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MILITARY LAW REVIEW

EDITORIAL POLICY: The *Military Law Review* provides a forum for those interested in military law to share the product of their experience and research. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

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ERRATUM

The following copyright notice should have appeared among the footnotes on the first page of the article *Miranda v. Arizona — The Law Today*, by Major Fredric I. Lederrr, published at 78 Mil. L. Rev. 107 (1977).

© 1977 by Fredric I. Lederer. All rights reserved. Reproduction of any kind without the express permission of the author is prohibited. This article will comprise Chapter 27 of P. Giannelli, F. Gilligan, E. Imwinkelried & F. Lederer, *Criminal Evidence*, to be published by the West Publishing Company in 1977.

The Editor apologizes to Major Lederer for this inadvertent omission.

A CONTRACT LAW SYMPOSIUM: INTRODUCTION

With this issue the *Military Law Review* initiates a series of volumes each of which will contain articles falling within a specified subject matter area. The present volume is devoted to procurement law, with three articles dealing with monetary aspects of federal government procurement. Future volumes will be dedicated to international law, administrative and civil law, military justice, and possibly other areas. Selection of a theme for a particular volume will depend upon the availability of relevant articles, and volumes in this series will not be consecutive.

To introduce the entire series, the *Military Law Review* presents a lecture and a short article concerning various aspects of professional responsibility, which cuts across all areas of legal specialization.

Colonel Wiener's lecture focuses on appellate advocacy within the military justice system. He observes that, while the ethical responsibilities of military and civilian lawyers are the same, the military attorney has a further responsibility to combine with the virtues of the legal profession those of the profession of arms. Drawing upon his extensive experience in government and private practice, Colonel Wiener summarizes advocacy as the art of persuasion, and emphasizes the responsibility of lawyers to learn how to be advocates. After presenting several examples of successful and unsuccessful advocacy, he closes with comments on the responsibility of courts to exercise judicial self-restraint.

From Colonel Wiener's commentary on learning by observation, the reader passes to Captain Robie's article on learning by direct instruction. Captain Robie deals with professional responsibility in the ethical sense. He reviews the federal ethical considerations which implement the American Bar Association's canons of professional responsibility for federal attorneys. From his experience with the Legal Education Institute of the Civil Service Commission, Captain Robie describes the various methods of teaching professional responsibility, and the problems and advantages of each.

While Colonel Wiener is concerned with military justice, and more specifically with trial work, Captain Robie emphasizes the responsibilities of federal attorneys who provide legal advice within government agencies, in like manner with corporation counsel. While a few federal procurement attorneys engage in the trial of contract disputes, and are therefore subject to substantially the re-

sponsibilities described by Colonel Wiener, most function directly or indirectly as advisors to procuring activities and thus are more likely to face the issues raised by Captain Robie's article.

Within government procurement no area requires more awareness of professional responsibility on the part of the federal attorney than does funds control. One of the most important standards for control of funds is the Anti-Deficiency Act, 31 U.S.C. 665 (1970 & Supp. V 1975), commonly referred to as Revised Statutes 3679. This statute provides the subject for the article by Major Hopkins and Lieutenant Colonel Nutt which opens the contract law symposium to which this volume is dedicated. The two authors consider every aspect of the operation of the Anti-Deficiency Act and its relationship with other statutes. They conclude with a recommendation for careful coordination between procurement personnel and their legal and fiscal advisors.

Such coordination may be fruitless if the parties concerned do not know in detail the types of federal expenditures which are permissible. Further, although violations of the Anti-Deficiency Act are more likely to occur at the stage of contract formation, it is possible for them to occur later also, during contract performance. Captain Monroe's article on the contract cost principles of Section XV of the Defense Acquisition Regulation, until recently called the Armed Services Procurement Regulation, provides practical information which can be helpful to procurement attorneys in both pre-award and performance situations.

Claims against government funds may arise from irregular procurements. The implications of the Anti-Deficiency Act and related statutes and regulations must be considered for each such claim, and the items of the claim must be fitted into the DAR (i.e., ASPR) system of cost principles. The editor, a former procurement attorney, presents a short article of his own discussing possible ways of settling irregular procurement claims.

In summary, awareness of professional responsibility is not something that comes naturally to lawyers. It must be learned, both as it relates to development of specific job skills and as it concerns ethical obligations of an attorney to his client or employer and to the courts. Issues of professional responsibility may arise in every type of legal practice, within every legal specialty. Within procurement law, for example, the need for funds control imposes a heavy obligation on procurement legal advisors to inform themselves as fully as possible concerning fiscal law requirements, the contract cost principles, and claims procedures.

Readers are encouraged to submit comments and suggestions to the Editor, *Military Law Review*, concerning the present issue and future issues in this symposium series. It is hoped that the symposium format will make the *Military Law Review* more useful to its readers, but reader response is needed to test the result of this initial effort and future efforts.

PERCIVAL D. PARK
Major, JAGC
Editor, *Military Law Review*

ADVOCACY AT MILITARY LAW: THE LAWYER'S REASON AND THE SOLDIER'S FAITH*

Colonel Frederick Bernays Wiener, AUS, Retired**

In this lecture Colonel Wiener draws upon his many years of government service and private practice to provide a view of trial and appellate advocacy within the military justice system and the federal courts.

I. THE GREATEST SOLDIER-JURIST OF THEM ALL

Part of the title of my talk this afternoon,¹ and many of its themes, are taken directly from the words of one of the most towering figures of modern times, the single individual who without question can be deemed America's outstanding soldier-jurist. I refer of course to Captain and Brevet Colonel Oliver Wendell Holmes, Jr., of the 20th Massachusetts Volunteers, who fought and was three times wounded in the Civil War.² At the close of his military service, he commenced the study of law.³ Soon he became a consummate lawyer, first editing the 12th edition of Kent's *Commen-*

*An address delivered under the auspices of the United States Court of Military Appeals and of the Military Law Institute at the 3d Annual Homer Ferguson Conference on Appellate Advocacy, at Washington, D.C., 18 May 1978. The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

**Ph.B., 1927, Brown Univ.; LL.B., 1930, Harvard Univ.; LL.D., 1969, Cleveland-Marshall Law School. Practiced law, 1930-1973, privately, in government service, and in the Army. Assistant to the Solicitor General of the United States, 1945-1948. Author of books and articles on legal, military, and historical subjects, including *CIVILIANS UNDER MILITARY JUSTICE* (1967).

¹ *The Soldier's Faith* (1895) in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* (M. D. Howe ed. 1962) 73 [hereinafter cited *OCCASIONAL SPEECHES*].

² Captain Holmes received successive brevets to Major, Lieutenant Colonel, and Colonel in 1867, back-dated to "the bloody 13th of March 1865," that were awarded for each of the three engagements in which he had been wounded. General Orders No. 67, W.D., A.G.O., at 21, 35, 56 (16 July 1867).

³ "Wendell, by the way, is working hard at the law, and judging by the fondness he has for talking over his points he is much interested in it. He will master the theoretical part easily enough, I doubt not." Letter from John C. Ropes to John C. Gray, Jr. (31 Jan. 1865) in *WAR LETTERS 1862-1865* (W. C. Ford ed. 1927) 450-451.

taries,⁴ and then publishing his own classic, *The Common Law*, in 1881.⁵ A year later he became a Justice of the Massachusetts Supreme Judicial Court, the highest tribunal in that Commonwealth, where he served for twenty years, for the last three as Chief Justice. Then, in December 1902, he took his seat on the Supreme Court of the United States. And there, for nearly thirty years, he shaped American law, with more grace, and above all with more wisdom, than most of his brethren, then or later. His influence did not cease with retirement in his 91st year, for many of the doctrines that he first set forth in dissent subsequently became law.⁶

Let me recall some of Justice Holmes' most striking passages that are particularly relevant here. In a famous address he said, "it seems to me that at this time we need education in the obvious more than investigation of the obscure." And in one of his early opinions he had declared: "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."⁸

"The war," the Justice said years afterwards, "was a great moral experience,"⁹ and of course it had an extraordinary impact on his thinking; no place there for soggy, sweet-scented nonsense about military matters. Let me share with you a few of the most striking excerpts from his talks and from his writings.

If we want conscripts, we march them up to the front with bayonets in their rear to die for a cause in which perhaps they do not believe. The enemy we treat not even as a means but as an obstacle to be abolished, if so it may be. I feel no pangs of conscience over either step. . . .¹⁰

Those who have not known what it is to march straight to where you see the bullets striking may talk, if they like, about the trials of civil life being greater than those of war. They may be right. But the

⁴ KENT'S COMMENTARIES (12th edition), published in 1873.

⁵ See now the 1963 edition of THE COMMON LAW by M. D. Howe.

⁶ See generally the biography by Mr. Justice Frankfurter in DICT. AMER. BIOG., Supp. One (1944) 417. The late Professor M. D. Howe's full length study of the Justice's life did not extend beyond the year 1882. M. D. HOWE, JUSTICE OLIVER WENDEL HOLMES: THE SHAPING YEARS, 1841-1870 (1957); *id.*, THE PROVING YEARS, 1870-1882 (1963).

⁷ *Law and the Court* (1913), in OCCASIONAL SPEECHES, *supra* note 1, at 168, 169.

⁸ Missouri, Kansas & Texas Ry. v. May, 194 U. S. 267, 270 (1904).

⁹ *A Provisional Adieu* (1902), in OCCASIONAL SPEECHES, *supra* note 1, at 150, 152.

¹⁰ *Ideals and Doubts* (1915), in COLLECTED LEGAL PAPERS (1921) 303, 304 [hereinafter cited as C.L.P.].

men who have been soaked in a sea of death and who somehow have survived, have got something from it which has transfigured their world. They learned in a bitter school honor and faith. They knew the passion of life and the irony of fate.¹¹

The flag is but a bit of bunting to one who insists upon prose. Yet, thanks to Marshall and to the men of his generation—and for this above all we celebrate him and them—its red is our life-blood, its stars our world, its blue our heaven. It owns our land. At will it throws away our lives.¹²

And Justice Holmes had no patience with those who distorted constitutional provisions into attenuated technicalities that subverted justice. In the *Paraiso* case he pointed out that the provision in the Philippine Bill of Rights, drawn almost verbatim from the sixth amendment,¹³ “giving the accused the right to demand the nature and cause of the accusation against him does not fasten forever upon those islands the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert.”¹⁴

All of those quotations, and of course many more are available, bear on the themes I propose to discuss with you today under the general heading of Advocacy at Military Law.

For I venture to suggest that the military lawyer is, in a very real sense, a special breed, one who combines with the reason of the lawyer the faith of the soldier. That does not mean that he—or she, because, obedient to the rule laid down in the very first section of the United States Code, the masculine includes the feminine¹⁵—that does not mean that the military lawyer must be a certified combat hero, or have successfully completed the ranger course, or be able to function as a parachutist, or as a frogman, or as a submariner. If indeed he can actually qualify as any of those, so much the better. After all, two Judge Advocates General of the Army won the Distinguished Service Cross in combat, General Blanton Winship in

¹¹ *Remarks at a Meeting of the Second Army Corps (1903)*, in OCCASIONAL SPEECHES, *supra* note 1, at 158–159.

¹² *John Marshall (1901)*, in OCCASIONAL SPEECHES, *supra* note 1, at 131, 135.

¹³ That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf.

Act of 1 July 1902, ch. 1369, § 5, 32 Stat. 691, 692.

¹⁴ *Paraiso v. United States*, 207 U.S. 368, 372 (1907).

¹⁵ “In determining the meaning of any Act of Congress, unless the context indicates otherwise. . . words importing the masculine gender include the feminine as well.” 1 U.S.C. § 1 (1976).

command of an infantry regiment in World War I, General Eugene M. Caffey while leading an Engineer Special Brigade on Utah Beach in Normandy on D-Day in World War II.

My point is that the military lawyer must combine the virtues of both professions that he represents. He must have, first, the resourcefulness of the old-time solo practitioner, and here I quote from Mr. Justice Jackson: “. . . this vanishing country lawyer . . . never quit. He could think of motions for every purpose under the sun, and he made them all. He moved for new trials, he appealed; and if he lost out in the end, he joined the client at the tavern in damning the judge—which is the last rite in closing an unsuccessful case, and I have officiated at many.”¹⁶

In addition, the military lawyer must have, at an irreducible minimum, a high degree of moral courage. He must, of course, treat with respect all of his military superiors. What they direct after discussion must be the guideline of his conduct. But he is bound to be fearless in tendering advice and in stating his opinion. He is bound by the same rules of professional ethics as is his counterpart in mufti.¹⁷ But he should always bear in mind that any behavior or position on his part that is morally pusillanimous constitutes conduct unbecoming a wearer of his country's uniform. Once more to draw on Mr. Justice Holmes, “It is worse to be a coward than to lose an arm. It is better to be killed than to have a flabby soul. The true teaching of life is a tender hard-heartedness which has passed beyond sympathy and which expects every man to abide his lot as he is able to shape it.”¹⁸

II. THE ESSENTIAL SUBSTANCE OF ADVOCACY

What is advocacy? Believe me, it is not raising one's voice and shouting in court; it is not putting on a show at trial or on appeal; nor is it arguing one's case to the public before a television microphone. (Time was when the conventions of the profession forbade

¹⁶ R. H. Jackson, *Tribute to Country Lawyers: A Review*, 30 A.B.A.J. 136, 139 (1944).

¹⁷ [T]here is not only no divergence between the Manual for Courts-Martial and the Canons of Professional Ethics, there is actually a literal concordance between the two. And why should there be essential conflict between the ethical standards of the two professions, of law and of arms? The lawyer is required to represent his cause with undivided fidelity, with unflinching energy, fearlessly, by every honorable means at hand, and without violating confidences reposed in him. The soldier for his part is bound to speak truth, to deal honorably with his fellows, and, in all this world, to fear only God.

Proceedings in Memory of Judge Paul W. Brosman, 15 Feb. 1956, 6 C.M.A. xi.

¹⁸ *Admiral Dewey* (1899), in OCCASIONAL SPEECHES, *supra* note 1, at 109, 110.

that latter performance; time also was when a lawyer was not permitted to advertise himself. But they order these matters differently now,¹⁹ and I suppose that the larger firms will soon be placing discreetly worded cards in the yellow pages—or perhaps even on billboards: “Fifty lawyers; no waiting.”)

No, advocacy is, very simply, the art of persuasion. It is the process of persuading another, or others, in law always those who constitute a tribunal or fact-finding body, to agree with the position that is being advanced. Sir Winston Churchill, speaking of the thirty most active and fruitful years of his life, referred to them as “years of action and advocacy.”²⁰

And, very plainly, advocacy needs to be learned. The present Chief Justice’s recent denigration of the talents of the bar should not have come as a stunning surprise to any who have regularly listened to counsel in that most august of American tribunals, the Supreme Court of the United States. Thirty-odd years ago, my dear friend and mentor, Mr. Justice Frankfurter, told me privately that four out of every five arguments that he was required to hear were “not good.” A decade or so later, when I inquired whether the proportion had changed, he replied in the negative, although he then suggested the word “inadequate.”

So, let me assure you, advocacy badly needs to be learned, and so it needs to be taught. I undertook the teaching of it nearly thirty years ago by writing a book that set out the governing principles. It was well received, indeed it won the ultimate accolade of being stolen from library shelves. It was later revised, and then supplemented, and as it is still in print and this is obviously a literate audience, I shall not and need not repeat any of its contents orally.²¹

But, in addition to intimating, as gracefully as possible, that you could profitably dip into that particular volume, let me urge you strongly to go to court, and to listen to advocates arguing actual cases. You will learn much from the able lawyers—and at least an equal amount from those who can only be characterized as unable, or even as lamentable. I am not at all ashamed to say that much of what I learned about advocacy and later successfully applied came from observing, and from reflecting on, the mistakes that I had seen

¹⁹ *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

²⁰ W. S. CHURCHILL, *THE GATHERING STORM* (1948) iv.

²¹ F. B. WIENER, *EFFECTIVE APPELLATE ADVOCACY* (1950); F. B. WIENER, *BRIEFING AND ARGUING FEDERAL APPEALS* (1961 & Supp. 1967) [hereinafter cited as *B.A.F.A.*].

others making in court. I say this not because of what the Germans call *Schadenfreude*, pleasure at someone else's discomfiture, but because, by noticing approaches and techniques that obviously failed to convince, I was greatly helped in eliminating from my own presentations everything that had been proved to be obviously self-defeating.

So, time spent listening to arguments in court is always time well spent. Similarly, I would strongly recommend learning the techniques of advocacy by studying the briefs in particular cases, and then comparing them with the opinions in those cases. This will enable you to evaluate the arguments that were persuasive, and to determine why they were, and similarly to assist you in understanding why other contentions proved unpersuasive. The older reporters understood this, and so always set out the text of counsel's arguments. Today, but in very attenuated and hence only marginally helpful form, you can find abstracts of briefs in the Lawyers' Edition of the United States Reports.

By way of making certain of these generalizations more concrete, I shall review with you three types of cases, all of which present problems for the advocate. No one needs much help in winning the easy case, except perhaps to heed the admonition that it is poor advocacy to stamp too hard on losing counsel when he is obviously down; any such action is apt to kindle a feeling of sympathy for him, sympathy that might carry over into his case.

I shall discuss with you three situations that are far from easy. First, the uphill case, which is always a challenge. Second, the dream case, where after losing on the first time up, you turn the court around on rehearing. Third, the dilemmatic case, where the court's mind is so firmly closed that there is simply no opening or opportunity for persuasion.

In all of these three categories, I shall be drawing on cases that arose in my own practice. You may conclude from that circumstance that I am now in my anecdotage. You may recognize in my selection the eternal dichotomy between, on the one hand, the interesting cases, and, on the other, the other fellow's cases. But I think that I can provide a sounder justification for my selections. Once more to quote Justice Holmes,

I say these things because I think one of the best things an older man can do for younger men is to tell them the encouraging thoughts his experience has taught him. It is better still if he can lift up their hearts—if after many battles which were not all victories, the old sol-

dier still feels that fire in him which will impart to them the leaven of his enthusiasm.²²

Indeed, even the invitation to participate in the proceedings of this conference evokes another Holmes remark: “. . . it is a great pleasure to an old warrior who cannot expect to bear arms much longer, that the brilliant young soldiers still give him a place in their councils of war.”²³

111. THE ADVOCATE’S CHALLENGE: THE UPHILL CASE

What makes a particular case an uphill challenge? Well, it may be weak on the facts, which are unappealing or unconvincing or both; or, while reasonably strong on the actual facts, those are not adequately reflected in the record; or, again, it may be weak on the law, either because many lower courts are opposed, or because the recent precedents in the court where the case is to be heard are, or at least strongly appear to be, essentially unfavorable.

I will discuss with you a single uphill case, a military one in the Supreme Court, *Wade v. Hunter*.²⁴

Wade and another had been tried for the rape of a German woman, soon after their 76th Infantry Division had entered Germany. After the court-martial had heard evidence and arguments, it reopened, calling for additional, identified civilian witnesses, and continuing the case until they could be produced.²⁵ But, during the continuance, the war moved on, and the 76th moved with it; this was “The Last Offensive” in the spring of 1945 just before the end of hostilities in Europe.²⁶

Accordingly, since it was no longer possible to bring the requested witnesses across the debris of combat to the location that the 76th Division had reached, its Commanding General transmitted the charges to Third Army, recommending retrial by a new court-

²² *Anonymity and Achievement* (1890), in OCCASIONAL SPEECHES, note 1, *supra* at 59, 61.

²³ Preface to C. L. P. *supra* note 10, at v.

²⁴ 336 U.S. 684 (1949).

²⁵ Law Member: The Court desires that further witnesses be called into the case, and to allow time to secure these witnesses, this case will be continued. We would like to have as witnesses brought before the Court, the parents of this person making the accusation, Rosa Glowsky, and also the sister-in-law that was in the room who could further assist in the identification or identity of the accused. The Court will be continued until a later date set by the T. [rial] J. [udge] A. [dvocate].

336 U.S. at 686, note 2.

²⁶ C. B. MACDONALD, *THE LAST OFFENSIVE* (1973), in the series, U.S. ARMY IN WORLD WAR II: EUROPEAN THEATER OF OPERATIONS.

martial. But the latter unit, which had all but reached the gates of Prague in Czechoslovakia, was similarly unable to deal with civilians in the German Rhineland. So it in turn sent the case to Fifteenth Army, the American occupation force in Germany.

Wade and the other soldier were then tried again by a court-martial of Fifteenth Army, which convicted Wade and acquitted the other. A Board of Review in the Assistant Judge Advocate General's Office held that, on the foregoing facts, Wade had been twice placed in jeopardy, and accordingly set aside the conviction. The Assistant Judge Advocate General for the European Theater of Operations disagreed, so the issue, which plainly was not open and shut, was resolved, under the terms of AW 50% then in force,²⁷ by the Theater Commander, who sided with the Assistant Judge Advocate General.

Once back in the United States, in the Disciplinary Barracks at Fort Leavenworth, Wade sought habeas corpus, with success in the district court.²⁸

Thereafter a recommendation for appeal reached the Department of Justice. But examination of the record there revealed its thinness; it reflected only names of places, and did not show their relationship or distance from each other. Thus the record left the impression that, somehow, the Army had sought and obtained a second bite at the cherry.

How does one improve a record when the case is on appeal? In *Wade*, with the help of historians and cartographers in The Pentagon, there was constructed a map that showed the place of the alleged rape, the place of the first trial, the front line when the 76th Division transferred the charges to Third Army, and the front line when Third Army sent the case to Fifteenth Army. On this was superimposed, to scale, the boundaries of the State of Kansas. And that map was submitted to the district court in support of a motion for new trial.

Well, the motion was denied, but by then the map had become part of the record on appeal. And for that appeal, it was blown up, and placed on an easel in the appellate courtroom.

Let me pause for a moment to explain why it was deemed insufficient to let the judges simply look at the small map in the printed record. Any time that counsel hands a document to the judges to be

²⁷ As amended by the Act of 1 Aug. 1942, ch. 542, 56 Stat. 732; codified at 10 U.S.C. § 1522 (1946).

²⁸ *Wade v. Hunter*, 72 F. Supp. 755 (D. Kan. 1947).

examined while he is arguing, he is creating competition that will almost completely deflect the attention of his audience. A map, in particular, will prove an overwhelming distraction, as much so as if a tape of someone else's conversation were being played back while counsel is on his feet talking.

With the map in the courtroom, within sight of all the judges, counsel for the government was able to outline the facts by using a pointer. Soon there were questions directed at places on the map. And when counsel for Wade appeared, he too referred continuously to what was on the easel.

As I have said, the case was far from being open and shut. The Tenth Circuit reversed, sustaining the military proceedings 2 to 1,²⁹ after which the Supreme Court also sustained them, this time by 6 to 3,³⁰ again after argument that had employed the map.

Consequently, I submit, *Wade v. Hunter* stands as an example of a case that could easily have been lost, what with disagreements in both the military and civilian judicial systems, but which was rescued through effective presentation of the realities, which were then made to prevail over sterile formulas and abstract concepts arising out of a single and essentially equivocal word, "jeopardy." In the end, the same "manifest necessity" that permits a new trial after the first jury has disagreed,³¹ or after a juror duly sworn is found to be disqualified,³² was held fully applicable to a situation where the first court-martial was unable to complete the trial because of its unit's continuing advance into enemy territory.

It seems appropriate to add that the *Wade* case also constitutes a most convincing exhibit in support of the proposition that there are indeed vast differences between civilian and military justice. In the civilian community, courts meet in established courthouses at fixed locations, and adhere to terms and hearing lists that are prescribed in advance. Contrariwise, the American military community during the last few months of World War II in Europe was constantly on the move as it advanced ever more deeply into the heart of the enemy's homeland. Therefore the *Wade* case not only illustrates techniques of advocacy, it counsels strongly against the doctrinaire application of rules appropriate for a stable civilian community to a

²⁹ *Hunter v. Wade*, 169 F. 2d 973 (C.A. 10, 1948).

³⁰ *Wade v. Hunter*, 336 U.S. 684 (1949).

³¹ *United States v. Perez*, 9 Wheat. 579 (1824).

³² *Simmons v. United States*, 142 U.S. 148 (1891); *Thompson v. United States*, 155 U.S. 271 (1894).

fluid, rapidly moving armed force engaged in actual and bitter combat.

IV. THE ADVOCATE'S DREAM: TURNING A COURT AROUND ON REHEARING

To be able to persuade a court to reverse itself on rehearing is indeed a dream, for it does not happen very often.

It did happen in the famous income tax case of the 1890's, but there no opinion on the point had been published after the first argument, the court being equally divided.³³ It happened in a Jehovah's Witnesses case in the 1940's, following a change in the membership of the court.³⁴ But the only time in the Supreme Court's now 188-year long history that it reversed itself on rehearing following a published opinion and without a controlling change in its membership was in *Reid v. Covert*,³⁵ a decision with which, I take it, you are all reasonably familiar.

I should suppose that now, more than twenty years after the event, neither that case nor its sequels³⁶ will raise either hackles or blood pressures in military circles. Believe me, those were once burning issues that then strained even the closest and longest of friendships. But in today's calmer atmosphere and on the present occasion it may be found useful to review some of the problems in advocacy that the rehearing presented.

The details of the two cases appear in detail in the opinions below,³⁷ and require no recital here, much less still another reargument of either law or fact. Suffice it to say that, after Mrs. Covert had been granted release by the U.S. District Court in the District of Columbia, and Mrs. Smith had been denied release by a U.S. District Court in West Virginia, both cases came to the Supreme

³³ *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

³⁴ *Jones v. Opelika*, 316 U.S. 584 (1942), *vacated on rehearing*, 319 U.S. 193 (1943). In the interval, Mr. Justice Byrnes had resigned and was replaced by Mr. Justice Rutledge.

³⁵ 354 U.S. 1 (1957), *withdrawing* *Reid v. Covert*, 351 U.S. 487 (1956) and *Kinsella v. Krueger*, 351 U.S. 470 (1956).

³⁶ *McElroy v. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *Kinsella v. Singleton*, 361 U.S. 234 (1960).

³⁷ *United States v. Covert*, 6 C.M.A. 48, 19 C.M.R. 174 (1955); *United States v. Smith*, 5 C.M.A. 314, 17 C.M.R. 314 (1954); *United States v. Covert*, 16 C.M.R. 465 (A.F.B.R. 1954); *United States v. Smith*, 13 C.M.R. 307 (A.B.R. 1953); *United States v. Smith*, 10 C.M.R. 350 (A.B.R. 1953).

Court on an accelerated briefing schedule, after which they were argued late in the term—and very late in the day.³⁸

Let me interrupt here to suggest that it is rarely the part of wisdom to ask to advance a case or to join in an adversary's request to do so. Like the "hydraulic pressure" of the so-called "great cases" of which Mr. Justice Holmes spoke,³⁹ the pressure of time has an equally deleterious effect. For it leads to decision by deadline, which is not good for litigants, any more than it is for courts.

In the first decisions, five justices voted to sustain the military jurisdiction to try the two women, while at the same time declining to consider the scope of the constitutional provision that empowers Congress "To make Rules for the Government and Regulation of the land and naval Forces."⁴⁰ Three justices announced a dissent that they had not had time to write.⁴¹ Mr. Justice Frankfurter, reserving judgment, also because of insufficient time to examine the issues, commented on the rationale of the majority decision by saying, "The plain inference from this is that the Court is not prepared to support the constitutional basis upon which the Smith and Covert courts-martial were instituted and the convictions were secured."⁴² Or, less elegantly put, there were insufficient votes to hold that the constitutional words, "land and naval Forces," were broad enough to include dependent wives.

When that opinion *dubitante* was orally announced, a knowledgeable lawyer sitting next to me whispered, "That's a command to file a petition for rehearing." And such a petition, which has been published and thus is available for study, was duly and timely filed.⁴³

Obviously, it was demonstrably untenable to sustain court-martial jurisdiction without consideration of the constitutional provision conferring such jurisdiction. But—Supreme Court Rule 58(1) stated that "A petition for rehearing. . . will not be granted, except at the instance of a justice who concurred in the judgment or decision and with the concurrence of a majority of the court." Therefore, one justice of the five who constituted the original majority had to be persuaded to change his mind.

Well, Mr. Justice Harlan did change his mind, for reasons that he

³⁸ The arguments concluded at 5:40 P.M., whereas at that time the stated hour for adjournment was 4:30 P.M. Supreme Court Rule 4(1) of 1954.

³⁹ Northern Securities Co. v. United States, 193 U.S. 197, 400-401 (1904).

⁴⁰ Kinsella v. Kruger, 351 U.S. 470 (1956), U.S.CONST. art. I § 8, cl. 14.

⁴¹ 351 U.S. at 485.

⁴² 351 U.S. at 481.

⁴³ B.A.F.A., supra note 21, at 431-40.

later set forth with unique candor.⁴⁴ To what extent he was influenced by the petition for rehearing, to what extent he was more greatly moved by the importunities of one or more of his brethren, probably no one now living can say. But this much is certain, that unless this one judge had been unusually open-minded, all the untenability of the original holding, and all the analysis and argument advanced in the petition for rehearing, would have been utterly and equally unavailing.

V. THE ADVOCATE'S DILEMMA: COURTS WITH COMPLETELY CLOSED MINDS

When, however, judges' minds are completely closed, every effort at persuasion necessarily fails. Law, history, the force of reasoned argument, whether singly or in combination, are then quite unable to move the immovable.

This was the lesson I learned in *Roman v. Sincock*,⁴⁵ the Delaware reapportionment case, one of a series that first announced that the *Baker v. Carr*⁴⁶ doctrine of equal apportionment extended to both chambers of state legislatures.

In the "One Man, One Vote" argument that had earlier prevailed, it was contended that the federal analogy of equal state representation in the United States Senate was inapplicable to state legislatures, because, while the Thirteen States had indubitably created the Union, it was the several states that had made their own counties.

Now, as a matter of history—genuine, documented history, not the slanted and selective presentation that is properly denigrated as "law office history"—as a matter of demonstrable historical fact, in Delaware that process had been reversed. There it was the "Three Lower Counties on Delaware," thus always referred to in the early Journals of the Continental Congress and in other contemporaneous writings, that, in 1776, had formed "The Delaware State."⁴⁷

Moreover, further research demonstrated a massive infirmity in the proposition that the fourteenth amendment prohibited legislative malapportionment. It was shown that, when Florida was read-

⁴⁴ *Reid v. Covert*, 354 U.S. 1, 65 (1957).

⁴⁵ 377 U.S. 695 (1964).

⁴⁶ 369 U.S. 186 (1962).

⁴⁷ As this cannot be concisely documented, a reference to Appellants' Brief, at 33-53, *Roman v. Sincock*, 377 U.S. 695 (1964), where the authorities are collected, must suffice.

⁴⁸ See *United States v. Florida*, 363 U.S. 121 (1960).

mitted to Congressional representation in 1868,⁴⁸ a Congressman voiced objection to the new Florida constitution. Under that instrument, he said on the floor of the House, Dade County with its last recorded population of only 30—that is where Miami now towers—had representation in the lower house equal to that of Jefferson County, the site of Tallahassee, which had over 3000 people. No such state constitution, he urged, should be approved. He was answered by that stalwart architect of Reconstruction, one of the leaders of the Radical Republicans, Ben Butler of Massachusetts.

Florida's constitution, said Butler, had been carefully considered by the Senate Committee on the Judiciary and by the House Committee on Reconstruction. It had been found republican and proper and to conform in every respect to the fourteenth amendment. The gentleman's objection should be voted down—and voted down it was.⁴⁹

Now, very obviously, that legislative history quite cut out the very heart of the constitutional organism of *Baker v. Carr*. But, since the Court that heard *Roman v. Sincock* believed in *Baker v. Carr*, and since it was determined to apply its apportionment doctrine to both parts of all state legislatures, it simply ignored the 1868 legislative history, which of course was closer to the meaning of the fourteenth amendment than were the judges who sat in the 1960's. No answer to that incident was ventured, because, very obviously, there was none that could be made. So counsel for the Delaware officials obtained, in return for his efforts, only two crumbs of rather wry professional amusement. The first was the look of extreme pain on the countenance of the late Chief Justice when the Ben Butler colloquy was unveiled in open court. The second was an identical look of pain when Mr. Justice Harlan referred to the same incident during the oral announcement of his dissent.⁵⁰

In short, and I think this may be set down as a timeless generalization of universal applicability, it is simply not possible ever to persuade people who resolutely refuse to be persuaded.

VI. APPLICATION OF ALL OF THE FOREGOING TO CURRENT MILITARY LAW

From what I have been able to gather from the USCMA reports and from the literature, I fear that there are indications that the

⁴⁸ Cong. Globe, 40th Cong., 2d Sess. 3090-92 (1868).

⁵⁰ Harlan, J., dissenting in *Reynolds v. Sims*, 377 U.S. 533, 589, 604-08 (1964), a dissent applicable also to *Roman v. Sincock*.

Court of Military Appeals now seems to be suffering from a collectively closed mind as it pursues its self-appointed task of undertaking to “civilianize” or to “judicialize” the military justice system.⁵¹

Recently, in the course of a workshop on appellate advocacy for prosecutors, I was asked by a young Army JA captain how to treat a question that he had been asked, or had heard asked, by the Court of Military Appeals. In substance, a judge had said, “You have cited cases from our court and from the U.S. Supreme Court. Do you have anything else?”

My suggested reply was, “No, we do not. We have assumed that this court would respect its own precedents, and that it would of course follow the rulings of the highest court in the land.”

But, on further reflection, I am not at all sure that this suggested after-the-fact answer was really helpful, essentially because a young lawyer is never as free as an older one to deal with extreme judicial positions. In the military, it is RHIP—rank is the touchstone; but in a courtroom it is AHIP—age. An older lawyer is allowed much more freedom, particularly when he is well known to the court in question.

But, recurring to substance, what can lawyers usefully say when facing the transformation and restructuring of the military justice system that seems to be in train?

Let me go back once more to Justice Holmes’ timeless comment that “we need education in the obvious.”⁵² And let me touch just briefly on some of the more obvious fundamentals.

The first American military codes go back to the Continental Congress, where John Adams drafted both the Articles of War as well as the Articles for the Government of the Navy. He followed the British Articles of War almost verbatim, because, as he wrote, those provisions had carried the British Empire “to the head of mankind.”⁵³ And Adams, let it be remembered, was not a military man at all. He was a lawyer, one of the ablest in the Colonies.⁵⁴

Following the successful outcome of the Revolution, the Federal Convention met in 1787 to draft the Constitution. Of that body’s 55

⁵¹ Address by Hon. A. B. Fletcher, Jr., *Where the Court of Military Appeals is Going in the COMA Evolution*, Federal Bar Association annual convention (30 Sept. 1977); J. S. Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 MIL. L. REV. 43 (1977).

⁵² *Supra* note 7.

⁵³ 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS (L. H. Butterfield ed., 1961) 409-410.

⁵⁴ 1, 2, AND 3 LEGAL PAPERS OF JOHN ADAMS (L. K. Wroth & H. B. Zobel eds., 1965), *passim*.

members, well over half had been in uniform during the arduous and at times apparently hopeless war for Independence. Including Washington, 18 had served in the Continental Army, while 13 more had had militia duty during the long struggle.⁵⁵

Did the framers, in the face of their own searing experiences, undertake to civilianize military justice? They did not. They put military justice into Article I, Section 8, clause 14, and they placed civilian justice into Article 111.

