duty to invite the union to the meetings. The easy answer is that the agency needs to educate the supervisor, but maybe it really raises a more fundamental question. If union and management agreed to a implementing a quality program, why can't the supervisor deal directly with his employees to discuss working conditions which are peculiar to them, without inviting the union representative? This would be employee empowerment by the unions. If the union did not agree to the quality program then the supervisor's practice can be prohibited as an ULP for bypassing the union. While the parties can negotiate over the application of

the "formal discussion" requirements as they implement the quality program, that doesn't address the fundamental question, why is it still needed in the era of employee empowerment. The "formal discussion" rule remains to ensnare unwary managers, and counsel, and remains an additional obstacle between the employee and management. It is highly unlikely under NPR that the formal discussion rule will ever be reconsidered, even if it is contrary to the theme of employee empowerment. Practically speaking, if the parties are engaged in partnership, it is unlikely the union would ever raise the issue, but one real indication that the statute is truly being reformed is that Sec. 7114(a)(2)(A) is actually reconsidered, otherwise the "reform" is really only a shift in negotiating power.

Again, so long as there were positive changes occurring under NPR, it is easy to dismiss the faults of NPR. The one effect that is overlooked is that this deference to NPP, allows NPR to set the agenda and hinder reform that might naturally evolve except that it doesn't pass the NPR test or is not within the field of focus of the NPR eyeglass.

A third reason to avoid using NPR as the guide in reforming federal labor management relations is the recognition that Congress has decided to manage the bureaucracy through recent legislation, specifically the Chief Financial Officers Act (CFOA), as amended by the Government Management Reform Act of 1994 (GMRA), and Government Performance and Results Act (GPRA). Any reform of labor relations should be integrated with these acts as they are developed and used to steer the government. This is not necessarily contrary to the NPR, but the emphasis under the two is different.

The NPR called for annual financial reports of the federal government and a focus on results. While the CFOA and GPRA support and implement many of the recommendations of the NPR, the determination whether a particular proposal should be enacted should not depend on its relationship to the NPR report or its HRM or management-labor relation recommendations, but rather on the unifying, long-term vision for managing the federal government that will occur through the CFOA and GPRA. The prescription underlying the NPR, that the government must focus on performance and accountability is already structured within the legislative framework of the CFOA and GPRA. If labor relations reform is not needed to further the goals of these acts, then it should not be enacted simply because it is recommended by NPR, NPC, or contained in the OPM proposed legislation. The CFOA and GPRA were not products of the NPR. They were legislative attempts to obtain control over the federal government and they obstentibly strengthen Congressional oversight, potentially interfering with NPR's broad theme of bottom-up management and strengthening the executive branch.

The CFOA and GPRA impose accountability on the agencies and require them to account for their financial management and the performance of their agencies. It is top-down management. The CFOA, as amended, requires the 24 major executive agencies /220/ to produce an entity-wide annual financial statements by 1 March 1997. /221/ By March 31, 1998, the executive branch will submit a consolidated financial audit which will be audited by the Comptroller General. /222/ It may sound surprising but before passage of the CFOA there was no requirement for an agency-wide standardized audit.

While the CFOA concerns financial management, the GPRA manages agency performance and results. The GPRA requires the agencies, to submit strategic plans to OMB and to Congress by September 30, 1997. In the strategic plan, an agency will

state its mission and objectives and explain how it intends to achieve these objectives with a description of the operational processes, skills and technology, and the human, capital, information, and other resources the agency will need to meet its objectives. Beginning the next year, the agency will also submit an annual performance plan, setting out specific performance goals for the agency. OMB will consolidate the performance goals and analyze the government-wide performance plan in conjunction with the President's budget to determine its, feasibility. This report will be sent to Congress beginning in February 1998. Beginning in FY 1999, the agencies must compare their actual performance with the goals that they set in their plans.

The GPRA also included a provision for pilot programs. In these programs the managers are allowed greater flexibility through the waiver of regulatory constraints in return for accountability for the performance of their programs and operations. Although the law required only 10 pilot programs, over one hundred program sites have been identified. The NPR highlighted these pilot programs as one of the cornerstones of new accountability in federal government. /223/ A survey was conducted by the Washington Public Affairs Center of U.S.C. to assess some early results from the programs and found the greatest difficulty for the participants was selecting performance indicators. /224/ Another frequent observation was the reluctant of program managers to move towards outcome-oriented performance measures because these factors were thought to exceed their direct control or because they would limit program flexibility. The survey was a sounding board for respondents engaged in the pilot program, and one point come out loud and clear, the respondents wanted more information, training, and guidance on performance measures and how to link them to the strategic plan and the budget. This hearkens back to the GAO study of the reinvention laboratories /225/ which had the ability to seek waivers of workplace regulations but did so in only forty percent of the cases and then less than one-third of the waiver requests involved personnel rules. If the program managers are still dealing with the basics of performance measurements and process improvements, why is it necessary to force a change in their human resource management relationships during this transition, unless they want it to happen?

Together the CFOA and GPRA are intended to prod the bureaucracy to tie the budget to performance and become accountable for the results. As the managers learn the new programs and develop indicators for performance, they will demand innovations in human resource management, but it is not the managers who are demanding changes in labor relations. For now the focus should be on implementing the CFOA and GPRA. This is still consistent with NPR. A focus on outcomes led the Coast Guard and OSHA to totally refocus their attitude and operations with impressive results in safety statistics. There is a great deal of training and a dramatic change in the work culture that still needs to take place to successfully implement the CFOA and GPRA in the federal government. Any reform of the labor relationship in the federal government should be related to these acts which are meant to provide long range strategic plans tied to the agency's budgets and performance.

Radical changes in human resource management are not necessary to shift our focus to outcome performance, and innovative management programs currently being introduced do not require dramatic alterations in our labor management relationship. Forcing these changes on the agencies now will only distract them from where their focus should be. It could also inhibit their request for a different approach on human resource issues because now their ideas are complicated or overcome by events as a result of legislated labor reform.

VII. CONCLUSION

The recommendations of the NPR on labor management relations should not drive our reform of federal labor relations. There is no doubt whatsoever that NPR has had a positive effect on improving governmental services and streamlining the bureaucracy. While reform may be needed as a constitutional lubricant, or it may simply be politics under another name; it is also true that reform is necessary to shake out embedded deadwood and reinvigorate complacent organizations. NPR has been instrumental in doing this. However, NPR should not be the basis on which we reform our federal labor relationship.

In their 1994 Status Report, NPR had the following quote, "It doesn't make sense when two people are sitting in a boat for one of them to point a finger accusingly at the other and say, 'Your end of the boat is sinking.'" The Report then added, "As labor and management increasingly realize, they, are in the same boat, needing one another to survive and prosper." /226/ There will be dramatic and exciting changes over the next decade as the federal government goes through the upheaval of downsizing and retooling its information and management systems. But success in keeping the boat afloat will not be determined by legislative changes in the scope of bargaining or broad-banding classification; it is going to be determined by the trust that is built between the employees, represented by their unions, and management. It is going to be determined by how openly they can communicate and whether they can express and acknowledge their respective interests.

Trust can be destroyed by either side. There are a number of examples given by unions, where partnership and trust was beginning to change an adversarial relationship, but then the bottom dropped out when the company was sold or the administration changed. But management can have the same problem with unions. This might be the case when management agrees to retain certain employees rather than contract out the jobs at a moneydraining site, and then the union begins a campaign demanding more and better benefits for these same employees. Any reform of the labor relationship must recognize that the unions are not united in their acceptance of partnership and cooperation and that the personalities of the representatives is sometimes more important than any government statute or program. The labor relations system we developed in the United States and in the Federal Government is an adversarial system by its nature. Labor and management will often have different interests when bargaining over the budget and organizational priorities. No proposed integration of partnership councils into the Federal bureaucracy is going to change that fact. This leaves us with having to decide how to resolve these inevitable disputes.

Perhaps the entire system does need to be rethought. Limiting ourselves to the language of Sec. 7106(b)(1) and arguing over whether these subjects should be permissive or mandatory subjects of bargaining does not seem to make for a productive reform process. As discussed above, it is short-sighted and ignores the long-term consequences. The real question is should management be allowed to preserve its determination of the budget and organizational priorities, and if so how should this be done? The same question can be asked of any other management right listed in Sec. 7106, but the budget and the mission priorities involve the issue of "public interest" and implicate those reasons for the very being of the public organization.