Let us turn to Congress, which has legislated on military law under the Constitution since the beginning.⁵⁶ Its latest expression is the Uniform Code of Military Justice, last amended in 1968⁵⁷—and that legislation appears in title 10 of the United States Code, Armed Forces, while civilian justice is dealt with in title 28.

Next, what says the Supreme Court? It was Jeremy Bentham, and here I am quoting from memory, who sneered that jurisprudence was the science of being methodically ignorant of what everyone knew. Well, the Supreme Court has not been fairly subject to that stricture in matters military. Some time back it said, in words frequently repeated:

An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers are impaired if any question be left open as to their attitude to each other.⁵⁸

Nor should we overlook what the Court said in the second flag salute case: “The Nation may raise armies and compel citizens to give military service. . . . It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life.”⁵⁹

And, let me add, the Supreme Court in recent years has regularly reversed Courts of Appeals that lost sight of those so obvious propositions: *Parker w. Levy*,⁶⁰ *Greer w. Spock*,⁶¹ *Middendorf w.*

⁵⁵ 6 D. S. FREEMAN, GEORGE WASHINGTON (1954) 93.

⁵⁶ See the authorities collected in my *Courts-Martial and the Constitution: The Original Practice*, 72 HARV. L. REV. 1, 13-22 (1958), reprinted in MIL. L. REV. BICENT. ISSUE 169, 181-188 (1975).

⁵⁷ MILITARY JUSTICE ACT OF 1968, PUB. L. 90-632, 82 Stat. 1335.

⁵⁸ *In re Grimley*, 137 U.S. 147, 183 (1890).

⁵⁹ *Board of Education v. Barnette*, 319 U.S. 624, 642 note 19 (1943).

⁶⁰ 417 U.S. 733 (1974).

⁶¹ 424 U.S. 828 (1976).

Henry,⁶² *Schlesinger v. Councilman*,⁶³ all of these were government appeals in which the judgments of the Courts of Appeals were reversed.

Moreover, any decision that breaks or subverts the chain of command dilutes if indeed it does not nullify the constitutional provision that makes the President the Commander in Chief.⁶⁴ In this connection it is well not to ignore the *Swaim* case, a decision notable not only for its dramatic circumstances but even more so for its basic doctrine.⁶⁵

The dramatic feature is that General Swaim remains the only Judge Advocate General—up to now—ever convicted by court-martial. And the doctrinal feature of the decision most significant in the present connection is that the Court sustained the power of the President to convene a general court-martial even though Congress had not specifically conferred such power on him. Why? Because, said the Court, the President is made Commander in Chief by the Constitution. I commend careful study of the *Swaim* case to any who are still inclined to believe that, even when expressly empowered by Congress to do so,⁶⁶ the Commander in Chief lacks authority to prescribe even a portion of the *Manual for Courts-Martial*.⁶⁷

Contentions along the foregoing lines doubtless mark the outside limits of any advocate's presentation. It is to be hoped that consideration of the fundamentals that have been outlined may serve to deflect the Court of Military Appeals from its present course of their disregard. It is also to be hoped, both for the state of the armed forces and for the safety of the nation, that the country's highest military tribunal will begin to map a path away from some of its more recent novel departures.

But although advocates before that court are under fairly obvious restraints, I am here under no such restrictions. I speak here as one equally retired from law practice and from military status, viewing current problems simply as a concerned citizen, but against a background of over 40 years' experience in and exposure to military law. Justice Holmes once said, "I hate to hear old soldiers telling what

⁶² 425 U.S. 25 (1976).

⁶³ 420 U.S. 738 (1975).

⁶⁴ U.S. Const. art. 11, § 2.

⁶⁵ *Swaim v. United States*, 165 U.S. 553 (1897).

⁶⁶ UNIFORM CODE OF MILITARY JUSTICE art. 36, 10 U.S.C. § 836 (1976) [hereinafter cited as U.C.M.J.]

⁶⁷ *United States v. Ware*, 24 C.M.A. 102, 104 note 10, 106, 51 C.M.R. 275, 277 note 10, 279, 1 M.J. 282, 285 note 10, 287 (1976). Compare the concurring and dissenting opinions in *United States v. Newcomb*, 5 M.J. 4 (C.M.A. 1978).

heroes they were.”⁶⁸ But I can at least say, without the slightest immodesty, that my experience with military justice has been multi-faceted. I have served as staff judge advocate; I have occupied every seat in the military courtroom—except one; I have taught military law at a university law school; and in the civil courts I have both defended and challenged the judgments of military tribunals.

And having had that background and experience, I want to emphasize the real, not just the verba! differences, between an armed force and a civilian society. Let me quote from General William Tecumseh Sherman, who was a lawyer long before he became a general:⁶⁹

I agree that it will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.

The object of the civil law is to secure to every human being in a community all of the liberty, security, and happiness possible, consistent with the safety of all. The object of the military law is to govern armies composed of strong men, so as to be capable of exerting the largest measure of force at the will of the nation.

These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs that principle weakens the army, impairs its value, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by grafting on our code their deductions from civil practice.⁷⁰

I should add that the basic definition, “An army is a collection of armed men obliged to obey one man,” was neither original with Sherman nor with any other military figure. It goes back to John Locke, from whom it was quoted by Dr. Samuel Johnson in his *Dictionary*.⁷¹

Consequently, as the Supreme Court said in *Orloff v. Wil-*

⁶⁸ *The Fraternity of Arms* (1897), in OCCASIONAL SPEECHES, *supra* note 1 at 100, 101.

⁶⁹ L. LEWIS, SHERMAN: FIGHTING PROPHET (1932) 103-112.

⁷⁰ UNIFORM CODE OF MILITARY JUSTICE, *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 780.

⁷¹ See E. L. MCADAM, JR. AND G. MILNE, JOHNSON'S DICTIONARY: A MODERN SELECTION (1963) 66.

loughby, ⁷² “The military constitutes a specialized community governed by a separate discipline from that of the civilian.”

And why? Because, while the civil community seeks to achieve the greatest good for the greatest number, the object of an armed force is to send men obediently against the public enemy, to their death if need be.

That is not a palatable fact these days, and so, being unpalatable, the Age of Aquarius deems it something to be ignored. But it cannot be ignored, and so I turn once more to Mr. Justice Holmes. Here is what he said in **1895**:

I have heard the question asked whether our war was worth fighting, after all. There are many, poor and rich, who think that love of country is an old wife's tale, to be replaced by interest in a labor union, or, in the name of cosmopolitanism, by a restless self-seeking search for a place where the most enjoyment may be had at the least cost For my own part, I believe that the struggle for life is the order of the world, at which it is vain to repine. I can imagine the burden changed in the way it is to be borne, but I cannot imagine that it will ever be lifted from men's backs. . . . Now, at least, and perhaps as long as man dwells upon the globe, his destiny is battle, and he has to take the chances of war.⁷³

That being so—and who is there now alive who can gainsay it?—we must address ourselves to the endless debate on the relationship between justice and discipline in a military community.

That matter was well put in a book on *The Art of War* published precisely three centuries ago, in a passage that graced the frontispiece of an earlier edition of the *Manual for Courts-Martial*:

Justice ought to bear rule everywhere, and especially in armies; it is the only means to settle order there, and there it ought to be executed with as much exactness as in the best governed cities of the kingdom, if it be intended that the soldiers should be kept in their duty and obedience.⁷⁴

In actual fact, justice and discipline in the military are indivisible, because, **as** everyone with troop experience has known since the beginning, a unit subjected to injustice is bound to be undisciplined. Hard, even harsh treatment in difficult situations is understandable when fairly administered, and is therefore acceptable. But unjust treatment is certain to destroy morale and hence military effective-

⁷² 345 U.S. 83, 87 (1953).

⁷³ *The Soldier's Faith* (1895), in OCCASIONAL SPEECHES, *supra* note 1, at 73, 74, 75.

⁷⁴ By Louis de Gaya (1678); frontispiece, MANUAL FOR COURTS MARTIAL, U.S. ARMY. 1921.

ness. In short, just as liberty *and* union are, as Daniel Webster reminded us, one and inseparable in civil relationships, so justice *and* discipline are one and inseparable in the military community.

In this connection, I must draw attention to a recent pronouncement to the effect that military discipline and military justice are not only divisible, but that the line between the two is to be drawn between the summary and the special court-martial. The American bar was recently told that nonjudicial Article 15 action and summary courts-martial involve military discipline, while proceedings before special and general courts-martial pertain to military justice.⁷⁵

Just a glance at the Uniform Code will serve to dispel this newly vouchsafed revelation.

Article 15 of the Code permits most minor miscreants to escape nonjudicial punishment by demanding trial by court-martial. Article 20 further entitles an accused to refuse trial by summary court-martial. Consequently, if the military boundary between justice and discipline is actually located above the summary and below the special court, then every minimal offender other than the maritime mischief-marker—the “member attached to or embarked in a vessel”⁷⁶—can, by his own unilateral and unreviewable act, remove himself entirely from the lowly levels of military discipline and enter upon the rarified uplands of military justice.

So my comment on this novel theory as to the point of separation between military discipline and military justice, a view first unveiled only a few months ago, is that it flies into the face of the Code and is, in consequence, completely mistaken. I doubt if I could deal with that hypothesis any more gently except at the sacrifice of accuracy.

Moreover, I venture to submit, the circumstance that presently the United States has only volunteer armed forces surely does not justify a fundamental restructuring of the Congressionally established system of military justice. For, traditionally as well as historically, the United States has almost always had volunteer forces. Although conscription was indeed considered in October 1814,⁷⁷ there was no draft law on the books until 1863, in the Civil War;⁷⁸

⁷⁵ Address by the Hon. A. B. Fletcher, Jr., at the Mid-Year Meeting of the American Bar Association, New Orleans, Louisiana (12 Feb. 1978). See also *United States v. Booker*, 3 M.J. 443 (C.M.A. 1977).

⁷⁶ U.C.M.J. art. 15(a).

⁷⁷ E. UPTON, *THE MILITARY POLICY OF THE UNITED STATES* (1917) 123, citing 1 Am. State Pap. Mil. Affairs 515.

⁷⁸ Act of 3 Mar. 1863, ch. 75, 12 Stat. 731.

nor from Appomattox until 1917;⁷⁹ nor from the 1918 Armistice until late in 1940, after the fall of France.⁸⁰ Remember, if you please, that an extension of the 1940 draft beyond a single year only passed the House of Representatives in August 1941 by a single vote.⁸¹ It was only from 1948 to 1973 that we regularly had peacetime conscription, and for much of that period it was concerned with actual hostilities in Korea and in Viet Nam.⁸² Consequently, most American military law, in actual, demonstrable fact, was fashioned and developed for purely volunteer forces.

Again, let it not be said that, because there is now no draft law in effect, enlistment in the armed forces has become like entering on any civilian job; it hasn't. To take only a very few examples, the civilian worker can quit at will, while for a soldier to do so is always a military offense, AWOL at best, desertion at worst.⁸³ The civilian can tell off the boss at any time; in an armed force such liberty is an obvious violation of the Code.⁸⁴ And to go on strike, which many hail as the highest manifestation possible in a free society, is, in an armed force, inescapably mutiny.⁸⁵

Also, and here I venture on delicate ground, what about the death penalty in the two situations? I will not undertake to review the gyrations of the Supreme Court in this area, although it would be well to point out that, since the fifth amendment in three separate clauses contemplates capital punishment,⁸⁶ the eighth amendment, adopted simultaneously as a part of the identical document, cannot fairly be read as condemning death sentences.

But what about death sentences in a military society? The faithful and obedient soldier daily risks death in every combat situation, and, counting only the wars of this century, more than 425,000 loyal

⁷⁹ Act of 18 May 1917, ch. 15, 40 Stat. 76.

⁸⁰ Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885.

⁸¹ H.J.R. 222, concerning extension of the Selective Compulsory Military Training and Service Act of 1940, was passed on 12 August 1941 by a vote of 203 to 202, with 27 members not voting. 87 CONG. REC. 7074 (1941).

⁸² The last selective service measure was the Act of 28 Sept. 1971, Pub. L. 92-129, 85 Stat. 348. Section 101(a)(35) of that act extended induction authority from 1 July 1971 to 1 July 1973. 50 U.S.C. App. § 467(c) (Supp. V 1975). The basic legislation was allowed to expire on the extended date.

⁸³ U.C.M.J. art. 86 (absence without leave); U.C.M.J. art. 87 (missing movement); U.C.M.J. art. 85 (desertion).

⁸⁴ U.C.M.J. art. 89 (disrespect); U.C.M.J. art. 89 (insubordinate conduct).

⁸⁵ U.C.M.J. art. 94.

⁸⁶ "No person shall be held to answer for a capital, or otherwise infamous crime. . . ."; "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"; and "nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend V.

and decent Americans have died in or as the result of battle.⁸⁷ Can we remain true to their memories, can we look future soldiers in the eye, if henceforward the cowards and the skulkers and those who misbehave before the enemy will be permitted to escape danger by receiving only sentences to imprisonment, sentences that are certain to be mitigated after the passage of a few years? The fact that in the 113 years since the Civil War ended there has been only a single execution for a purely military offense in the American armed forces, and that this single wholly justified penalty has evoked a continuing emotional wail over more than a quarter of a century, strongly suggests that we badly need to rethink our civic values.⁸⁸

Finally, and of course this is something that counsel are not free to say, civilian justice as now administered is hardly a persuasive advertisement for nonmilitary tribunals.

Back in 1905, William Howard Taft declared that “I grieve for my country to say that the administration of the criminal law in all the states in the Union (there may be one or two exceptions) is a disgrace to our civilization.”⁸⁹ What do you suppose he would say today, when the streets of few American cities are safe at night, when in some there is no safety even in daylight hours, and when bail practices are so loose that, once a criminal has been apprehended, he is immediately turned loose to commit further deprivations?

The raunchy centers of adult bookstores and theaters that now infest virtually all sizeable communities today are a direct consequence of the series of decisions that suddenly discovered how, contrary to previous pronouncements,⁹⁰ the first amendment protected obscenity.⁹¹ And in my home state, state judicial proceedings to close down massage parlors, which of course are simply old-time bawdy houses differently named, were halted for six weeks by a federal judge while he pondered the merits of those establishments’ claims of constitutional right.⁹² The same jurist recently enjoined a municipal ordinance that sought to bar nude theatrical perform-

⁸⁷ WORLD ALMANAC (1978) 329. The exact figure is 425,845.

⁸⁸ At this juncture I venture to cite my own study, *Lament for a Skulker: The Case of Private Slovik*, 4 COMBAT FORCES J. (July 1954) 33.

⁸⁹ W. H. TAFT, *The Administration of Criminal Law*, 15 YALE L.J. 1, 11 (1905).

⁹⁰ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

⁹¹ *E.g.*, *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

⁹² Phoenix, Arizona, newspapers for 31 March and 13 May 1978 (Maricopa County campaign against massage parlors).

ances.⁹³ I wonder what James Madison, who framed the Bill of Rights, would have thought of those results.

Nor should we forget why it is that the federal courts are overcrowded. Without any doubt, it is because they are too busily engaged in tasks for which they are obviously unfitted, such as operating schools and prisons, apportioning legislatures, and listening to the complaints of every eccentric who claims constitutional sanctions for everything he wants, or who asserts constitutional prohibitions against everything he dislikes.⁹⁴ Indeed, today the Supreme Court is all too plainly passing on the utility and desirability of legislation, behaving precisely like that Council of Revision that the Framers advisedly rejected.⁹⁵

So I say, let us not hold up today's American civilian justice as the embodiment of everything that is excellent. Believe me, it is currently a badly flawed institution.

I have pointed out earlier that the Court of Military Appeals' campaign to civilianize military justice lacks affirmative constitutional and statutory sanction. More than that, its holding that there are limits on the President's power to prescribe the *Manual for Courts-Martial* plainly ignores the constitutional provision that makes him the Commander in Chief.⁹⁶ Its determination that it is the body having ultimate supervision of all aspects of the administration of military justice, so that it can mandamus a Judge Advocate General,⁹⁷ disregards the explicit Code provision that lodges the "supervision of the administration of military justice" in the several Judge Advocates General.⁹⁸

Nor can I forbear mention of the *Henderson* case, where an individual convicted of a premeditated conspiracy to murder went scot-free because the prosecution had been somewhat dilatory in bringing him to trial.⁹⁹ The statutory admonition for prompt trial in Article 10 of the Code sets no fixed time limits. It derived from old AWs 69 and 70,¹⁰⁰ which in turn had their origin in the Civil War provision that effected the release of Brig. Gen. Charles P. Stone,

⁹³ Phoenix, Arizona, newspapers for April 1978 (Yuma, Arizona, ordinance against nudity).

⁹⁴ *E.g.*, P. B. Kurland, Government by *Judiciary*, 20 MODERN AGE 358 (1976).

⁹⁵ M. FARRAND, THE FRAMING OF THE CONSTITUTION (1913) 70, 156-57, 202.

⁹⁶ U.S. CONST. art. 11, § 2. Compare *United States v. Larneard*, 3 M.J. 76 (C.M.A. 1977).

⁹⁷ *United States v. McPhail*, 24 C.M.A. 304, 52 C.M.R. 15, 1 M.J. 457 (1976).

⁹⁸ U.S.C.M. art 6(a).

⁹⁹ *United States v. Henderson*, 24 C.M.A. 259, 51 C.M.R. 711, 1 M.J. 421 (1976).

¹⁰⁰ H.R. Rep. No. 491, 81st Cong., 1st Sess. 13 (1949); S. Rep. No. 486, 81st Cong., 1st Sess. 10 (1949).

who had been held for several months and then was never **tried**.¹⁰¹ In the *Henderson* case, there was no indication whatever that the accused had been prejudiced in the slightest by the delay in bringing him to trial. The disinterested observer, therefore, is bound to apply to that decision, which turned loose a convicted murderer, the famous remark of Charles Dickens' Mr. Bumble: "If the law supposes that, then the law is a ass—a idiot."¹⁰²

All too plainly, therefore, the Court of Military Appeals has become an activist court. This is regrettable, because in our constitutional system judges are meant to be umpires, not contestants. An activist court, operating not only without warrant from statutes or from the Constitution, but actually in violation of both, is thus an essentially lawless body. If it has not respect for its own precedents, how can it expect respect from others for its more recent pronouncements? The worthies of old, from the Thirteenth Century to the Twentieth, have always inveighed against activist judges.

Hearken to Bracton, writing before 1257; he composed that monumental treatise *On the Laws and Customs of England* because, he said, "these laws and customs are often misapplied by the unwise and unlearned who ascend the judgment seat before they have learned the law . . . , and frequently subverted by the greater judges who decide cases according to their own will rather than by the authority of the laws."¹⁰³ And Justice Holmes, some six hundred and fifty years later, made the same point: "It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be **wrong**."¹⁰⁴

Nor must we forget the same Justice's later comment, uttered in dissent: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court."¹⁰⁵ Alas, that standard of restraint was later widely ignored.

¹⁰¹ 1 W. WINTHROP, *MILITARY LAW AND PRECEDENTS* (2d ed. 1896) *165-67; *id.*, 1920 reprint at 119.

¹⁰² OLIVER TWIST, ch. 51.

¹⁰³ 2 BRACTON, *DE LEGIBUS ET CONSUECUDINIBUS ANGLIAE* (S.E. Thorne ed. 1968) 19 note 1.

¹⁰⁴ *Law and the Court* (1913), in *OCCASIONAL SPEECHES*, *supra* note 1, at 168, 171-172.

¹⁰⁵ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 218, 221 (1917).

During the time that Chief Justice Warren presided over the Supreme Court, that tribunal squarely overruled over **30** cases.¹⁰⁶ Such a wholesale disregard of what theretofore was settled is, very plainly, not justice according to **law**.¹⁰⁷ It is, rather, a return to justice without law, to the jurisprudence of the Eastern *Kadi* at the gate, who decides cases by whim rather than by rule. Dean Roscoe Pound once wrote, "Law must be stable and yet it cannot stand still."¹⁰⁸ Well, law in the United States over the last twenty years or so has been far from stable.

Let me quote here, with permission from the owner of the literary rights, part of a letter that the late Dean Acheson wrote me in September 1964, when he was engaged in writing his first volume of memoirs, *Morning and Noon*.¹⁰⁹ He had been law clerk to Mr. Justice Brandeis from 1919 to 1921; this is what he wrote:

I have just been writing of those days and of "our" court, as Brandeis called the White Court, in a volume which I hope to finish before I get sent away again. It was not so bad, a pig headed and obstructive group of old codgers. But they were not trying to goose the country into their conception of the New Jerusalem.¹¹⁰

As I have said, I sincerely hope that the Court of Military Appeals can be persuaded to abandon its present effort to restructure the military justice system to their own hearts' desire. But if reason proves unable to prevail, there are remedies at hand—and all of them involve Congressional action.

We are witnessing now how the Congress is in the process of declaring illegal unionization of the armed forces.¹¹¹ No quicker way towards demoralizing and dismantling an armed force could possibly be devised than to permit its members to join labor unions; and obviously Congress was dissatisfied with the half-hearted directives emanating from the Department of Defense, directives that approached the matter from the widely different situation of civil ser-

¹⁰⁶ U.S. Constitution Annotated, S. Doc. 92-82, 92d Cong., 2d Sess.'1794-1796 (1972) (Nos. 89-133).

¹⁰⁷ See R. Pound, *Justice According to Law*, 13 COLUM. L. REV. 696 (1913), 14 id. 1, 14 id. 103 (1914). No one can read this seminal essay without being permanently impressed by Pound's greatness, a quality that none of his later tergiversations could ever dilute or dissipate.

¹⁰⁸ R. POUND, INTERPRETATIONS OF LEGAL HISTORY (1923) 1.

¹⁰⁹ Published in 1965.

¹¹⁰ Here quoted with the permission of his son, David C. Acheson, Esq., of the District of Columbia bar.

¹¹¹ S. 274, 95th Cong., 1st Sess. (1977), a bill to prohibit union organization in the armed forces, passed the Senate on 16 Sept. 1977. 123 Cong. Rec. 15088 (1977).

vants' rights rather from that of soldiers' and sailors' and airmens' duties.¹¹²

Similarly, I am certain that Congress will not permit those same armed forces to be disrupted by decisions, from a court of its own creation, that short-circuit the chain of command, doctrinaire decisions that are all too plainly rested on demonstrably fallacious notions. So I envisage three possible solutions.

The first of these, which may indeed have been long overdue, is to permit an appeal by the government from Court of Military Appeals decisions, excluding, of course, further review of rulings on the sufficiency of evidence and similar purely factual matters.

Actually, such a provision would simply equalize the existing position, for the accused is always free to invoke the assistance of the federal courts once he has exhausted his military remedies. Of course he could always relitigate the question of jurisdiction, which he—and mostly she—have already done with considerable success.¹¹³ More than that, the accused who loses in the Court of Military Appeals can, as the *Calley* case shows, retry virtually every asserted trial error on collateral attack.¹¹⁴ So a provision permitting government appeals would really be an equalizer.

And, with such appeals given a statutory basis, I foresee no constitutional complications, any more than where the federal courts now review the conclusions of administrative agencies. Of course I am aware that direct appeal failed in three earlier cases, *Ex parte Vallandigham*,¹¹⁵ *In re Vidal*,¹¹⁶ and *Shaw v. United States*.¹¹⁷ But in none of those was there the slightest authorization for the course being attempted.

¹¹² D. C. Siemer, A. S. Hut, Jr. and G. E. Drake, *Prohibition on Military Unionization: A Constitutional Appraisal*, 78 MIL. L. REV. 1 (1977).

¹¹³ *McElroy v. Guagliardo*, 361 U.S. 281 (1960), considering *United States v. Guagliardo*, 25 C.M.R. 874 (A.F.B.R.), *pet. denied*, 9 C.M.A. 819, 26 C.M.R. 516 (1958); *Wilson v. Bohlender*, 361 U.S. 281 (1960), considering *United States v. Wilson*, 9 C.M.A. 60, 25 C.M.R. 322 (1958); *Grisham v. Hagan*, 361 U.S. 278 (1960), considering *United States v. Grisham*, 4 C.M.A. 694, 16 C.M.R. 268 (1954); *Kinsella v. Singleton*, 361 U.S. 234 (1960), considering *United States v. Dial*, 9 C.M.A. 541, 26 C.M.R. 321 (1958); *Kinsella v. Krueger*, 354 U.S. 1 (1957), considering *United States v. Smith*, 5 C.M.A. 314, 17 C.M.R. 314 (1954); and *Reid v. Covert*, 354 U.S. 1 (1957), considering *United States v. Covert*, 6 C.M.A. 48, 19 C.M.R. 174 (1955). In each of these cases, the Court of Military Appeals had earlier sustained jurisdiction.

¹¹⁴ *Calley v. Callaway*, 382 F. Supp. 650 (M.D. Ga. 1974), *rev'd* 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911.

¹¹⁵ 1 Wall. 243 (1863).

¹¹⁶ 179 U.S. 126 (1900).

¹¹⁷ 209 F.2d 811 (D.C. Cir. 1954).

A second form of remedy was proposed about a dozen years ago, which I mention only for the sake of completeness. At that time a high-powered Army board, obviously misled by its lawyer members, proposed affording the Court of Military Appeals by increasing its membership: There were to be two additional judges, drawn from the ranks of retired Judge Advocates General of the armed forces.¹¹⁸ At the time I expressed indignation that this crass court-packing plan, all too reminiscent of 1937, had not evoked immediate outrage.¹¹⁹ But perhaps I should not have been concerned, for in the event the plan was so obviously infirm that it never got off the ground; and today it is remembered, if at all, merely as a curiosity.

Finally, and of course this would be the most drastic cure of all, if we look back into American history we will find that, on three separate occasions, Congress abolished courts of which it did not approve.

The first instance is a matter of general history, tolerably well known. After the election of 1800, the lame duck session of President John Adams' last Congress created a series of United States Circuit Courts which, as a matter of judicial administration, were badly needed. In the closing days of Adams' tenure, a host of partisan Federalists were appointed to these new tribunals; those were the "midnight judges." Within a year, those Circuit Courts were simply abolished by Jefferson's 7th Congress.¹²⁰

The second example is less widely known, except of course to students of the federal judicial system. Back in 1910, before planes and buses, when the railroads constituted the basic system of communication holding the country together, the front line of litigation was engaged in fighting over the regulatory powers of the Interstate Commerce Commission. At that time a Commerce Court was established, whose jurisdiction was limited to review of that agency's orders.¹²¹ Well, the Commerce Court had a sorry record of reversals by the Supreme Court, and one of its members was impeached and convicted. So, in the first year of the Wilson administration, it was

¹¹⁸ Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army, Report to Honorable Wilber M. Bruckner, Secretary of the Army 194, 195, 198 (1960). The proposal would have required amendment of U.C.M.J. art. 67(a)(1).

¹¹⁹ *Constitutional Rights of Military Personnel, Hearings Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.* 87th Cong., 2d Sess. 781 (1962).

¹²⁰ Act of 13 Feb. 1801, ch. 4, 2 Stat. 89; Act of 8 Mar. 1802, ch. 8, 2 Stat. 132; see F. Frankfurter and J. M. Landis, *The Business of the Supreme Court* (1928) 25-32, reprinted from 38 HARV. L. REV. 1029-1036.

¹²¹ Act of 18 June 1910, ch. 309, 36 Stat. 539.

abolished, and all of its jurisdiction was transferred to three-judge district courts — where it rested for some 60 years.¹²²

The third example is hardly known even to lawyers; it comes from the Civil War. At that time, Washington was a Southern city in every respect, where slavery existed until abolished, not by anything in the Constitution, but by an Act of Congress in April 1862.¹²³ The court of general jurisdiction then was the Circuit Court of the United States for the District of Columbia, which trebled in brass as a U.S. District Court and also as a Criminal Court. But its judges were suspected of being Confederate sympathizers. So Congress in March 1863 simply abolished that court, and created instead a new tribunal, the Supreme Court of the District of Columbia, to which President Lincoln appointed staunch Union men.¹²⁴ Despite a change of name in 1936¹²⁵ and the transfer away of its non-Federal business in 1970,¹²⁶ the court created in 1863 is still functioning today; it is now the United States District Court for the District of Columbia. But the judges of the tribunal that was abolished in 1863 were simply turned out to pasture.

I suppose that every one present here today was at some time, most likely in grammar school, exposed to Patrick Henry's thrilling denunciation of the Stamp Act in 1765. The precise text of his remarks was doubtless somewhat embroidered by his grandson-biographer, but it has been a part of the American heritage for so long that the legend, if indeed legend it be, now qualifies as a fact that has been conclusively established.

Here was Patrick Henry's peroration:

Tarquin and Caesar each had his Brutus, Charles the First his Cromwell, and George the Third—

“Treason!” shouted the Speaker.

”Treason, treason,” cried other members.

¹²² Act of 22 Oct. 1913, ch. 32, 38 Stat. 208, 219; see F. Frankfurter and J. M. Landis, *The Business of the Supreme Court* (1928) 153-162, reprinted from 39 HARV. L. REV. 594-603. Jurisdiction to review ICC orders was finally transferred from three-judge district courts to courts of appeals by the Act of 2 Jan. 1975, Pub. L. 93-584, 88 Stat. 1917, codified at 28 U.S.C. § 2321 (1970).

¹²³ Act of 16 Apr. 1862, ch. 54, 12 Stat. 376.

¹²⁴ Act of 3 Mar. 1863, ch. 91, 12 Stat. 762; see F. L. Bullard, *Lincoln and the Courts of the District of Columbia*, 24 A.B.A.J. 117 (1938).

¹²⁵ Act of 25 June 1936, ch. 804, 49 Stat. 1921.

¹²⁶ Title I of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473; see *Palmore v. United States*, 411 U.S. 389 (1973).

Henry finished his sentence: “mag profit by their example. If *this* be treason, make the most of it.”¹²⁷

¹²⁷ R. D. MEADE, **PATRICK HENRY: PATRIOT IN THE MAKING (1957) 173**, quoting from 1 W. W. HENRY, **LIFE, CORRESPONDENCE AND SPEECHES OF PATRICK HENRY (1891)86-87**.

THE TEACHING OF PROFESSIONAL RESPONSIBILITY TO FEDERAL GOVERNMENT ATTORNEYS: THE UNEASY PERCEPTIONS*

Captain William R. Robie**

The ethical responsibilities of lawyers in federal service differ significantly in certain respects from those of attorneys in private practice. In this article Captain Robie deals with the problem of making federal attorneys aware of these differences.

Captain Robie briefly reviews the Federal Ethical Considerations, a set of standards developed in 1973 by the Federal Bar Association to implement within government service the canons of the American Bar Association's Code of Professional Responsibility, promulgated effective 1 January 1970. The author discusses a dilemma peculiar to federal attorneys, that of whether one's client is the particular official whom one is advising, or the entire agency or the government as a whole, or perhaps none of these, but the public interest in general, however defined.

The author next surveys three subject-matter areas of instruction in professional responsibility. The first of these areas covers ethical standards that apply to all government employees, nonlawyers as well as lawyers. Training in this area has been conducted primarily by the Office of the General Counsel of the Civil Service Commission.

The second affects federal attorneys who represent other government employees as individuals, as defense

*The opinions and conclusions presented in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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counsel before courts-martial or administrative board proceedings or as legal assistance officers. This second area also includes attorneys who act as prosecutors. Instruction is carried out by The Judge Advocate General's School, U.S. Army, at Charlottesville, Virginia, and by other similar institutions.

The third and last area concerns responsibilities of federal attorneys who provide legal advice within government agencies, in like manner with corporation counsel in the private sector. This is the area in which the dilemma posed above arises most frequently and most sharply. However, of the three areas, this one has been most neglected, and the Legal Education Institute of the Civil Service Commission has been the agency most active in disseminating information to federal attorneys in need of it.

Captain Robie describes the various methods of instruction used by the Institute. This includes integration of material on professional responsibility with other material in general orientation courses; the seep-down approach, in which professional responsibility instruction is mixed with the material of substantive law courses of all types; and the separate course approach, in which professional responsibility is considered by itself, separately from other material. From his practical experience working for the Institute, the author concludes that the separate-course approach is best of the three from a pedagogical point of view, but that the integrated and seep-down approaches tend to be far more popular with prospective students. He concludes also that, although the Federal Ethical Considerations can be helpful in resolving the dilemmas faced by federal attorneys, nevertheless there is still need for clarification of the relationship between the federal attorney and the agency for which he or she works.

I. THE SUBSTANTIVE DILEMMA

“The ultimate client, if not the only client of the government attorney, is the advancement of the common good.”

John R. Risher, Jr.¹

¹Risher *Speaks on Legal Ethics, Calls for Decisions of “Conscience,”* 15 THE

“[T]he administrator who the lawyer advises . . . is the real client.”

F. Trowbridge von Baur ²

The problems inherent in attempting to instruct federal government attorneys (and by analogy, state and local government attorneys also) are epitomized by these two conflicting statements. Determining what professional ethical standards, if any, federal government attorneys must adhere to is the primary problem faced by those seeking to develop and provide instruction on professional responsibility to federal government attorneys. That problem is compounded by the lack of certainty as to who is the client that most federal government attorneys, military as well as civilian, are supposed to represent.³

Private practitioners are generally admitted to practice in one or more state jurisdictions (including the District of Columbia and the territories) where the American Bar Association's Code of Professional Responsibility (CPR) has been adopted albeit with variations. Each state's version of the Code serves as a formal ethical guide and as a disciplinary tool for attorneys admitted to practice in that state.

Federal government attorneys who hold attorney positions (ordinarily in the GS-905 classification series) must be admitted to practice in a state, territory, or the District of Columbia, and must remain members in good standing of the bar of that jurisdiction in order to maintain their government jobs.⁴ Therefore, each federal attorney is technically guided by the CPR as adopted in his or her state of bar admission with regard to his or her ethical conduct. The CPR, however, addresses only a limited number of ethical situations that a government attorney might face. Although the Code indicates in its Preamble that “not every situation . . . can be foreseen, but fundamental ethical principles are always present to guide”⁵ each attorney, the Code has not clearly identified the

FORUM (Newsletter of the District of Columbia Chapter, Federal Bar Association) at 1 (January-February 1977).

²*Debate on Legal Ethics Continues*, 15 THE FORUM at 3 (April-May 1977).

³For a discussion of professional responsibility for judge advocates practicing as prosecutors or defense counsel before courts-martial, see Cooke, *Ethics of Trial Advocates*, THE ARMY LAWYER, Dec. 1977, at 1.

⁴U.S. CIVIL SERVICE COMMISSION BULLETIN No. 930-16 (1972); FEDERAL PERSONNEL MANUAL 930-11, Sub-part 3 [hereinafter cited as FPM]; and FPM 213, Appendix A.

⁵

Preamble

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the

principles which apply in areas of considerable concern to federal attorneys.

When the present Code became effective for all American Bar Association members on January 1, 1970, a number of members of the Federal Bar Association (FBA) concluded that the ethical considerations included with the Code "appeared to have been drawn principally with a view toward the problems of the lawyer in private practice."⁶ The FBA National Council in September 1970, directed a thorough study of the question of ethical guidelines under the Code as they applied to the federal attorney. That study resulted in a preliminary report, completed during 1971. Then, in October 1971, the FBA's Committee on Professional Ethics⁷ was directed by FBA President C. Normand Poirier to begin an analysis of each canon as it applied to federal government lawyers.*

At the same time, President Poirier submitted to the Committee three questions to be answered in a formal committee opinion. The three questions were:

individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible. For only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.

The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

ABA CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT at 1C (1976).

⁶Poirier, *The Federal Government Lawyer and Professional Ethics*, 60 A.B.A.J. 1641 (1974). Special note should be made of the impetus given to the whole question of ethical concerns of government attorneys by FBA President C. Normand Poirier (1971-1972). His efforts in seeking to clarify this important area, before Watergate ever occurred, are in large measure responsible for the limited guidance available to federal attorneys today.

⁷*Id.* The Committee was chaired by the Honorable Charles Fahy, senior circuit judge of the U.S. Court of Appeals for the District of Columbia Circuit.

⁸F.B.A. Professional Ethics Comm., *The Government Client and Confidentiality; Opinion 73-1*, 32 F.B.J. 71 (1973).

1. Under what circumstances may a federally employed lawyer disclose information concerning a government official of any rank which would reveal corrupt, illegal, or grossly negligent conduct?

2. If disclosure may be properly made, to whom may it be made?

3. Who is the client of a government attorney in the executive or legislative branches of government?⁹

A proposed opinion was completed in June 1972, and was circulated widely within the legal community of the federal government and within the Federal Bar Association.

Likewise, the Committee completed a preliminary draft of the additional ethical considerations in July 1972, and circulated that draft widely. After considerable redrafting of both the opinion and the ethical considerations, the Committee issued the opinion, titled "The Government Client and Confidentiality: Opinion 73-1," in early 1973. Subsequently, on November 17, 1973, the National Council of the Federal Bar Association formally adopted the Federal Ethical Considerations.¹⁰

The Federal Ethical Considerations recognized that all nine canons of the ABA Code of Professional Responsibility had some application to the particular circumstances faced by the federal lawyer in his legal work.¹¹

With regard to Canons 1,¹² 2,¹³ and 9,¹⁴ the ethical considerations

⁹ Poirier, *supra* note 5, at 1541.

¹⁰ These are Canons 1, A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession; 2, A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available; 3, A Lawyer Should Assist in Preventing the Unauthorized Practice of Law; 4, A Lawyer Should Preserve the Confidences and Secrets of a Client; 5, A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client; 6, A Lawyer Should Represent a Client Competently; 7, A Lawyer Should Represent a Client Zealously, within the Bounds of the Law; 8, A Lawyer Should Assist in Improving the Legal System; and 9, A Lawyer Should Avoid Even the Appearance of Professional Impropriety.

¹¹ Canon 1. A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.

F.E.C.-1-1. This canon, as well as all others, is fully applicable to the federal lawyer. Better to comply with it he should acquaint himself with the regulations especially applicable to his department or other agency of his employment. In that connection attention is directed to 5 C.F.R. § 735.210, 28 U.S.C. 5 636, House Concurrent Resolution No. 175 of July 11, 1958, 72 Stat. B12, and Chapter 11 of 18 U.S.C. concerned *inter alia* with conflicts of interests.

¹² Canon 2. A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available.

F.E.C.-2-1. The federal lawyer, within the limitations of statute, of agency regulations, and of general conflict-of-interest laws and principles, bears a professional responsibility to make legal counsel available to all in need.

A. The offering of his services is on his own time and not at the expense of the government except where statutory or regulatory provision is made for the rendering of such services at government expense.

essentially quoted and referred to federal statutes and regulations that control by law types of conduct involving conflict of interest which are analogous with those described in the CPR which arise in private practice.¹⁵

The general substantive conflict-of-interest statutes applicable to all government employees are found in 18 U.S.C. §§ 201, 203, 205, and 207-211 (1970).¹⁶ These statutory provisions have been further supplemented by Executive Order No. 11222, "Standards of Ethical Conduct for Government Officers and Employees,"¹⁷ as amended by Executive Order No. 11590.¹⁸ The Civil Service Commission, implementing the executive orders just mentioned, has issued regulations specifically identifying the procedures, disclosure requirements, and actions that agencies must take to insure to the greatest extent possible, ethical, i.e., legal conduct on the part of their

B. Within the limitations above referred to he should be receptive to representing the poor in matters referred to him by local legal aid and community action societies

F.E.C.-2-2. The federal lawyer is encouraged, where his position permits, to undertake review from time to time of agency or departmental regulations or policy with the view of enabling citizens unable to pay for needed services to obtain the help of the federal lawyer insofar as may be done within the limitations applicable to his position and consistently with his primary obligation to the government service.

F.E.C.-2-3. The federal lawyer who notes that a person with whom he is dealing is in need of legal counsel would be well advised to recommend that he obtain counsel.

13 Canon 9. A Lawyer Should Avoid Even the Appearance of Professional Impropriety.

F.E.C.-9-1. This canon No. 9 and the American Bar Association ethical and disciplinary considerations with respect thereto should be observed by the federal lawyer.

F.E.C.-9-2. While a federal lawyer may appropriately represent on appointment an indigent accused of crime in the circumstances set forth in these federal ethical considerations, see F.E.C.-2-1, he may not do so, other than in the proper discharge of his official duties, in federal criminal cases or otherwise as proscribed by 18 U.S.C. § 206, entitled "Activities of officers and employees in claims against and other matters affecting the government." (F.E.C.-9-2 adopted September 3, 1974.)

¹⁴ Each of the ABA canons is interpreted by numbered ethical considerations (EC) which are analogous with the Federal Ethical Considerations (F.E.C.) The canons are implemented by disciplinary rules (DR) which, however, have no federal analogue.

¹⁵ Section 201 deals with bribery of public officials and witnesses, describing acts which constitute bribery and prescribing penalties therefor. Section 203 is concerned with unauthorized compensation for Members of Congress and other federal officials in proceedings or other matters in which the Government has an interest. Section 205 prohibits officers and employees of the United States from acting as agents or attorneys for prosecuting claims against the United States, or other matters in which the United States is a party. Section 207 provides for disqualification of former officers and employees of the Government in matters connected with their former duties or official responsibilities. Section 208 prohibits officers and employees of the Government from taking action in matters affecting their personal financial interests. Section 209 provides that salaries of officers and employees of the Government shall be paid only by the Government. Finally, sections 210 and 211 deal with the buying and selling of public offices.

¹⁶ 30 Fed. Reg. 6469 (1965).

¹⁷ 36 Fed. Reg. 7831 (1971).

¹⁸ 5 C.F.R. Part 735, Employee Responsibilities and Conduct (1976).

employees.¹⁹ Finally, each agency has issued its own regulations to comply with the Civil Service Commission regulations. The result is a fairly detailed, unambiguous set of legal guidelines against which to measure the conduct of federal government attorneys in the conflict-of-interest area.

The Committee further indicated simply that Canon 3²⁰ "is fully applicable to the federal lawyer." Exactly what that means remains unclear for the federal attorney. An example of the problems for the federal attorney under this canon is found in Disciplinary Rule 3-101(A) which states, "A lawyer shall not aid a non-lawyer in the unauthorized practice of law." Presumably this means that a government lawyer should not allow a paralegal in the lawyer's office to operate independently of the attorney on legal matters. The Civil Service Commission's qualification standards for paralegal specialists (GS-950 classification series), however, indicate that "work in this series may or may not be performed under the direction of a lawyer."²¹ Whether this statement about government paralegals conflicts with DR 3-101(A) is unclear; certainly an ethical question is raised by the existence of the qualification standard.

The ethical considerations adopted under Canon 4²² provide some real guidance to federal lawyers about who their client is not. Specifically, Federal Ethical Considerations (F.E.C.) 4-1 and 2

¹⁹ Canon 3. A Lawyer Should Assist in Preventing the Unauthorized Practice of Law.
F. E. C. —3—1. This canon is fully applicable to the federal lawyer.

²⁰ U.S. CIVIL SERVICE COMMISSION BULLETIN No. 930-17, August 11, 1975.

²¹ Canon 4. A Lawyer Should Preserve the Confidences and Secrets of a Client.

F.E.C.4-1. If, in the conduct of official business of his department or agency, it appears that a fellow employee of the department or agency is revealing or about to reveal information concerning his own illegal or unethical conduct to a federal lawyer acting in his official capacity the lawyer should inform the employee that a federal lawyer is responsible to the department or agency concerned and not the individual employee and, therefore, the information being discussed is not privileged.

F.E.C.4-2. If a fellow employee volunteers information concerning himself which appears to involve illegal or unethical conduct or is violative of department or agency rules and regulations which would be pertinent to that department's or agency's consideration of disciplinary action, the federal lawyer should inform the individual that the lawyer is responsible to the department or agency concerned and not the individual employee.

F. E. C. 4-3. The federal lawyer has the ethical responsibility to disclose to his supervisor or other appropriate departmental or agency official any unprivileged information of the type discussed above in F. E. C. —4—1 and 2.

F. E. C. 4.4. The federal lawyer who has been duly designated to act as an attorney for a fellow employee who is the subject of disciplinary, loyalty, or other personnel administration proceedings or as defense counsel for court-martial matters or for civil legal assistance to military personnel and their dependents is for those purposes acting as an attorney for a client and communications between them shall be secret and privileged. In respects not applicable to the private practitioner the federal lawyer is under obligation to the public to assist his department or agency in complying with the Freedom of Information Act, 5 U.S.C. 9 522 (1970), and regulations and authoritative decisions thereunder.

²² See also Cooke, *supra* note 3 at 8.

indicate that another employee of the agency or department is *not* the client of the government attorney and that “a federal lawyer is responsible to the department or agency concerned and not the individual employee and, therefore, the information being discussed is not privileged.” F.E.C. 4-3 informs the federal lawyer of his responsibility to disclose to his supervisor or other appropriate official any unprivileged information mentioned in F.E.C. 4-1 and 2. F.E.C. 4-4, however, provides for the application of the attorney-client privilege where a federal lawyer is designated to act as an attorney for a fellow employee in certain administrative proceedings, as defense counsel in courts-martial,²³ and for civil legal assistance to military personnel and their dependents.

F.E.C. 5-1 seems to address more explicitly the function of the federal attorney:

The immediate professional responsibility of the federal lawyer is to the department or agency in which he is employed, to be performed in light of the particular public interest function of the department or agency. He is required to exercise professional judgment which transcends his personal interest, giving consideration, however, to the reasoned views of others engaged with him in the conduct of the business of the government.

This statement, while seeking to delineate clearly the function of the federal lawyer, also gives rise to the two different interpretations of which client the federal lawyer is to represent. Those two interpretations, as expressed by Mr. Risher (the public interest or “the advancement of the common good”) and Mr. vom Baur (the administrator) at the outset of this article, may both be reasonably inferred from this Ethical Consideration. Without a definitive answer in this area, however, the federal lawyer still has no guidance in determining to whom his professional responsibility is owed.

The Committee felt that Canon 6 was fully applicable to the federal lawyer, without further identifying who the client may be. In Canon 7²⁴ the Committee recognized that the American Bar

²³ Canon 6. A Lawyer Should Represent a Client Competently.

F.E.C.-6-1. In performing the duties of his particular employment this obligation is fully applicable to the federal lawyer, to be fulfilled with special regard to the public interest. When designated to represent a fellow employee or a member of the armed services in matters referred to in F.E.C.-4-4, the public interest is not inconsistent with the assumption of the traditional attorney-client relationship with the individual represented.

²⁴ Canon 7. A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.

F.E.C.-7-1. The obligation stated in this canon is fully applicable to the responsibility of the federal lawyer when representing an individual in the circumstances referred to in F.E.C.-4-4 and F.E.C.-6-1. In the performance of the obligations of his position in other respects he is well and faithfully to discharge the duties of his office as prescribed by his oath of office. Of special application to the federal lawyer are the American Bar Association Ethical

Association Ethical Considerations 7-13²⁵ and 7-14²⁶ adequately addressed the needs of the federal attorney as specifically addressed in the CPR and its Ethical Considerations. Finally, in F.E.C. 7-2, the Committee clouded the issue of who may be the client by stating that the federal lawyer is obligated to promote the public interest entrusted to the agency by which he is employed.²⁷

This statement seems to support Mr. Risher's proposition that the public interest is the ultimate client of the government attorney and certainly does not put to rest the doubt created elsewhere in the Federal Ethical Considerations as to whether the individual agency head or administrator may be the client.

Canon 8²⁸ does not assist in "unmuddling" the dilemma presented at the outset. F.E.C. 8-1 recognizes the responsibility of the government attorney, a responsibility which is perhaps greater than that of the private attorney, to seek improvement in the legal system. It concludes with the admonition that "paramount consideration is due the public interest."²⁹ F.E.C. 8-2, however, indi-

Considerations 7-13 and 7-14, the former respecting the responsibility of a public prosecutor, and the latter the government lawyer who has discretionary power relative to litigation.

F.E.C.-7-2. The federal lawyer is under the professional obligation faithfully to apply his professional talents to the promotion under law and applicable regulations of the public interest entrusted to the department, agency or other governmental agency of his employment.

²⁵ EC 7-13. The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

²⁶ EC 7-14. A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

²⁷ Note 24 *supra*.

²⁸ Canon 8. A Lawyer Should Assist in Improving the Legal System.

²⁹ F.E.C.-8-1. The general obligation to assist in improving the legal system applies to federal lawyers. In such situations he may have a higher obligation than lawyers generally. Since his duties include responsibility for the application of law to the resolution of problems incident to his employment there is a continuing obligation to seek improvement. This may be accomplished by the application of legal considerations to the day-to-day decisional process. Moreover it may eventuate that a federal lawyer by reason of his particular tasks may have

cates that a government attorney should be prepared to resign before publicly attacking his own agency for "a decision which is contrary to his professional, ethical, or moral judgment."³⁰ Further, the attorney is not free to abuse professional confidences reposed in him during the process leading to the decision.

F.E.C. 8-3 encourages the lawyer to seek reform through the internal mechanisms of his own agency, the Office of Management and Budget, the Department of Justice, other agencies where appropriate authority rests, or through bar association activities or other avenues not involving a public attack on the agency. This Ethical Consideration concludes with a cautionary statement that lawyers in federal service should respect the confidences of the government officials they advise, and should otherwise behave in such a way that those officials willingly seek their advice, while at the same time the lawyers should exercise independent professional judgment, giving their honest opinions even if these are unpopular.³¹

This statement seems to favor the view that the federal lawyer is the attorney for agency officials as opposed to the public interest. Certainly, agency officials are the ones who depend upon the counsel of government attorneys and who must be able to have confidence in them if they are to respect and act upon the attorneys' opinions.

insight which enhances his ability to initiate reforms. thus giving rise to a special obligation under Canon 8. In all these matters paramount consideration is due the public interest.

³⁰ F.E.C. -3-2. The situation of the federal lawyer which may give rise to special considerations. not applicable to lawyers generally, include certain limitations on complete freedom of action in matters relating to Canon 8. For example. a lawyer in the Office of the Chief Counsel of the Internal Revenue Service may reasonably be expected to abide, without public criticism. with certain policies or rulings closely allied to his sphere of responsibility even if he disagrees with the position taken by the agency. But even if involved personally in the process of formulating policy or ruling there may be rare occasions when his conscience compels him publicly to attack a decision which is contrary to his professional, ethical or moral judgment. In that event, however, he should be prepared to resign before doing so, and he is not free to abuse professional confidences reposed in him in the process leading to the decision.

³¹ F.E.C. -3-3. The method of discharging the obligations imposed by Canon 8 may vary depending upon the circumstances. The federal lawyer is free to seek reform through the processes of his agency even if the agency has no formal procedure for receiving and acting upon suggestions from lawyers employed by it. Such intra-agency activities may be the only appropriate course for him to follow if he is not prepared to leave the agency's employment. However, there may be situations in which he could appropriately bring intra-agency problems to the attention of other federal officials (such as those in the Office of Management and Budget or Department of Justice) with responsibility and authority to correct the allegedly improper activities of the employing agency. Furthermore, it may be possible for the lawyer to participate in bar association or other activities designed to improve the legal system within his agency without being involved in a public attack on the agency's practices, so long as the requirement to protect confidences is observed.

The Federal Ethical Considerations do not adequately resolve the question of who the client may be. Further guidance must be sought from Opinion 73-1 ("The Government Client and Confidentiality") in the answer to the specific question raised by FBA President Poirier, "Who is the client of a government attorney in the executive or legislative branches of government?" The Opinion indicates that where the government attorney is clearly designated to represent an individual client in government service (or a military dependent) in an administrative, disciplinary, or legal assistance context, the "usual attorney-client relationship arises, with its privilege and professional responsibility to protect and defend the interest of the one represented."³²

The Opinion then notes that the more usual situation is that of the lawyer who "is a principal legal officer of a department, agency or other legal entity of the Government, or a member of the legal staff of the department, agency, or entity."³³ With regard to these attorneys, "we do not suggest, however, that the public is the client as the client concept is usually understood. It is to say that the lawyer's employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the governmental organization of which he is a part."³⁴ The Opinion completes the answer to the question posed with the following:

. . . the client of the federally employed lawyer, using the term in the sense of where lies his immediate professional obligation and responsibility, is the agency where he is employed, including those charged with its administration insofar as they are engaged in the conduct of the public business. The relationship is a confidential one, an attribute of the lawyer's profession which accompanies him in his government service. This confidential relationship is usually essential to the decision-making process to which the lawyer brings his professional

Sound policy favors encouraging government officials to invite and consider the views of counsel. This tends to prevent the adoption of illegal policies. Even where there are choices between legal alternatives, the lawyer's viewpoint may be valuable in affecting the choice. Lawyers in federal service accordingly should conduct themselves so as to encourage utilization of their advice within the agencies, retaining at all times an obligation to exercise independent professional judgment, even though their conclusions may not always be warmly embraced. The failure of lawyers to respect official and proper confidences discourages this desirable resort to them.

³² F.B.A. Professional Ethics Comm., *supra* note 8, at 72.

³³ *Id.*

³⁴ *Id.*

talents. Moreover, it encourages resort to him for consultation and advice in the on-going operations of the agency.³⁵

The Opinion comes down, then, squarely on the side of the agency and its administrators as the clients of the government attorney.

Still, the Committee's Opinion has not fully persuaded all who are employed in government service; otherwise, Mr. Risher would not have had to raise again the question of who is the client as recently as early 1977, fully four years after the Opinion was issued. Further, the difficulty for government attorneys is that this Opinion, although explanatory in a way that is not found elsewhere in the CPR, its Ethical Considerations and Disciplinary Rules, or in the Federal Ethical Considerations, is not binding on any government attorney; nor are there court decisions applying its definitional standards to government attorneys.

Many attorneys within and outside the federal government still argue that the Federal Ethical Considerations at least imply that the public interest may be the client of the federal attorney. That a final determination has not been widely accepted may indicate that such a determination has not been made. The unsettled nature of this dilemma provides considerable impetus for much of the professional responsibility instruction for federal attorneys who do not represent individual clients.

II. THE METHODOLOGY OF TEACHING PROFESSIONAL RESPONSIBILITY TO FEDERAL GOVERNMENT ATTORNEYS

Instruction in professional responsibility provided to federal government attorneys can be divided into three categories: (1) instruction on the legal requirements for ethical conduct that apply to all government employees; (2) instruction on professional responsibility for government attorneys who represent individual government employees (or military dependents); and (3) instruction on professional responsibility for attorneys who provide legal advice within government agencies.

Instruction concerning the legal requirements of ethical conduct which apply to all government employees has been developed primarily by the Civil Service Commission's Office of General Counsel. The Commission has had the responsibility for issuing regulations implementing Exec. Order No. 11222 since its promulgation in

³⁵*Id.* at 72-73.

1965.³⁶ Beginning in November 1975, the Office of the General Counsel has sponsored an Ethics Conference once each year for the

³⁶ Several sections of Exec. Order No. 11222, as amended, deal with the authority of the Civil Service Commission to issue regulations. The President has delegated broad authority to the Commission:

Section 601. The Civil Service Commission is designated and empowered to perform, without the approval, ratification, or other action of the President, so much of the authority vested in the President by Section 1753 of the Revised Statutes of the United States (5 U.S.C. 631) (now covered by sections 3301 and 7301 of Title 5) as related to establishing regulations for the conduct of persons in the civil service.

Section 602. Regulations issued under the authority of Section 601 shall be consistent with the standards of ethical conduct provided elsewhere in this order.

Authority to review regulations of other agencies, as well as to issue its own regulations, is granted to the Commission by one section of the general provisions of Exec. Order No. 11222:

Section 701. The Civil Service Commission is authorized and directed in addition to responsibilities assigned elsewhere in this order:

(a) To issue appropriate regulations and instructions implementing Parts II, III, and IV of this order;

(b) To review agency regulations from time to time for conformance with this order; and

(c) To recommend to the President from time to time such revisions in this order as may appear necessary to ensure the maintenance of high ethical standards within the Executive Branch.

(Part II deals with standards of conduct in general; part III, with standards of ethical conduct for special government employees; and part IV, with reporting of financial interests.) Special authority to issue regulations concerning statements of financial interest is also conferred on the Commission:

Sec. 402. The Civil Service Commission shall prescribe regulations, not inconsistent with this part, to require the submission of statements of financial interests by such employees, subordinate to the heads of agencies, as the Commission may designate. The Commission shall prescribe the form and content of such statements and the time or times and places for such submission.

Finally, the Commission has authority to review and approve regulations issued by agency heads granting exceptions to the general prohibition against accepting gifts:

Section 201. (a) Except in accordance with regulations issued pursuant to subsections (b) of this section, no employee shall solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any person, corporation, or group which—

(1) has, or is seeking to obtain, contractual or other business or financial relationships with his agency;

(2) conducts operations or activities which are regulated by his agency; or

(3) has interests which may be substantially affected by the performance or nonperformance of his official duty.

(b) Agency heads are authorized to issue regulations, coordinated and approved by the Civil Service Commission, implementing the provisions of subsection (a) of this section and to provide for such exceptions therein as may be necessary and appropriate in view of the nature of their agency's work and the duties and responsibilities of their employees. For example, it may be appropriate to provide exceptions (1) governing obvious family or personal relationships where the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factor—the clearest illustration being the parents, children or spouses of federal employees; (2) permitting acceptance of food and refreshments available in the ordinary course of a luncheon or dinner or other meeting or on inspection tours where an employee may properly be in attendance; or (3) permitting acceptance of loans from banks or other financial institutions on customary terms to finance proper and usual activities of employees, such as home mortgage loans. This section shall be effective upon issuance of such regulations.

purpose of providing each agency's ethics counselors (usually attorneys) with updated information on the legal standards of conduct and ethical requirements placed on all government employees.³⁷

The Conferences have covered such topics as gifts and travel; outside activities and post-government employment: how to review financial statements and resolve conflicts; conflict-of-interest laws; conflicts of interest between spouses; problems of special government employees (e.g., advisory committee members); referrals of criminal activity of government employees; the dynamics of handling ethics disputes; pending legislation on conflicts of interest; and whether employee disclosures to ethics counselors are privileged.

Most of these topics are the subject of statutes, executive orders, or agency regulations, and have been handled within a traditional continuing legal education format, i.e., participants receiving information and discussing the pertinent laws, current interpretations and applications of these laws, and proposed changes to the law. Some agencies utilizing information developed at the Conferences together with their own regulations, have developed similar presentations for their own employees.³⁸

The second category of professional responsibility instruction is directed to government attorneys who represent individual government employees (or military dependents). This type of instruction basically covers criminal, administrative, and civil legal-assistance representation or advice where a normal attorney-client relationship exists or where a public prosecutor is involved.

Professional responsibility instruction for government attorneys involved in criminal proceedings as prosecutors or defense counsel is primarily conducted by four institutions—The Judge Advocate General's School, U.S. Army, the Naval Justice School, the Air Force Judge Advocate General School, and the Attorney General's Advocacy Institute. The first three provide instruction to military trial and defense counsel in courts-martial, among other areas of

³⁷ These seminars were developed by David Reich, Ethics Counsel in the Office of General Counsel, U.S. Civil Service Commission. The first Ethics Conference was held on November 24–25, 1975, at Airlie House, Airlie, Virginia, and included 86 participants from 58 agencies. The second conference was held at the Sheraton Inn, Gettysburg, Pennsylvania, on September 20–22, 1976, and included 90 participants from 68 agencies. The next conference was scheduled for October 17–19, 1977, in Williamsburg, Virginia.

³⁸ The Department of Labor, The Judge Advocate General's School, U.S. Army, and the Air Force Judge Advocate General School all provide material and/or instruction concerning standards of conduct as required by agency regulations.

law;³⁹ the last provides a two-week orientation primarily for new Assistant United States Attorneys.

The first three of these schools provide what may be described as an "integrated" approach to professional responsibility instruction. The "integrated" approach implies that a separate block of time will be set aside in the course for a specific discussion of professional responsibility issues involving the federal government attorney. In addition to this general "integrated" approach, The Judge Advocate General's School, U.S. Army, provides a separate 14-hour elective on this subject as part of its Graduate Course.⁴⁰ This "separate course" approach will be discussed further later.

Each of the schools uses as instructional materials the CPR, the American Bar Association Standards Relating to the Administration of Criminal Justice, their own agency regulations dealing with professional responsibility,⁴¹ and selected court cases. In addition, the Air Force Judge Advocate General's Department has prepared a 1-½ hour color videotape entitled "The Government Lawyer and Professional Responsibility." The videotape (utilized by the Air Force Judge Advocate General School in its criminal law instruction) is accompanied by a syllabus, course materials, and an examination which are to comprise a thirty-eight hour course when used as a separate course. Materials included with the videotape are, in addition to those noted above, several law review articles and a number of Formal and Informal Opinions of the American Bar

³⁹For example, the Army Judge Advocate General's School offers instruction in administrative and civil law, international law, and procurement law, as well as military justice, through dozens of short courses which can be attended by members of all the uniformed services and by civilian lawyers employed by the Government.

⁴⁰The 41-week Judge Advocate Officer Graduate Course is comparable with graduate (i.e., LL.M.) programs of civilian law schools, and is available to career officers with from four to eight years of active commissioned service. A nonresident version of this course is also available. About one-fourth of the course work of the Graduate Course consists of electives. A normal course load would include up to fourteen elective courses distributed among the four quarters of the academic year.

The course in professional responsibility can be one of these courses. Formerly called "Ethical Applications and Standards," this course now bears the name of the major portion of the course materials, the ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE (1974).

⁴¹Each of the military services have, in their own regulations concerning military justice, made the American Bar Association Code of Professional Responsibility applicable to military attorneys except where specific differences are spelled out in the regulations. See ARMY REG. No. 27-10, MILITARY JUSTICE, para. 2 3 2 (C12, 12 Dec. 1972), and NAVY JUDGE ADVOCATE GENERAL'S MANUAL, para. 0142.

Association Standing Committee on Ethics and Professional Responsibility. No separate instruction is provided by the Attorney General's Advocacy Institute on professional responsibility.

Instruction on the professional responsibility aspects of the representation of federal employees (including military personnel) in administrative proceedings is covered by the Army and Air Force schools through a "seep-down" approach. This approach, in which the professional responsibility aspect of a substantive or procedural course "seeps" into the instruction in each of the areas discussed in the course, was the traditional approach to the teaching of professional responsibility utilized in many law schools before the current emphasis on professional responsibility instruction caused substantial changes in previous practices. Materials used in these courses generally are procedural in nature and are generally limited to agency regulations on administrative hearing procedures and selected court cases arising from challenges to these regulations.

In fact, very little material exists that is directly related to professional responsibility in administrative proceedings beyond agency regulations that may or may not mention the application of the CPR to agency administrative proceedings. In such cases, the CPR is usually applied informally by administrative law judges, hearing and grievance examiners, and boards of officers (if military attorneys are involved as advisors to board members, who are generally *not* attorneys in the military context).

A more deliberate effort is made to integrate professional responsibility directly into courses designed to provide instruction to military attorneys providing civil legal assistance to military personnel and their dependents. Although the "seep-down" approach is used in the legal assistance instruction at the Army school, the Air Force School includes a separate "Professional Responsibility Seminar" in its civil law instruction for legal assistance officers. Both the Army and the Air Force provide for the application of the CPR to the legal assistance program in their regulations.⁴²

Provision of legal assistance on matters involving the personal legal affairs of military personnel is probably the activity carried on by federal government attorneys most similar to that of their civilian counterparts, and the utility of the CPR is probably highest in this area as a result. Opinions of the ABA Standing Committee on

⁴² AIR FORCE REG. No. 110-22, LEGAL ASSISTANCE PROGRAM, para. 1(e)(3) (22 Aug. 1975); ARMY REG. No. 608-50, LEGAL ASSISTANCE, para. 9 (C1, 27 Aug. 1975).

Ethics and Professional Responsibility interpreting the CPR, its Ethical Considerations and Disciplinary Rules, are also heavily utilized because they address specific ethical problems encountered by attorneys providing legal services to individual clients on their personal legal problems. No separate instruction on professional responsibility with regard to the provision of legal assistance is provided by the Naval Justice School.

The third type of professional responsibility instruction is provided to attorneys whose primary responsibility is provision of legal services within government agencies, much as a corporate counsel does for a corporation in the private sector. This type of instruction reflects much of the dilemma that exists with regard to the identity of the client being represented. Little if any intra-agency training exists in this area;⁴³ the existing formal instruction is conducted primarily by the Legal Education Institute in the U.S. Civil Service Commission.

The Institute, which formally began conducting interagency continuing legal education courses for federal government attorneys in February 1975, has attempted to utilize each of the approaches or methods of professional responsibility instruction mentioned in this paper, i.e., "integrated," "seep-down," and "separate course."⁴⁴ The Institute began its first course using the "integrated" approach and has continued a policy of utilizing this approach in each of its "type" courses, i.e., those which are aimed at a particular level of federal attorney. These courses include the Institute for New Government Attorneys, the Seminar for Attorney-Managers, the Institute for Legal Counsels, the Administrative Law Judges and the Regulatory Process Seminar, and the Paralegal Workshop (although participants are obviously not attorneys).

In each of these courses, a similar package of problems and reference materials was developed and used by Professors Howard L. Greenberger and James C. Kirby, Jr., of the New York University School of Law in the delivery of this instruction.⁴⁵ These professors

⁴³The Office of the Solicitor, Department of Labor, does include a 45-minute presentation on "Ethics and the Department of Labor" at the beginning of each of its week-long procedural training programs for attorneys. The emphasis of this presentation is on the ABA CPR and its application in trial situations.

⁴⁴The Judge Advocate General's School, U.S. Army, and the Air Force Judge Advocate General School have also used all three approaches but in different types of professional responsibility instruction rather than in only one type as has the Legal Education Institute.

⁴⁵See Appendix III for the most recent outline of the topics covered during the Legal Education Institute's "integrated" professional responsibility instruction.

have utilized their academic and governmental experiences to prepare problem situations which address the unsolved dilemma concerning the identity of the client, as well as other current issues in the field of professional responsibility. Professor Greenberger developed the problems addressing the dilemma with full realization that these problems would provide discussion vehicles rather than answers to the dilemma. Alerting federal government attorneys to the existence of the dilemma, as well as providing them with resource materials that may assist them in resolving the dilemma within their individual legal offices, has been a primary goal of the Legal Education Institute's professional responsibility instruction.

The Institute has also tried each of the remaining methods of teaching professional responsibility in other courses. First, the Institute has utilized the "seep-down" method in several of its substantive law and skills development courses, including the Environmental Law Seminar, the Law of Federal Employment Seminar, the Trial Practice Seminar, and the Seminar for Attorneys on the Freedom of Information and Privacy Acts. Usually, public interest attorneys from the private sector have raised and discussed professional responsibility issues in substantive law courses, especially where they have seen and experienced professional responsibility problems in a government context. This method, however, has a limited impact on federal attorneys who take these courses. In the Institute's experience, the "seep-down" method has not provided sufficient time either to discuss adequately or to uncover the professional responsibility concerns and problems of federal attorneys; nor has it made federal attorneys sufficiently aware of the existence of such professional responsibility considerations in their day-to-day practice of the law.

Most recently, the Legal Education Institute has attempted to use the third approach to teaching professional responsibility—providing a "separate course" dealing specifically with the professional responsibility concerns of federal attorneys. In the fall of 1975, at the suggestion of Professor Greenberger and with his assistance, the Institute developed a Symposium on Professional Responsibility which was to have been held on May 6–7, 1976, in Washington, D.C., at the National Press Club. The Symposium was to provide a two-day coverage of virtually all the aspects of professional responsibility that have been broadly addressed in this paper.⁴⁶

⁴⁶Specific topics to have been included were:

Because of the peculiar nature of the Legal Education Institute,⁴⁷ this Symposium on Professional Responsibility provided a unique opportunity. Since the Institute is the only source of professional responsibility instruction in the federal government that actually charges tuition for its courses, and since agency attorneys may attend the Institute's courses or any other courses solely in their agency's discretion, there was a chance to determine whether agencies and in particular their general counsels would fund attendance of their attorneys at a course aimed solely at professional responsibility. The answer to that question was "no"—perhaps a qualified "no," but nevertheless a "no."

One week before the course, even after an extensive telephone campaign had increased the number of attendees from **29** to **50**, the Institute was forced to cancel the course because there were not sufficient prospective attendees to cover the anticipated costs of the Symposium. The result of this unsuccessful effort to develop a high-quality course with high-quality speakers, discussion leaders, and panelists, to be provided to federal attorneys at a reasonable cost (**\$75** for the two days including two luncheons) was to eliminate the "separate course" approach from the Institute's methods of delivering instruction in professional responsibility.

As a practical matter, federal government attorneys, while they are willing to discuss and address the professional responsibility concerns which they have as a separate part of other courses or

The Public Interest and Responsibility—What and to Whom?;

The Government Lawyer and Conflicts of Interest—Past, Present, and Future;

Should the Government Attorney Require More of His Civilian Counterpart than He Does of Himself?;

Is Continuing Legal Education an Ethical Responsibility of the Government Attorney?;

Morals and Professional Ethics; and

The Ethics of Resignation.

Scheduled speakers and panelists were to have included the late Justice Tom C. Clark; Chief Judge Edward D. Re of the U.S. Customs Court; Professor Kirby of the New York University Law School; Ronald Ostrow of the Los Angeles Times; John G. Banomi, then Chief Counsel to the Grievance Committee of the Association of the Bar of the City of New York; A. A. Sommer, Jr., then a Commissioner of the Securities and Exchange Commission; Martin Lipton, a private practitioner in New York City; Richard E. Wiley, then Chairman of the Federal Communications Commission and President-Elect of the Federal Bar Association; Paul A. Wolkin, Director of the ALI-ABA Committee on Continuing Professional Education; Bishop Fulton J. Sheen; Thomas M. Franck, Co-author of *RESIGNATION IN PROTEST* and a Professor at the New York University School of Law; and Gerald Ter Horst, former Press Secretary to President Ford.