These questions are not easily answered by looking at customer satisfaction surveys or antedotes about taking the timeclocks out of the workplace. The satisfaction of the customer being surveyed usually has no rational relationship to the taxpayers' satisfaction with the agency, and neither may have anything to do with why the agency was established in the first place. And as for timeclocks, they may be coming out of the

Dept of Labor, they are being put in at Congress because the employees want to be sure they are paid for their overtime.

Considering the current political climate it is unlikely that the 1994 recommendations of the NPC will be enacted, but the administration will propose a less ambitious reform using the same ideas. The problem with enacting E.O. 12871 into law is that it does shift the advantage in negotiations without understanding the reasons underlying §7106, or understanding the consequences on the various agencies who would rather have the flexibility to continue partnership dialogue, but now find they are forced to negotiate issues they are not prepared to address with a union who no longer believes partnership is necessary. If broad-banding classification is enacted, the agencies must be protected from having to negotiate the implementation of this classification system. The evidence concerning the system is mixed at best, and it does show increased salary costs and difficult implementation. Proposals concerning incentive pay programs need rethinking about their impact on the budget and mission priorities, and also the employees' incentive to perpetuate the incentives programs or manipulate budgets and baseline figures. In private industry, sharing the profits is something that can hopefully be anticipated each year; but in public agencies, last year's profit means just that much less in the budget next year, especially when budgets are being cut all around.

The Federal labor-management relationship can use some reform. The Authority's innovative intervention program to target frequent filers of ULP is productive and should be applauded, but it doesn't change any fundamental relationships. While trust may be the determinative factor in keeping the boat afloat, certainty in their relationship and in their rights and obligations will also prevent them from accusing each other for not doing their part. The proposals of the NPR, NPC, and OPM legislation will not instill certainty, in federal labor relations. In fact, they bring uncertainty, which will be further exasperated by caselaw and policies that either shift or do not address the real issues. Introducing the "good government" standard adds nothing to the statute but an opportunity for argument and confusion. Maintaining the agency's right to determine organization and manning as a core management function, but then require interest arbitration over the number, types, and grades of employees or positions assigned to any organizational subdivision is absurd.

If there is any reform of the Federal Service Labor-Management statute it should be an independent project, separate from the NPR, or its creations and recommendations. There are real problems existing in the federal government. We should be more concerned with the shadow government we are creating as we continue to downsize, and the waste and fraud existing in that behemoth which gobbles the vast majority of the federal budget. No politician ever lost an election for bashing the federal bureaucracy. That's unfortunate because it forces the incumbents to indict the system, whether it deserves the blame or not, and to institute reform programs with great fanfare for political reasons. The truth is the bureaucracy evolves over time. The Federal government was changing before NPR was instituted, trying to use private sector innovations, like TQM and partnership. NPR has speeded up the process in many ways, but the headlong rush to reform should not propel us to change our federal labor relations based on NPR.

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1. The NPR said its recommendations would save $108 billion over fiscal years 1994 to 1999. Personnel reductions were to account for $40.4 billion, program and organizational changes for $36.4 billion, and procurement reform would save $22.5 billion. NPR, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS, Preface (Sept. 1993). In their 1994 Status Report, NPR said $46.9 billion in proposed savings was already enacted. NPR, CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS: STATUS REPORT, 7 (Sept. 1994). NPR documents can be downloaded from http://www.npr.gov/npr or http:Hsunsite.unc.edu/npr/nptoc.html.

2. Voter focus on the the budget deficit and NPR's promise of billion dollar savings allowed budget-cutting and downsizing to take preeminence as the guiding objectives in the reinvention. of government. DONALD KETTL, Building Lasting Reform: Enduring Questions, Missing Answers, INSIDE THE REINVENTION MACHINE, 15 (1995); JAMES D. CARROLL, The Rhetoric of Reform and Political Reality in the National Performance Review, PUB. ADMIN. REV., 302, 304 (May/Jun 1995).

3. The NPR criticized Inspector General investigations into fraud, waste, and abuse for inhibiting creative innovation in the government.

4. Comparing the $1.5 trillion federal budget to an individual making $50,000 means a savings worth a dime to the individual translate to about 3 million dollars to the government. A savings or cost of 2 million dollars can be news to the taxpayer, but in comparison to the overall budget, we are talking nickels and dimes.

5. VICE-PRESIDENT GORE, supra, note 1.

6. DAVID OSBORNE AND TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT is TRANSFORMING THE PUBLIC SECTOR (1992). Ten principles are posited as essential to a successful entrepreneurial public organization: (1) steer rather than row; (2) empower communities; (3) encourage competition; (4) focus on mission, not on rules; (5) fund outcomes, not inputs; (6) serve the customer; (7) concentrate on earnings, not spending; (8) invest in prevention, not cures; (9) decentralize authority; (10) solve problems through the marketplace.

7. Id. at 265. Osborne and Gaebler say the best way to secure union cooperation is to insure job security with comparable pay. "No one wants to innovate themselves out of a job. But when they know they have job security, their attitude toward innovation changes dramatically." Id. They also argue that today's managers can manage wider scopes of control because of today's computerized systems. "Hence participatory organizations find that they must eliminate layers and flatten their hierarchies." Id.

8. Id. at 254.

9. Id. at 253. One recent study raises doubts concerning the effectiveness of decentralized federal organizations versus the centralized organizations under Title 5. MESCH, PERRY, WISE, Bureaucratic and Strategic Human Resource Management. An Empirical Comparison in the Federal Government, 5 JOUR.PUB. ADM. RESEARCH AND THEORY, 385 (Oct. 1995).

10. OSBORNE & GAEBLER, supra, note 6, at 254. Quoting Grifford Pinchot Ill. (Emphasis removed).

11. Chapter 3 of the Report dealt solely with employee empowerment outlining six steps to get results-Step 1: Decentralize Decisionmaking Power; Step 2: Hold All

Federal Employees Accountable For Results; Step 3: Give Federal Workers The Tolls They Need To Do Their Jobs; Step 4: Enhance The Quality Of Worklife; Step 5: Form A Labor-Management Partnership; Step 6: Exert Leadership.

12. NPR, supra, note 1.

13. Two helpful articles on the early formation of federal labor relations are Lt.Col Richard T. Dawson and Lt.Col W. Kirk Underwood, Overview of Labor Management Relations in the Air Force, 35 A.F.L.Rev. 1 (1991) and Michael R. McMillian, Collective Bargaining in the Federal Sector.- Has the Congressional Intent Been Futfilled? 127 Mil.L.Rev 169 (1990). See also COUTURIER, infra, note 15.

14. In 1912, the Lloyd-LaFollette Act gave federal employees the right to join labor organizations.

15. See, e.g., JEAN J. COUTURIER, PUBLIC SECTOR BARGAINING: CIVIL SERVICE, POLITICS, AND THE RULE OF LAW: THE EVOLVING PROCESS-COLLECTIVE NEGOTIATIONS IN PU13LIC EMPLOYMENT (1985). The National Federation of Federal Employees (NFFE) was organized in 1913. The American Federation of Government Employees (AFGE) was formed by 32 members of the NFFE which it broke from the AFL in 1932. See We Stand Unite& A History of the AFGE 6 (No Date).

16. Executive Order 10988, 27 Fed. Reg. 551 (1962).

17. Id. at Section 6.
18. Id. at Preface.

19. Executive Order 11491, 34 Fed. Reg. 17605 (1969).

20. List of Executive Orders - E.O. 12107, 44 Fed. Reg. 1055, December 28, 1978 (Relating to the Civil Service Commission and Labor-Management in the Federal Service); E.O. 12027, 42 Fed. Reg. 61851, December 5, 1977 (Relating to the Transfer of Certain Executive Development and Other Personnel Functions); E.O.11901, 41 Fed. Reg. 4807, January 30, 1976 (Relating to Labor-Management Relations in the Federal Service); E.O. 11838, 40 Fed. Reg. 5743, February 6, 1975 (Relating to Labor-Management Relations in the Federal Service); E.O. 11787, 39 Fed. Reg. 20675, June 11, 1914 (Revoking E.O. 10987, Relating to Agency Systems for Appeals From Adverse Actions; E.O. 11616,,36 Fed. Reg. 17319, August 26, 1971 (Amending E.O. 1149 1).