⁴⁷The LEI, as a governmental entity, is reimbursed by other government agencies for the tuition of their participants in the Institute's courses.

through the “seep-down” method, are seemingly unwilling for whatever reasons to expend government funds solely to attend instruction or participate in discussions of professional responsibility as it applies to federal attorneys. The Institute has successfully continued its practice of providing an “integrated” approach to professional responsibility instruction in five of its seventeen courses and continues to utilize, but does not recommend as an *effective* method of providing professional responsibility instruction, the “seep-down” approach used in at least four other courses.

III. A BRIEF ASSESSMENT

The results of this brief glance at the teaching of professional responsibility to the federal government attorney can be summarized in the following two sets of conclusions:

First, although the ABA Code of Professional Responsibility (along with its Ethical Considerations, Disciplinary Rules, and Opinions of the Standing Committee on Ethics and Professional Responsibility) may provide effective and sometimes binding guidance to federal government attorneys who provide legal representation for individual federal employees (including military personnel and their dependents), it does not provide adequate or binding guidance to federal government attorneys whose primary function is to provide legal advice within federal agencies.

Further, although the Federal Bar Association has taken dramatic steps toward clarifying the role and professional responsibilities of the federal government attorney by means of the adoption of the Federal Ethical Considerations and by the issuance of Opinion **73-1** by its Professional Ethics Committee, controversy continues to exist over the precise relationship from a professional responsibility perspective between the federal government attorney, his or her employing agency, and the public interest or the public taxpayer.

This controversy is exacerbated by the lack of firm or binding professional responsibility guidelines for agency attorneys. Without such binding guidelines and without a clear and binding determination as to whom the federal government attorney’s professional responsibility is owed, it is not surprising that many federal government attorneys never address the professional responsibility concerns which have been expressed here. If there can be no resolution of these concerns, why should they even be addressed?

Second, presuming of course that the professional responsibility concerns of federal government attorneys not only should but must be addressed by those who provide learning opportunities to federal

government attorneys, the most realistic approach to providing instruction that will be meaningful and of lasting value on this subject is the “integrated” approach which allows attorneys to wrestle directly with professional responsibility problems and concerns, rather than the “seep-down” approach, which can be a haphazard brush with the topic at worst and probably a nonimpacting approach at best.

While the “separate course” approach might ideally be the most effective method of providing professional responsibility instruction, the opportunities for obtaining successful participation by a sufficient number of federal attorneys who have a choice whether they attend such a course are limited indeed.

Assessment of these results does not terminate with this article. Each of the institutions mentioned here, and hopefully many others, must continue to develop professional responsibility standards and instruction that will overcome the problems currently being experienced in this important field. If “progress is our most important product,” we must seek to improve that product in order to further develop the quality and understanding of professional responsibility practiced by the federal attorney.

THE ANTI-DEFICIENCY ACT (Revised Statutes 3679): AND FUNDING FEDERAL CONTRACTS: AN ANALYSIS*

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In this article the authors provide a comprehensive review of one of the least well understood federal statutes, the Anti-Deficiency Act, 31 U.S.C. § 665, commonly referred to by its older designation, Revised Statutes 3679. Several related statutes concerning fiscal matters are discussed, together with determination of responsibility for violations of the Anti-Deficiency Act, and other considerations. The authors conclude that violations can be avoided through reasonable staff coordination during the procurement process.

*The opinions and conclusions expressed in this article are those of the authors and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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I. INTRODUCTION

“You are advised that you are responsible for an over-obligation of Operation and Maintenance, Army funds in violation of Revised Statutes 3679”

Thus commences the investigation of a potential violation of the statute commonly referred to as the Anti-Deficiency Act, an act that was until recently often cited but seldom invoked. However, in 1974, with the revelation of violations in the Army procurement accounts, great attention was focused on the Anti-Deficiency Act.¹ Alleged violations of every kind began to show up as a result of audits by the U.S. Army Audit Agency and inspections conducted by the Inspector General. Table 1, below, illustrates the growing

TABLE 1

**Number of Alleged Violations of
R.S. 3679 . By Fiscal Years²**

FY REPORTED	TOTAL ALLEGED	NO VIOLATION	NO VIOLATION	UNDER REVISION/ CONSIDERATION
FY 70-74	23	7	16	0
FY 75	28	14	13	1
FY 76	64	11	15	38
FY 77	77	7	41	29
FY 78	5	0	0	5

¹31 U.S.C. 665 (1970 & Supp. V 1975), commonly referred to by its older designation, Revised Statutes 3679. The Revised Statutes were the first codification of the general and permanent laws of the United States. This codification was carried out initially in response to the Act of June 20, 1874, ch. 33, § 2, 18 Stat. 113. A more comprehensive effort was made in implementation of the Act of Mar. 2, 1877, ch. 82, § 1, 19 Stat. 68, as amended by the Act of Mar. 9, 1878, ch. 26, 20 Stat. 27. The Code known as the Revised Statutes of 1878 was the result. The present United States Code system began with the Act of June 30, 1926, 44 Stat. 1. Most titles of the United States Code, including title 31, have never been enacted into positive law, and citations to those titles are useful only for finding the text of the statutes included therein. Revised Statutes 3679 is thus the correct name for the statute found today at 31 U.S.C. § 666. The same applies to Revised Statutes 3678, at 31 U.S.C. 5 628.

²R.S. 3679 violations inventory prepared by Office of the Comptroller of the Army, dated 31 Jan. 1978.

awareness in the Army of potential violations of the Anti-Deficiency Act. A need exists for better understanding and appreciation of the provisions of Revised Statutes 3679, and of the associated legal aspects of funding.³

II. HISTORY

The Anti-Deficiency Act is the cornerstone of Congressional efforts to bind the Executive branch of government to the limits on expenditure of appropriated funds set by appropriation acts and related statutes. It is an attempt to protect and preserve the Congressional power of the purse. Section 8, Article I of the Constitution grants to Congress the power to “. . . lay and collect taxes, duties, imports, and excises, to pay the debts and provide for the common defense and general welfare of the United States . . .”⁴ Section 9 of the same Article provides that “. . . no money shall be drawn from the treasury but in consequence of an appropriation made by law.”⁵ The limitations are absolute. No executive agency is empowered to obligate or expend public monies until Congress has exercised its authority under these two sections.

However, notwithstanding the powers granted to Congress in Article I, for many years after the adoption of the Constitution the executive departments exercised little or no control over the monies appropriated to them. Various techniques were used to avoid congressional spending limitations. Funds were obligated without or in advance of appropriations.⁶ They were commingled and used for

³See Appendix A, *Definitions*.

⁴U.S. CONST. art I, 5 8, cl. 1. See *Bradley v. United States*, 98 U.S. 104 (1878); *Knote v. United States*, 95 U.S. 149 (1877).

⁵U.S. CONST. art I, § 9, cl. 1. See *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937), wherein the court stated that this section of the Constitution “means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.”

⁶Examples abound of obligations created by executive agents without adequate appropriations available to fund the obligations. In 1870 deficiency appropriations were necessary to pay workmen hired by the Navy Department (Act of Apr. 13, 1870, ch. 55, 16 Stat. 83); and to pay clerks in the Office of the Comptroller of the Currency (Act of Apr. 20, 1870, ch. 56, 16 Stat. 84). As late as 1977 deficiency appropriations were necessary to pay contractors under Army contracts. (See *Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 1st Sess. 614 (1977).) See also A. SMITHIES, *THE BUDGETARY PROCESS IN THE UNITED STATES* 63-64 (1955).

purposes other than those for which they were appropriated.’ Finally, the executive departments would obligate or expend their appropriations during the first few months of the year and then seek a deficiency appropriation from Congress to continue to operate.⁸

Congress became increasingly restive as executive abuses grew. As early as 1819, Senator Henry Clay lamented executive disregard of the appropriations process:

Are we [Congress] to lose our rightful control over the public purse? It is daily wrested from us [by officials of executive departments], under high sounding terms, which are calculated to deceive us, in such a manner as appears to call for approbation rather than censure of the practice.⁹

Efforts were made to place tighter controls on executive spending. For instance, a provision in the military appropriations act of 1820 required the Secretaries of War and Navy to report annually to Congress balances under each specific heading of the preceding year’s appropriation.¹⁰ In 1834 Congress passed an act requiring the Navy to report any transfers of appropriations to another executive branch of government.¹¹ Other statutory devices designed to tighten fiscal controls were employed by Congress over the years until the advent of the War Between the States. That conflict caused Congress to remove fiscal restraints to insure support for the war effort.

All of the old executive abuses reasserted themselves during the war years. Funds were commingled. Obligations were made without appropriations. Unexpended balances from prior years were used to augment current appropriations. The cessation of hostilities did not result in a concomitant cessation of abuses. If anything, the executive departments redoubled their efforts to override the right of Congress to “control of the public purse.”

⁸John C. Calhoun speaking in 1816 remarked “on the evils—great evil . . . which resulted to the public interests from the practice, particularly in the War Department, of permitting funds to be diverted from one object of appropriation and applied to another.” L. WILMERDING, JR., *THE SPENDING POWER, A HISTORY OF EFFORTS OF CONGRESS TO CONTROL EXPENDITURE* 78 (1943). And again, in 1817, addressing the same subject before the Committee of the Whole of the House of Representatives, Calhoun commented that, although various expenditures were for good objects, “. . . the money had not been applied to the objects for which it was appropriated. It was a sheer abuse of power. . . .” WILMERDING, *supra* at 80.

⁹WILMERDING, *supra* n.7, at 99–117.

¹⁰*Id.* at 90.

¹¹*Id.* at 73, 213. Similar controls in prior appropriation acts had not proved uniformly successful. See 11 *ANNALS OF CONG.* 22, 23, 61, 448 (1810).

¹²Act of June 30, 1834, ch. 171, 4 Stat. 742.

Finally in 1868 Congress determined to reassert its constitutional prerogatives. The first step in this direction was taken with the passage of a statute on February 12, 1868 which provided:

So much of the first section of the act of March third, eighteen hundred and nine, entitled "An act further to amend the several acts for the establishment and regulation of the Treasury, War, and Navy Departments," as authorizes the President, on the application of the secretary of any department, to transfer the moneys appropriated for a particular branch of that department to another branch of expenditure in the same department, be, and the same is hereby, repealed; and all acts or parts of acts authorizing such transfers of appropriations be and the same are hereby repealed, and no money appropriated for one purpose shall hereafter be used for any other purpose than that for which it is appropriated.¹²

This statute was intended to end two abuses: (1) the commingling of current appropriations and (2) the diversion of old appropriations to purposes for which they were not intended.¹³

After enactment of the statute of 1868, only one loophole remained in the wall that Congress was erecting about its spending powers—the executive habit of creating obligations without appropriations, often called "coercive deficiencies." This loophole was filled in 1870 with the enactment of the statute that, with amendments, became known as the Anti-Deficiency Act.¹⁴ It provided:

That it shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriations.¹⁵

The two abuses addressed by the statute of 1868 virtually disappeared with the act's passage. However, executive departments continued to expend "an entire appropriation before the end of the fiscal year in expectation of a deficiency grant."¹⁶ Year after year Congress faced the dilemma addressed by Representative Hemenway: "Under the law [the departments] can make these deficiencies, and Congress can refuse to allow them; but after they are made it is very hard to refuse to allow them."¹⁷ During the quarter

¹² Act of Feb. 12, 1868, ch. 8, § 2, 15 Stat. 35, 36.

¹³ See WILMERDINC, *supra* n.7, at 118-123.

¹⁴ Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251. This evolved into the current 31 U.S.C. § 665 (the Anti-Deficiency Act).

¹⁵ *Id.*

¹⁶ STUDENSKI, PAUL & KROSS, FINANCIAL HISTORY OF THE UNITED STATES 275 (1963).

¹⁷ 39 CONG. REC. 3687 (1905).

century following enactment of the 1870 statute, executive disregard of congressional spending limits became flagrant and habitual. Congressman Theodore Burton, speaking from the floor of the House of Representatives in 1904, remarked:

The increase of deficiency appropriations is to be noted . . . A committee or subcommittee may frame a bill for a branch of the public service and seek to secure economy and at the same time sufficient provision for the public functions in question. Afterwards, the amounts recommended and adopted by Congress may be exhausted by some Department of the Government, expenses may be applied for purposes or to an extent which the committee would not have approved, yet another committee or subcommittee not equally familiar with the subject may promptly provide the amount.¹⁸

Congress continued to lament executive caused coercive deficiencies in 1906:

We find that whenever we cut down or when generally we cut down the amounts estimated for any given object to what, in the judgment of Congress, is ample provision for a given and specific work, those in charge of bureaus arbitrarily proceed to expend amounts under the appropriations as though their estimates had been allowed in full, giving no attention to the mandate contained in the appropriation determined by Congress. And then what happens? At the next session of Congress they come here with either an anticipated or an actual deficiency, and to our questions why, with good management, they could not have kept their expenditures within the limits set by Congress, they give us general and unsatisfactory reasons¹⁹

However, 1906 was also a year of reckoning for the executive departments. In 1905 Congress had amended the Act of 1870 (R.S. 3679) to give it teeth. All "obligations," rather than just contracts, were prohibited unless adequate appropriations were available.²⁰ Acceptance of voluntary services was forbidden, apportionment by monthly allotments was required (unless waived), and criminal penalties were included for violation of the act.²¹

Even after the amendments, the year 1905 brought almost as many deficiencies as the preceding years. Hence, Congress once again returned to the legislative drawing board. In 1906 Revised Statutes 3679 was amended to prohibit waiver of apportionment except in emergencies or unusual circumstances.²² Waivers and mod-

¹⁸38 CONG. REC. 3296 (1904).

¹⁹40 CONG. REC. 1273 (1906) (Congressman Littauer).

²⁰Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257.

²¹*Id.*

²²Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 49.

ifications of apportionments were required to be in writing and the reasons to be given in "each case."²³

After 1906, R.S. 3679 remained unchanged until 1950. In that year the statute was revised to create an elaborate scheme for apportionment and reapportionment.²⁴ Criminal penalties for knowing and willful violations were set at a fine of not more than \$5000, imprisonment for not more than 2 years, or both.²⁵ Administrative discipline was provided for noncriminal violations.²⁶ R.S. 3679, as revised in 1950, is essentially the controlling statute today. It is found in Title 31, Section 665.²⁷

111. THE ACT

A. PUNITNE SECTIONS

Revised Statutes 3679 contains criminal penalties for knowing and willful violations of its provisions,²⁸ and administrative sanctions for other than knowing and willful violations.²⁹ However, these penalties are actuated only by violation of one or more of three subsections of the act.³⁰ Subsection (i)(1) of Revised Statutes 3679 states:

In addition to any penalty under other law, any officer or employee of the United States who shall violate subsections (a), (b), or (h) of this section shall be subjected to appropriate administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office; and any officer or employee of the United States who shall knowingly and willfully violate subsection (a), (b), or (h) of this section shall, upon conviction, be fined not more than \$5,000 or imprisoned for not more than two years, or both.³¹

A complete examination of the effect and meaning of these three subsections is critical.³²

Subsection (a) provides:

No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor

²³*Id.*

²⁴Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 765.

²⁵*Id.*

²⁶*Id.*

²⁷Text of statute is duplicated in Appendix B.

²⁸31 U.S.C. § 665(i) (1) (1970).

²⁹*Id.*

³⁰36 Comp. Gen. 683 (1957).

³¹31 U.S.C. § 665 (i) (1) (1970).

³²See diagram at Appendix C.

shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.³³

This section has two substantive provisions with three distinct prohibitions. The first prohibition is against the *making* of an obligation or expenditure under any appropriation “in excess of the amount available therein.” Simply put, no officer of the government can obligate or expend funds that do not exist. Incurring any deficiency is strictly forbidden, but not unknown. On February 19, 1976, a Comptroller General opinion, quoted in part below, was forwarded to the Chairman of the House of Representatives Appropriations Committee:

[Y]ou requested our views on . . . certain actions proposed to be taken by the Department of the Army to deal with overobligations in four separate Army procurement appropriations.

It appears that the overobligations result from numerous contracts . . . Obviously these contracts violate the Anti-Deficiency Act.³⁴

The contracts referred to by the Comptroller General had obligated approximately \$160 to \$180 million more for procurement than Congress had made available by appropriation—the very thing prohibited by subsection (a) of the Anti-Deficiency Act.

Just a little more than one year later, the Army was again explaining to the Congress massive overobligations in the “Other Procurement, Army” appropriation. Congress was less than pleased:

Mr. Edwards. The committee meets this afternoon to give consideration to an Army requirement for an additional \$21 million to liquidate obligations which have or will be incurred against the fiscal year 1973–75 “Other Procurement, Army,” appropriation. *This is a serious and disturbing matter because it involves another violation of the Anti-Deficiency Act by the Army.*³⁵ (emphasis added)

Although both the above examples of violations of R.S. 3679 are taken from the Army, the other military services have not escaped the notice of Congress. Mr. Edwards of the Subcommittee of the House of Representatives Committee on Appropriations when discussing the 1973–75 Army violations in the procurement accounts

³³31 U.S.C. § 665 (a) (1970).

³⁴Ms. Comp. Gen. B-132900, Feb. 19, 1976.

³⁵*Hearings on Dep't of Defense Appropriation for 1978, Before Dep't of Defense Subcomm. of House Comm. on Appropriations, 95th Cong., 1st Sess., Part 3, 613 (1977) [hereinafter cited as 1977 Hearings].*

also had this to say: “And it might be well to at least note in the record that while the Army is the one sitting here, standing in the need of prayer, that the Navy and the Air Force haven’t been too diligent either according to [the GAO] report”³⁶ Indeed, Mr. Edwards was addressing only a few of the many examples of violations of this first prohibition of subsection (a) of the Anti-Deficiency Act.

A particularly dangerous area in respect to the first prohibition is contracts that create unlimited or indeterminate liabilities. For instance, the provisions of a building lease wherein the government (lessee) was obligated to indemnify the lessor for “losses, liabilities and litigation expenses” arising in relation to the lease was found by the Comptroller General to violate Revised Statutes **3679** because the provision obligated the government beyond the extent and availability of appropriations.³⁷ The logic is simple. By assuming responsibility for all losses, liabilities and litigation expenses arising from the lease, the government assumed an unlimited liability. No lid was placed upon the potential amount that the United States might become obliged to expend and thus the obligation, unlimited in nature, exceeded available appropriations, which are finite. A similar result is not reached, and no violation occurs, when a ceiling within appropriation availability is placed on the government’s duty to indemnify.³⁸

The second prohibition in subsection (a) of 31 U.S.C. § **665** forbids any officer or employee of the United States from *authorizing* any obligation or expenditure in excess of an appropriation. This is more sweeping than the first limitation imposed by the subsection. An actual overobligation or overexpenditure need not occur and yet a violation may. For example, suppose an appropriation is made and apportioned to the Department of the Army [hereinafter referred to as DA] in the amount of one million dollars. DA makes the funds available by allocations to subordinate commands for obligation.³⁹ If DA, upon receipt of the one million dollars, allocates \$1,100,000 to lower commands, a violation of subsection (a) occurs. The DA action

³⁶*Id.* at 620.

³⁷35 Comp. Gen. 85 (1955). See also 12 Comp. Gen. 390 (1932); Comp. Gen. Dec. B-168106, 74-2 C.P.D. para. 3.

³⁸42 Comp. Gen. 708 (1963).

³⁹Appendix D, outline of fund distribution scheme.

“authorizes”⁴⁰ the subordinate commands to obligate funds in excess of available appropriations. The violation is complete the minute the allocation in excess of appropriations is made. Further, it cannot be “cured.” Even if DA were to discover the overallocation and withdraw the excess obligational authority,⁴¹ a reportable violation, the authorization to obligate in excess of available funds, exists.⁴²

While the first two prohibitions of subsection (a) address current appropriations, the third prohibition relates to future appropriations. It was intended to prevent the Executive from involving the Government in any contract or other obligation in one fiscal year by relying upon an appropriation to be made in the next fiscal year. This practice was decried as early as 1820. At that time, a member of the House protested “against the practice of permitting the Heads of Departments to legislate for Congress, and to pledge the funds of the Government to any extent at their pleasure. As a general principle . . . contracts ought not be made in anticipation of appropriations. . . .”⁴³

Executive agencies still attempt transactions that would create obligations on behalf of the United States in advance of appropriations. For instance, in 1971 the Administrative Office of the United

⁴⁰See DoD Dir. 7200.1, Administrative Control of Appropriations Within the Department of Defense, para. IV.B., XII [hereinafter cited as DoD Dir. 7200.11. See also Army Reg. No. 37-20, Administrative Control of Appropriated Funds, para. 16a (July 16, 1965) [hereinafter cited as AR 37-20].

⁴¹An argument based upon para. 16c, AR 37-20, *surpa* n. 40, can be made that this is a mere accounting error and that a violation of R.S. 3679 does not occur if the fund authorizations are withdrawn before an overobligation or overexpenditure is made. However, this interpretation does not take into account the statement in 31 U.S.C. § 665(a) and para. 16a, AR 37-20, that an *authorization* to obligate in excess of appropriations is a violation.

⁴²“ . . . [A] violation of R.S. 3679 . . . will occur when any action results in an overdistribution . . . of funds in any appropriation.” AR 37-20, *supra* n. 40, para. 16a. Similarly, Office of Management & Budget Circular A-34, July 1976 [hereinafter cited as OMB Cir. A-34] provides at page 51:

Types of violations to be reported. [The agency head will furnish . . . information on violations of the following character:

(a) Any case where an officer or employee of the United States has . . . authorized an expenditure from or . . . an obligation under any appropriation or fund . . . in excess of the amount available therein.

Similarly, allotments in excess of allocations violate R.S. 3679. Dep’t of Defense Handbook 7220.9-H, Accounting Guidance Handbook, para. 21003.B.8, Aug. 1972, *as amended*. It should be noted, however, that except for specific statutory limitations, R.S. 3679 violations can occur only at the appropriation level for appropriations not subject to apportionment. DoD Handbook 7220.9-H, *eupra* at para. 21003.B.1.a. See also letter from Office of the Comptroller of the Army, subject: Report of Violations of Revised Statutes 3679—Number 12-76, 26 Feb. 1976.

⁴³WILMERDING, *supra* n. 7, at 94-5.

States Courts was prevented by the Comptroller General from paying attorneys appointed by the Courts in one fiscal year with appropriations made available in succeeding fiscal years.⁴⁴ Thus, with one notable exception, care must be taken to insure that transactions do not create obligations in one fiscal year with the intent to fund such obligations from appropriations to be made in the future, unless specifically authorized by law.

The permissible exception just mentioned is a limited one. A conditional contract obligates the government only if and when an appropriation is passed. Such contracts were discussed in a 1959 Comptroller General decision:

Although the government may not be obligated by contract or purchase, unless otherwise authorized by law, until an appropriation act providing funds with which to make payment has been enacted, a conditional contract which specifically provides that the government's liability is contingent upon the future availability of appropriations may be entered into prior to the enactment of an appropriation act⁴⁵

Provision is made in the Armed Services Procurement Regulation, Section 1318, for such conditional contracts.⁴⁶

Subsection (b) of Revised Statutes 3679, the second subsection that can result in criminal and administrative sanctions,⁴⁷ contains a

⁴⁴50 Comp. Gen. 589 (1971).

⁴⁵39 Comp. Gen. 340 (1959). See Armed Services Procurement Reg. § 1318 (1976 ed.) [hereinafter cited as ASPR]. The Supreme Court recognized, by implication, the propriety of conditional contracts in *Bradley v. United States*, 98 U.S. 104 (1878).

⁴⁶ASPR § 1318 provides:

Contracts Conditioned Upon the Availability of Funds

(a) *Fiscal Year Contracts.* To effect procurements promptly upon the beginning of a new fiscal year, it may at times be necessary to initiate a procurement properly chargeable to funds of the new fiscal year prior to the availability of such funds. In such instances, the clause in 7-104.91(a) shall be included in the contract. This authority shall be used only for operation and maintenance and continuing services (such as rentals, utilities, and items of supply which are not financed by stock funds) which are necessary for normal operation and for which the Congress consistently appropriates funds.

(b) *Contracts Crossing Fiscal Years.* A one-year requirement or indefinite quantity contract for services funded by annual appropriations may extend beyond the end of the fiscal year current at the beginning of the contract term provided that any specified minimum quantities are certain to be ordered in the fiscal year current at the beginning of the contract term (see 22-107). In this case, the clause in 7-104.91(b) shall be included in the contract. Also, a contract for expert or consultant services entered into in accordance with 22-204.2 and calling for an end product which cannot feasibly be subdivided for separate performance in each fiscal year may cross fiscal years.

(c) *Acceptance of Supplies or Services.* When either of the Availability of Funds clauses is used, the supplies or services shall not be accepted by the Government until funds are available to the contracting officer for the procurement and until the contracting officer has given notice to the contractor (to be confirmed in writing) of such availability. Records will be maintained to insure adequate administrative control of funds.

⁴⁷31 U.S.C. § 665(i)(1) (1970).

very different prohibition from those found in subsection (a). It prohibits acceptance of voluntary services on behalf of the United States:

(b) No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of **property**.⁴⁸

The Comptroller General enlarged the rule by saying no person is authorized to make himself a voluntary creditor of the United States by incurring and paying obligations of the government which he is not legally required or authorized to incur or to pay.⁴⁹ Thus, the subsection is directed not only at agents of the United States who accept voluntary services, but at the individuals rendering such services as well. The entire transaction, offer and acceptance of voluntary services, is forbidden.⁵⁰

However, it must be remembered that this prohibition relates to voluntary services rendered by private individuals without authorization of law and not to “. . . the assignment of persons holding office under the government to the performance of additional duties or the duties of another position without additional compensation.”⁵¹ Any service rendered to the United States in violation of R.S. 3679 does not obligate the government, legally or morally, to make any payment for such services.⁵² The prohibition was well, if somewhat restrictively, summarized in an early decision of the United States Supreme Court:⁵³

It would seem that Congress designed to put its mark of condemnation upon the practice of obtaining services from private parties, without incurring liabilities for them, such as was adopted in this case, when, on May 4, 1884, it declared that “Hereafter no department or officer of the United States shall accept voluntary service for the Government, or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving loss of human life or the destruction of property.” 23 Stat. 17, C. 37. The language used clearly indicates that the government shall not, except in the emergencies mentioned, place itself under obligations to any

⁴⁸*Id.* at § 665(b).

⁴⁹**Ms.** Comp. Gen. B-129004, Sept. 6, 1956.

⁵⁰**Ms.** Comp. Gen. B-177836, Apr. 24, 1973.

⁵¹23 Comp. Gen. 272 (1943); see also 30 Op. Att’y Gen. 51, 52 (1913); **Ms.** Comp. Gen. B-157719, Oct. 15, 1965.

⁵²13 Comp. Gen. 108 (1933); 10 Comp. Gen. 248 (1930); 3 Comp. Gen. 681 (1924); **Ms.** Comp. Gen. B-177836, Apr. 24, 1973; **Ms.** Comp. Gen. B-140736, 1 June 1961.

⁵³*United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888).

one. The principle condemned **is** the same, whether the party rendering the service does so without any charge or because paid by other parties. The government is forbidden to accept the service in either case.⁵⁴

There are three exceptions to the prohibition against accepting voluntary services. Two are in the statute while the other is discussed in the legislative history of R.S. **3679**, and in Comptroller General decisions.

Revised Statutes **3679** authorizes acceptance of voluntary services on behalf of the United States if there is an "emergency involving the safety of human life or the protection of **property**."⁵⁵ This exception is intended to reach "occasions when the life-saving organization of government might require the service of persons not regularly provided for by law."⁵⁶ The exception authorizes incurrance of deficiencies only for personal services needed to save lives or to protect **property**,⁵⁷ and the property protected must be government property.⁵⁸

Guidance for determining what constitutes an "emergency" within the meaning of the statute is found in Comptroller General decisions. For instance, in **1923** the Comptroller General considered a claim from the S.S. *Rexmore's* owners.⁵⁹ The *Rexmore*, a British vessel, while bound for London, received a message from the U.S. Army transport ship *Crook*. The *Crook* was taking water in a hold and appeared to be in danger of sinking. The *Crook* was carrying **1100** people. The *Rexmore* deviated from its course, reached the *Crook* and accompanied that vessel until the danger was past. Later the owners of the *Rexmore* filed a claim for 500 pounds. In allowing part of the claim, the Comptroller General stated:

The claim is one of services rendered under sudden emergency involving the loss of human life or the destruction of Government property. [R.S. **3679**] relates particularly to the acceptance of what is termed voluntary services and the implication of the statute is that claims against the United States arising under the conditions [here] stated may be considered. Such claims are more or less in the nature of equities and are generally for submission to the Congress . . . If, however, a tangible service appears to have been rendered for which definite compensation can be computed, there appears no reason why,

⁵⁴*Id.* at 305.

⁵⁵31 U.S.C. § 665(b) (1970).

⁵⁶15 CONG. REC. 3410-11 (1884) (remarks of Congressman Randall). *See also* 15 CONG. REC. 2143-4 (1884).

⁵⁷Ms. Comp. Gen. B-152554, Feb. 24, 1975.

⁵⁸*Id.*

⁵⁹3 Comp. Gen. 799 (1923).

if an appropriation is available, settlement and adjustment should not be made through this office.⁶⁰

At the other end of the spectrum, the Comptroller General in 1930 addressed a situation in which compensation for voluntary services was denied.⁶¹ In 1928 a Navy seaplane made a forced landing close to one of the Florida keys. The aircraft was intact and the pilot was in no danger. Mr. J. B. Easton was boating in the vicinity of the downed aircraft and offered to tow the plane 2½ miles to the nearest island. He was allowed to do so by the pilot. Later, Mr. Easton filed a claim for his services. The Comptroller General denied the claim saying:

The question . . . is whether the services should be considered as having been rendered under sudden emergency involving loss of human life or destruction of Government property so as to bring the said claim within the purview of section 3679, Revised Statutes

It appears to be definitely established . . . that . . . this case did not involve loss of human life or destruction of Government property.

The facts of record conclusively show that the services here in question were voluntary and rendered in a case not within the exceptions stated in [R.S. 3679] . . . The acceptance of voluntary service in contravention of the statute cannot form the basis of a legal claim against the United States.⁶²

The foregoing decisions indicate that payment for voluntary services because of an “emergency” as an exception to R.S. 3679 is permissible only in the event of a sudden life- or property-imperiling situation. Mere inconvenience or a potential future emergency is not enough.

The second exception derives from the statutory language which prohibits acceptance only of voluntary services “in excess of that authorized by law.” This language clearly permits officers or employees of the United States to accept voluntary services where there is express legislative authority to do so.⁶³ The legislative waiver must be specific.⁶⁴ In the words of the Comptroller General, “. . . the Congress, when it [believes] the use of voluntary services to be desirable, specifically [provides] for the acceptance of those services.”⁶⁵ General legislative authority to issue regulations to

⁶⁰*Id.* at 800–01. For a similar result see 3 Comp. Gen. 979 (1924).

⁶¹10 Comp. Gen. 248 (1930).

⁶²*Id.* at 249–50.

⁶³*See, e.g.*, MS. Comp. Gen. B-139261, June 26, 1959.

⁶⁴*Id.*; *see, e.g.*, 10 U.S.C. § 2602 (1976); Army Reg. No. 930–5, American Red Cross Service Program and Army Utilization (19 Nov. 1969, and all changes).

⁶⁵*Id.*

implement statutory duties is not sufficient to authorize acceptance of voluntary services based upon such regulations.⁶⁶ For instance, 10 U.S.C. § 3012 provides:

(b) The Secretary [of the Army] is responsible for and has the authority necessary to conduct all the affairs of the Department of the Army. . . .

(g) The Secretary may prescribe regulations to carry out his functions, powers and duties under this title.⁶⁷

The authority to issue regulations to carry out the very broad duties given to the secretary does not include the power to issue regulations that would permit the acceptance of voluntary services otherwise prohibited by 31 U.S.C. § 665(b).⁶⁸

In addition to the exemptions in R.S. 3679 permitting acceptance of and payment for voluntary services, another exception has developed from the legislative history of the act.⁶⁹ Acceptance of gratuitous services provided with the express consent of the government is not a violation of the statute if there is "some applicable provision of law authorizing the acceptance of services without compensation."⁷⁰ This concept of gratuitous services was addressed early by the Comptroller General in 1928. The Federal Trade Commission proposed to enter a contract for stenographic services. The services were to be furnished at no cost to the government. In holding that the services were not prohibited by subsection (b) of R.S. 3679, the Comptroller General observed:

The voluntary service referred to in R.S. 3679 is not necessarily synonymous with gratuitous service, but contemplates service furnished on the initiative of the party rendering the same without request from or agreement with, the United States therefor. Services furnished pursuant to a formal contract are not voluntary within the meaning of said section."

⁶⁶*Id.*

⁶⁷10 U.S.C. § 3012 (1976).

⁶⁸Ms. Comp. Gen. B-139261, June 26, 1959.

⁶⁹See Director of the Bureau of the Budget and Comptroller General of the United States, Report and Recommendations With Respect to the Anti-Deficiency Act and Related Legislation and Procedures to the Senate Committee on Appropriations (1947).

⁷⁰27 Comp. Gen. 194, 196 (1947).

⁷¹7 Comp. Gen. 810, 811 (1928). See also opinion of The Judge Advocate General of the Army, DAJA-AL 1978/2016, 6 Feb. 1978.

This decision was clarified somewhat in later Comptroller cases, notably that at **26 Comp. Gen. 956**. That decision involved a request by the Civil Service Commission to employ college students without compensation as part of an educational institution's "internship program." The Comptroller General first stated the general rule related to acceptance of gratuitous services:

. . . The prohibition against acceptance of voluntary services (contained in section **3679**, Revised Statutes) does not, of itself, prevent the acceptance of gratuitous services *if* otherwise legal, where the services are rendered by one who upon being appointed as a Government employee without compensation, agrees in writing, and in advance, that he waives any and all claims against the Government on account of such services⁷² (emphasis added)

26 Comp. Gen. 956, 958-59 (1947). It should be noted that a somewhat different rule applies to students and on-the-job studies. In United States Civil Service Commission Bulletin No. **309-15**, Subject: Providing **Worksite** Experience for Students in a Nonpay Status, July **12, 1974**, the rule concerning student studies is stated thusly:

It is consistent with the provisions of 31 U.S.C. § **665** for agencies to permit students in a nonpay status to have access to worksites in order to conduct studies and research related to agency **mission** and to receive orientation and **training**, along with exposure to **learning** projects related to their educational objectives. Arrangements for such worksite experiences are usually made in cooperation with individual educational institutions. Any agency entering into an **arrangement** to provide **worksite** experience for students in a nonpay status must make certain that the assignments do not involve the production of services which are covered by funds currently appropriated to the agency, or which are of a type that normally would be covered by appropriated funds.

This rule has been addressed, also, in a memorandum from the Chief, Labor and Civilian Personnel Law Office, Office of the Judge Advocate General, U.S. Army, **15 Nov. 1977**:

It is generally accepted that the law permits acceptance of volunteer services that do not involve the production of services which are covered by funds currently appropriated to the agency, or which are of a type that normally would be covered by appropriated funds. In this connection, it is consistent with the provisions of 31 U.S.C. § **665** to permit students to have access to government worksites in order to conduct studies and research related to the agency mission. . . . However, any agency that enters into such an arrangement to provide worksites for students in a nonpay status must make certain that the assignments do not involve the production of services. . . .

Additionally, many statutes exist that permit training by federal agencies of students in a volunteer or nonpay status. A good example is the Comprehensive Employment and Training Act of **1973**, Pub. L. **93-203**, **87 Stat. 839**, Dec. **28, 1973** (**29 U.S.C. § 801**, et seq.) [hereinafter referred to as CETA]. In a **1975** opinion (**54 Comp. Gen. 560**) addressing CETA, the Comptroller General concluded:

31 U.S.C. **665** (b) has been interpreted as barring "the acceptance of unauthorized services not intended or agreed to be gratuitous and, therefore, likely to afford a basis for a future claim on Congress" [citation omitted]. The enrollees or trainees here involved would be participating in a program authorized and funded pursuant to a Federal Statute [CETA] designed to utilize the Federal establishment to the maximum extent feasible in providing work and training opportunities for those in need thereof. Under the circumstances considering that the services in question will arise out of a program initiated by the Federal Government, it would be anomalous to conclude that such services are proscribed as being voluntary within the meaning of 31 U.S.C. § **665** (b). That is to say, it is our opinion that circumstances here involved need not be considered the acceptance of "voluntary services" within the meaning of that phrase as used in 31 U.S.C. § **665**(b).

Key language in the general rule is the requirement that gratuitous services when accepted must be “otherwise legal.” The Comptroller General does not elucidate. Does this mean that there must be express statutory provision for acceptance of gratuitous services, or merely that such services are not prohibited by some statute or regulation? A draft revision of Army Regulation **37-20** indicates that express statutory authority must exist.

A violation occurs when an officer or employee permits an individual to perform [some service], without pay, or other compensation . . . Such a violation is not avoided by the individual’s waiver of compensation, *unless there is specific legislative authority for this practice* . . .⁷³ (emphasis added)

There are two statutes applicable to the Army, **31 U.S.C. § 666** concerning reserve officers, and employment of experts and consultants under **5 U.S.C. § 3107**, that permit acceptance of gratuitous services.

Additionally, the Comptroller General further limits acceptance of such services to those instances when compensation for the services is fixed administratively and is paid from a lump sum appropriation.⁷⁴ Compensation may not be waived, according to the Comptroller General, where

. . . compensation is fixed for any office or position by or pursuant to statute and there exists no specific authority for the payment of an amount less than that specifically provided . . . the amount so fixed must be paid to the person filling the office or position and . . . there can be no valid waiver of all or any part of the **salary**.⁷⁵

This is reasonable because waiver of a statutory right to a salary fixed by Congress is dubious at best. In fact, the Court of Claims in *Miller v. United States*⁷⁶ labeled such attempts as void in violation of public policy.

Any bargain whereby, in advance of his appointment to an office with a salary fixed by legislative authority, the appointee attempts to agree with the individual making the appointment that he will waive all salary or accept something less than the statutory **sum**, is contrary to public policy, and should not be tolerated by the **courts**.⁷⁷

The conclusion to be drawn from the foregoing decisions is that services which can be accepted without violating R.S. **3679** are few

⁷³Draft Army Reg. No. **37-20**, Administrative Control of Appropriated Funds (Feb. 1977) [hereinafter cited as Draft **AR 37-20**].

⁷⁴**26** Comp. Gen. **956, 961** (1947).

⁷⁵*Id.* at **959**.

⁷⁶*Miller v. United States*, **103 F.413** (C.C.S.D.N.Y. 1900).

⁷⁷*Id.* at **415**.

and are hemmed in with numerous limitations. The Department of the Army has recognized these limitations in its proposed revision to Army Regulation 37-20.⁷⁸

Subsection (h) is the final punitive subsection of the Anti-Deficiency Act and provides:

NO officer or employee of the United States shall authorize or create any obligation or make any expenditure (A) in excess of an apportionment or reappropriation, or (B) in excess of the amount permitted by regulations prescribed pursuant to subsection (g) of this section.⁷⁹

This subsection is important for two reasons. First, it emphasizes the statute's primary thrust, prohibition of authorizations, obligations or expenditures in excess of an apportionment or reappropriation.⁸⁰ Apportionment, the method adopted by Congress to keep agencies within their respective appropriations, must be made in a manner that will prevent the need for deficiency or supplemental appropriations⁸¹ and, assuming apportionments are properly

⁷⁸Draft AR 37-20, supra n. 73, para. 13, provides:

A violation [of R.S. 3679] occurs when an officer or employee permits an individual to perform without pay, duties of the type which are or should be supported by a position, the compensation of which is fixed by the Classification Act (as opposed to pay rates established administratively under lump-sum appropriation). Such a violation is not avoided by the individual's waiver of compensation, unless there is specific legislative authority for this practice.

⁷⁹31 U.S.C. § 665 (h) (1970). Subsection (g) of that statute provides:

(g) Any appropriation which is apportioned or reappropriated pursuant to this section may be divided and subdivided administratively within the limits of such apportionments or reappropriations. The officer having administrative control of any such appropriation available to the legislative branch, the judiciary, the United States International Trade Commission, or the District of Columbia, and the head of each agency, subject to the approval of the Director of the Bureau of the Budget, shall prescribe, by regulation, a system of administrative control (not inconsistent with any accounting procedures prescribed by or pursuant to law) which shall be designed to (A) restrict obligations or expenditures against each appropriation to the amount of apportionments or reappropriations made for each such appropriation, and (B) enable such officer or agency head to fix responsibility for the creation of any obligation or the making of any expenditure in excess of an apportionment or reappropriation. In order to have a simplified system for the administrative subdivision of appropriations or funds, each agency shall work toward the objective of financing each operating unit, at the highest practical level, from not more than one administrative subdivision for each appropriation or fund affecting such unit.

⁸⁰31 U.S.C. § 665(c) (1) (1970) provides for apportionment:

(e) (1) Except as otherwise provided in this section, all appropriations or funds available for obligation for a definite period of time shall be so apportioned as to prevent obligation or expenditure thereof in a manner which would indicate a necessity for deficiency or supplemental appropriations for such period; and all appropriations or funds not limited to a definite period of time, and all authorizations to create obligations by contract in advance of appropriations, shall be so apportioned as to achieve the most effective and economical use thereof. As used hereafter in this section, the term "appropriation" means appropriations, funds and authorizations to create obligations by contract in advance of appropriations. [Apportionment is defined in Appendix A, *infra*.]

⁸¹*Id.*

made, the appropriation subject to those apportionments should remain intact. Naturally, if the apportionment is exceeded (a violation of R.S. 3679 itself), it is possible for the appropriation to become overobligated or overexpended. However, by requiring apportionments which restrict the amount of obligational authority available at any one time, the chance of exceeding an appropriation is far less than it would be otherwise.

Second, the statute prohibits actions "in excess of the amount permitted by regulations prescribed pursuant to subsection (g) of [R.S. 3679]."⁸² This provision provides executive agencies with discretion. The statute does not require authorizations, obligations, or expenditures in excess of fund subdivisions below the level of an apportionment to be treated as violations of R.S. 3679. However, because of the prohibition against actions in excess of those permitted by regulation, the head of an agency can elevate such excesses to the level of a statutory violation. This result is discussed in DoD Handbook 7220.9H. Citing subsection (h) of the Anti-Deficiency Act, the Handbook continues:

DoD Directive 7200.1 was issued pursuant to Section 3679, Revised Statutes, and has the force and effect of law Therefore, creating an obligation or making an expenditure in excess of the amount permitted by DoD Directive 7200.1, or violation of any provisions thereof, is as much, and as serious, a violation of the law as creating an obligation or making an expenditure in excess of an appropriation, apportionment, or reapportionment⁸³

DoD Directive 7200.1 establishes further fund subdivisions (allocations, allotments) the violation of which are violations of R.S. 3679. Thus, the Secretary of Defense has elected by his own regulations to exercise the discretion provided by statute and elevate violations of subdivisions of funds below an apportionment to the level of statutory violations.

B. NONPUNITIVE SECTIONS

The remaining subsections of Revised Statutes 3679 are important because they establish an intricate scheme for apportionment of appropriations. The basic requirement for apportionment is found in subsection (e)(1):

Except as otherwise provided in this section, all appropriations or funds available for obligation for a definite period of time shall be so

⁸² 31 U.S.C. § 665(h) (1970).

⁸³ Dep't of Defense 7220.9-H, Accounting Guidance Handbook, para. 21003.B.1, Aug. 1, 1973 [hereinafter cited as DoD 7220.9H].

apportioned as to prevent obligation or expenditure thereof in a manner which would indicate a necessity for deficiency or supplemental appropriations for such period; and all appropriations or funds not limited to a definite period of time, and all authorizations to create obligations by contract in advance of appropriations, shall be so apportioned as to achieve the most effective and economical use thereof.⁸⁴

A 1957 Comptroller General opinion discussing this subsection indicated that apportionment is required not only to prevent the need for deficiency or supplemental appropriations, but to insure that there is no drastic curtailment of the activity for which the appropriation is made.⁸⁵ Such curtailment could occur, absent an apportionment, by an agency expending its entire appropriation before the end of a fiscal year. Congress would then be placed in the position of granting an additional appropriation or allowing the activity to cease.

It is evident from reading the apportionment subsections of R.S. 3679 (31 U.S.C. § 665(c)-(g)) that Congress wants to insure that executive agencies establish controls that will implement the apportionment scheme. Heads of departments and agencies must conduct government operations during a fiscal year within the limits of appropriations and expend such appropriations at a rate which will not exhaust the funds before the end of the period for which they are appropriated.⁸⁶

IV. IMPLEMENTATION OF THE ACT

Subsection (g) of R.S. 3679⁸⁷ requires the heads of agencies to establish systems of administrative controls to implement the act.

⁸⁴31 U.S.C. 5 665(c) (1) (Supp. V 1975).

⁸⁵36 Comp. Gen. 699 (1957). Apportionments and reapportionments which might involve the necessity of deficiency or supplemental appropriations can be made under certain circumstances. Subsection (e) (1) of R.S. 3679 (31 U.S.C. § 665 (e) (1)) provides:

No apportionment or reapportionment, which in the judgment of the officer making such apportionment or reapportionment, would indicate a necessity for a deficiency or supplemental estimate shall be made except upon a determination by such officer that such action is required because of (A) any laws enacted subsequent to the transmission to the Congress of the estimates for an appropriation which require expenditures beyond administrative control; or (B) emergencies involving the safety of human life, the protection of property, or the immediate welfare of individuals in cases where an appropriation has been made to enable the United States to make payment of, or contributions toward, sums which are required to be paid to individuals either in specific amounts fixed by law or in accordance with formulae prescribed by law.

⁸⁶See 38 Comp. Gen. 501 (1959).

⁸⁷31 U.S.C. 5 665 (g) (Supp. V 1975).

The systems must do two things: (1) keep obligations and expenditures within the amount of an apportionment, and (2) enable the agency head to fix responsibility for making any obligation or expenditure in excess of an apportionment.⁸⁸ Such administrative controls are present at various levels within the executive branch.

The first step in the ladder of R.S. 3679 implementation is the Office of Management and Budget [hereinafter referred to as OMB]. It was only after the creation of OMB⁸⁹ that significant strides were made to insure compliance with the Anti-Deficiency Act.⁹⁰ It was this office that began to effect accounting improvements, establish tighter fund controls and simplify appropriation structure ~OMB implementation of R.S. 3679 is found in OMB Circular A 34 [hereinafter referred to as A-34].⁹²

Guidelines and controls are provided by A 34 that strengthen the apportionment process, which as previously mentioned⁹³ is the bulwark of the Anti-Deficiency Act's provisions to prevent deficiencies in appropriations.⁹⁴ Included in A 34 are “. . . instructions on budget execution—financial plans, apportionments, reapportionments, deferrals, proposed and enacted rescissions, systems for administrative control of funds, allotments, operating budgets, reports on budget execution, and reports on violations of section 3679 of the Revised Statutes.”⁹⁵

The portion of A-34 related to administrative systems for control of funds establishes certain minimum standards for such systems. There must be controls that:

- (1) are not inconsistent with any accounting procedures prescribed by law or pursuant to law,
- (2) restrict obligations or expenditures against each appropriation to the amount of apportionments or reapportionments made for each appropriation,
- (3) enable the agency head to fix responsibility for the creation of any obligation or the making of any expendi-

⁸⁸See generally Interim Report on Effectiveness and Enforcement of the Anti-Deficiency Act, to the House Comm. on Appropriations, 84th Cong., 1st Sess. 1505 (1955) [hereinafter cited as Interim Report, 1955].

⁸⁹Formerly the Bureau of the Budget.

⁹⁰J. BURKEHEAD, GOVERNMENT BUDGETING 344-45 (1958).

⁹¹Senate Comm. on Government Operations, Financial Management in the Federal Government, 87th Cong., 1st Sess. 13138 (1961).

⁹²OMB Cir. A 34, Instructions on Budget Execution, July 15, 1976.

⁹³See discussion, *supra* at 20.

⁹⁴See 31 U.S.C. 99 665(c) through (g). See also text above note 79, *supra*.

⁹⁵OMB Cir. A-34, *supra* note 92, at 3.

ture in excess of an apportionment or reappportionment, and

(4) provide for prompt reporting of violations of implementing regulations or the statute.⁹⁶

The Department of Defense (DoD) issued DoD Directive **7200.1**, August 18, 1955, prescribing a system of administrative controls, as required by law and consistent with OMB guidance. The directive's stated purpose is essentially that of the statutory mandate:

B. The purpose of [DoDD **7200.11** is to (a) prescribe Department of Defense regulations designed to restrict obligations and/or expenditures against each appropriation or other fund to the amount available therein, and, where apportionments or reappportionments of appropriations are required to be made, to the amounts of such apportionments or reappportionments, and (b) enable the Assistant Secretary of Defense (Comptroller) to fix responsibility for the creation of any obligation or the making of any expenditure in excess of an appropriation, apportionment, reappportionment, or *subdivision* thereof.⁹⁷ (emphasis added)

The key language in the DoD directive's statement of purpose is "subdivision thereof." This extends the prohibitions and reporting requirements of the act to fund subdivisions below the apportionment level. The directive provides for two further subdivisions of funds. The Secretary of each military department, or designated official of other Department of Defense components, must allocate apportioned funds to operating agencies. The total allocations "within each appropriation shall not be in excess of the amount indicated in the apportionment document as being available for use for each apportionment period."⁹⁸ The head of each operating agency that receives an allocation must then make allotments in specific amounts, in writing, to the heads of installations or other organizational units.⁹⁹ Again, the total of sums allotted cannot exceed the amount of allocations available for the period in question. The heads of installations may make suballotments, if required. Graphically, and in

⁹⁶31 U.S.C. 5665(g) (Supp. V 1975). See also OMB Cir. A-34, *supra* note 92, Part 111.

⁹⁷DoD Dir. 7200.1, *supra* note 40, para. II.B. This directive is under revision.

⁹⁸*Id.* para. VI.

⁹⁹*Id.* para. VI.A.

simplified form, the scheme operates as shown in Table 2. The net effect of the directive is to make an overobligation, overauthorization or overexpenditure by an installation of its allotment a violation of R.S. 3679. Instead of a limited number of potential violations at the apportionment level, a larger number of potential violations is possible at the numerous installations receiving allotments. This is the reason that Section IX of the directive places responsibility to assure that obligations and expenditures will not exceed allotments or suballotments directly on "the head of each installation or other DoD organization that receives allotments or suballotments."¹⁰⁰ In theory at least, the violations, although potentially more numerous, should involve less money by being below the apportionment level.

Section XII of the directive addresses violations of R.S. 3679. It requires that violations of the statute or the directive be reported to the head of the military department in which the violation occurred. Upon receipt of the report, the agency head, on the basis of the report and other appropriate data, will take "appropriate disciplinary action, including, when circumstances warrant, suspension from duty without pay, removal from office where applicable, or appro-

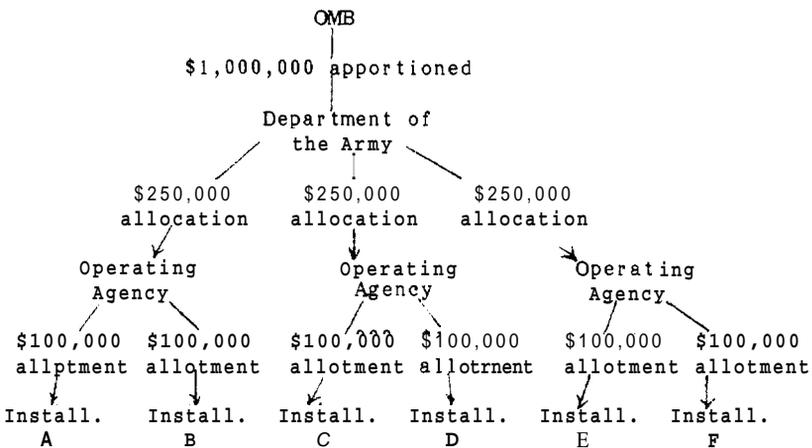


TABLE 2. Subdivision of Funds

¹⁰⁰*Id.* para. IX.

priate action under the Uniform Code of Military Justice.”¹⁰¹ The directive does not describe exactly what “other appropriate data” not contained in the report of violation may be relied upon. Certainly any extraneous information used by the agency head or a subordinate commander to determine the disciplinary action that is “appropriate” must necessarily be rather limited. The person subject to the discipline may have had no opportunity to examine such data. The DoD directive requires only that the report contain a statement from the responsible officer of any extenuating circumstances related to the violation.¹⁰² Any data relied upon that is not in the report should be made available to the individual subject to potential discipline.

Paragraph B in the same Section XII describes the information that must be developed and put in reports of violation under R.S. 3679. The military departments have implemented these reporting requirements in their various regulations.¹⁰³ The final substantive paragraph of the directive requires military departmental implementation of the directive. It reads:

XIV. Implementation

This directive shall be implemented in each military department by the promulgation of instructions . . . all subsequent changes, additions or deletions to such instructions shall be submitted to the Assistant Secretary of Defense (Comptroller) for approval prior to issuance.¹⁰⁴

The Department of the Army has complied with this requirement in Army Regulation 37-20.¹⁰⁵

Paragraph 16 of the Army Regulation¹⁰⁶ provides a detailed discussion of actions that are violations of Revised Statutes 3679. In many cases subparagraphs of paragraph 16 merely paraphrase the Anti-Deficiency Act, OMB Circular A-34, or DoD Directive 7200.1. For instance, subparagraph 16c provides:

¹⁰¹*Id.* para. XII. It should be noted that military personnel are more vulnerable to criminal prosecution for violations of R.S. 3679 than are their civilian counterparts who are not subject to the Uniform Code of Military Justice. Civilians can be prosecuted for criminal violations of R.S. 3679 only if such violations are knowing and willful. However, military personnel could be prosecuted for dereliction of duty or breach of a lawful regulation.

¹⁰²*Id.* para. XIIB(2) (g).

¹⁰³*See, e.g.*, AR 37-20, *supra* note 40, paras. 17 & 18. See also Air Force Reg. 177-16, Administrative Control of Appropriations (15 May 1975).

¹⁰⁴DoD Dir. 7200.1, *supra* note 40, section XIV.

¹⁰⁵AR 37-20, *supra* note 40.

¹⁰⁶*Id.*

Any . . . employee of the Department of the Army who involves the Government in a contract or other obligation for the payment of money for any purpose, either in advance of appropriations or without adequate funding authority to cover the obligation, is in violation of Revised Statutes 3679. . . .¹⁰⁷

Note subsection (a) of the Anti-Deficiency Act:

No officer or employee of the United States shall make or authorize an expenditure or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose¹⁰⁸

Other subparagraphs of paragraph 16 are explanatory in nature. In this vein, subparagraph 16b emphasizes that subparagraph (a) of the Anti-Deficiency Act, just quoted, requires consideration of both obligations and authorizations to obligate, singly or in combination. Subparagraph 16(b) states: “. . . incurrence of obligations or issuance of authorizations to incur obligations, either separately or combined, in excess of fund availability authorized by any subdivision of appropriated funds is a violation of Revised Statutes 3679.”¹⁰⁹ Some other subparagraphs however do more than paraphrase or explain the statute. A few of these subparagraphs create interpretive problems that deserve considered attention. Foremost of the villains in this respect is subparagraph 16a which provides:

Except when authorized by the provisions of Revised Statutes 3732 (Sec. III), or other applicable laws, a violation of Revised Statutes 3679, as amended, and of this regulation will occur when any action results in an overdistribution, overobligation, or overexpenditure of funds in any appropriation or subdivision thereof. . . .¹¹⁰

This portion of subparagraph 16a does no more than reiterate the prohibitions established by subparagraph (a) of R.S. 3679, a distribution of funds being nothing more than an authorization to obligate funds.¹¹¹ However, the regulation continues by further defining a violation as any action that “exceeds any statutory or *administrative limitation properly imposed upon the particular transaction or fund* involved.”¹¹² (emphasis added) The emphasized

¹⁰⁷*Id.* para. 16c.

¹⁰⁸31 U.S.C. § 665(a) (1970).

¹⁰⁹AR 37-20, *supra* note 40, para. 16b.

¹¹⁰*Id.* para. 16a.

¹¹¹See discussion of subsection (a), R.S. 3679, *supra* at 8.

¹¹²AR 37-20, *supra* note 40, para 16b.

language seems to expand significantly the number and type of potential R.S. 3679 violations. It appears to make the violation of any limitation imposed upon a fund or a fund transaction a violation of R.S. 3679. Some support for this interpretation is found in the DoD Accounting Guidance Handbook, paragraph 21003.B.5:

[A]ny absolute restriction or limitation imposed administratively which modifies or restricts the terms of fund authorizations (i.e., limits the authority to issue allocations, allotments or suballotments, or authority to incur obligations or make expenditures), in effect also constitutes a separate subdivision of funds, and shall be treated as such. . . . 113

If this is the effect, in fact, of para. 16a, AR 37–20, many transactions otherwise totally unrelated to fund control become limits for fund control purposes. For example, Army Regulation 105–16, a communications regulation, prescribes policies and procedures and defines responsibilities related to communications equipment to insure that such equipment complies with national and international regulations governing the use of the “electromagnetic spectrum.”¹¹⁴ It establishes procedures for obtaining a radio frequency allocation. Obviously, fund control to prevent overobligation or overexpenditure under an appropriation is not the critical aim of this regulation. However, the following provision of AR 105–16 could be construed as an “administrative limitation . . . upon . . . funds” within the meaning of paragraph 16a, AR 37–20: “Funds for the development, purchase, lease, or use of equipment or systems the operation of which is dependent upon the use of the radio frequency spectrum, will not be released to the contracting officer until DA . . . has formally approved an RF [radio frequency] allocation. . . .”¹¹⁵ Both regulations are poorly written. Why tie fund expenditure to the limitation in AR 105–16? Why make it possible under paragraph 16a of AR 37–20 to construe language such as that just quoted as a fund limitation the violation of which would also be a violation of the Revised Statutes 3679? By the careless drafting used in both regulations, an unnecessary question of regulatory construction arises, namely, is AR 105–16 to be considered an administrative limitation of the use of funds?

Fortunately, guidance is available to resolve these questions. On 30 May 1975 in a memorandum for the Comptroller of the Army, the

¹¹³DoD Handbook 7220.9–H, *supra* note 83, para. 21003.B.5.

¹¹⁴Army Reg. No. 105–16, Radio Frequency Allocations For Equipment Under Development, Production, and Procurement (20 Dec. 1973).

¹¹⁵*Id.* para. 1–7a.

Assistant Secretary of the Army (Financial Management) (ASA(FM)) reinterpreted “administrative limitation of funds” and specifically paragraph 21003.B.5, DoD handbook 7220.9–H. The memorandum corrected an “apparent Army misinterpretation of policy contained in paragraph 21003.B.5, DoD Handbook 7220.9–H.”¹¹⁶ The memorandum continued with the proper construction:

It has long been our policy to limit RS 3679 violations to those cases where monetary restrictions are related directly to the funding/ budgetary control process or required by specific statute [T]he exceeding of an absolute limitation on use of funds imposed by DoD, DA or commanders in funding channels constitutes a violation of R.S. 3679.¹¹⁷

Thus, to be a fund limitation within the meaning of AR 37–20, paragraph 16a, and R.S. 3679, a limitation must be:

- (1) included on or as a part of a funding document,
- (2) implementing a specific statute such as the minor construction act,¹¹⁸
- (3) imposed by a regulation or a directive that implements 3679, or
- (4) directed within funding/budgetary channels.

Oblique support for the Assistant Secretary’s interpretation limiting the number of fund limitations is found in the House of Representatives Interim Report on Enforcement of the Anti-Deficiency Act. The report concluded that one of the common situations leading to violations of that act included “use of an excessive number of allotments [fund limitations] too restrictive in amount.”¹¹⁹ Certainly, without the limiting interpretation of the Assistant Secretary, the sweeping language of 16a concerning “administrative limitations” on the use of funds would create innumerable fund limitations subject to violation within the meaning of R.S. 3679. The Army would be rapidly marching backward into the very error noted by the House of Representatives in the Interim Report in 1955. However, following the ASA(FM) interpretation, the Army is

¹¹⁶Memorandum for the Comptroller of the Army, from the Assistant Secretary of the Army (Financial Management), subject: Section 3679 of the Revised Statutes, As Amended (31 U.S.C. § 665), 30 May 1975 [hereinafter cited as ASA (FM) Memorandum].

¹¹⁷*Id.*

¹¹⁸10 U.S.C. 2674 (1970), as amended (Supp. V 1975).

¹¹⁹Interim Report, 1955, *supra* note 88, at 2.

freed from the meaningless exercise of reporting "violations" of the Anti-Deficiency Act because of failure to comply with regulations not within the funding channels, such as AR 105-16 on communications equipment.

A proposed revision to AR 37-20¹²⁰ has incorporated the ASA(FM) interpretation by deleting any reference to administrative limitations. The successor paragraph in the draft AR to 16a is paragraph 9a which reads in pertinent part: ". . . [A] violation of Revised Statutes 3679, as amended, . . . will occur when any action . . . exceeds any statutory limitation imposed upon the particular transaction or funds involved."¹²¹ (emphasis added)

Compare with the current paragraph 16a: ". . . [A] violation of Revised Statutes 3679, as amended, . . . will occur when action . . . exceeds any statutory or administrative limitation properly imposed upon the particular transaction or funds involved."¹²² (emphasis added) Miraculously, the wound in the flesh of the Army heals. With the elimination of two simple words the draft regulation eliminates a multitude of potential violations created by the broad sweep of the present Army regulation, but never intended by Congress when it passed R.S. 3679. Congress was little concerned when passing the Anti-Deficiency Act with radio frequencies or their manner of assignment. There is no statute requiring reports to Congress of such transgressions unless paragraph 16a of AR 37-20 is applied too broadly. With the change proposed by the draft regulation, the danger of such faulty application of the provisions of the Anti-Deficiency Act is removed.¹²³

Until revision of Army Regulation 37-20, reliance must be placed upon current Department of the Army policy to avoid the pitfalls of too many administrative fund subdivisions. The current policy is stated in a message¹²⁴ issued in October 1977:

1. Effective 1 October 1977 (FY 78), limitations subject to the provisions of R.S. 3679 will be shown on the fund

¹²⁰Draft AR 37-20, *supra* note 73.

¹²¹*Id.* at para. 9a.

¹²²AR 37-20, *supra* note 40, para. 16a.

¹²³The Draft Revision to AR 37-20 has not been approved by DoD or OMB. According to informal discussion between the authors and officials of DoD, it is not likely that the proposed revision will be approved in its present form.

¹²⁴Message, DTG 080372 Oct. 77, issued by DACA-FAA-6, subject: Identification of Absolute Limitations Falling Under the Provisions of Section 3679 of the Revised Statutes, as amended (31 U.S.C. § 665) [hereinafter cited as Absolute Limitations Message].

authorization document (DA 1323 or other authorized fund issuance document). Other constraints established at any organizational level within the Army are considered to be and are designated as targets.

2. Limitations on funding documents established at Department of the Army level must be perpetuated by funding documents issued to lower echelons throughout the Army if applicable. Under no circumstances will additional limitations be added to the fund authorization documents or a lower limit be established for the specific limitations established at departmental level without prior approval of the Comptroller of the Army or his designee. Such requests for each particular limitation must fully justify the need for an additional limit not prescribed by the Department of the Army. This policy does not affect the normal fund distribution of suballocations, allotments, or suballotments.

3. The "targets" referred to in paragraph 1 are administrative controls and are not absolute limitations. It is possible to exceed such "targets" without incurring a violation of R.S. 3679. However, such "targets" are not less important than absolute limitations from an Army command viewpoint. Exceeding of "targets" will be reported to the level of authority which established the "target" and violators will be subject to normal command discipline. Additionally-exceeding of a target could be the proximate cause for exceeding an actual administrative subdivision of funds or violation of other control subject to R.S. 3679. The responsibility for a violation of R.S. 3679 can be determined only by an investigation. In the event that culpability is determined by the investigation against the individual who exceeded the target, that individual could be subject to the punitive provisions of R.S. 3679 in addition to any disciplinary action imposed for exceeding the target.

4. All actions on alleged violations which do not meet the foregoing criteria and the limitation specified on funding documents issued in FY 1978 will be discontinued. Reports of alleged violation in process at HQDA will be reviewed in light of these guidelines and those not meeting

the criteria will be cancelled by notification of no violation.¹²⁵

The policy requires any administrative limitation the violation of which will result in a violation of R.S. 3679 to be included on fund authorization documents. Any limitation on such document at the Department of the Army level must be perpetuated on funding documents issued to lower echelons of the Army. The net effect of the message is to pass the limitations down to the allotment or sub-allotment level.¹²⁶ Statutory limitation on the use of funds must also be followed.

Administrative limitations imposed on the use of funds other than those included on funding documents are to be treated as targets. Pursuant to the message, violation of a target is not a violation of Revised Statutes 3679. The concept of using targets for managerial control of funds is authorized by OMB Cir. A-34.¹²⁷

An elaborate and costly allotment system by itself does not provide adequate data for reviewing the efficiency and economy with which funds are used. When a need exists for the establishment of classifications or subdivisions below apportionment and allotment control levels, they *should be specifically provided for in the system and distinguished from allotments and suballotments for the purpose of controlling apportionments pursuant to the provisions of section 9679 of the Revised Statutes.*¹²⁸ (emphasis added)

Additionally, the Comptroller General has approved the concept of targets:

[I]n accordance with the provisions of the 1956 amendment [to R.S. 3679], departments and agencies are directed to discontinue the type of appropriation control associated with subdivision of allotments into a multitude of pockets of obligational authority which cannot be exceeded, as a means of governing the rate of obligation . . .

The proposal to authorize allottees to subdivide allotments into allowances [targets] as a means of meeting their operating needs rather than to serve as an appropriation control . . . conforms to the provisions of. . . [R.S. 3679].¹²⁹

In the October 1977 message the Department of the Army meets, finally, the urgings of Congress and the provisions of OMB circular A-34 by adopting a system of controls below the allotment level

¹²⁵*Id.*

¹²⁶See Army Reg. No. 37-2, Distribution of Funds and Fund Documentation, para. 8a (5 Feb. 1965) [hereinafter cited as AR 37-2].

¹²⁷OMB Cir. A-34, *supra* note 92.

¹²⁸*Id.* at § 31.2

¹²⁹37 Comp. Gen. 220, 224-25 (1957).

which, if exceeded, does not result automatically in a violation of R.S. 3679. For instance, suppose an installation receives an allotment for \$100,000, operation and maintenance (O&M) funds. During the course of the fiscal year numerous obligations will arise against that allotment. Further, because the allotment is provided to the installation on a fund authorization document, it may contain limitations on the use of the funds (*e.g.*, minor construction limits; family housing restrictions). Pursuant to the October message, these funding restrictions must be obeyed. But what about limitations below the allotment level? Suppose a purchase request is issued to contract for janitorial services. The request cites \$40,000 of the O&M allotment as available for the procurement. A contract is awarded for \$50,000. Is R.S. 3679 violated by this transaction?

A citation of funds is not generally considered to be a fund distribution.¹³⁰ It takes place below the allotment level and hence under the October message is a "target." The target amount was \$40,000 which was exceeded by \$10,000 when the obligation (contract) was incurred. At this point, no R.S. 3679 violation exists because "it is possible to exceed . . . targets without incurring a violation of R.S. 3679."¹³¹ The office that established the target must be notified that the target was exceeded.¹³² Of course, violators may be disciplined.¹³³

A different result is reached if, at the time \$40,000 was reserved for the janitorial contract, \$55,000 of the \$100,000 O&M allotment was reserved, obligated or disbursed for other purposes. The October 1977 message indicates that ". . . exceeding a target could be the proximate cause for exceeding an actual administrative subdivision of funds or violation of other control subject to R.S. 3679."¹³⁴ An allotment is a subdivision of funds.¹³⁵ A violation of R.S. 3679 occurs when ". . . any action results in an overdistribution, overobligation, or overexpenditure of funds in any appropriation or subdivision thereof. . . ."¹³⁶ The cause of the violation is the failure to stay within the "target" set for janitorial services.

¹³⁰ AR 37-2, *supra* note 126, at para. 8b. *See also* AR 37-20, *supra* note 40, para. 8c.

¹³¹ Absolute Limitations Message, *supra* note 124; 37 Comp. Gen. 220 (1957).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ DoD Dir. 7200.1, *supra* note 40, para. IV.D; AR 37-2, *supra* note 126, para. 8a; AR 37-20, *supra* note 40, paras. 5d and 8a.

¹³⁶ AR 37-20, *supra* note 40, para. 16a.

The approach adopted by the October message is desirable. It provides a means to control funds without becoming enmeshed in the Anti-Deficiency Act. The only disquieting fact is that the message does not amend or supersede Army Regulation 37-20. Although the message and the regulation can be applied consistently, some conflicts may arise. For example, the message provides: "Under no circumstances will additional limitations be added to the Fund Authorization Documents or a lower limit be established for the specific limitations established at Departmental level without prior approval of the Comptroller of the Army or his designee." ¹³⁷ This seems to forbid establishing fund subdivisions below the allotment or suballotment level without prior approval from the Comptroller of the Army. However, paragraph 8e of AR 37-20 states:

Authority to obligate granted by means of any document other than a Program Funding Authorization Schedule (DA Form 1323) will not be considered a subdivision of funds within the meaning of Revised Statute 3679 unless—
* * *

(3) The document contains a positive statement such as, "obligations incurred pursuant to this authority shall not exceed \$. . . without either prior written approval of the issuer or an amendment to this authority."¹³⁸

Thus, if a fund citation is issued containing the above or similar language, a subdivision of funds is created notwithstanding Department of the Army policy. Violation of the limit established by such a fund citation would be a violation of R.S. 3679,¹³⁹ notwithstanding the policy established by the October message. The answer to the potential conflict, of course, is to insure that the requirements established by the message are strictly followed.

Although subparagraph 16a is the more troublesome provision of the current AR 37-20, two other subparagraphs, 16c and 16.1, deserve mention. Both raise interesting interpretative and practical problems. Subparagraph 16c provides:

Any officer, enlisted person, or civilian employee of the Department of the Army who involves the Government in any contract or other obligation for the payment of money for any purpose, either in advance of appropriations or without adequate funding authority to cover the obligation, is in violation of Revised Statutes 3679. . . .¹⁴⁰

¹³⁷ Absolute Limitations Message, *supra* note 124.