21. Codified at Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. 7100 et seq. (1978).

22. Management reserved the right to 1) determine the mission, budget, organization, number of employees, and internal security practices of the agency; and 2a) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against the employees; b) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted; c) with respect to filling positions, to make selections from appointments from among properly ranked and certified candidates for promotion; or any other appropriate source; and 3) to take whatever actions may be necessary to carry out the agency mission during emergencies. 5 U. S.C. Sec. 7106 (1978).

23. The legislative history is informative on the conflict between the House bill, which would broaden the scope of bargaining, and the Senate bill, which was closer to the Administration's desires and the executive orders. See also DONALD F. PARKER, SUSAN J. SCHURMAN, AND B. RUTH MONTGOMERY, Labor-Management Relations Under CSRA: Provisions and Effects in LEGISLATING BUREAUCRATIC CHANGE: THE CIVIL SERVICE REFORM ACT OF 1978,161 (1984).

24. Permissive bargaining subjects include 1) numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project or tour of duty, or on the technology, methods, and means of performing work; 2) procedures which management officials of the agency will observe in exercising any authority under this section of the statute; or 3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section of the statute. 5 U.S.C. Sec. 7106 (1978).

25. NPR, supra, note 1.

26. The fourteen recommendations are HRM01- Create a Flexible and Responsive Hiring System; ERM02 - Reform the General Schedule Classification and Basic Pay System; IIRM03 - Authorize Agencies to Develop Programs for Improvement of Individual and Organizational Performance; HRM04 -Authorize Agencies to Develop Incentive Awards and Bonus Systems to Improve Individual and Organizational Performance; HRM05 - Strengthen Systems to Support Management in Dealing with Poor Performers; HRM06 - Clearly Define the Objective of Training as the Improvement of Individual and Organizational Performance; Make Training More Market-Driven; HRM07 -Enhance Programs to Provide Family Friendly Workplaces; HRM08 - Improve Processes and Procedures Established to Provide Workplace Due Process for Employees; HRM09 - Improve Accountability for Equal Employment Opportunity Goals and Accomplishments; ERM10 - Improve Interagency Collaboration and Cross-Training of Human Resource Professionals; HRM11 - Strengthen the Senior Executive Service So That It Becomes a Key Element in the Government wide Culture Change Effort; HRM12 - Eliminate Excessive Red Tape and Automate Functions and Information; HRM13 - Form Labor-Management Partnerships for Success; HRM14 - Provide Incentives to Encourage Voluntary Separations.

27. NPR, REINVENTING HUMAN RESOURCE MANAGEMENT, ACCOMPANYING REPORT OF NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (Sept. 1993).

28. Id.

29. NPR, supra, note 1, Chapter 3 (1993).

30. Id.

31. E.O. 12871, 58 Fed. Reg. 52201 (1993). Its original 2 year term was extended to 1997 by E.O. 12974, 60 Fed. Reg. 51875 (1995). Its membership was amended by E.O. 12983, 60 Fed. Reg. 66855 (1995).

32. NPC, A REPORT TO THE PRESIDENT ON IMPLEMENTING RECOMMENDATIONS OF THE NATIONAL PERFORMANCE REVIEW (Jan. 1994).

33. For further insight on the debate occuring in the NPC during this time, See, CAROL BAN, Unions, Management, and the NPR, in INSIDE THE REINVENTION MACHINE, 131, 138-141 (1995).

34. NPC, supra, note 32, at pp. ii, iii, 12-23.

35. Some other interesting proposals were institution of a "fair share dues" security agreement; implement routine use access to the union for otherwise exempt information; allow voluntary recognition by an agency of an exclusive bargaining representative; and amend the definition of supervisor. Id. at pp. iv-v, 12-23.

36. Id. at p. 11.

37. The NPC was originally composed of 11 representatives, one each from the three largest unions (AFGE, NTEU, NFFE), one from the AFL-CIO Public Employee Dept., and seven representatives from federal agencies, (1) Director of the Office of Personnel Management (OPM); (2) Deputy Secretary of Labor; (3) Deputy Director for Management, Office of Management and Budget; (4) Chair, Federal Labor Relations Authority; (5) Federal Mediation and Conciliation Director; (6 & 7) A deputy Secretary or other officer with department- or agency-wide authority from two executive departments or agencies (hereafter collectively "agency"), not otherwise represented on the Council. The membership was enlarged to include management representatives by E.O. 12983, 60 Fed. Reg. 66855 (1995), which amended E.O. 12871 by adding one elected office holder each from both the Senior Executives Association and the Federal Managers Association.

38. E.O. 12871 at Section 2. "Section 2. Implementation of Labor-Management Partnerships Throughout the Executive Branch. The head of each agency subject to the provisions of chapter 71 of Title 5, United States Code shall: ... (d) negotiate over the subjects set forth in 5 U.S. C. 7106(b)(1), and instruct subordinate officials to do the same: ... ... Id.

39. 5 U.S.C. Sec. 7117(a)(1) (1995). There is no such deference to agency-wide regulations. The agencies must show a compelling need for the regulation to exclude bargaining.

40. The sunset of the Federal Personnel Manual provisions has arisen in a number of ways. Note that in GSA and NFFE below the OPM guidance was resurrected. FAA, Little Rock and NATCA, 51 FLRA No. 86 (1996) (Although the FPM was abolished in Dec. 31, 1993, later guidance affecting this case was provisionally retained through Dec. 31, 1994); FAA, Little Rock, and NATCA, 51 FLRA 216, 51 FLRA No. 24 (1995); GSA and NFFE, 50 FLRA 136, 50 FLRA No. 28 (1995)(Authority accepts OPM's position that the rescinded OPM guidance on hybrid work schedules is still persuasive for interpreting and administering the Work Schedules Act); NFFE and Dept of the Army, Rock Island Arsenal Rock Island, 49 FLRA 151, 49 FLRA No. 21, (1994)(Authority did not apply provisions of FPM chapter Which had been abolished, but applied FPM provisions that have been provisionally retained).

41. ALLAN HOLMES, Reform Trickles In, GOVERNMENT EXECUTIVE, 46, 47 (Oct. 1995).

42. 5 CFR Parts 430 and 45 1, as amended by 60 Fed. Reg. 43936 (1995).

43. The language is verbatim from the recommendations of the NPC. NPC, supra, note 32, at p. 11.

44. J. L. GARNETT, Operationalizing the Constitution Via Administrative Reorganizations: Oilcans, Trends, and Proverbs, THE AMERICAN CONSTITUTION AND THE ADMINISTRATIVE STATE: CONSTITUTIONALISM IN THE LATE 20TH CENTURY 83, 86 (1989).

45. Under E.O. 11491, the Asst. Secy. of Labor reviewed an employee participation committee created in June 1977. Veterans Admin. Hosp., Muskogee, Oklahoma, A/SLMR No. 301, 3A/SLMR 491 (1978). The Asst. Sec. found management violated the E.O. by establishing the committee and dealing directly with employees over conditions of employment. The ALJ in Dept of the Navy, Pearl Harbor Navy Shipyard, 29 FLRA No. 96, 29 FLRA 1236 (1987) briefly describes the import of quality programs during the 1970s. Id. at 1241.

46. GAO, MANAGEMENT REFORM - STATUS OF AGENCY REINVENTION LAB EFFORTS p. 26 (March 1996)(GAO/GGD-96-69). Thirteen percent of the respondents said they were told to initiate the effort by their agency officials.

47. Id.

48. RONALD SANDERS AND JAMES THOMPSON, The Reinvention Revolution, Gov. EXEC., Reinvention Insert, p. 6A (March 1996).

49. BNA, 34 GERR 243 (Feb. 19, 1996).

50. NPR, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS: STATUS REPORT (Sept. 1994).

51. Id. at p. 38.

52. A dispute regarding a gain-sharing proposal was reviewed in Dept. of Army, Red River Depot v. FLRA, 977 F.2d 1490 (D.C. Cir. 1992), on remand, NAGE Local R14-52 and Dept of Army, Red River Depot, 48 FLRA 1198 (1993).