¹³⁸ AR 37-20, *supra* note 40, para. 8e.

¹³⁹ *Id.* See 31 U.S.C. § 665(h) (1970).

¹⁴⁰ *Id.* para. 16c.

Similar language is found in subsection (a) of Revised Statutes 3679¹⁴¹ and in OMB Circular A-34.¹⁴² The key question raised by the above quoted provision is whether the prohibition against involving "the Government in a contract or other obligation for the payment of money . . . without adequate funding authority . . ." includes irregular or unauthorized procurements. If such actions are to be considered obligations without adequate funding authority, innumerable actions by government employees who have no authority to bind the United States could potentially result, nonetheless, in violations of R.S. 3679. Under such an interpretation, many fact patterns could be anti-deficiency violations. For instance, in a rather famous case, *Williams v. United States*,¹⁴³ a Major Russell, without any authority to do so, entered into an agreement with a paving contractor to seal-coat certain roads on an Air Force installation. No funds were available at the time the agreement was made. Eventually, the contractor filed a claim against the United States. The Court of Claims found a contract based upon implied ratification of Major Russell's actions by an authorized contracting officer. At no time did the Court raise the issue of or discuss R.S. 3679, even though Major Russell's actions ultimately "obligated" the United States "without adequate funding authority to cover the obligation." A number of other examples exist.¹⁴⁴ Additionally, the proposition that irregular procurement actions are R.S. 3679 violations, if carried to the ultimate, logical extreme, would also encompass contract actions now considered to be "constructive changes" under existing contracts.

A cursory examination of OMB Circular A 34 tends to support the interpretation that irregular procurements are R.S. 3679 violations. The circular provides at page ten: "In addition to orders and contracts for future performance, obligations incurred include: (a) the value of goods and services accepted and other liabilities arising against the appropriation or fund without a formal order . . ." ¹⁴⁵ The OMB Circular is reinforced by the DoD Accounting Guidance

¹⁴¹31 U.S.C. § 665(a) (1970).

¹⁴²OMB Cir. A-34 note 92 at § 71.1(b).

¹⁴³*Williams v. United States*, 127 F. Supp. 617 (Ct. Cl. 1965).

¹⁴⁴*See, e.g., White Construction Co. v. United States*, 135 Ct. Cl. 126 (1966); *Standard Store Equipment Co., ASBCA 4348, 58-2 BCA 1902 (1958)*. These cases and others are discussed in an article by Colonel Harvey B. Meyer appearing in an impact letter from HQ, U.S. Army Test & Evaluation Command, subject: Impact of Current Developments on the Legal Mission of DARCOY, Feb. 1977.

¹⁴⁵OMB Cir. A-34, *supra* note 92, at § 22.1.

Handbook: “. . . [A]ny officer or employee of the Department of Defense, who without proper authority, involves the Government in a contract or other obligation for the payment of money for any purpose, is in violation of R.S. 3679.”¹⁴⁶ Before leaping to the unnecessary conclusion that every irregular procurement results in a violation of R.S. 3679, it should be noted that neither the Circular nor the Handbook mention timing of the obligation. When does an obligation occur? Does it arise when the unauthorized or irregular action takes place, or only when an individual (e.g., contracting officer), the General Accounting Office, or a court of competent jurisdiction recognizes a legal liability on the part of the United States?

If the former, a violation of R.S. 3679 would occur, not only under the OMB Circular and DoD guidance, but pursuing another chain of logic as well. Title 41, section 11 provides that “no contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment.” Army Regulation 37-20, subparagraph a states: “a violation of Revised Statutes 3679, as amended, . . . will occur when any action . . . exceeds any statutory . . . limitation properly imposed upon the particular transaction. . . .”¹⁴⁷ Subsection (h) of the Anti-Deficiency Act makes a violation of AR 37-20 a violation of the statute.¹⁴⁸ Irregular procurements are not supported by an appropriation at the time the unauthorized act occurs. In terms of subparagraph (c) of AR 37-20, adequate funding authority would be lacking for the obligation.

Such actions take place with little or no thought being given to correct contractual procedures, let alone the mundane necessity of obtaining funds to support the purchase. For example, in 1972 an officer at a recruiting station in Gallup, New Mexico, ordered drapes for the U.S. Army recruiting station. The officer had no authority to bind the Government. However, neither this nor the lack of money to pay for the goods stayed the officer in the performance of what he perceived as his duty.¹⁴⁹ The action, following the train of reasoning just discussed, would be a violation of 41 U.S.C. § 11, AR 37-20, DoD Handbook 7220.9-H and 31 U.S.C. § 665(h).

Although tempting, this line of reasoning is faulty because it fails to recognize certain very important factors that surround irregular

¹⁴⁶DoD 7220.9-H, *supra* note 83, para. 21002.B.2.

¹⁴⁷A similar provision is found in DoD 7220.9-H, *supra* note 83, para. 21002.B.5 (Aug. 1, 1972).

¹⁴⁸31 U.S.C. § 665(h) (1970).

¹⁴⁹Ms. Comp. Gen. B-179019, Sept. 24, 1973.

procurements. First, the United States cannot be bound except by and to the extent of the authority vested by statute or regulation in its agents.¹⁵⁰ The classic statement of this rule is found in *Federal Crop Insurance Corp. v. Merrill*:

The Government may carry on its operations through conventional executive agencies or through corporate firms created for defined ends. [citations omitted] Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority . . . And this is so even though . . . the agent himself may have been unaware of the limitations upon his authority.¹⁵¹

The first assumption in any irregular procurement is that the person dealing with the unauthorized employee or officer is responsible for ascertaining the scope of the employee's authority or for bearing the risk of not doing so. The presumption is that the United States is under no obligation to pay an individual for goods and services supplied on the request of an unauthorized government official. At most, those who supply goods or services to the United States at the behest of unauthorized officials have merely a claim against the government for the reasonable value of those goods or services. Further, such a claim denotes a controversy, not an admitted liability.¹⁵²

A matter in controversy, where the Government is not definitely liable for the payment of money, is not recordable as an obligation.¹⁵³ It is only when the claim is recognized by some individual or agency with authority to do so that an obligation arises against the United States. Various Comptroller General opinions indicate that claimants against the United States, where the claims are based upon unauthorized procurement actions, are entitled to payment on a quantum meruit or a quantum valebat basis only if two things are

¹⁵⁰*Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); *Sutton v. United States*, 266 U.S. 574 (1921); *Filor v. United States*, 76 U.S. 45 (1869); *Ms. Comp. Gen. B-179019*, Sept. 24, 1973.

¹⁵¹*Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947).

¹⁵²*Grant v. United States*, 92 F. Supp. 369, 374 (D.C.N.C. 1950). See also *Army Reg. No. 37-21*, Establishing and Recording of Commitments and Obligations, para. 2-23b (26 May 1977) [hereinafter cited as AR 37-21]. Further support for this position is found in the DoD Handbook 7220.9-H, *supra* note 83, para. 22113.D, which states: "A document evidencing a present legal liability of the Government where such liability has been determined to exist by competent legal authority shall be recorded as an obligation in the amount of the liability when such determination is made."

established. First, the Government must receive a benefit, and second, any actions by unauthorized officials must be ratified or approved by an authorized official.¹⁵⁴ Moreover, such events are a recordable obligation only after being reduced to writing.¹⁵⁵ Until such time, no funds are legally obligated and the United States is not liable to make any payment.¹⁵⁶ Neither factor can be missing if the United States is to be liable for payment.

For example, in *Jung Won Kim*¹⁵⁷ the Comptroller General found both factors were missing—no ratification by an authorized official and no showing of benefit to the United States—and denied a claim against the Government for use of a stream bath facility. In another case, *Moore's Auto Body and Paint, Inc.*,¹⁵⁸ the Government received a benefit, but the order was not made or confirmed by an authorized government official. Moore had a contract to remove scratches and dents and to paint and mark ten military vehicles. During contract performance, Moore discovered major body damage to one of the vehicles. Moore alleged that someone in the Automotive Equipment Maintenance Section of the military facility authorized Moore to make the necessary repairs to the vehicle. The contracting officer was never contacted. Moore completed the work and requested payment of \$190. Obviously the United States received a benefit. Just as obviously, Moore incurred additional costs. However, the Comptroller General denied recovery because the work performed was not called for in the contract and the unauthorized order to perform the work was never ratified by an authorized official. The Comptroller General opinion stated: "Without ratification by an authorized government contracting official, we cannot agree to the payment of the \$190.00."¹⁵⁹

Thus, an obligation cannot arise against the United States merely because an unauthorized official has procured goods or services. Much more is necessary, and it does not follow that an Anti-Deficiency Act violation occurs, *eo instanti*, with every irregular procurement. However, an irregular procurement may cause a vio-

¹⁵³35 Comp. Gen. 185 (1955).

¹⁵⁴Ms. Comp. Gen. B-179019, Sept. 24, 1973; Ms. Comp. Gen. B-166439, May 2, 1969.

¹⁵⁵31 U.S.C. 9 200 (1970). See *American Renaissance Lines, Inc. v. United States*, 494 F.2d 1059 (D.C.C. 1974); 20 *The Government Contractor*, para. 93 (1978).

¹⁵⁶Ms. Comp. Gen. B-157360, Aug. 11, 1965.

¹⁵⁷Comp. Gen. Dec. B-182781, 1975-2 CPD para. 78.

¹⁵⁸Comp. Gen. Dec. B-189304, 1977-2 CPD para. 72.

¹⁵⁹*Id.* at 2.

lation of R.S. 3679 if, after ratification or other legally binding recognition (e.g., by the Comptroller General), no funds are available to liquidate the obligation.

The final paragraph of AR 37-20 that deserves consideration is subparagraph 16.1 which provides: "Commanders responsible for administrative control of funds will take necessary action to establish internal controls and accounting procedures adequate to prevent violations of Revised Statutes 3679" ¹⁶⁰ This portion of the subparagraph, if read in a cursory manner, appears to place strict liability on a commander for violations of the Anti-Deficiency Act. The commander must create a system that is "adequate to prevent violations of Revised Statutes 3679." It seems to follow that if a violation occurs, the system was inadequate and the commander failed to accomplish the task set by subparagraph 1. Or is this the necessary conclusion? A perfect system could be designed that would always prevent violations *if* people were perfect. Unfortunately, utopia does not exist. People make mistakes that result in R.S. 3679 violations. This fact is recognized by the second sentence of subparagraph 16.1: "Such action will include procedures for periodic review of internal controls and accounting reports to reveal any violations which may have occurred during the accounting period."¹⁶¹

Thus, subparagraph 16.1 should not be read as an easy out for determining responsibility for R.S. 3679 violations, e.g., as placing responsibility on the commander in every instance. Each case must be judged on its own facts because subparagraph 16.1 requires a commander to do only two things:

- (1) create a system of controls designed to prevent R.S. 3679 violations, and
- (2) to monitor that system to pick up any violations that may occur.

If a violation does occur, it must be analyzed to determine whether the cause of the violation was systemic or human error. Even if systemic, a commander cannot be automatically named responsible for the violation based on subparagraph 16.1. Did the commander take time to inform himself about the fund control system? Were internal control, accounting and monitoring procedures in operation? Did the

¹⁶⁰ AR 37-20, *supra* note 40, para. 161.

¹⁶¹ *Id.* See discussion of determining responsibility for violations of R.S. 3679, *infra* at 89.

¹⁶² 31 U.S.C. § 665(a) (1970).

commander have notice of weaknesses or flaws in the system? If so, what action, if any, did the commander take to correct the weaknesses? Finally, and most important, if the system was faulty with the knowledge of the commander, did the system fault cause the Anti-Deficiency violation? If not, the commander cannot be held responsible based upon subparagraph 16.1.

V. OBLIGATION OTHERWISE AUTHORIZED BY LAW

Subsection (a) of R.S. 3679¹⁶² prohibits obligations or expenditures in excess of an appropriation, and obligations in advance of appropriations “*unless such contract or obligation is authorized by law.*”¹⁶³ (emphasis added) The term “authorized by law,” in fact subsection (a) of R.S. 3679, was addressed in an early opinion of the Attorney General:

“he meaning of the provision is very plain. It declares that the department shall have power to bind the Government by contract only in two cases: (1) where the contract is expressly authorized by law; and (2), where there is an appropriation already made large enough to fulfill it. In the first case there is an express power to contract for the work For instance, if Congress impowers the Secretary [of an agency] to contract for [certain work], the Secretary may make a contract at once for the whole work; *and even though no appropriation has yet been made to meet it*, the faith of the Government will be pledged to make it good. . . .”¹⁶⁴ (emphasis added).

Although this summary of the effect of the language “authorized by law” is accurate, the application of the provision to specific facts is more difficult. Undoubtedly, a statute can waive the provisions of R.S. 3679 and authorize obligations to be made that, absent the statutory waiver, would be violations of R.S. 3679.¹⁶⁵ Additionally, a statute may direct an agency to perform functions or carry out programs for which no appropriation is available. Obligations incurred as a result of such direction are deemed to be “beyond the administrative control of the agency”¹⁶⁶ and any deficiencies resulting from such “directed” obligations are not violations of the Anti-Deficiency Act.¹⁶⁷

¹⁶³ *Id.*

¹⁶⁴ 9 OP. ATT'Y GEN. 18-19 (1857).

¹⁶⁵ See 35 Comp. Gen. 263, 266 (1955).

¹⁶⁶ 44 Comp. Gen. 89 (1964).

¹⁶⁷ *Id.* at 90. See 31 U.S.C. § 665(e) (1) (1970), *supra* note 85.

The statute relied upon to invoke the Anti-Deficiency Act exception "authorized by law," must require an agency to take a specific action, or follow a course of action, that results in obligations which ultimately exceed an appropriation or otherwise create a deficiency.¹⁶⁸ Further, where the Congress intends to authorize administrative officers to incur obligations in excess of appropriations ". . . such authority is generally given in clear and unmistakable terms."¹⁶⁹ However, Congressional history can be relied upon to establish the necessary Congressional intent.¹⁷⁰ Where such authority is found, obligations incurred are "otherwise authorized by law" and do not violate R.S. 3679.¹⁷¹ Absent such "unmistakable" intent, a violation of R.S. 3679 will result.¹⁷²

R.S. 3732 (41 U.S.C. § 11) is an excellent example of a statute that authorizes the making of contracts or the creation of obligations without an adequate appropriation, or indeed any appropriation. It provides:

No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, *except in the Departments of the Army, Navy, and Air Force, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year* (emphasis added).¹⁷³

The authority granted to the military departments by R.S. 3732 is seldom discussed or interpreted. There are few opinions dealing with the effect of the authority. The dissent in the Floyd Acceptances, a Supreme Court case often cited when the authority of government agents is in question, found time to allude to R.S. 3732. Citing the statute, the dissent explained the rationale for the existence of the authority granted therein to create obligations without an appropriation:

. . . [C]ontracts for the subsistence and clothing of the Army and Navy by the Secretaries are not tied up by any necessity of an appropriation or law authorizing it. The reason for this is obvious. The Army and Navy must be fed, and clothed, and cared for at all times and places, and especially when in distant service. The Army in

¹⁶⁸See 39 Comp. Gen. 422 (1959); 31 Comp. Gen. 238 (1951).

¹⁶⁹39 Comp. Gen. 422, 426 (1959).

¹⁷⁰Ms. Comp. Gen. B-159141, Aug. 18, 1967.

¹⁷¹39 Comp. Gen. 422, 426 (1959); see also *New York Airways, et al. v. United States*, 177 Ct. Cl. 800 (1966).

¹⁷²See 31 Comp. Gen. 238 (1951).

¹⁷³41 U.S.C. § 11 (1970), commonly referred to as Revised Statutes 3732.

Mexico and Utah are not to be disbanded and left to take care of themselves.¹⁷⁴

Any obligation created pursuant to R.S. 3732 does not violate the Anti-Deficiency Act¹⁷⁵ provided that only the items specified therein are procured¹⁷⁶ and that only bona fide necessities of the current year are purchased.¹⁷⁷

Additional constraints on the use of R.S. 3732 authority to create obligations without an appropriation are found in the Department of Defense (DoD) implementation of that statute. DoD Directive 7220.8 provides that it is DoD policy to “. . . limit the use of the authority [provided in R.S. 3732] to emergency circumstances, the exigencies of which are such that *immediate* action is imperative and such action cannot be delayed long enough to obtain sufficient funds to cover the procurement or furnishing of clothing, subsistence, forage, fuel, quarters, transportation or medical and hospital supplies for necessities of the current fiscal year.”¹⁷⁸ The directive also indicates that the use of this authority is a violation of the Anti-Deficiency Act unless the obligation created to procure the items specified in R.S. 3732 was made “(1) in emergency circumstances . . ., and (2) such procurements are not in excess of the necessities to relieve the period of emergency, and provided, however, the necessities of such period do not exceed the necessities of the current fiscal year.”¹⁷⁹ A violation of R.S. 3679 will result if any of the restrictions in the directive are not met. Thus, if an emergency arises during which one of the military departments, without adequate appropriations, procures an item specified in R.S. 3732, but buys more than needed to meet the emergency, the directive and R.S. 3679 are violated. The procurement is no longer deemed to be authorized by law, because the purchase is in excess of the authority granted in 41 U.S.C § 11 as implemented. Conversely, if an item specified in R.S. 3732 is procured in sufficient quantities to

¹⁷⁴The Floyd Acceptances, 74 U.S. 666 (1869).

¹⁷⁵15 OP. ATT'Y GEN. 124 (1876).

¹⁷⁶15 OP. ATT'Y GEN. 209 (1877). At times items are added to those specified in the statute. For example, the Dep't of Defense Appropriation Act, 1964, Pub. L. 88-149, § 512(b), Oct. 17, 1963, 77 Stat. 254 provided: “Upon determination by the President that such action is necessary, the Secretary of Defense is authorized to provide for the cost of an airborne alert as an excepted expense in accordance with the provisions of Revised Statutes 3732 (41 U.S.C. 11).”

¹⁷⁷15 OP. ATT'Y GEN. 124 (1876).

¹⁷⁸DoD Dir. 7220.8, Policies and Procedures Governing the Use of the Authority of Section 3732, Revised Statutes, § IV.A, Aug. 16, 1956 [hereinafter cited as DoD 7220.8].

¹⁷⁹*Id.* at para. IV.D.

meet the emergency but such quantities exceed the “necessities of the current year,” a violation of the Anti-Deficiency Act will occur. Obviously, the authority provided by R.S. 3732 is intended to be used very sparingly.

The strict limitations on use of the authority contained in **41 U.S.C. § 11** are due partially, at least, to the historic circumstances in which the statute was first promulgated. R.S. 3732 was enacted in **1861** during a period of armed conflict.¹⁸⁰ It was designed to assist in the prosecution of a war effort. Thus, restrictions on its use, particularly in peacetime, are necessary, but the DoD directive is somewhat draconian. Why add controls, the violation of which are also violations of the Anti-Deficiency Act, when Congress was satisfied with one limit: necessities of the current year? The DoD restrictions on the use of R.S. 3732 authority to times of emergency and then only to procure so much of an item as is necessary to meet the emergency are wise. However, there is no need, as the DoD directive does,¹⁸¹ to make violations of these restrictions concomitant violations of the Anti-Deficiency Act. The purpose of R.S. 3732 and of the Anti-Deficiency Act can be achieved by better, less detailed implementation and a greater effort to comply with those requirements than by heaping unnecessary limitations on procurement actions the violation of which are then considered to be violations of **R.S. 3679**.¹⁸² DoD implementation of R.S. 3732 and R.S. 3679 should be structured so that only specific violations of the limitations in R.S. 3732—procuring other than the specified items or, if specified, procuring more than the necessities of the current year—result in concurrent violations of R.S. 3679.

VI. RELATED STATUTES

Congress has the right to place limits on its appropriations and when it does, “its will expressed in the law should be explicitly followed.”¹⁸³ The Anti-Deficiency Act is only one such limitation and it cannot be applied in a vacuum. It is surrounded by many statutes,

¹⁸⁰ Act of Mar. 2, 1861, ch. 84, § 10, 12 Stat. 220.

¹⁸¹ DoD Dir. 7220.8, *supra* note 178, § IV.D.

¹⁸² See Interim Report 1955, *supra* note 88, which discusses the propensity of the Dep’t of Defense to impose unnecessary multiple limitations on the use of funds.

¹⁸³ 37 Comp. Gen. 155, 158 (1957), *citing* 13 OP. ATT’Y GEN. 289. See also *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958), wherein the court stated at 132: “. . . [B]eyond challenge is the power of the Federal Government to impose reasonable conditions on the use of the federal funds. . .” *citing* *Buman v. Parker*, 348 U.S. 26 (1954).

closely related, that affect the method, manner and legality of obligation and disbursement of public money. Failure by a government official or employee to comply with the requirements of any one of this larger number of related statutes could result in a violation of R.S. 3679.

A. *BONA FIDE NEEDS, 31 U.S.C. 712a*

Title 31, section 712a, United States Code, is one of this group of statutes. It is often referred to as the bona fide need statute and provides:

Except as otherwise provided by law, all balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year.¹⁸⁴

The Office of Management and Budget Circular A-34 contains the following statement of the rule enunciated in section 712a.

In reporting orders for supplies and services, agencies should bear in mind . . . the general rule for *lawfully* obligating a fiscal year appropriation is that the supplies or services ordered are intended to meet a bona fide need of the fiscal year in which the need arises or to replace stock issued in that year.¹⁸⁵

This statement of the rule is somewhat awkward. A better description is in Army Regulation 37-21:

Components of the Department of the Army will determine that the goods, supplies, or services required pursuant to contracts entered into or orders placed obligating funds for an annual or multiple year appropriation are intended to meet a bona fide need of the period for which the funds were appropriated or to replace stock used in that

The statute has been construed in numerous decisions of the Comptroller General. He has indicated that 31 U.S.C. § 712a is designed . . . to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which

¹⁸⁴31 U.S.C. § 712a (1970).

¹⁸⁵OMB Cir. A-34, supra note 92, at § 25.1D.

¹⁸⁶Army Reg. No. 37-21, Establishing and Recording of Commitments and Obligations, para. 1-6d(1) (26 May 1977) [hereinafter cited as AR 37-21]. Note that the regulation specifically includes multiple year funds within the coverage of 31 U.S.C. § 712a. See also DoD 7220.9-H, supra note 83, at para. 22103.C.1.

they are made.”¹⁸⁷ In other opinions the General Accounting Office¹⁸⁸ has expressed the general rule established by § 712a in many ways. In volume 37 of the Comptroller General opinions the rule is stated thusly: “Concerning the matter of obligation of appropriations by contract, it is the general rule that the subject matter of the contract must concern a need arising within the fiscal year covered by the appropriation sought to be charged.”¹⁸⁹

In volume 48 the rule was expressed somewhat differently: “[Contracts] executed and supported under authority of fiscal year appropriations can only be made within the period of their obligation availability and must concern a bona fide need arising within such fiscal year availability.”¹⁹⁰

The Comptroller General has also stated the rule of § 712a by merely paraphrasing the statute: “. . . [A]n appropriation made specifically for the service of a particular year . . . may be used, in the absence of statutory authorization otherwise, only for payment of expenses properly incurred during the fiscal year or for payments under contracts properly made within that year.”¹⁹¹ An expense to be properly incurred or a contract to be properly made must be firm and complete within the fiscal year of the appropriation to be charged.¹⁹² If an order, requisition, or contract is improperly executed or is not complete, the appropriation will not be obligated by the defective effort.¹⁹³

The issue of when a bona fide need arises is a factual determination that depends upon the circumstances of each case.¹⁹⁴ A critical factor in making that determination is the time when the need arises, not when the need is ultimately fulfilled.¹⁹⁵ Thus, although supplies purchased and used during a fiscal year, or services rendered during a fiscal year, are necessarily bona fide needs of that year, supplies need not be delivered or services performed in a particular fiscal year to be a bona fide need of the year. For example, a

¹⁸⁷50 Comp. Gen. 589, 590 (1971). See also 56 Comp. Gen. 142, 154 (1976); 37 Comp. Gen. 155 (1957).

¹⁸⁸As used in this paper, the General Accounting Office and the Comptroller General are synonymous.

¹⁸⁹37 Comp. Gen. 60, 62 (1957).

¹⁹⁰48 Comp. Gen. 497 (1969).

¹⁹¹37 Comp. Gen. 155, 157 (1957); 29 Comp. Gen. 436 (1941).

¹⁹²44 Comp. Gen. 695, 697 (1965), citing 32 Comp. Gen. 436 (1952). See also 37 Comp. Gen. 861, 863 (1958).

¹⁹³44 Comp. Gen. 695, 696 (1965). See also 21 Comp. Gen. 1159 (1942).

¹⁹⁴44 Comp. Gen. 339, 401 (1965); 37 Comp. Gen. 155, 159 (1957).

¹⁹⁵37 Comp. Gen. 155 (1957); 20 Comp. Gen. 436 (1941).

present need may exist for equipment or material that cannot be delivered until a subsequent fiscal year because of production or fabrication requirements. The equipment or material is treated **as** a bona fide need of the year in which the need arose. The Comptroller General has stated the “production/fabrication” leadtime rule as follows:

If . . . material will not be obtainable on the open market at the time needed for use, a contract for its delivery when needed may be considered a bona fide need of the fiscal year in which the contract is made [rather than the fiscal year in which delivery is made], provided the time intervening between contracting and delivery is necessary for production and fabrication of the **material**.¹⁹⁶

Army Regulation **37-21** seems to indicate that the leadtime involved can include procurement leadtime as well as the time actually necessary to fabricate the **item**.¹⁹⁷ In any event, the time between contract execution and delivery must not be unreasonably long, usually not over a **year**.¹⁹⁸

An obligation or contract to replace stock used in a particular fiscal year is treated **as** a bona fide need of the year in which the order for such stock is made rather than the time that the stock is **delivered**.¹⁹⁹ Stock in such cases generally refers to readily available common use standard items and not items manufactured especially for a particular purpose and which require a lengthy period for **production**.²⁰⁰ The amount of stock ordered should be limited to the quantity that is reasonably necessary to maintain a current running supply for the ordering activity until new orders can be placed in the next fiscal **year**.²⁰¹ If the stock is held by the ordering activity an unreasonable length of time after delivery, instead of issuing the stock to the ultimate user, the propriety of the purchase will come into question. Arguably, if stock is held too long after it is ordered, the stock requirement was not a bona fide need of the year in which the order was placed or the contract was **executed**.²⁰²

The application of the bona fide needs rule to service contracts is, if anything, more difficult than applying it to supply contracts. Gen-

¹⁹⁶ 37 Comp. Gen. 155, 159 (1957).

¹⁹⁷ **AR** 37-21, *supra* note 186.

¹⁹⁸ 38 Comp. Gen. 628 (1959); 37 Comp. Gen. 155 (1957).

¹⁹⁹ 32 Comp. Gen. 436 (1958); 29 Comp. Gen. 489 (1950); 21 Comp. Gen. 825 (1941); 2 Comp. Gen. 1159 (1923).

²⁰⁰ 44 Comp. Gen. 695 (1965).

²⁰¹ 2 Comp. Gen. 825 (1923).

²⁰² **Ms.** Comp. Gen. B-134277, Dec. 18, 1957.

erally, it is considered that a bona fide need for services does not arise until the services are rendered. Thus, where a contract is entered in one fiscal year . . . for services which are not performed or required to be performed until the succeeding fiscal year, the appropriation current at the time the services are rendered is properly chargeable with the cost."²⁰³ However, the mere fact that a contract for services covers part of two fiscal years does not always require payment thereunder to be split between the fiscal years upon the basis of the services actually performed during each fiscal year.

The Comptroller General has indicated that the fiscal year appropriation current at the time a contract is executed is chargeable for all the services rendered under that contract provided the purchase is a single undertaking determinable at the time the contract is entered, both as to services needed and the price to be paid therefor.²⁰⁴ Army Regulation 37-21 reiterates the rule: "Obligations incurred for contracts or orders which provide for services with or without an end product or 'package' and which constitute a single undertaking will be obligated in the fiscal year the contract is awarded. Such contracts must meet the bona fide need criteria."²⁰⁵ For example, in 1943 the General Accounting Office declared that the planting and cultivation of rubber trees to first production was a single undertaking payable from the appropriation current when the contract was executed even though performance would occur in more than one fiscal year.²⁰⁶ AR 37-21 gives as an example of a single undertaking a contract "for painting buildings which requires six months and crosses fiscal years."²⁰⁷

In addition to the "single undertaking rule," the Department of Defense (DoD) Appropriation Act provides specific authority to enter contracts for certain services and to pay for those services

²⁰³ Ms. Comp. Gen. B-174226, Mar. 13, 1972, citing 37 Comp. Gen. 319 (1955); 27 Comp. Gen. 764 (1948); 21 Comp. Gen. 1159 (1941).

²⁰⁴ 23 Comp. Gen. 370 (1943).

²⁰⁵ AR 37-21, *supra* note 186, para. 2-5a(1). A further discussion of the concept is found in 24 Comp. Gen. 195, 196 (1944):

The fact that a contract covers a part of two fiscal years does not necessarily mean that payments thereunder are for splitting between the two fiscal years involved upon the basis of services actually performed during each fiscal year. In fact, the general rule is that the fiscal year current at the time the contract is made is chargeable with payments under the contract, although performance thereunder may extend into the ensuing fiscal year [citations omitted]. However, that rule can apply only where an appropriation current at the time may be considered as obligated for the performance of the entire contract.

²⁰⁶ 23 Comp. Gen. 370 (1943).

²⁰⁷ AR 37-21, *supra* note 186, para. 2-5a(3).

with the appropriation current at the time the contract is executed. The authority granted also authorizes the contracts to cross from one fiscal year into another.²⁰⁸ Section 807 of the DoD Appropriation Act states that funds appropriated by that act are available for “payments under contracts for maintenance of tools and facilities for twelve months beginning at any time during the fiscal year.”²⁰⁹ Until quite recently, there was some question about the type of services that fall within the scope of this provision. What, exactly, does “maintenance of tools and facilities” include? A Department of the Army circular²¹⁰ issued in 1970 discussed an identical provision in the then current appropriation act. After first stating the authority granted, the circular continues: “Examples of contracts for maintenance of facilities are custodial services and buildings and ground maintenance. Other contracts for maintenance of facilities, including fire protection, may be placed under this authority.”²¹¹ The circular provided additional guidance for the use of this and similar appropriation authority. Funds current at the time the contract performance is to commence are to be charged for the entire contract amount “to the extent that that amount is fixed or reasonably ascertainable.”²¹² New work added to the contract is to be charged to the funds current when the work is added.²¹³ If the contract extends over more than one fiscal year and the entire contract is to be charged to the funds current at the time the contract is executed,²¹⁴ performance must commence within the same year that the contract is awarded.²¹⁵ Application of the authority is limited to services of a recurring nature.²¹⁶

²⁰⁸The authority was first granted in the DoD Appropriation Act, 1965, E 506(f), Pub. L. 88-446, 78 Stat. 465 (1964). The DoD Accounting Guidance Handbook, DODH 7220.9-H, *supra* note 83, para. 22103.C.1, discussed this statutory authorization:

. . . [I]f the provisions of [an] appropriation act make [annual or multiple-year] appropriations available for payments under contracts for specified services for periods beyond the period for which the appropriation is otherwise available, the contract for such services extending into the ensuing period (fiscal year) may be charged to the appropriation current at the time the contract is entered into.

²⁰⁹DoD Appropriation Act, 1978, Pub. L. 95-111, § 807(f), 91 Stat. 886 (1977).

²¹⁰DEPT OF ARMY CIR. No. 751-2-96, § 111, 24 July 1970 [hereinafter cited as DA CIR. 715-2-96].

²¹¹*Id.* at § 111.2.

²¹²*Id.* at § 111.4.

²¹³*Id.* at § 111.4.

²¹⁴If an availability-of-funds clause is used, performance can be delayed, but the appropriation to be charged is that current when performance begins.

²¹⁵DA CIR. 715-2-96, *supra* note 210, at § 111.4.

²¹⁶*Id.*

The most recent implementation of the authority to execute contracts for the maintenance of tools and facilities in the manner prescribed by the appropriation act is Army Regulation 37-21 which states:

An example of statutory authority to record obligations in the year of contracting is that contained in the annual appropriation acts which authorize the issuance of contracts for the maintenance of tools and facilities (includes custodial contracts) for 12 months or less at any time during the fiscal year.²¹⁷

The regulation adds very little to the earlier circular except to note that the contract period authorized can be less than the full 12 months prescribed by the appropriation act.

Another example of statutory authority contained in appropriation acts is one that authorizes payments under leases "for real or personal property for twelve months beginning at any time during the fiscal year."²¹⁸ The general rule related to leases of property is that the term of the lease cannot extend beyond the period of availability of the appropriation under which they are executed.²¹⁹ Under that principle

... leases ... may, in the absence of specific statutory authority otherwise, be regarded as binding upon the United States only to the end of the fiscal year and, therefore, may not be regarded as obligating the appropriation under which they are made beyond the fiscal year for which the appropriation is made. No difference is perceived in this respect between the rental of real estate and the rental of personal property.²²⁰

Of course, the appropriation act furnishes the "specific authority" necessary for the lease to extend over more than one fiscal year and one would think that the authority so granted would be easy to use. This is not the case, however, because of the most recent Army Regulation 37-21. That regulation, addressing the appropriation authority related to the lease of property, states: "Another example of a special statutory authority is that contained in annual appropriation acts authorizing payments under leases (rental contracts) of 12 months or less at any time during the fiscal year *provided [the] lease does not include a termination clause.*"²²¹ (emphasis added).

The regulation does assist somewhat in the application of the statutory authority by clearly indicating that rental is synonymous

²¹⁷ AR 37-21, *supra* note 186, para. 2-5a (2).

²¹⁸ DoD Appropriation Act, 1978, § 807 (g), Pub. L. 96-111, 91 Stat. 886 (1977).

²¹⁹ See, e.g., *Leiter v. United States*, 271 U.S. 204 (1926).

²²⁰ 24 Comp. Gen. 195, 197 (1944).

²²¹ AR 37-21, *supra* note 186, para. 2-5a (2).

with lease and that the contract term can be less than a full 12 months. However, with the addition of the emphasized portion of the regulation quoted above, help in application stops and the regulation becomes a hindrance.

What is intended by the addition of the proviso that the lease cannot contain a termination clause? This proviso is not contained in the statute. If applied literally, few leases could use the authority provided by the statute because almost every lease executed by the United States will contain a termination for convenience or similar clause. In fact, even if intentionally omitted, a termination clause otherwise required by law to be included in a contract will be read into that contract by operation of law.²²²

The provision in the regulation is based upon language in the Department of Defense Accounting Guidance Handbook which provides:

Rental Agreements and Leases, Real and Personal Property. The amount recorded as an obligation shall be based on the agreement or lease or on a written administrative determination of the amount due under the provisions thereof.

1. Under a rental agreement which may be terminated by the Government at any time without notice and without incurring any obligation to pay termination costs, the obligation shall be recorded each month in the amount of the rent for that month.