53. See e.g., LINDA THORNBURG, Can Employee Participation Really Work?, HR MAGAZINE, 48 (Nov 1993); ROBERT W. MILLER AND FREDRICK N. PRICHARD, Factors Associated with Workers' Inclination to Participate in an Employee Involvement Program, GROUP AND ORGANIZATION MANAGEMENT, 414 (Dec 1992); WILLIAM COOKE, Product Quality Improvement Through Employee Participation: The Effects of Unionization and Joint UnionManagement Administration, INDUSTRIAL AND LABOR RELATIONS REVIEW, 119 (Oct 1992); BENNETT HARRISON, The Failure of Worker Participation, TECHNOLOGY REVIEW 74 (Jan. 1991).

54. DAVID HORNESTAY, Partnership Pays, GOVERNMENT EXEC., Feb. 1996 at 43. It would be interesting to see a real cost study, but the variables, such as productivity increases versus costs of negotiated union proposals, may make this too complicated. In any event the cost of "labor peace" and "better working conditions" in the federal workplace may be worth the cost without any other return.

55. Id.

56. BNA, Targeting Frequent Filers Reduced Unfair Practice Charges, FLRA Says, 34 GERR 242 (Feb 19, 1996).

57. CAROL BAN, Unions, Management, and the NPR in INSIDE THE REINVENTION MACHINE, 131, 150-151 (1995).

58. The second part of the problem is establishing credibility with career civil servants and managers, those most threatened by cut-backs and downsizing.

59. GAO, MANAGEMENT REFORM, IMPLEMENTATION OF THE NATIONAL PERFORMANCE REVIEW's RECOMMENDATIONS, 6,7 (Dec 1994); CHRISTOPHER FOREMAN, JR., Reinventing Politics? The NPR Meets Congress in INSIDE THE REINVENTION MACHINE, 152 (1995); CHRISTOPHER FOREMAN, JR., Reinventing Capital Hill?, THE BROOKINGS REVIEW, 35 (Winter 1995).

60. See e.g., JAMES THOMPSON AND VERNON JONES, Reinventing the Federal Government. The Role of Theory in Reform Implementation, 25 AMER. REV. PUB. ADMIN. 183 (June 1995); DONALD KETTL, Building Lasting Reform: Enduring. Questions, Missing Answers, INSIDE
THE REINVENTION MACHINE, 31 (1995); PERI E. ARNOLD, Reform's Changing Role, PUB. ADMIN. REV., 407 (Sep/Oct 1995).

61. See e.g., DONALD KETTL, supra, note 60, at p. 14; JAMES D. CARROLL, The Rhetoric of Reform and Political Reality in the National Performance Review, PUB. ADMIN. REV. 302 (May/Jun 1995).

62. See e.g., RONALD C. MOE, The 'Reinventing Government' Exercise: Misinterpreting the Problem, Misjudging the Consequences, PUB. ADMIN. REV. I I I (Mar/Apr 1994).

63 J.L. GARNETT, Operationalizing the Constitution Via Administrative Reorganization: Oilcans, Trends, and Proverbs in THE AMERICAN CONSTITUTION AND THE ADMINISTRATIVE STATE: CONSTITUTIONALISM IN THE LATE 20TH CENTURY 83, 98 (1987).

64. PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY (1995); R.N. JOHNSON & G.D. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY, 160, 162 (1994); MARK L. GOLDSTEIN, AMERICA'S HOLLOW GOVERNMENT : How WASH. HAS FAILED THE PEOPLE (1992); CHESTER NEWLAND, Public Executives. Imperium, Sacerdotium, Collegium? Bicentennial Leadership Challenges, in THE AMERICAN CONSTITUTION AND THE ADMINISTRATIVE STATE: CONSTITUTIONALISM IN THE LATE 20TH CENTURY 83, 98 (1987).

65. PERI E. ARNOLD, supra, note 60.

66. In September 1995, there were 2,010,921 employees in the executive branch (excluding 845,393 Postal Service employees). OFFICE OF PERSONNEL MANAGEMENT, FEDERAL CIVILIAN WORKFORCE STATISTICS: EMPLOYMENT AND TRENDS AS OF SEPTEMBER 1995. By law the Full Time Equivalent (FTE) federal workforce (excluding the Postal Service) is limited to 2,003,300 during FY 1996; 1,963,300 during FY 1997; 1,922,300 during FY 1998; and 1,882,300 during FY 1999. Approximately 830,000 are employed by the Dept of Defense. Independent agencies, such as the EPA, NASA, or GSA, employed approximately 1,073, 521 and the other significant executive agencies employed the following - Veterans Affairs 263,904; Treasury 155,951; Agriculture - 113,321; Justice 103,262; Transportation 63,552; Health and Human Services - 59,788. Id.

67. The four unions are the American Federation of Government Employees (AFGE)(600,000), National Treasury Employees Union (NTEU)(150,000), National Federation of Federal Employees (NFFE)(150,000), and the National Association of Government Employees (NAGE). NPC, NATIONAL PARTNERSHIP COUNCIL1994 ASSESSMENT OF PARTNERSHIP ACTIVITIES (Feb. 13, 1995) and NPC, supra, note 29.

68. MARICK F. MASTERS AND ROBERTS. ATKIN, Bargaining, Financial, and Political Bases of Federal Sector Unions, REV. OF PUB. PERS. ADM. 5, 12-14 (Winter 1995); CAROLYN BAN, supra, note 57, at 134 (Citing a 1990 article concerned with union funds). This percentage can be somewhat misleading because there is no union security arrangement in the federal sector, and the unions have consistently vocalized their concern about "free-riders".

69. See R. JOHNSON AND G. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY: THE ECONOMICS AND POLITICS OF INSTITUTIONAL CHANGE (1994). See also BRIAN J. COOK, Book Review, AMER. POL SCIEN. REV. 763 (Sep 1995)("But in trying to explain the political success of the unions, [R. Johnson and G. Libecap] also reveal the limits of rational choice analysis of interest group power. All they essentially conclude is that the unions are powerful by virtue of a little voting power, big political action committee sums strategically spent, and lobbying power. ... None of this is much of a revelation.") Id.

70. Even the unions supporting partnership find there is a limit to their cooperation as shown by two recent law suits, AFGE v. Clinton, DC-S Ohio, Eastern Div, No. C2 96-0283, 3/18/96, (discussed infra at footnote 190), reported in Privatization: AFGE Suit Alleges That Privatization of Air Force Base Functions is Illegal, 34 GERR 420 (March 25, 1996) and
NTEU v. U.S., DC DC, No. 96-624, filed Apr. 9, 1996, (discussed in footnote 209), reported in BNA, NTEU Suit Challenges Constitutionality of Recently Signed Line-Item Veto Bill, 34 GERR 544 (Apr. 15, 1996).

71. MIKE PARKER AND JANE SLAUGHTER, Labor-Management Partnerships Are Harmful in WORK: OPPOSING VIEWPOINTS, 146, 152, (1993). See also CAROL BAN, supra, note 57, at 144. ("several observers, ..., expressed the concern that union leaders are too far out in front of their members."); MIKE CAUSEY, A Suit That Doesn't Fit?, THE WASH. POST, Feb. 5, 1996, at B-2. ("Some union members, apparently a minority, are uneasy with their leaders sitting on "partnership" councils... ...); NUKE CAUSEY, They Know Where You Live, THE WASH. POST, Apr. 24, 1996, at D-2. (OPM releases names and addresses of bargaining unit members to unions. "In return for their cooperation on downsizing and reengineering of government, union leaders have been given active roles in partnership councils with top career and political officials.").

72. MIKE CAUSEY, Private Pleasures, THE WASH. POST, Mar. 3, 1996, at B-2. (quoting union officials).

73. GAO, supra, note 59, at 6.

74. These acts include the CHIEF FINANCIAL OFFICERS ACT OF 1990, FEDERAL ACQUISITION STREAMLINING ACT, The INSPECTOR GENERAL ACT, the FEDERAL EMPLOYEE PAY COMPARABILITY ACT OF 1990, The

GOVERNMENT PERFORMANCE AND RESULTS ACT OF19930 the GOVERNMENT MANAGEMENT REFORMACT OF 1994.

75. CHIEF FINANCIAL OFFICERS ACT OF 1990, Pub. L. 101-576, 104 Stat 2838, Nov. 15, 1990.

76. The CFOA was amended by the SOCIAL SECURITY INDEPENDENCE AND PROGRAM IMPROVEMENT ACT OF 1994, Pub. L. 103-296 §1080)(1), 108 Stat 1464, Aug, 15, 1994 and the GOVERNMENT MANAGEMENT REFORM ACT OF 1994, Pub.L. 103-356, 108 Stat 3410, Oct. 13,1994.

77. GOVERNMENT PERFORMANCE AND RESULTS ACT Of 1993, Pub.L. 103-62, 107 Stat 285, Aug. 3, 1993.

78. DAVID H. ROSENBLOOM, The Context of Management Reform, THE PUBLIC MANAGER, 3, 5 (Spring 1995).

79. Carol Ban notes union disappointment at the scope of proposed labor relations reform. CAROL BAN, supra, note 57, at 149. ("Union leaders were reported to feeling 'estranged' because the administration dropped labor law reform from the draft civil service reform bill."). In hearings on Civil Service Reform before the Subcommittee on Civil Service of the House Committee on Government Reform and Oversight, Donald Devine highlights what he considers to be unacceptable proposals the Clinton Administration withdrew from proposed legislation for political reasons. He then vigorously attacks the remaining provisions of the Act. See Testimony of Donald C. Devine, given Oct. 12, 1995 and memorandum, Making Government Work. How Congress Can Really Reinvent Government (Aug. 24, 1995). "Contrary to the Administration's own staff recommendations, which were overruled personally by Vice President Al Gore, the White House decided to give the unions equal power with management in 'labor-management councils' that would make the major management decisions in agencies of the federal government. In addition, it was proposed originally that the unions be given an involuntary dues checkoff from federal employees-without even a requirement for representation elections. While the White House was forced to retreat from the second proposal, the first was codified in E.O. 12871, issued in 1993, making the unions "full partners" with management in the assignment and classification of work and creating labor-management committees to enforce this throughout the government. A presidential 'partnership council' of union and Administration officials was created to make furhter recommendations, including the proposal for involuntary dues collection and union representation by card submission rather than by secret ballot." Id.

80. Consider the following, "The entire [1993 NPR] Report implicitedly argues that greater faith should be placed in the abilities and motivations of the politically appointed leadership in the departments and agencies." MOE, supra, note 62, at 116.

81. See, CONGRESSIONAL RESEARCH SERVICE LIBRARY OF CONGRESS TO THE JOINT COMM. ON THE ORGANIZATION OF THE CONGRESS, 103D CONG., 1ST SESS., CONGRESSIONAL REORGANIZATION: OPTIONS FOR CHANGE (Joint Committee Print 1993) at 166-170. (The Balance Between Career Executives and Political Appointees) (Criticizing the increase in political appointees).

82. The Malek Manual was a 113 page manual which detailed how to create networks, layering, or parallel paths of political personnel who would be used to by-pass or control incumbent career bureaucrats. Paul Light provides an example of one of the techniques explained in the manual.

83. See LIGHT, supra, note 64, at 56; GOLDSTEIN, supra, note 64, at 116-119. Light reports that Reagan's approval was based on two criteria, the appointee must have voted in the 1980 election and given some level of support to the Reagan/Bush campaign or a supporter of Reagan/Bush.

84. Under the FEDERAL WORKFORCE RESTRUCTURING ACT OF 1994, the total number of fulltime positions in the federal government may not exceed 1,882,3000 during Fiscal Year 1999 , a reduction of 272,900 positions from a 1993 baseline. How the number 272,900 was determined is explained in LIGHT, supra, note 64, at 30-36. The justification purportedly relies on an appropriate span of control of 1:15 as opposed to the current ratio of 1:7, but Light shows that the appropriate span of control was determined by the numbers needed to down-size the government rather than the other way around.

85. J. CARROLL, supra, note 61, at 302. Mr. Carroll believes this concentration will be reinforced by the devolution of personnel matters from the OPM to the agencies, without furhter oversight of the merit system principles; but this is based on the unlikely assumption that agencies cannot responsibly manage their personnel systems.

86. Speech of Vice-President Gore to the Nat. ASSO. of Newspaper Writers on Apr. 19, 1996.

87. DONALD KETTL, supra, note 6 1.

88. In a recent report, GAO, OFFICE OF MANAGEMENT AND BUDGET - CHANGES RESULTING FROM THE OMB 2000 REORGANIZATION (Dec 1995), Report at p. 2-3., While initial efforts under OMB 2000, appear favorable, GAO said it remains to be seen whether the initial positive results can be sustained over the long term. GAO noted that OMB has failed in the past to coordinate its management and budget functions effectively and has not established a stable management capacity. GAO reports can be downloaded at http://www.gao.gov.

89. OPM has suffered the largest percentage decrease in personnel of any agency during the restructuring. Some of the loss is due to "privatizing" its training function, which was transferred to a NAFI in the Dept of Agriculture. Its investigative functions will be spun off in the future to an ESOP.

90. MIKE CAUSEY, The Pension Pit, THE WASH. POST, Mar. 1, 1996, at C-2, col. 1.

91. SMITH State and Local Advisory Reports On Public Sector Employment Labor Legislation: A Comparative Analysis, 67 MICH. L. REV. 891 (1969).

92. DONALD WOLLETT, The Bargaining Process In The Public Sector: What Is Bargainable?, 51 OR. L. REV. 177 (1977).

93. See NPC, supra, note 32, pp. 14-16. The permissive subjects are the numbers, types, and grades of employees or positions assigned to any divisional subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work.

94. 5 U.S.C. Sec. 7106(a)(2) (1978).

95. The 1995 HRM Reinvention Act would have legislated the scope of bargaining found in E.O. 12781.

96. Title VII of the Civil Service Reform Act of 1978, (codified at Title 5, Chapter 71, 5 U.S.C. Sec. 7100 et seq. (1978)).

97. One current study of labor-management partnerships is found in CATHIE M. LANE, Bittersweet Partnerships, GOV'T EXECUTIVE p. 41 (Feb 1996).

98. 5 U.S.C. 7119 (1995).

99. FDIC and NTEU, 18 FLRA 768 (1985).

100. 51 FLRA 386, 51 FLRA No. 36, FLRA Rep. No. 871 (1995).

101. 22 F.3d 1150, 1155 (D.C. Cir. 1994).

102. Id.

103. 5 U.S.C. Sec. 7103(a)(12) (1995).

104. WOLLETT, GRON AND WEISBERGER, Collective Bargaining In The Public Sector, p. 186-87 (4th ed. 1993).

105. See 5 U.S.C. Chap. 53.

106. 5 U.S.C. Sec. 7103(a)(14)(C) (1995).

107. There are however, several groups of employees whose salary or fringe benefits are not established by law. See generally PETER BROIDA, A GUIDE To FEDERAL LABOR RELATIONS AUTHORITY LAW AND PRACTICE, Chap. 4, (1995). Even here the Authority recently found previously prohibited "pay" proposals are now appropriate for bargaining. See IAMAW and U.S. Dept. of Treasury, 50 FLRA 677, 50 FLRA No. 87 (1995), on remand from, U.S. Department of the Treasury, Bureau of Engraving and Printing v. FLRA, 995 F.2d 301 (D.C. Cir.1993).

108. 5 U.S.C. Sec. 7117 (1978). See supra, note 40 and cases cited there. This does not mean the regulations are easily interpreted. In NTEU v. FLRA, 30 F.3d 1510 (D.C. Cir. 1994), the D.C. Circuit disagreed with the Authority's interpretation of OPM regulations which had been used to deny the negotiability of several performance award proposals. However, even the D.C. Cicuit was uncertain of the meaning of the regulation and stated, "If OPM were to issue an authoritative (and reasonable) interpretation of Sec. 430.504(d), and if the union's proposal conflicted with that interpretation of the regulation, we do not think that our decision would oblige the FLRA to order the parties to bargain over the proposal." Id. at 1516.

109. Its human resource recommendations included HRM04 - Authorize Agencies to Develop Incentive Awards and Bonus Systems to Improve Individual and Organizational Performance. NPR, REINVENTING HUMAN RESOURCE MANAGEMENT - ACCOMPANYING REPORT To FROM RED TAPE To RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS - (Sept. 1993).