2. Under a rental agreement providing for termination without cost upon giving a specified number of days notice of termination, an obligation shall be recorded upon execution of the agreement in the amount of rent payable for the number of days notice called for in the agreement. In addition, an obligation shall be recorded each month in the amount of the rent payable for that month. When the number of days remaining under the lease term is equal to the number of days advance notice required under it, no additional obligation shall be recorded.

Under a rental agreement providing for a specified dollar payment in the event of termination, an obligation shall be recorded upon execution of the agreement in the amount of the specified minimum dollar payment. In addition, an obligation shall be recorded each month in the amount of the rent payable for that month. When the amount of rent remaining payable under the terms of the agreement is equal to the obligation recorded for the payment in the event of termination, no additional monthly obligation shall be recorded.

Under a rental agreement which does not contain a termination clause, an obligation shall be recorded at the time of its execution in the total amount of rent specified in the agreement even though the

²²²See *G. L. Christian and Associates v. United States*, 320 F. 2d 345 (Ct. Cl. 1963).

period of the lease (12 months maximum) extends into the subsequent fiscal year.²²³

Army Regulation 37–21, implementing the DoD Handbook, states:

(a) Obligations for rents under rental agreements which contain termination provisions will be established and recorded on the first day of the first month of the period covered by the lease. The obligation will be recorded for the first month's rent and *also* for the *termination* period.²²⁴ (emphasis added)

If the lease period crosses fiscal year lines, the obligation will be recorded **as** follows:

. . . [T]he funds previously obligated to cover the number of days' notice, not to exceed the number of days remaining to the end of the contract, will be obligated in sufficient time . . . to permit the use of such funds for other requirements. On 1 October of the new fiscal year, the obligations will be established and recorded in an amount to cover 1 month of rent, together with a new obligation for the number of days' advance notice [required by the **lease**].²²⁵

The limitations placed by DoD and DA on the manner of recording obligations under leases of real or personal property appear to be premised upon the theory that such treatment of obligations “. . . accurately portrays the true liability of the government at a given point in time.”²²⁶ The statement seems accurate, but fails to stand up under close analysis. For example, suppose a lease is executed for rental of personal property. The term of the lease is specified as twelve months. The lease also contains a provision whereby the government can terminate the lease sixty days after notice of intent to terminate. The argument for recording the obligation for one month plus the sixty days is that because the government has the right to terminate and thus limit its obligation to **90** days that is the government's actual liability. Not so.

The government is liable for **12** months under the lease *until* the right to terminate is actually exercised. Only then is the government's liability reduced to one month's rent plus the termination period. At that time the government's obligation should be reduced to the amount necessary to fund the remainder of the lease. This approach is consistent with termination actions in general.²²⁷ Ad-

²²³ DoD Handbook 7220.9H, *supra* note 83, para. 22104.H.

²²⁴ AR 37–21, *supra* note 186, para. 2 4 g (2) (a).

²²⁵ *Id.* para. 2–8g (2) (a) 2.

²²⁶ Memorandum for Mr. Phillip H. Miller, Deputy Director for Procurement, DSS–W, subject: Funding of Rental Agreements with Termination Clause, from the Office of the Comptroller of the Army, 4 Nov. 1977.

²²⁷ See DoD Handbook 7220.9–H, *supra* note 83, para. 22114.B. AR 37–21, *supra* note 186, para. 2–10c.

mittedly this approach is not consistent with current OMB,²²⁸ DoD²²⁹ or DA²³⁰ guidance. However, the DoD appropriation act²³¹ provision certainly supplies adequate authority to change the policy position so as to provide contracting activities with the flexibility necessary to lease real or personal property at any time for a period of 12 months.²³²

It should be noted that, in any event, the termination clauses addressed above by the Accounting Guidance Handbook and AR 37-21 do not include standard termination for convenience clauses required for use in DoD contracts by the Armed Services Procurement Regulation.²³³ Such clauses do not contain termination periods.²³⁴ The right to terminate provided by these clauses may be exercised whenever it is in the best interest of the United States.²³⁵ The amount of liability that may result from such termination is not fixed when the contract is executed. Hence, the amount of the termination cost under such clauses cannot be obligated with one month's rent to reflect the total apparent liability of the government under the lease at any point in time.

Without doubt the amount of the government's actual liability under leases that have a termination for convenience clause is the entire lease price. Thus, obligations under leases for real or personal property that contain termination for convenience clauses, rather than clauses establishing a termination period, should be charged against the appropriation current when the lease is executed for the entire lease period.²³⁶ Of course the lease period cannot exceed the 12 month term permitted by the appropriation act.

Although the rules related to what is or is not a bona fide need of a particular fiscal year seem to be interminable, a few additional concepts must be mentioned. The rule established by section 712a is also applicable to multiple-year appropriations.²³⁷ Such appropria-

²²⁸See OYB Cir. A-34, *supra* note 92, § 25.1.E.

²²⁹See DoD Handbook 7220.9H, *supra* note 83, para. 22104.H.

²³⁰See AR 37-21, *supra* note 186, para. 2-8g.

²³¹DoD Appropriation Act, 1978, Pub L. 95-111, § 807(j), 91 Stat. 886 (1977).

²³²The Office of General Counsel, Dep't of Defense, recognized by implication that the language of the DoD Appropriation Act, 1978, *supra* note 231, because of its permissive nature, could be used to alter the current policies for obligating funds under leases. Memorandum of Office of Assistant General Counsel (Fiscal Matters), Dep't of Defense, subject: Funding of Rental Agreements with Termination Clause, Dec. 7, 1977.

²³³See, e.g., ASPR § 7-103.21.

²³⁴See, e.g., ASPR 9 § 7-103.21, 7-203.10, and 7-302.10.

²³⁵*Id.*

²³⁶DoD Appropriation Act, 1978, Pub. L. 95-111, § 807(j), 91 Stat. 886 (1977).

²³⁷See 55 Comp. Gen. 768, 773 (1976).

tions are available for obligation for the period of the appropriation as specified in the appropriation act so long as the obligation relates to a bona fide need arising against the appropriation during its period of **availability**.²³⁸

Legislation authorizing advance payments under a contract does not overcome the limitations established by 31 U.S.C. § 712a. Absent specific direction to the contrary, such legislation merely authorizes advance payments for bona fide needs that arise during the period of an appropriation's **availability**.²³⁹ It is not authority to contract for future needs.

Work incidental to completion of contracts properly entered during a fiscal year are chargeable to the appropriation current at the time the original contract was **executed**.²⁴⁰ In other words, a change or modification within the general scope of a contract are to be funded with the same appropriation that supported the original **contract**.²⁴¹

It is essential to understand the full import of § 712a because that statute is intimately connected with the prohibitions of the Anti-Deficiency Act. Section 712a prohibits the obligation of a current appropriation to liquidate overobligations of prior **years**.²⁴² The bona fide need is that of the prior year. Additionally, current appropriations cannot be used to pay for bona fide needs of future fiscal **years**.²⁴³ To the extent a contract purports to obligate an appropriation for a future need, it violates not only § 712a, but R.S. 3679²⁴⁴ as well by creating an obligation in advance of an appropriation legally available therefor.²⁴⁵

A good illustration of this concept is found in volume 56 of the Comptroller General Decisions.²⁴⁶ The General Services Administration entered a contract for automatic data processing equipment (ADP). The contract was for twelve months with options which, if exercised, would cover a total of 65 months. The contract was to be funded from annual appropriations. The agreement contained a pro-

²³⁸23 Comp. Gen. 862 (1944); see also 37 Comp. Gen. 861 (1958); 18 Comp. Gen. 969 (1939); 16 Comp. Gen. 205 (1936).

²³⁹34 Comp. Gen. 432, 434 (1955).

²⁴⁰18 Comp. Gen. 967, 970-71 (1939).

²⁴¹AR 37-21, *supra* note 186, para. 2-10a (4); see also DoD Handbook 7220.9-H, *supra* note 83, para. 22114.A.1; 41 Comp. Gen. 134, 138 (1961).

²⁴²55 Comp. Gen. 768, 773 (1976).

²⁴³See 36 Comp. Gen. 683 (1957).

²⁴⁴31 U.S.C. § 665(a) is violated.

²⁴⁵See 37 Comp. Gen. 60, 62 (1957).

²⁴⁶56 Comp. Gen. 142 (1976).

vision for “separate charges” which were to be paid to the company furnishing the ADP if the contract was stopped prior to **60** months of systems life. The Comptroller General indicated that such separate charges violated **31** U.S.C. § 712a and **31** U.S.C. § **665**. Continuing, that officer stated:

Any contract provision that purports to bind the Government to pay more than the reasonable value of the goods or services for the fiscal year in question as a penalty or damages for failing to renew a contract for subsequent years cannot be considered as pertaining to the needs of the current year.²⁴⁷

Thus, the obligation created to pay separate charges is not supported by any legally available appropriation. This is a violation of subsection (a) of the Anti-Deficiency Act.

B. REVISED STATUTES 3678, 31 U.S.C. § 628

Revised Statutes **3678** is another statute that often appears when questions relating to violations of the Anti-Deficiency Act arise. The forerunner of R.S. **3678** was enacted first into law on March **3**, **1809** and provided that executive agencies were to insure that “. . .the sums appropriated by law for each branch of expenditure in the several departments shall be solely applied to the objects for which they are respectively appropriated, and to no other.”²⁴⁸ The present provision is substantially the same as the **1809** version: “Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.”²⁴⁹ There is very little discussion of R.S. **3678** in Department of Defense directives or Department of Army regulations. AR **37-21** at paragraph 2-6c provides: “Caution will be exercised to assure that funds are charged solely for purposes for which the appropriations or funds involved are designated. . .”²⁵⁰ This is merely a paraphrase of the statute and provides little assistance in any attempt to understand the full effect of R.S. **3678**. It certainly provides no guidance with respect to the relationship of R.S. **3678** to the Anti-Deficiency Act, R.S. **3679**.

R.S. **3678** makes “. . .unlawful the diversion of funds appropriated for one purpose to another object of expenditure; and it also

²⁴⁷*Id.* at 154.

²⁴⁸Act of Mar. 3, 1809, ch. 28, 2 Stat. 535.

²⁴⁹31 U.S.C. § 628 (1960), commonly referred to as Revised Statutes 3768.

²⁵⁰AR 37-21, *supra* note 186, para. 2-6c.

is intended to prohibit an appropriation for any purpose from being enlarged or augmented, directly or indirectly, beyond the amount thereof as fixed by law.”²⁵¹ It is a sweeping statute that is “. . . not only [a limitation] on the authority of administrative officers . . . but on the authority of [the General Accounting Office] to allow credit for payment made or claimed from appropriated moneys.”²⁵² The prohibition of the statute applies equally to express contracts and to payments proposed to be made on the basis of quantum meruit.²⁵³

The statute’s limitation goes to the appropriation to be used to discharge a liability and not to the determination of whether a liability in fact exists. For example, if a judgment is rendered by a court of competent jurisdiction against the United States and no appropriation is legally available for the purpose of discharging that judgment, a legal liability exists nonetheless. The concept was well summarized by the Comptroller General.

An appropriation constitutes the means for discharging the legal debts of the Government. . . . The judgment of a court has nothing to do with the means—with the remedy for satisfying a judgment. It is the business of courts to render judgments, leaving to Congress and the executive officers the duty of satisfying them.²⁵⁴

Essentially, when attempting to determine whether an appropriation can be charged consistent with R.S. 3678, the question is one of power. Is there statutory power to use a particular appropriation in the manner desired?²⁵⁵ The question encompasses not only charges that are obviously within the intended purpose of an appropriation, but expenditures necessarily incident to the primary purpose of that appropriation.²⁵⁶

It is well recognized that an appropriation may be used not only to pay for objects specifically covered thereby, but to fund items essential to carry out those objects. The General Accounting Office has held that

. . . appropriated funds may be used for objects not specifically set forth in an appropriation act only if there is a direct connection between such objects and the purpose for which the appropriation is

²⁵¹6 Comp. Gen. 171, 172 (1926).

²⁵²7 Comp. Gen. 213, 214 (1927).

²⁵³Ms. Comp. Gen. B-151399, B-151458, and B-151688, June 28, 1963.

²⁵⁴7 Comp. Gen. 645, 648 (1928), *citing* Geddes v. United States, 38 Ct. Cl. 428 (1903).

²⁵⁵See 36 Comp. Gen. 621, 623 (1957).

²⁵⁶*Id.*

made, and if the object is essential to the carrying out of such purposes, . . . see 31 U.S.C. § 628 (1970).²⁵⁷

For example, in 1971 the Forest Service asked the opinion of the General Accounting Office (GAO) on whether it would be proper to buy litter bags for use in national forests and to fund them from an appropriation titled "Forest Protection and Utilization."²⁵⁸ The GAO first stated the test to be used: ". . . whether the contract involved is reasonably necessary or incident to the execution of the program or activity authorized by the appropriation."²⁵⁹ The opinion then concluded that litter bags were "reasonably necessary" to carry out a program of forest protection.

However, caution is necessary when determining whether an expense is incidental. Administrative flexibility is normally provided by the appropriation statutes, but that flexibility is still confined to the purposes of the appropriation. This principle was well stated by the Comptroller General:

Generally, the Congress in making appropriations leaves largely to administrative discretion the choice of ways and means to accomplish the objects of [an] . . . appropriation, but, of course, administrative discretion may not transcend the statutes, nor be exercised in conflict with law, nor for the accomplishment of purposes unauthorized by the appropriation; and, just as clearly, such unauthorized objects may legally no more be reached indirectly . . . than by direct expenditure. . . .²⁶⁰

Of course, the most important statute of use to determine which appropriation to charge is the appropriation act itself. For example, in 1955 the Department of Health, Education and Welfare (HEW) wanted to convert a room in the HEW building from a guard room to an emergency operations room. A new guard room was to be installed elsewhere in the building. The General Services Administration (GSA) was to perform the work because the building was under the Administration's control. HEW proposed to pay only for the cost of converting the guard room to an operations room, but not the costs of the new guard room. GSA contended that HEW received the entire benefit of the conversion and should fund it. However, the General Accounting Office, when requested to resolve the

²⁵⁷55 Comp. Gen. 346, 347 (1975), citing 27 Comp. Gen. 679, 681 (1948). See also 63 Comp. Gen. 770 (1974); 37 Comp. Gen. 360 (1967).

²⁵⁸50 Comp. Gen. 535 (1971).

²⁵⁹*Id.* at 636.

²⁶⁰18 Comp. Gen. 286, 292 (1938).

issue, looked solely at the appropriation acts of the respective agencies.

Nothing has been found in the current appropriations for the Department of Health, Education and Welfare which would authorize that Department to expend funds for a guard locker room. Furthermore, the appropriations for the General Services Administration include provisions for furnishing normal protection or guarding of Government buildings under the control of such Administration which would include furnishing a guard locker room.²⁶¹

Thus, the appropriation act is always the place to commence any inquiry about whether an expenditure for a particular object or purpose is authorized. However, that act may not provide an answer. For example, suppose a cost or charge arose that could reasonably be paid by one of two general appropriations? This was the question which confronted the Comptroller General in a 1944 case.²⁶² In that year the post office used soldiers to deliver very "heavy" Christmas mail. The post office defrayed all the costs of using the soldiers. Two appropriations were available against which to make the charges. One was "Miscellaneous Items, 1st and 2nd Class Post Offices" and the other was the "Unusual Conditions" appropriation. The Comptroller General indicated that in such cases an administrative election to use one of the appropriations is to be made. Once the election is made, the agency is bound and cannot subsequently shift to the other appropriation.²⁶³ If, on the other hand, two appropriations are available for use for a particular object, one of which is specific while the other is general, the specific appropriation must be used to the exclusion of the general.²⁶⁴ This is true even if the general appropriation is later in time.

Where Congress has specifically limited the amount to be expended for [a particular item] by a department during a fiscal year, a later appropriation providing for additional work to be carried on by that department during the same fiscal year does not of itself authorize the exceeding of such limitation.²⁶⁵

Unless specifically provided otherwise, appropriations cannot be mixed even if they are provided for identical purposes.²⁶⁶

Although the appropriation act is the key statute for determining the purposes and objects for which funds appropriated thereby may

²⁶¹ 34 Comp. Gen. 454, 456 (1955).

²⁶² 23 Comp. Gen. 827 (1944).

²⁶³ *Id.* See also 50 Comp. Gen. 535 (1971).

²⁶⁴ See 38 Comp. Gen. 758 (1959).

²⁶⁵ 19 Comp. Gen. 324, 326 (1939).

²⁶⁶ See 45 Comp. Gen. 256 (1965); 6 Comp. Gen. 748 (1927).

be expended, other statutes may expand or reduce fund availability for particular purposes.²⁶⁷ For example, in 1976 the Comptroller General addressed the propriety of expanding certain funds to bomb the Cambodian mainland during the rescue of the crew of the ship *Mayaguez*.²⁶⁸ The question arose because of seven separate statutes prohibiting the use of funds for offensive activities in Indochina. Noting the President's power to protect United States citizens, the Comptroller General indicated that the expenditure was proper because the bombs could not be deemed unnecessary, based upon testimony of certain executive officers, to effect the rescue of the crew.

Revised Statutes 3678 is often violated and in a multitude of ways. Some situations determined by the General Accounting Office to be violations tend to stretch the statutory coverage to unnecessary lengths,²⁶⁹ but others are more direct. For instance, attempts by the Forest Service to use monies appropriated for "construction and maintenance" of forest trails and roads to close such roads and trails was a violation of R.S. 3678.²⁷⁰ Efforts by the Navy to pay unauthorized carrying charges led the Navy into a R.S. 3678 violation.²⁷¹ And when the Bureau of Land Management in Utah attempted to trade office space with a smaller Federal agency and continue to pay rent on its old office space for the benefit of that smaller agency, R.S. 3678 again reared its ugly head.²⁷²

²⁶⁷See, e.g., 10 U.S.C. § 2674 (1970), as amended (Supp. V 1975).

²⁶⁸55 Comp. Gen. 1081 (1976).

²⁶⁹See, e.g., 18 Comp. Gen. 285, 296-97 (1938). In this case the Comptroller General considered the lawfulness of paying certain price increases. Specifically, he found that (a) if a solicitation includes requirements that restrict competition in violation of competitive bidding statutes, (b) if such restrictions are not reasonably requisite "to the accomplishment of the legislative purposes of the contract appropriation," and (c) if the restrictions have the effect of increasing the contract prices charged against the appropriations, then such increases are an unauthorized charge in violation of R.S. 3678.

²⁷⁰53 Comp. Gen. 328 (1973). A similar result was reached in regard to executive attempts to discontinue the Clinch River breeder reactor project:

Comptroller General Elmer Staats said yesterday he has warned administration officials that they will be breaking the law if they go ahead with a plan to phase out the \$2 billion Clinch River breeder reactor project.

Staats sent a letter to Energy Secretary James Schlesinger Friday, saying he would "disallow" any money spent to curtail the controversial project in Tennessee and hold the official who approves the spending personally responsible.

Copies of the letter were dispatched to President Carter and other aides.

Staats said the law requires that an \$80 million appropriation for 1978 be used to continue the design of the reactor—not for killing the project, as some administration officials have suggested would be done.

Richmond Times-Dispatch, Mar. 13, 1978, at A-2, Col. 7.

²⁷¹2 Comp. Gen. 181 (1922).

²⁷²35 Comp. Gen. 701 (1956).

Using one appropriation to augment another is to use it for a purpose not authorized by law, absent specific statutory authority to the contrary.²⁷³ Sometimes such augmentation can be very subtle. For example, in 1924 the Comptroller General addressed a not uncommon way in which augmentation occurs: "The performance of work by one department for another department . . . without reimbursing the whole additional cost of such work as accurately as it may reasonably be ascertained, would contravene [R.S. 3678] . . . in that it would augment one appropriation at the expense of another."²⁷⁴ Augmentation may not be allowed even if the source of augmentation is from private resources.²⁷⁵

As previously mentioned, the sweep of Revised Statutes 3678 is extensive. Violation of such limitations, using an appropriation for improper purposes, is not cured by notifying Congress of the executive intent to misuse an appropriation.²⁷⁶ Reimbursement of an appropriation that is used for improper objects from a different appropriation or fund that is proper for use for the particular object does not prevent the violation of R.S. 3678, unless specific statutory authority exists for the transaction.

[If] a proposed arrangement would result in the use of an appropriation for a purpose other than that for which made, . . . such use, *even in the first instance only and under an agreement for reimbursement*, would be in direct contravention of the plain provisions of section 3678, Revised Statutes.²⁷⁷ (emphasis added)

Generally speaking, a violation of R.S. 3678 will not occur if the purpose for which an appropriation is used is authorized by statute. Amounts of individual items in an agency's budget estimates presented to Congress on the basis of which a lump sum appropriation

²⁷³ 45 Comp. Gen. 255 (1965); 37 Comp. Gen. 155, 158 (1957); 3 Comp. Gen. 974 (1924); 2 Comp. Gen. 282 (1922).

²⁷⁴ 3 Comp. Gen. 974, 976 (1924).

²⁷⁵ See 55 Comp. Gen. 1293 (1976).

²⁷⁶ 37 Comp. Gen. 472 (1958).

²⁷⁷ 5 Comp. Gen. 796, 797 (1926). This result is supported by 31 U.S.C. § 623a.

§ 623a. Accounting adjustments between appropriations.

Subject to limitation 8 applicable with respect to each appropriation concerned, each appropriation available to any executive department or independent establishment of the Government, or any bureau or office thereof, may be charged, at any time during a fiscal year, for the benefit of any other appropriation available to such executive department or independent establishment, or any bureau or office thereof, for the purpose of financing the procurement of materials and service, or financing other costs, for which funds are available both in the financing appropriation to be charged and in the appropriation so benefited. Such expenses so financed shall be charged on a final basis during, or as of the close of, such fiscal year to the appropriation so benefited, with appropriate credit to the financing appropriation (emphasis added).

is enacted are not binding on executive officers unless carried into the appropriations act itself.²⁷⁸ The Comptroller General has stated the rule thusly: “. . .[S]ubdivisions of an appropriation contained in the agency’s budget request or in Committee reports are not legally binding upon the department or agency concerned unless they are specified in the appropriation act itself.”²⁷⁹

The Comptroller General continued: “. . .[I]n a strict legal sense, the total amount of a line item appropriation may be applied to any of the programs or activities for which it is available in any amount absent further restrictions provided by the appropriation act or another statute.”²⁸⁰ The same rule applies to lump sum appropriations.²⁸¹ Thus, regulatory controls on the purposes for which funds may be used, if violated, will not result necessarily in a concomitant violation of R.S. 3678, or for that matter the Anti-Deficiency Act.²⁸²

Obviously, executive departments should abide by budget estimates or agreements with Congress. Or, as stated by the Comptroller General, “[t]his is not to say that Congress does not expect that funds will be spent in accordance with budget estimates or in accordance with restrictions detailed in Committee reports.”²⁸³ The failure of an executive agency to “keep faith” with Congress in this respect could result in the budget and committee restrictions being carried into the appropriation act.

Additionally, it should be noted that regulatory limits are absolute if included on funding documents.²⁸⁴ For instance, the Department of Defense regulations and requirements related to reprogramming actions are to be included on fund documents.²⁸⁵ Hence, if funds made available by such funding documents are used in contravention of the DoD reprogramming requirements, a violation of the Anti-Deficiency Act results even if R.S. 3678 arguably is not violated.²⁸⁶ Further, the DoD Accounting Guidance Handbook²⁸⁷ indicates that

²⁷⁸Comp. Gen. Dec. B-183851 (1 Oct. 1975), found at both 75-2 C.P.D. 203 and 55 Comp. Gen. 307 (1975); see also 17 Comp. Gen. 147 (1937).

²⁷⁹55 Comp. Gen. 812 (1975), citing 55 Comp. Gen. 307 (1975); 17 Comp. Gen. 147 (1937).

²⁸⁰55 Comp. Gen. 812 (1975).

²⁸¹55 Comp. Gen. 307 (1975).

²⁸²55 Comp. Gen. 812 (1975); 55 Comp. Gen. 307 (1975).

²⁸³55 Comp. Gen. 307 (1975); see also 36 The Journal of Politics 77 (1974).

²⁸⁴See Absolute Limitations Message, *supra* note 124.

²⁸⁵See disposition form, subject: Identification of Absolute Limitations Falling Under the Provisions of Section 3679 of the Revised Statutes, as amended (31 U.S.C. § 665), from the Office of the Comptroller of the Army, 13 Oct. 1977.

²⁸⁶Absolute Limitations Message, *supra* note 124.

. . . each limitation established for budget programs, projects and subprojects in the annual funding programs, annual budget authorizations and other operating budgets of DoD components constitutes, in effect, a *separate subdivision of funds if such limitations, in fact, are rigid restrictions against making allocation, allotments, obligations, or expenditures in excess thereof*. Therefore, if any such limitation is excluded, it shall be considered to be a violation of Section 3679. If on the other hand, *these limitations are not rigid restrictions*, but are only advisory guides and may be exceeded at the option of the holder of the allocation, allotment or suballotment without reference to the individual who established them, they are not considered to be separate subdivisions of funds.²⁸⁸ (Emphasis added)

The next step in the analysis of R.S. 3678 is to determine when, if ever, a violation of that statute is also a violation of the Anti-Deficiency Act. Undoubtedly, all of the funding statutes passed by Congress to control the method and manner of using appropriated funds are closely related.

In 1962 the General Accounting Office (GAO) summarized the effect of the various funding statutes.

These statutes evidence a plain intent on the part of Congress to prohibit executive officers unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditure or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriation under which they are made [31 U.S.C. § 665(a), 31 U.S.C. § 712a and 41 U.S.C. § 111]; to keep all the departments of the Government in the matter of incurring obligations for expenditures, within the limits [31 U.S.C. § 655(a)] and purposes [31 U.S.C. § 628] of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose in advance of appropriations made for such purpose [31 U.S.C. § 665(a)]; and to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which they are made [31 U.S.C. § 712a].²⁸⁹

Although GAO opinions often cite and discuss R.S. 3678 (31 U.S.C. § 628) together with one or more of the statutes discussed above, such opinions seldom do more. There is no attempt by GAO to discuss the interrelationship of such statutes. Is a violation of R.S.

²⁸⁷ DoD Handbook 7200.9-H, *supra* note 83.

²⁸⁸ *Id.* at para. 21003.B.5.

²⁸⁹ 42 Comp. Gen. 272, 275 (1962). See also 21 OP. ATT'Y GEN. 244, 248, where, addressing the earlier versions of the various funding statutes, that office stated the statutes' purpose was "to prevent executive officers from involving the Government in expenditures or liabilities beyond those contemplated or authorized by the lawmaking power."

3678 also an automatic violation of R.S. **3679**, the Anti-Deficiency Act, or is more necessary? If it is an automatic violation, in what manner and of which subsection of R.S. **3679**? Further, if R.S. **3679** is violated every time R.S. **3678** is not followed, why do GAO decisions exist that indicate a violation of R.S. **3678** without even mentioning the Anti-Deficiency statute? Answers for these questions are not easily formulated.

The decisions of the Comptroller General illustrate the difficulty of any attempt to construe R.S. **3678** in relation to R.S. **3679**. For example, in **1959** that officer issued an opinion²⁹⁰ in response to a request from the Department of Army. The Army Corps of Engineers desired to use a public works appropriation to fund certain improvements to state owned roads that provided access to the public work covered by the appropriation. The Comptroller General opined:

It is well established that appropriated funds are not available for the repair, improvement, or reconstruction of state-controlled public roads, unless specifically authorized by substantive law or the appropriation concerned [citation omitted]. The use of appropriated funds therefor in the absence of specific authority would result in violations of sections **3678** [and] **3679**, as amended, . . . Revised Statutes²⁹¹ (emphasis added).

Compare this decision with one rendered by the GAO somewhat earlier.²⁹² The Navy entered into an agreement with a local civilian community for mutual fire support between the community and a nearby naval facility. Approximately **\$200** of a naval appropriation was spent under the agreement to fight fires in the local community. In an audit the GAO took exception to this item in the Navy accounts. The Navy then requested an opinion from the GAO on the propriety of the agreements and the exceptions taken in the account. The opinion said:

. . . [M]utual aid agreements purporting to require the use of Federal fire fighting facilities outside of such Federal reservations in return for the use of local fire fighting facilities on a United States reservation, would *contravene not only the provisions of 3678 of the Revised Statutes but also section 3732 thereof, 41 U.S.C. § 11*, which prohibits the making of contracts on behalf of the United States unless authorized by law or within appropriations therefor. The existing laws generally do not provide either authority or funds for that purpose²⁹³ (emphasis added).

²⁹⁰39 Comp. Gen. 338 (1959).

²⁹¹*Id.* at 390.

²⁹²32 Comp. Gen. 91 (1952).

²⁹³*Id.* at 95.

Note that no mention is made of the Anti-Deficiency Act, R.S. 3679, although the decision indicates R.S. 3678 is violated and that *no funds* are available for such firefighting activities. Why is R.S. 3679 violated if Federal monies are used for road betterments on behalf of a state, but not if those monies are used to fight fires in a state? Surely the fact that one appropriation was specific and the other, general is not the basis for the inexplicably different results. About the only thing that is established for certain by the two opinions is that a violation of Revised Statutes 3678 does not result in an automatic violation of the Anti-Deficiency Act. Instead, each statute must be measured against the facts or circumstances of each case. To the extent that more than one funding statute is violated, the violations are entirely distinct under each statute. This is demonstrated in a 1943 GAO opinion:²⁹⁴

A stipulation to pay interest for delay in payment for supplies is prohibited because the delay may extend beyond the period for which the appropriation is made and thus involve the Government in an obligation for the future payment of money for which no appropriation has been made, contrary to 3679 and 3732, Revised Statutes. It is prohibited, also, because an appropriation made to purchase supplies is not made to pay interest and the payment of interest would be a diversion of the appropriation, contrary to section 3678, Revised Statutes.²⁹⁵

An approach to unraveling the complexities of the relationship of R.S. 3678 to R.S. 3679 is that advanced in draft Army Regulation 37-20, February 1977.²⁹⁶ That regulation provides at paragraph 14f

Section 3678 of the Revised Statutes, (31 U.S.C. § 628) "application of money appropriated," provides that: "Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others." Misapplication of obligations/expenditures are considered to be an accounting error and, as such, do not constitute a violation [of R.S. 3679]. However, if funds are not available for adjustment in the subdivision of funds properly chargeable or if the charge is not valid for any available appropriation, a reportable violation [of R.S. 3679] occurs.²⁹⁷

This approach is reasonable. Often violations of 31 U.S.C. § 628 are unintentional or mistakes of judgment. Often serious questions exist as to whether a particular expenditure is properly chargeable

²⁹⁴22 Comp. Gen. 772 (1943).

²⁹⁵*Id.* at 775. See also 41 Comp. Gen. 255 (1961).

²⁹⁶Draft AR 37-20, *supra* note 73.

²⁹⁷*Id.* para. 14f.

to an appropriation. Thus such errors should be correctable without violating R.S. 3679 to the extent that proper funds are available.²⁹⁸

AR 37-20 provides for correction of such errors:

If an apparent overobligation or overexpenditure exists solely because of an accounting, clerical, recording or reporting error and is not in fact [a violation of R.S. 3679] . . . and such overobligation is eliminated upon correction of the error, a violation has not occurred and report of violation is not required.²⁹⁹

The “error” concept as applied to the R.S. 3678-79 relationship is best illustrated by examples. Suppose operation and maintenance funds are erroneously used to contract for services in support of a research and development (R&D) facility and it is subsequently determined that R&D funds should have been used. A violation of R.S. 3678 has occurred. Funds from one appropriation have been used for an object that should have been funded from a different appropriation.³⁰⁰ Additionally, an obligation without legally available funds in violation of R.S. 3679 seems to have occurred. However, the transaction is actually a recording error. The obligation was erroneously recorded against operation and maintenance rather than research and development funds. Thus, in accordance with AR 37-20, paragraph 16e, the accounting error should be reversed and, if adequate R&D funds are available to cover the contract obligation, no violation of R.S. 3679 should be found. Of course, if no R&D appropriation is available or, though available, is inadequate to cover the contract amount after the error in recordation is corrected, a violation of Revised Statutes 3679 does result.

The most reasonable approach to resolving a problem is not always the one adopted. Unfortunately, a position contrary to that of the draft AR 37-20 can be constructed which, it appears, the De-

²⁹⁸ Such an approach seems to be consistent with Dep’t of Defense guidance with respect to accounting errors. The DoD Accounting Guidance Handbook, DoD 7200.9-H, *supra* note 83, provides at para. 21003.B.3: “Errors in posting to accounting records are not violations, per se. However, such errors may cause an actual overallocation, overallotment, overobligation, or overexpenditure, thereby resulting in a violation of Section 3679.”

²⁹⁹ AR 37-20, *supra* note 40, para. 16e.

³⁰⁰ Once a violation of R.S. 3678 occurs, it is not corrected by subsequent actions, including the use of proper funds. *See, e.g.*, 49 Comp. Gen. 578 (1970); 36 Comp. Gen. 386 (1956); 5 Comp. Gen. 796 (1926). R.S. 3678 does not require, as does R.S. 3679, that reports of violations be made to Congress, nor does R.S. 3678 contain punitive provisions for violations. However, certain sanctions are available for violations of this statute. *See* the discussion of the liability of certifying officers, *infra* at 131.

³⁰¹ DoD Handbook 7220.9, *supra* note 83, para. 21003.B.5.

partment of Defense has accepted. The DoD Accounting Guidance Handbook provides:

Appropriation limitations, special limitations (those which apply to two or more appropriations), and similar statutory limitations legally limit the availability of funds and the authority to obligate or expend appropriations for certain objects or purposes (emphasis added). Therefore, these limitations shall be considered, in effect, separate subdivisions of funds.³⁰¹

Any obligation in excess of a fund subdivision or a statutory limitation imposed on the use of funds is a violation of R.S. 3679.³⁰² Hence, to obligate funds in violation of R.S. 3678 is to violate R.S. 3679. As discussed above, this approach is not consistent with many Comptroller General opinions, but the wise attorney, contracting officer, comptroller or fiscal officer will insure that funds are obligated only for the objects for which appropriated.

C. THE MINOR CONSTRUCTION ACT, 10 U.S.C. § 2674

Permanent legislation prohibits any contract for the “. . . erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose.”³⁰³ This statute is intended to insure that executive officers of the Government do not involve the United States in expenditures or liabilities beyond those authorized by law.³⁰⁴ Instead, express statutory authority is required for the construction of public buildings, and such authority will not be inferred from a general statute.³⁰⁵ For example, appropriations to agencies made available to be used for necessary expenses are limited to current or running expenses of a miscellaneous character incident to an agency's particular function and will not be construed to include expenses for construction and improvements of public buildings.³⁰⁶

Normally, the requirements of 41 U.S.C. 9 12 are met by congressional appropriations for construction which are limited by amount to specifically authorized projects.³⁰⁷ However, a somewhat

³⁰²*Id.* See also DoD Directive 7200.1, *supra* note 40, para. IX; AR 37-20, *supra* note 40, para. 16a.

³⁰³41 U.S.C. § 12 (1970).