110. Id. at p. 37, referring to GAO and MSPB observations. Consider a recent study, DENNIS DALEY, Pay-for-Performance and the Senior Executive Service: Attitudes

About the Success of Civil Service Reform, Am. REV. PUB. ADMIN. 3 55 (Dec 1, 1995). (No relationship found).

111. Id. at p. 36.

112. NPC, supra, note 32, at p. 37.

113. Amendment of parts 430, 432, 451, and 531 of Title 5, Code of Federal Regulations, 60 FR 43936, August 23, 1995, effective September 22, 1995.

114. 5 C.F.R. Secs. 430.501 through 430.506 (1994).

115. 5 C.F.R. Sec. 451.104(a)(1) provides: An agency may grant a cash, honorary, or informal recognition award, or grant time-off without charge to leave or loss of pay consistent with chapter 45 of title 5, United States Code, and this part to an employee, as an individual or member of a group, on the basis of a suggestion, invention, superior accomplishment, productivity gain, or other personal effort that contributes to the efficiency, economy, or other improvement of Government operations.

116. Agencies are encouraged to involve employees in developing such programs. When agencies involve employees, the method of involvement shall be in accordance with law. 5 CYR Sec. 451.103(b) (1994), 60 Fed. Reg. 43936, August 23, 1995.

117. Incentive pay arrangments discussed will include the profit-sharing and gainsharing arrangements allowed under 5 U. S.C. Chapter 45 and 5 CYR Part 45 1.

118. The agencies also argued that these awards were a means or method of performing work. That argument was rejected as well; but since that subject is a permissive subject of bargaining making the argument in face of E.O. 12871 it loses even more of its utility as a shield to negotiation.

119. 27 FLRA 132 (1987).

120. NTEU v. FLRA, 793 F.2d 371 (D.C. Cir 1986), reversing, NTEU and IRS, 14 FLRA 463(1984).

121. 5 C.F.R. Sec. 430.504(D) (1994); 5 C.F.R. Sec. 451.104(e)(3) (1994).

122. NFFE and USDA, FCIC, 48 FLRA 552, 48 FLRA No. 54 (1993). See National Federation of Federal Employees, Local 1482 and U.S. Department of Defense,, Defense Mapping Agency, Hydrographic/Topographic Center, Louisville Office, Louisville, Kentucky, 45 FLRA 1346, 1350 (1992) (Proposals that mandate the granting of cash performance awards are inconsistent with 5 C.F.R. Sec. 430.504(D) because they prevent an agency from reviewing and approving those awards). Id. at 13 5 1. See also NFFE and Defense Mapping Agency, 45 FLRA 1346, 1350 (1992); NAGE and Dept of Navy, Newport News, 43 FLRA 47, 43 FLRA No. 3 (1991).

123. See supra, note 108.

124. See Social Security Admin. v. FLRA, 983 F.2d 578 (4th Cir. 1992), reversing in part, 41 FLRA 224 (1991); NAGE Local R14-52 and Dept of Army, Red River Depot, 48 FLRA 1198 (1993). The Authority has restricted the breadth of the first prong of its two-prong Wright-Patterson test, which is used to determine whether a proposal impermissibly infringes an the agency's right to determine its own budget.

125. 30 F.3d 1510 (D.C. Cir. 1994).

126. 878 F.2d 1430 (Table, Case No. 88-2171), 146 L.R.R.M. (BNA) 3088, 1989 WL 74869 (1989). (Because this is an unpublished decision, Fourth Circuit rules do not allow it to be cited as precedence).

127. Specifically, the Fourth Circuit found it Violated the regulatory prohibition on considering factors other than merit and the requirement for administering awards within existing funds, not a "review and approve" provision.

128. Langley Air Force Base, supra note 124, at p.2.

129. 2 FLRA 604 (1980).

130. 48 FLRA 1198 (1993).

131. 48 FLRA at 1206-07.

132. Id. Citations omitted above are: "Compare Air Logistics Center, Sacramento, (proposal that agency would bear the entire burden of an increase in health benefits premiums and reimburse employees who had paid the increased premiums was not inconsistent with the first part of the budget test) with National Association of Government Employees, Local R1-44 Federal Union of Scientists and Engineers and U.S. Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island, 38 FLRA 456, 477-80 (1990), remanded as to other matters without decision, No. 91-1045 (D.C. Cir. July 23, 1991) (proposal requiring that 1.5 percent of base aggregate payroll be allocated in the budget for awards directly interfered with management's right to determine its budget based on the first part of the budget test) and Norfolk Naval Shipyard, 38 FLRA at 1594-96 (proposal prescribing the maximum amount that could be included in the budget to fund performance awards directly interfered with management's right to determine its budget). In sum, under this part of the test, a proposal that directly prescribes the items or amounts that will be specified in an agency's plan to fund its programs and operations during a fiscal year interferes with the agency's right to determine its budget."

133. "More Specifically, the [Circuit Court] stated that a conclusion with regard to whether the proposal requires the inclusion in the budget of a particular program or amount might be dependent upon whether or not the Agency retained the ability to adjust the baseline productivity level each year to reflect prior productivity gains." Id

134. Red River Depot, 48 FLRA at 1209.

135. 47 FLRA 080 (1993).

136. 47 FLRA at P. 998.

137. 47 FLRA at p. 998.

138. Id. at p. 994

139. 51 FLRA 491, 51 FLRA No. 42 (1995)

140. It is interesting that the revised regulations deleted the prohibition that the awards program not be used as a substitute for pay. See C.F.R. Sec. 104 (d) (1995)(“An award

under this part shall not be used as a substitute for other personnel actions, or as a substitute for pay.")

141. The analysis of "pay established by statute" was recently revised under IAMAW and U.S. Dept. of Treasury, 50 FLRA 677, 50 FLRA No. 87 (1995), on remand from, U.S. Department of the Treasury, Bureau of Engraving and Printing v. FLRA, 995 F.2d 301 (D.C.Cir. 1993), to allow for expanded negotiation.

142. Federal law actually states that it is the policy of Congress in setting pay for Federal employees that Federal pay rates will be comparable with non-Federal pay rates for the same level of work within the same local pay area and any existing pay disparities between Federal and non-Federal employee should be completely eliminated. 5 U.S.C. Sec. 5301 (1990).

143. RONALD N. JOHNSON AND GARY D. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY, p. 139 (1994).

144. Id. See also GREGORY B. LEWIS AND SAMANTHA L. DURST, Will Locality Pay Solve Recruitment and Retention Problems in the Federal Civil Service, PUB. ADMIN. REV., pp.371, 372 (Jul/Aug 1995)(citing studies demonstrating grade inflation in civil service),

145. PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY, p. 75, Table 3-2, Number of Government Employees and the Ratio of Supervisors to Subordinates, 1983, 1989, and 1992 (1995). In this particular table, Paul Light was concerned with the span of control. His raw data showed the workforce of GS 1-10 declined during this period, while the greatest increase in Federal personnel occurred in the GS 11-15 compartment. Paul Light attributed the change to a new occupational mix in the workforce and a hollowing out phenomenon. Id at p. 75.

146. GAO, FEDERAL JOB CLASSIFICATION: COMPARISON OF JOB CONTENT WITH GRADES ASSIGNED IN SELECTED OCCUPATIONS (Letter Report, 10/95). Regarding discriminatory practices, the study found that the likelihood of a position being overgraded increased as the incumbents' GS grades increased, occupations with high female representation were more likely to be undergraded than those occupations with medium or low female representation; and occupations with high minority representation were more likely to be overgraded than those occupations with medium or low minority representation. Id.

147. GAO, RETENTION ALLOWANCES: USAGE AND COMPLIANCE VARY AMONG FEDERAL AGENCIES (Dec 95).

148. STEPHEN BARR, Export-Import Bank Overpaid Salaries, THE WASH. POST, Feb. 1, 1996, A-19, Col.4.

149. A private study apparently found that the bank's specialists could earn 35 to 95 percentage more in private industry. MIKE CAUSEY, Special Pay Packages, THE WASH. POST, Mu. 29, 1996, B-2, Col. 1.

150. Clinton Limits Executive Bonuses, GOV'T EXECUTIVE, p. 6 (Dec. 1995).

151. STEPHEN BARR, Clinton Plan To Set 3% Pay Raise, THE WASH. POST, Feb. 3, 1996, pp.A-1, A-4, col. 1.

152. THE WASH. POST, March 31, 1996, p. B-2, col. 1.

153. GAO, FEDERAL PERSONNEL: FEDERAL/PRIVATE SECTOR PAY COMPARISONS (Chapter Report, 12/14/94).

154. GAO, MANAGEMENT REFORM: IMPLEMENTATION OF THE NATIONAL PERFORMANCE REVIEWS RECOMMENDATIONS, p. 419 (December 1994); GAO, MANAGEMENT REFORM: GAO's COMMENTS ON THE NATIONAL PERFORMANCE REVIEW'S RECOMMENDATIONS p. 220 (Dec 1993).

155. NPR supra, note 110, at p. 23.

156. See PETER BROIDA, A GUIDE To FEDERAL LABOR RELATIONS AUTHORITY LAW & PRACTICE, (1995). In NAGE Local RI-109 and VAMC, Newington, 38 FLRA 211 (1990). (The Authority said, although it has not expressly defined "types" of employees, it has in many cases discussed, in general, management's right to determine numbers, types, and grades of employees, and in particular, the right to determine types of employees).

157. Id., citing, March AFB, Riverside, CA and AFGE Local 1953, 13 FLRA 255 (1983).

158. 5 U.S.C. Sec. 7117(a)(2) (1995); 5 C.F.R. §2424.11 (1995).

159. MARK L. GOLDSTEIN, AMERICA'S HOLLOW GOVERNMENT, P. 146 (1992).

160. NEWLAND, supra, note 64, at p. 112, quoting FREDERICK C. MOSHER, The Changing Responsibilities and Tactics of the Federal Government, PUB. ADMIN. REV., pp. 541-548 (Nov/Dec 1980).

161. Testimony of John Sturdivant, The Federal Role in Privatization, Hearings Before the Subcommittee on Government Management, Information, and Technology of the Comm. on Government Reform and Oversight, 104th Cong. 1st Sess., p. 96 (1995).

162. MIKE CAUSEY, supra, note 72.

163. Prepared Statement of Andrew Jones, Worldwide Privatization Coordinator, Arthur Anderson in COMMITTEE REPORT, supra, note 163, at p. 24 (1995).

164. NPR and OMB, PRIVATIZATION RESOURCE GUIDE AND STATUS REPORT, (Feb. 13, 1995).

165. This approach reflects a government review of the existing commercial, State or local government service market and a decision that a service need not be provided by the federal government. This option includes many federalism concepts. Electrical power generation and distribution (rural electrification), and helium production and sales are also examples of services that fit into this category. Id.

166. Privatization implies that the government is currently providing the service, but no longer sees the need to be in direct control of its provision, operations or maintenance. Privatization reflects the sale of assets and related service requirements (rights) by the government. However, it also includes assumptions that services are I necessary and must be provided in the future. It is rarely simple divestiture, as outlined above. The sale agreements themselves establish and refer to the regulatory and oversight environment

that will continue to exist to assure that public and/or agency access and service requirements are maintained. This may or may not include agreed-upon user fees or rate commission (utility) oversight. Privatization can include sale to or forgiveness of debt from other public authorities or to private sector investors. Simple examples include waste water treatment plants, airports, ports, bridges, parks, and recreation facilities Government exerts control through regulatory and sale covenants. Id.

167. This approach recognizes that there is a definite public need for a service at the federal level. Generally it is a service that can readily be provided by the private sector, but there is no commercial service market able or willing to take on the responsibility. In effect, instead of providing the service directly as a public (in-house) good, the government opts to create a corporation and a market where there is none today. Fannie Mae, Connie Mack, etc. are examples. Another example is Conrail, where there was a public need and no private sector interest in providing the financial or operating assets necessary-the risks were simply too high relative to expected returns. Amtrak is currently considered a part of this category. Government exerts control through a combination of limited operational and management controls, (board member, owner of preferential stock, budget review authority, appropriations, etc.) and regulatory controls. Id.

168. This approach reflects a joint public and private sector investment relationship. The government may share in the ownership of assets and may share in operational responsibilities. Many hub airports facilities and regional transportation authorities (e.g., the Port Authority of New York) fall into this category. Id.

169. This is the "outsourcing" or "contracting-out" alternative (FAR recompetitions and OMB Circular A-76 make/buy decisions). It reflects a decision by the government to remain fully responsible for the provision of all services and management decisions. The question is whether the service can be more effectively procured through in-house or contract sources. Id.

170. There are many books and articles discussing the pros and cons of privatization. Two that provided the authors some unique insights are BRENDAN MARTIN, IN THE PUBLIC INTEREST?: PRIVATIZATION AND PUBLIC SECTOR REFORM (1993) and S. ARONOWITZ & W. DIFAZIO, THE JOBLESS FUTURE (1994).

171. The Federal Role in Privatization, Hearings Before the Subcommittee on Government Management, Information, and Technology of the Comm. on Government Reform and Oversight, 104th Cong., 1st Sess. (1995)(ISBN 0-16-047296-2).

172. NPC, supra, note 32.

173. The Current Standard for reviewing, impact and implementation" proposals regarding their interference with management's rights is "directly interferes," not "substantially interferes."

174. PETER BROIDA, supra, note 157, citing NFFE v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989).

175. Dept. of Treasury, IRS v. FLRA, 110 S.Ct. 1623 (1990).

176. AFGE Local 1345 and Dept. of Army, Ft. Carson, 48 FLRA 168 (1993).

177. OMB Circular No. A-76, "Performance of Commercial Activities." (Aug 4, 1983), published at Federal Register 37110-37116. (Aug. 16, 1983). OMB documents can be downloaded at http://www.whitehouse.gov/WH/EOP/OMB.

178. IRS v. FLRA, 996 F.2d 1246, 1248 (D.C. Cir 1993)("The Circular states that, except for the agency's own internal appeal system, '[t]his Circular and its Supplement shall not ... establish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular.' A Supplement to the Circular adds that a decision in the internal review process should not be subject to appeal outside the agency.").

179. 48 FLRA at p. 206. Still, the Circular does provide an appeal process through the agency, and actions eventually taken to implement the decisions can be negotiable under the "impact and implementation" provisions of Sec. 7106(b)(2) and (3).

180. OMB Circular No. A-76 (Revised), Part 1, Chapter 1, Section A, para. (7)(c)(8) (Aug 4,1983).

181. The appeals procedures are now located at Part 1, Chapter 3, Section K, para. 7.

182. Infra, notes 195-198 and accompanying text.

183. American Federation of Government Employees v. Clinton, DC-S Ohio, Eastern Div, No. C2 96-0283, 3/18/96. Reported in Privatization: AFGE Suit Alleges That Privatization of Air Force Base Functions is Illegal, 34 GERR 420 (March 25, 1996).

184. Kelly AFB was recognized for its partnership initiatives which supposably saved the Federal government over two million dollars in litigation costs. This just show that there are some issues that cannot be agreed to under the umbrella of partnership.

185. 10 U.S.C. Sec. 2464 requires DoD to maintain a core capability sufficient to ensure technical competence and resources necessary for an effective and timely, response to a mobilization or other national defense emergency. This requires sufficient depot maintenance to support the JCS contingency scenarios. However, 10 U.S.C. Sec. 2464 also allows DoD to contract out core logistical functions under Circular A-76. Still, under 10 U.S.C. Sec. 2466, no more than 40% of DoD's maintenance and repair work can go to private firms.

186. DoD released a report on April 4, 1996, urging elimination of the 60/40 split. DOD Asks Congress To Eliminate Split In Depot Level Maintenance, 34 GOVERNMENT EMPLOYEE RELATIONS REPORT 513 (April 8, 1996).

187. The Administration has an vested interest in this matter because, in a political move, it promised to privatize the maintenance work at McClellan AFB and Kelly AFB so as to retain the employment in the local community, Without the correcting legislation, it may be impossible to fulfill the promise and close the bases.

188. The memorandum entitled, Improving the Combat Edge Through Outsourcing, was reported as one of three reports issued on 4 April 1996. BNA, DOD Directs Military Services to Pursue Outsourcing, Privatization Opportunities, 34 GERR 543 (Apr. 15, 1996).

189. Administration Awards $14.5 Million For Displaced Workers At Kelly Air Base, 34 GOVERNMENT EMPLOYEE RELATIONS REPORT 513 (April 8, 1996). This also helps the Administration as it preaches "corporate citizenship."

190. Revised Supplemental Handbook, Performance of Commercial Activities, OMB Circular No. A-76, 61 Fed. Reg. 14338, (April 1, 1996). The provisions of the Revised Supplemental Handbook are effective March 27, 1996 and apply to all cost comparisons in progress that have not yet undergone bid opening or where the in-house bid has not yet otherwise been revealed.

191. 61 Fed. Reg. at p. 16340 (April 1, 1996).

192. The draft Revision had proposed a cap on the agency's determination of "core activities" to 10 percent of the agency's total FTEs. Core activities are excluded from A-76 requirements because they represent an essential commercial service. The final Revision removed the proposed 10 per cent limitation to provide maximum' flexibility to the agencies to identify functions as "core" and exempt them from cost comparison. In place of the 10 percent core limit, one commenter had requested the right to appeal agency determinations of their core requirements and their decision to convert from in-house to contract performance on the basis of a core designation. This change was not incorporated. OMB has decided that the determination of a "core" function is, fundamentally, a management decision.

193. "There was strong support and strong opposition to this provision. One commenter suggested that no conversions should be authorized without a cost comparison -- even if all Federal employees are placed in other comparable Federal positions. ... In contrast, another commenter objected to the idea that failure to place a single employee could require a cost comparison or otherwise delay a direct conversion to contract. The provision has been modified to clarify that in addition to assuring placement in "comparable Federal positions," the conversion to contract with placement and without cost comparison is limited to competitive awards. These direct conversions to contract must retain the benefits of full and open competition. In the absence of adverse actions to Federal employees and similar to the policy of reliance on the private sector for new starts and expansions, Federal managers should be permitted to rely on the competitive dynamics of the private sector." Announcement of Revised Supplemental Handbook, supra, note 180.

194. OMB did not permit appeals of basic organizational decisions, saying, the A-76 appeal process is not a surrogate to resolve management-union complaints.

195. The first notice of the ESOP conversion was printed in The Washington Post on April 14, 1996. STEPHEN BARR, OPM, in a First, Acts to Convert an Operation Into Private Firm, THE WASH. POST, p. A-4 (April 14, 1996).

196. STEPHEN BARR, supra, note 195.

197. KATHERINE M. PETERS, The Hard Sell, GOVERNMENT EXECUTIVE 20, 24 (Feb. 1996).

198. Supra, notes 171-181 and accompanying text.

199. A recent article suggesting reform of federal corporations in light of expected increased use under NPR Phase 2 is, A. MICHAEL FROOMKIN, Reinventing The Government Corporation, 1995 U.ILL.L.REV. 543 (1995).

200. OPM Issues Template To Help Agencies Convert To Performance-Based Systems, 34 GERR 513 (April 8, 1996).

201. DONALD KETTL, Building Lasting Reform: Enduring Questions, Missing Answers in INSIDE THE REINVENTION MACHINE, P. 83 (Eds. DiIulio and Kettl) (1995).

202. E. SAM OVERMAN AND KATHY J. BOYD, Best Practice Research and Postbureaucractic Reform, JOUR. PUB. ADMIN. RESEARCH AND THEORY 67, 77 (Jan 1994).

203. D. KETTL, supra, note 201, at p. 24. "The NPR avoided a quick counterattack by the unions and in fact won their endorsement for the report."

204. Even the unions understand that the next Administration may be hostile to the objectives of the public employee unions. NTEU filed a suit (NTEU v. U.S., DC DC, No. 96-624, filed Apr. 9, 1996) challenging the constitutionality of the line-item veto because the line-item veto would make it more difficult to push through legislation improving wages, benefits, and working conditions if a president is hostile to these issues. BNA, NTEU Suit Challenges Constitutionality of Recently Signed Line-Item Veto Bill, 34 GERR 544 (Apr. 15, 1996)(Reporting remarks of Robert Tobias, National Prersident of NTEU).

205. ROB GURWITT, Entrepreneurial Government: The Morning After, GOVERNING 34 (May 1994).

206. This sounds remarkably similar to an observation in Gurwitt's article, where a city official says, "There were meetings and meetings and meetings. ... There were team-building meetings, training sessions, personality profiling exercises, and lots of brainstorming sessions." Gurwitt, supra, note 205, at p. 40.

207 PAUL LIGHT, Surviving Reinvention, GOV'T. EXEC. 55 (Jun 1994).

208. BARToN WECHSLER, Reinventing Florida's Civil Service System: The Failure of Reform, REV. PUB. PER. ADMIN. 64 (Spring 1994).

209. Id. at p. 75.

210. JAMES L. SUNDQUIST, The Concept of Governmental Management: Or, What's Missing in the Gore Report, PUB. ADMIN. REV., p. 398 (Jul/Aug 1995).
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211. GURWITT, supra, note 205, at p.38, quoting Gordon Whitaker, a professor of public administration at the University of North Carolina.

212 JAMES D. CARROLL, The Rhetoric of Reform and Political Reality in the National Performance Review, PUB. ADMIN. REV., p. 302-312 (May/Jun 1995).

213. D.KETTL, supra, note 203, at p. 49.

214. 5 U.S.C. §7111 (a) and Sec. 7116(a)(5) (1995).

215. E.O. 11491, Section 10(e) provided: "When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the

unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to membership. The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

216. In Dept. of Veterans Affairs v. FLRA, 3 F.3d 1386 (10th Cir. 1993), it was held interviews of employees conducted by an agency's staff attorney in preparation for a hearing constituted formal discussions in connection with a grievance so that agency committed unfair labor practice in failing to give union advance notice and opportunity to be, represented, even if Brooks/Johnny Poultry rights are given. In a special concurrence Judge Moore said, it is an illogical result, but because the law required this absurdity, he must concur, although he does not like doing so.

217. Defense Logistics Agency, Defense Depot, Tracy, California And Laborers' International Union Of North America, Local 1276, AFL-CIO, FLRA ALJ Dec. Rep. No. 25, 1982 WL 23451 (Dec. 28, 1982).

218. Memorandum to FLRA Regional Directors (Aug. 8, 1995). The memorandum is available by faxing a request to the Office of the General Counsel at 202-482-6608. The views of the GC are: An agency commits an unfair labor practice if it deals directly with unit employees over negotiable terms and conditions of employment. Air Force Accounting and Finance Center, Lowry AFB, Denver Colorado, 42 FLRA No. 85, 42 FLRA 1226 (1991). Therefore if a supervisor-employee group is going to discuss issues appropriate for negotiation with the exclusive representative, the group cannot be established without the consent of the union. Department Of The Navy, Pearl Harbor Naval Shipyard, Pearl Harbor, Hawaii, 29 FLRA No. 96, 29 F.L.R.A. 1236 (1987). The union is under no obligation to negotiate the agency's proposal to establish an labor-management group that will discuss negotiable conditions of employment.

219. Memorandum, supra, note 218, at p. 2.

220. The official literature covering the CFOA often refers to 23 executive agencies. The Social Security Administration was added as the 24th agency by the Social Security Independence and Program Improvement Act of 1994, Pub. L. 103-296 Sec. 1080)(1), Aug, 15, 1994. In 1994 the 24 executive agencies accounted for $1,566,150,000 in budget outlays and 98.8% of the federal budget.

221. 31 U.S.C. Sec. 3515(a), Pub. L. 103-356, Title IV, Sec. 405(a).

222. 31 U.S.C. Sec. 331, Pub.L. 103-356, Title IV, Sec. 405(b).

223. NATIONAL PERFORMANCE REVIEW, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS: STATUS REPORT, p. 41 (1994).

224. VICTOR J. KIMM, GPRA: Early Implementation, THE PUBLIC MANAGER, P. 11-12 (Spring 1995).

225. GAO, MANAGEMENT REFORM - STATUS OF AGENCY REINVENTION LAB EFFORTS pp. 35-41 (March 1996).

226. NPR, supra, note 223, at p. 40.