³⁰⁴21 OP. ATT'Y GEN. 244 (1895).

³⁰⁵See, e.g., 42 Comp. Gen. 212 (1962); 38 Comp. Gen. 392 (1958).

³⁰⁶38 Comp. Gen. 758 (1959).

³⁰⁷See, e.g., Act of Aug. 15, 1977, Pub. L. 95-101, 91 Stat. 837.

more general authority to engage in construction is given to the Department of Defense by a statute known as the Minor Construction Act.³⁰⁸ That Act provides:

§ 2674. Establishment and development of military facilities and installations costing less than \$400,000.

(a) Under such regulations as the Secretary of Defense may prescribe, the Secretary of a military department may acquire, construct, convert, extend, and install, at military installations and facilities, urgently needed permanent or temporary public works not otherwise authorized by law, including the preparation of sites and the furnishing of appurtenances, utilities, and equipment, but excluding the construction of family quarters. However, a determination that a project is urgently needed is not required for a project costing not more than \$75,000 or for a project which the Secretary of a military department determines will, within three years following completion of the project, result in savings in maintenance and operation costs in excess of the cost of the project.

(b) This section does not authorize a project costing more than \$400,000. A project costing more than \$200,000 must be approved in advance by the Secretary of Defense, and a project costing more than \$75,000 must be approved in advance by the Secretary concerned.

(c) Not more than one allotment may be made for any project authorized under this section.

(d) Not more than \$50,000 may be spent under this section during a fiscal year to convert structures to family quarters at any one installation or facility.

(e) Appropriations available for military construction may be used for the purposes of this section. In addition, the Secretary concerned may spend, from appropriations available for maintenance and operations, amounts necessary for any project costing not more than \$75,000 that is authorized under this section.

(f) The Secretary of each military department shall report in detail annually to the Committees on Armed Services of the Senate and House of Representatives on the administration of this section.³⁰⁹

³⁰⁸ 10 U.S.C. § 2674 (1976).

³⁰⁹ *Id.* This statute has been amended, effective Oct. 1, 1978, to increase the dollar limitations for projects, remove the urgency requirement for projects in excess of the operation and maintenance fund limits and to change the project approvals required. The amended statute reads as follows:

SEC. 608. (a) Section 2674 of title 10, United States Code, is amended to read as follows:

§ 2674. Minor construction projects.

(a) Under such regulations as the Secretary of Defense may prescribe, the Secretary of a military department or the Director of a defense agency may acquire, construct, convert, extend, and install, at military installations and facilities, permanent or temporary public works not otherwise authorized by law including the preparation of sites and the furnishing of appurtenances, utilities, and equipment, but excluding the construction of family quarters.

(b) This section does not authorize a project costing more than \$500,000. A project costing more than \$400,000 must be approved in advance by the Secretary of Defense, and a project

The monetary limitations and approval requirements of the Act are absolute limitations³¹⁰ which, if not followed, will result in a violation of R.S. 3679.³¹¹ A distinction must be made in this respect, however, between projects that require secretarial approval

costing more than \$300,000 must be approved in advance by the Secretary of the military department or the Director of the defense agency concerned.

(e) The total costs for all projects initiated under authority of this section by any military department, or by the defense agencies, in any fiscal year (except those projects funded from appropriations available for operations and maintenance as provided in subsection (e)) may not exceed the total amount authorized for minor construction projects for such military department or for the defense agencies, as the case may be, in the annual Military Construction Authorization Act for such fiscal year.

(d) Not more than \$50,000 may be spent under this section during a fiscal year at any one installation or facility to convert structures to family quarters.

(e) Only funds appropriated to a military department or to the defense agencies for minor construction projects may be used by such department or by such agencies to accomplish minor construction projects, except that the Secretary of a military department or the Director of a defense agency may spend, from appropriations available for maintenance and operations, amounts necessary for any project costing not more than \$100,000 that is authorized under this section.

(f) The Secretary of each military department and the Secretary of Defense, for the defense agencies, shall submit an annual detailed report to the Committees on Armed Services and Appropriations of the Senate and House of Representatives on the administration of this section. In addition, such committees shall be notified in writing at least 30 days before any funds are obligated for a project approved under this section coating more than \$300,000.

(g) As used in this section, "project" means a single undertaking which includes all construction work, land acquisition, and installation of equipment necessary to (1) accomplish a specific purpose, and (2) produce a complete and usable facility or a complete and usable improvement to an existing facility.

(h) The Directors of the defense agencies shall carry out the construction of minor projects under authority of this section by or through a military department designated by the Secretary of Defense as provided in section 2682 of this title.

(b) The item relating to section 2674 in the analysis at the beginning of chapter 159 of title 10, United States Code, is amended to read as follows:

"2674 Minor construction projects."

(c) The amendments made by this section shall become effective October 1, 1978. P.L. 95-82 § 608, Aug. 1, 1977, 91 Stat. 377.

See Monroe, *New Minor Construction Act*, *THE ARMY LAWYER*, Mar. 1978, at 35. In this article Captain (P) Monroe compares the text of the existing statute with that of the new statute. He summarizes the differences as follows:

1. The ceiling on minor construction projects has been raised from \$400,000 to \$500,000.
2. There is no longer any statutory requirement for a determination of urgency or self-compensation.
3. There is a 30 day Congressional notice requirement for all projects costing more than \$300,000.
4. Projects costing between \$300,000 and \$400,000 must have prior Secretary of the Army approval and those from \$400,000 to \$500,000 must have prior Secretary of Defense approval.
5. The limit on minor construction projects for which O&M funds may be expended has been increased from \$75,000 to \$100,000.

Id. at 37.

³¹⁰Ms. Comp. Gen. B-154061, June 19, 1964. Once the dollar limitation set by the minor construction act is reached, "there is no appropriation available" for the payment of any sum in excess of the limitation. Instead, relief must be sought from Congress.

³¹¹See DoD Handbook 7220.9-H, *supra* note 83, para. 21003.B.5.1, which reads: "statutory limitation such as the limitation in 10 U.S.C. § 2674 authorizing the use

“in advance” and those for which the statute does not set approval requirements.

Suppose a construction project that requires approval of the Secretary of Defense in accordance with 10 U.S.C. § 2674(b) is commenced before approval is obtained. Absent that approval, the minor construction statute cannot be invoked as authority for the project because such approval must be “in advance.”³¹² Hence, obligations incurred for the construction would be made without authority of law or an appropriation adequate for the fulfillment of the obligation. This would violate 41 U.S.C. §§ 11–12 and the Anti-Deficiency Act. Presumably the violation cannot be cured by an after-the-fact approval of the project because the minor construction statute requires prior approval.

A violation of the Anti-Deficiency Act can occur also if the dollar limits of an approved project are exceeded when such project requires prior approval at the Secretarial level. Thus, if the Secretary of the Army were to approve and fund a minor construction project for \$150,000 under the authority of 10 U.S.C. § 2674, that dollar limit is the ceiling on the project costs unless a higher limit is subsequently approved. The only flexibility in the approval requirement is found in Army Regulation 415-35 at paragraph 3-4b:

Increases in project scope in excess of 10 percent of the basic facility for which project approval has been received, or criteria of an approved project, will not be made without prior authorization by the approving authority. Also, no changes of any type will be made by the construction activity if they will result in an increase in funded cost over the amount approved and allocated for the project.³¹³

Therefore, if \$150,000 was the total amount approved and allocated for the above hypothesized project and the construction activity ultimately obligated \$170,000, a violation of 10 U.S.C. § 2674 would occur. Further, because limitations imposed pursuant to this statute have the same effect for the purpose of the Anti-Deficiency Act as a

of funds for minor construction in stated amounts, although not creating separate subdivisions of funds, constitute limitation which if exceeded would cause a violation of Section 3679.” See also Army Regulation 415-35, Minor Construction, para. 1-1 (C2, 30 Sept. 1976) [hereinafter cited as AR 415-35].

³¹² 10 U.S.C. § 2674 (b) (1976). See also Ms. Comp. Gen. B-175215, Apr. 20, 1972, wherein it is indicated that the advance approval relates not only to “project” approval but to the dollar amount of the project as well. Additionally, the project dollar limitations are those of the statute current when the project is approved. Dollar amounts cannot exceed the amounts authorized when the project commenced even if amendments to the minor construction statute increase the dollar limits per project.

³¹³ AR 415-35, para. 3-4b (C3, 2 Mar. 1977).

subdivision of funds,³¹⁴ the violation of 10 U.S.C. § 2674 would also result in a reportable violation of R.S. 3679.

Unlike minor construction projects in excess of \$75,000 which require approval at either the Department of Army or the Department of Defense, and must be funded with military construction funds, minor construction projects costing under \$75,000³¹⁵ are not required by 10 U.S.C. § 2674 to be approved in advance at any level. Such projects may be funded from the operation and maintenance appropriation of the various military departments.³¹⁶

The reason for including a dollar ceiling on minor construction projects to be funded with operation and maintenance (O&M) monies was explained in 1956 in Senate Hearings on Military Public Work Construction:

The principle thing that [the dollar limitation on the use of operation and maintenance funds for minor construction does] . . . is to insure that . . . construction will be funded out of construction funds . . . We [Congress] are trying to insure that the large projects [are] funded out of construction funds.³¹⁷

Thus, the statutory limitation of \$75,000 (soon to be \$100,000)³¹⁸ is an absolute limit on the cost of minor construction projects funded with O&M money. Such funds are not, therefore, legally available for construction in excess of that amount.³¹⁹ If the funded cost of a minor construction project, funded by O&M funds, exceeds the statutory limitation on the use of such funds, R.S. 3679 is violated, as well as 10 U.S.C. § 2674.³²⁰

Whether a violation of R.S. 3679 can occur in a minor construction project without exceeding the \$75,000 limitation in 10 U.S.C. § 2674 on the use of O&M funds for such purposes is somewhat more complex. However, the Office of the Comptroller of the Army has provided some guidance in this respect. Suppose Fort Blank uses operation and maintenance money to commence a minor construction project with an estimated cost of \$52,000 but fails to obtain the approvals required by paragraph 2 4 of Army Regulation 41535. Is this failure a violation of R.S. 3679? Are O&M funds then being used

³¹⁴ DoD Handbook, 7220.9-H, *supra* note 83, para. 21003.B.5.

³¹⁵ This limit is raised to \$100,000 by Pub. L. 95-82, *supra* note 309, effective Oct. 1, 1978.

³¹⁶ 10 U.S.C. § 2674 (e) (1976); see also Pub. L. 95-82, *supra* note 306,

³¹⁷ 41 Comp. Gen. 522, 525 (1962).

³¹⁸ See Pub. L. 95-82, *supra* note 309.

³¹⁹ *Id.*

³²⁰ See 10 U.S.C. § 2674 (1976); 10 U.S.C. § 665 (1976); DoD Handbook 7220.9-H, *supra* note 83, para. 21003.B.5.

for construction without legal authority to do so? Or suppose the same project receives the required approval but ultimately costs **\$70,000** to complete. If the project is fully funded, does a failure to obtain prior approval of the increased project cost result in a violation of the Anti-Deficiency statute? In responding to these questions, it must be remembered that, unlike projects requiring approval at departmental level, **10 U.S.C. § 2674** does not require prior approval of O&M funded minor construction under **\$75,000**. With this in mind the Comptroller of the Army has concluded that the two situations hypothesized above would not result in a violation of R.S. **3679** because “. . . (1) the event occurs below Departmental level, (2) the limitation [amount of approved project] is not in funding channels or on funding documents, and (3) the project is otherwise fully funded through funding channels.”³²¹

D. PROJECT ORDERS, 41 U.S.C. § 23

Title **41**, section **23** provides:

All orders or contracts for work or material or for the manufacture of material pertaining to approved projects heretofore or hereafter placed with Government-owned establishments shall be considered as obligations in the same manner as provided for similar orders or contracts placed with commercial manufacturers or private contractors, and the appropriations shall remain available for the payment of the obligations so created as in the case of contracts or orders with commercial manufacturers or private contractors.³²²

This statute authorizes government agencies to place orders³²³ with Government owned and Government operated (GOGO) facilities. A GOGO is “. . . any shipyard, arsenal, ordnance plant, or other manufacturing or processing plant or shop, equipment overhaul or maintenance shop, research-and-development laboratory or testing facility or proving ground which is owned and operated by the Government. . . .”³²⁴ Project orders issued under the authority of **41 U.S.C. § 23** must be specific, definite and certain both as to the work encompassed by the order and the terms of the order itself.³²⁵

³²¹ Letter from the Assistant Comptroller of the Army to the Chief, Procurement Law Division, The Judge Advocate General's School, U.S. Army, dated 23 June 1977.

³²² **41 U.S.C. § 23** (1970).

³²³ Such orders are referred to as “project orders.” See Department of Defense Instruction 7220.1, Regulations Governing the Use of Project Orders, May 4, 1971 and all changes [hereinafter cited as DoDI 7220.11.

³²⁴ DoDI 7220.1, III.C.

³²⁵ *Id.* at VI.A.1.

GOGO establishments that are recipients of project orders must be substantially in a position to manufacture the materials, supplies and equipment, or equipped to render the work or services ordered.³²⁶ Orders under 41 U.S.C. § 23 may be issued for:

[P]roduction or construction, modification, conversion, alteration, renovation or rehabilitation, overhaul, or maintenance of ships, aircraft, guided missiles, other weapons, vehicles of all kinds, ammunition, clothing, machinery and equipment for use in such operations, and other military and operating supplies and equipment, including components, and spare parts of all such items, to the extent such work is performed in GOGO establishments under other appropriate authority.

[R]esearch, development, test and evaluation . . .

[specific] projects for minor construction and maintenance of real property. . .³²⁷

Such orders may not be issued for:

[M]ajor new construction of real property;

[E]ducation, training, subsistence, storage, printing, laundry, welfare, transportation (including port handling), travel or communication where any of these purposes are the primary purpose of the request.³²⁸

In performing work under an order, a GOGO can use subsidiary contracts with private firms, ". . . provided such subsidiary ordering and contracting are incident to and are for use in carrying out the purpose of the project order."³²⁹

Because orders under 41 U.S.C. § 23 create obligations in the same manner as contracts with commercial manufacturers or private contractors,³³⁰ the orders are subject to the same fiscal restraints as are contracts with private firms. Such orders must concern a bona fide need existing in the fiscal year in which issued.³³¹ Project orders may not be used for the primary purpose of continuing the availability of appropriations.³³² The order must obligate appropriations to pay only for the purposes for which such appro-

³²⁶*Id.* at VI.A.7. This limitation must be met. If an activity cannot perform the work substantially in-house, a project order may not issue to that activity. Great controversy in this respect has surrounded the ability of engineers to accept project orders. See Dep't of Army Message No. 3570472, June 1977, subject: Project Orders Placed on the Engineers.

³²⁷*Id.* at IV.A.1., IV.A.2 and IV.B.

³²⁸*Id.* at IV.C.

³²⁹*Id.* at VI.A.7.

³³⁰See 34 Comp. Gen. 418 (1955); 1 Comp. Gen. 175 (1921).

³³¹DoDI 7220.1, supra note 323 at VI.A.2.

³³²*Id.* at VI.A.5

priations are available.³³³ Project orders that overobligate or over-expend appropriations or subdivisions thereof violate R.S. 3679. Thus, if a post has a \$100,000 O&M allotment and issues a project order to a GOGO for a proper project wherein the order obligates \$110,000, a violation of the Anti-Deficiency Act arises.³³⁴ An obligation has been created that exceeds the subdivision of funds available to liquidate that obligation. Hence, activities that issue project orders under 41 U.S.C. § 23 must take care to insure that those orders conform to statutory and regulatory requirements for the use and obligation of appropriations.

*E. SECTION 601 OF THE ECONOMY ACT OF
1932, AS AMENDED, 31 U.S.C. § 686*

The authority used by most agencies to support intragovernmental agreements is section 601 of the Economy Act of 1932, as amended.³³⁵ Section 601 (31 U.S.C. § 686) provides:

(a) Any executive department or independent establishment of the Government, or any bureau or office thereof, if funds are available therefor and if it is determined by the head of such executive department, establishment, bureau or office to be in the interest of the Government to do so, may place orders with any other such department, establishment, bureau or office for materials, supplies, equipment, work or services, of any kind that such requisitioned Federal agency may be in a position to supply or equipped to render, and shall pay promptly by check to such Federal agency as may be requisitioned, upon its written request, either in advance or upon furnishing or performance thereof, all or part of the estimated or actual cost thereof as determined by such department, establishment, bureau, or office as may be requisitioned, but proper adjustments on the basis of actual cost . . . [of work performed] . . . shall be made . . .³³⁶

The purpose of this legislation was explained in an early House Report:

The purpose of . . . [31 U.S.C. § 686] . . . is to permit the utilization of the materials, supplies, facilities, and personnel belonging to one department by another department or independent establishment which is not equipped to furnish the materials, work, or services for itself, and to provide a uniform procedure so far as practical for all departments.

³³³ 31 U.S.C. § 628 (1970).

³³⁴ 31 U.S.C. § 665(a) (1970); DoDI 7220.1, *supra* note 323, IX; AR 37-20, para. 16a; Dep't of Army MSG 0803072 Oct. 77, subject: Identification of Absolute Limitations Falling Under the Provisions of Section 3679 of Revised Statutes, as amended (31 U.S.C. 665).

³³⁵ 47 Stat. 417, 31 U.S.C. § 686 (1970). *See* 34 Comp. Gen. 418 (1955).

³³⁶ 31 U.S.C. § 686(a) (1970).

. . . [V]ery substantial economies can be realized by one department availing itself of the equipment and services of another department in proper cases. A free interchange of work as contemplated by this title will enable all bureaus and activities of the Government to be utilized to their fullest

It frequently happens that one department may need certain services which it can not advantageously perform for itself. Where such services can be furnished by another department at less cost or more conveniently, the department needing such services should have the privilege of calling upon any department of the Government that is equipped to provide such services.³³⁷

Following the passage of Section 601 of the Economy Act, the General Accounting Office issued a number of decisions which ruled that the statute did not authorize one agency to call upon another for the provision of work or services by means of contracts with private industry.³³⁸ The theory was that the Economy Act could not be used as a vehicle for the delegation by one agency to another of statutory duties vested in the former.³³⁹ In 1942, Congress amended section 601 to provide:

That the Department of the Army, Navy Department, Treasury Department, Federal Aviation Administration, and the Federal Maritime Commission may place orders, as provided herein, for materials, supplies, equipment, work, or services, of any kind that any requisitioned Federal Agency may be in a position to supply, or to render *or to obtain by contract*.³⁴⁰ (Emphasis added)

A Senate report³⁴¹ explained why certain agencies were allowed to order upon other agencies even though the agencies ordered upon were to perform the work by letting a contract with industry. The Senate believed that such authority would be useful:

Where one department already has a contractor working at the desired location and the other department deems it advantageous to have the same contractor perform work for it at this place under the same contract.

Where two departments are to perform similar work at the same location, each has funds available therefor, and it is desired that the work be performed under a single contract [or]

³³⁷52 Comp. Gen. 128, 131 (1972), quoting H. REP. No. 1126, 72d Cong., 1st Sess. 15-16 (1932).

³³⁸See, e.g., 20 Comp. Gen. 264 (1940); 19 Comp. Gen. 544 (1939); 18 Comp. Gen. 262 (1938).

³³⁹Ms. Comp. Gen. A-70486, Mar. 18, 1936.

³⁴⁰31 U.S.C. § 686(a) (1970).

³⁴¹52 Comp. Gen. 128, 132 (1972) citing S. REP. No. 840, 77th Cong., 1st Sess. (1932).

Where one department desires another, due to its organization or special knowledge, to perform certain work for it.³⁴²

This authority granted in the 1942 amendment is strictly limited to the agencies or activities enumerated in the statute.³⁴³

The authority provided by section 601 for one agency to order upon another is limited to agencies of the federal government. It does not allow state agencies, including the national guard, to order upon a federal activity or to accept orders from such activity.³⁴⁴ Nor does it authorize an intrabureau or intradepartmental arrangement.³⁴⁵

Orders placed pursuant to section 601 were originally to be considered as obligations upon appropriations in the same manner as orders or contracts placed with private contractors.³⁴⁶ However, 31 U.S.C. § 686-1 significantly modified that concept. Section 686-1 limits funds used to finance Economy Act orders to the period of availability for obligation authorized in the act appropriating the funds to the ordering activity. Section 686-1 states: "No funds withdrawn and credited pursuant to section 686 of . . . [title 31]

³⁴² *Id.*

³⁴³ Such authority may, of course, be granted by statute independent of 31 U.S.C. § 686 (1970).

³⁴⁴ *Ms.* Comp. Gen. B-152420, Feb. 25, 1964.

³⁴⁵ ³⁸ Comp. Gen. 734 (1959). Such intra-bureau or intra-agency procurements are authorized by 31 U.S.C. § 628a (1970). This statute was passed specifically to allow what the Comptroller General has ruled was not authorized by the Economy Act, section 601. In *S. REP. NO.* 1289, 89th Cong., 2d Sess., 1966 U.S. CODE CONG. & AD. NEWS 2340, it was stated that § 628a was designed to

. . . permit (subject to the limitation applicable to each appropriation concerned) an agency to use each appropriation available to it during a fiscal year to finance the procurement of materials and services or other costs for which funds are available in other appropriations of the agency, provided final adjustment by charge to the appropriation benefited and credited to the financing appropriation is made on or before the close of each fiscal year.

Inasmuch as the expenditures of all departments and agencies must be made pursuant to law, appropriations may be used only for the particular purposes specified therein. Legislation has been enacted authorizing departments or agencies to provide materials and services to each other on a reimbursable basis where it is in the interest of the Government that this be done (31 U.S.C. § 638). This authority, however, does not apply to bureaus or offices within the departments or agencies.

Under this legislation, an available appropriation could be used for the original procurement of materials or services required by several bureaus within a department or agency charging in the first instance one appropriation and later after the services have been performed or the product furnished, make an accounting adjustment charging various other appropriations legally obligated for the cost of the services or materials.

This bill will have absolutely no effect on present law [prohibiting transfer of funds for purposes other than those intended by Congress]. Every expenditure must be charged to the correct appropriation as enacted. There can be no diversion of funds for other purposes under this legislation. This legislation is primarily a bookkeeping convenience. It does not authorize the augmentation of funds. . . .

³⁴⁶ 31 U.S.C. § 686(c) (1970).

. . . , shall be available for any period beyond that provided by the act appropriating such funds."³⁴⁷ The effect of this section is that interagency agreements under **31 U.S.C. § 686** chargeable to fiscal year appropriations must deobligate funds furnished under those agreements at the end of the fiscal year of the appropriation availability to the extent that the performing agency (agency ordered upon) has not incurred valid obligations by performance of the work, by contract or otherwise.³⁴⁸

Economy Act orders create some interesting problems in relation to the Anti-Deficiency Act. That such orders can lead to violations of R.S. **3679** is unquestionable. Suppose, for instance, such an order is issued for the performance of work the cost of which exceeds the funds available to the ordering agency to pay for the work? The order is an authorization to the performing activity to incur obligations.³⁴⁹ An authorization to obligate in excess of available funds violates R.S. **3679**.³⁵⁰

An even more interesting example of potential R.S. **3679** violations connected with orders under the Economy Act grows out of the requirements of Section **686-1**, Title **31**. Suppose Fort Blank needs a large number of training aids to carry out its training mission. Suppose, further, that training aids are normally procured by an activity of the Navy Department. Fort Blank issues an order under section **601** of the Economy Act of August **20, 1977**, to the Navy activity for the required training aids. Operation and Maintenance funds, available for obligation until September **30, 1977**, are obligated on the order. The Navy receives the order, but is unable to contract for the Army requirement until October **15, 1977**. On that date the Navy signs a contract with a private firm for the needed supplies.

What funds are legally available for the contact? Certainly not those originally provided by the Army. Those funds, available only for fiscal year **1977**, must be deobligated at the end of that fiscal year (September **30, 1977**) in accordance with **31 U.S.C.**

³⁴⁷ **31 U.S.C. § 686-1** (1970).

³⁴⁸ **39 Comp. Gen. 317** (1959); **34 Comp. Gen. 418** (1955); **31 Comp. Gen. 83** (1951); **Ms. Comp. Gen. B-134099**, 13 Dec. 1957. DoD Handbook 7220-9-H, *supra* note 83, at para. 22114.C provides: "Obligations recorded for Economy Act Orders against annual or multiple-year appropriations shall be decreased as of the point in time the appropriation is no longer available for obligation to the extent that the agency ordered upon has not incurred obligations under such orders."

³⁴⁹ See attachment to opinion, Procurement Law Division, Office of The Judge Advocate General, U.S. Army, DAJA-PL 1976/6586, 13 Mar. 1976.

³⁵⁰ **31 U.S.C. § 665(a)** (1970). See also AR 37-21, *supra* note 40, para. 16a.

§ 686-1. Thus the Navy executed a contract not supported by an appropriation available for the fulfillment thereof, a violation of 31 U.S.C. § 665(a) and (h) and Army Regulation 37-20, paragraph 16b. Even more interesting in this hypothetical situation is the question of who is responsible for the violation — Army or Navy personnel?

VII. DETERMINING RESPONSIBILITY FOR VIOLATIONS OF THE ANTI-DEFICIENCY ACT

Revised Statutes 3679 requires each officer who has control of any appropriation subject to apportionment in the legislative and judicial branches of Government, and the head of each executive agency, to prescribe by regulation, subject to approval by the Director of the Office of Management and Budget, a system of administrative controls that will among other things, enable such officer or agency head to fix responsibility for the creation of any obligation or expenditure in excess of an apportionment or reapportionment.³⁵¹ A task easier set than done.

The Department of Defense (DoD) implementation of R.S. 3679, DoD Directive 7200.1,³⁵² states:

When any provision of Section 3679, Revised Statutes, or any provisions of this directive have been violated, the head of the organizational unit under whose jurisdiction the violation has occurred shall promptly report such violation. . . stating the circumstances and naming the individual or individuals involved.³⁵³

The directive also indicates that, in addition to including the name and position of the individual or individuals responsible for violations of R.S. 3679, the report of the violation shall describe “ . . . the administrative discipline imposed and any further steps taken with respect to the officer or employee, or an explanation as to why no disciplinary action is considered necessary.”³⁵⁴ Similar requirements are set out in Army Regulation 37-20.³⁵⁵ Certainly Congress desires that responsibility for violations be fixed. Mr. Adabbo, during hearings held by the Department of Defense Subcommittee of the House of Representatives Committee on Appropriations, stated: “What concerns me . . . is not only the \$21 million [overobligation] and possibly an additional \$300 million, \$400 mil-

³⁵¹ 31 U.S.C. § 665(g) (1970 & Supp. V 1975).

³⁵² DODD 7200.1, *supra* note 40.

³⁵³ *Id.* XII.A.

³⁵⁴ *Id.* XII.B.(2) (h).

³⁵⁵ AR 37-20, *supra* note 40, paras. 17 & 18

lion, or \$700 million, but also that the names [of the responsible individuals] have not been submitted to the committee in accordance with the law."³⁵⁶

Essentially, the responsible person or persons,³⁵⁷ within the intent of R.S. 3679, are those whose actions are responsible for the particular error that directly causes the overobligation or other violation. In some situations the action and the individual responsible for the action that results in a violation are relatively easy to identify. The Department of Defense Accounting Guidance Handbook³⁵⁸ specifies: "The term 'responsible officer,' as used in DoD Directive 7200.1, is the officer or employee who has authorized or created the overobligation or expenditure in question . . ."³⁵⁹

This approach is consistent with testimony presented to the Senate during hearings on amendments to the Anti-Deficiency Act in 1950. Referring to what became subsection (g) of R.S. 3679, Frederick Lawton, then Director of the Bureau of the Budget, stated:

At the present time, theoretically, I presume the agency head is about the only one that you could really hold responsible for exceeding [an] apportionment. The revised section provides for going down the line to the person who creates the obligation against the fund and fixes the responsibility on the bureau head or the division head, if he is the one who creates the obligation.³⁶⁰

Thus, if a contracting officer executes a contract which, combined with other outstanding obligations and liabilities, exceeds the fund subdivision from which payment is to be made, under the above guidance the contracting officer is the responsible party within the meaning of R.S. 3679. Or suppose a financial officer commits funds in excess of the amount available in a particular subdivision. Since a commitment is an authorization to obligate within the meaning of R.S. 3679,³⁶¹ the issuance of a commitment in excess of available funds is a violation of the statute.³⁶² Hence, the issuing officer, the

³⁵⁶*Hearings on Dep't of Defense Appropriation, 1978, Before the Subcomm. on the Dep't of Defense of the Comm. on Appropriations, House of Representatives*, 95th Cong., 1st Sess. 631 (1977) [hereinafter cited as 1978 Hearings].

³⁵⁷Whenever possible, under the facts of each case, only one party should be named as responsible for a violation of R.S. 3679. AR 37-20, *supra* note 40, para. 18g states: "Although other persons may have participated in the transaction [giving rise to a violation], in usual circumstances a single individual will be found responsible."

³⁵⁸DoD Handbook 7220.9-H, *supra* note 83.

³⁵⁹*Id.* para. 21104.B.

³⁶⁰*Hearings Before the Senate Appropriations Comm. on H.R. 7786*, 81st Cong., 2d Sess. 10 (1950). H.R. 7786 later became the General Appropriation Act of 1951.

³⁶¹AR 37-21, *supra* note 197, para. 1-4.

employee who “. . . authorized . . . the overobligation . . .,” is the party responsible for the violation.

Other instances of violations of R.S. 3679 arise where it is equally easy to identify the responsible party. Army Regulation 37-20³⁶³ indicates that an accounting, clerical, recording or reporting error is not of itself a violation of R.S. 3679, but if such error leads to a violation in fact, “[t]he person who made or caused the error, and thus created the overobligation, will be named in the report [of violation].”³⁶⁴ That regulation also provides that “[i]f a violation occurs because of withdrawal of funds in excess of available balances, the person who authorized or directed the withdrawal of funds will be held responsible for the violation.”³⁶⁵

When targets are used in accordance with recent Department of Army policy statements³⁶⁶ and an individual creates an obligation in excess of a target which is the proximate cause of an overobligation in a fund subdivision, the party that exceeds the target is responsible for the overobligation.³⁶⁷ For example, an installation’s allotment for operation and maintenance (O&M) is \$100,000. Of the \$100,000, \$75,000 has been obligated leaving a balance of \$25,000. The installation contracting officer is given a citation of funds (target) of \$20,000 against the O&M allotment to buy supplies. If the contracting officer enters a contract for \$30,000, not only is the “target” exceeded, but the O&M allotment, a subdivision of funds,³⁶⁸ is overobligated. The latter is a violation of R.S. 3679³⁶⁹ and the contracting officer is the individual responsible for that violation.³⁷⁰

Although the situations discussed above make the task of fixing responsibility for R.S. 3679 violations appear easy, such violations many times involve numerous complex transactions and many individuals. This is particularly true if the amount of the violation is very large and the actions involved occurred over a long period of time. In cases such as these, R.S. 3679 still requires that responsi-

³⁶² 31 U.S.C. § 665(a) (1970); AR 37-21, *supra* note 197, para. 1-4.

³⁶³ AR 37-20, *supra* note 40.

³⁶⁴ *Id.* para. 16c.

³⁶⁵ *Id.* para. 16i.

³⁶⁶ Message, Office of the Comptroller of the Army, subject: Identification of Absolute Limitations Falling Under the Provisions of Section 3679 of Revised Statutes, as amended (31 U.S.C. 665), 7 Oct. 1977. See discussion of the background of this message, in text above notes 116-19 *supra*.

³⁶⁷ *Id.*

³⁶⁸ See DoD Directive 7200.1, *supra* note 40, para. IV.D.

³⁶⁹ *Id.* para. IX.

³⁷⁰ Absolute Limitations Message, *supra* note 124.

bility for the violation be fixed. Obviously, no individual should be named unless his actions were a cause in fact of the violation. But if many individuals are involved, it is necessary to determine which action of which individual was the proximate cause of the violation.³⁷¹ The best approach was summarized in a 1976 memorandum for the Assistant Secretary of the Army (Financial Management).

[The individual held responsible for an R.S. 3679 violation] must, of course, be distinguishable from the [other individuals involved] in the degree of his responsibility. Generally, he will be the highest ranking official in the decision-making process who had knowledge, either actual or constructive, of (1) precisely what actions were taken and (2) the impropriety or at least questionableness of such actions. There will be officials who had knowledge of either factor. But the person in the best and perhaps only position to prevent the ultimate error—and thus the one who must be held accountable—is the highest one who is aware of both.³⁷²

Thus, where multiple individuals are involved, the individual who is responsible within the meaning of R.S. 3679 for any violation of that statute must not be too remote from the cause of the violation³⁷³ and must be in a position to have prevented the violation from occurring.

VIII. MISCELLANEOUS CONSIDERATIONS

A. OTHER LIABILITY

The fact that an individual involved in a violation of Revised Statute 3679 is not named responsible for the violation does not mean that other action cannot be taken. For example, if the individual is military, prosecution under the Uniform Code of Military Justice for dereliction of duty is possible.³⁷⁴ A civilian is subject to administrative sanctions.³⁷⁵

Disbursing officers are particularly vulnerable. Such officers are personally accountable for any illegal, improper, or inaccurate pay-

³⁷¹General Counsel, Dep't of the Army, legal opinion, subject: R.S. 3679 Violations in the PEMA 71 and Prior and OPA 72 Appropriations, Mar. 28, 1976 [hereinafter cited as PEMA 71 and Prior Violations].

³⁷²Memorandum For the Assistant Secretary of the Army (Financial Management), subject: ARMCOM R.S. 3679 Investigation, 1976.

³⁷³PEMA 71 and Prior Violations, *supra* note 371.

³⁷⁴UNIFORM CODE OF MILITARY JUSTICE, art. 92.

³⁷⁵See, e.g., CPR 700 (C17) 751.3 and table pertaining to penalties for various offenses, CPR 700 (C17) 751.A (1973).

ment.³⁷⁶ The liability of such officers arises the moment an improper payment is made.³⁷⁷ Further, the officer is not relieved of personal liability merely because he relied upon an opinion of another executive officer (e.g., legal counsel) in making the payment;³⁷⁸ nor will the officer be relieved of liability even if value is received by the Government, or the officer acted in good faith.³⁷⁹

Disbursing officers in some executive agencies are not held personally responsible for illegal or erroneous payments made by them upon properly certified vouchers. Instead, the certifying officer bears responsibility for such payments.³⁸⁰ However, in the Departments of the Army and Navy, the disbursing officer remains responsible.³⁸¹ Such officers may be relieved from personal liability by the office of the Comptroller General³⁸² unless an irregular, illegal or improper payment is made as direct result of a disbursing officer's negligence.³⁸³ In the latter instance, no relief is available.

B. INVESTIGATION OF POTENTIAL R.S. 3679 VIOLATIONS

The commander of the installation or activity where a potential violation of R.S. 3679 arises is responsible for causing an investigation to be made of that potential violation.³⁸⁴ No particular form is specified for the investigation.³⁸⁵ Numerous possibilities exist. An investigation may be made in accordance with the provisions of Army Regulation 15-6³⁸⁶ or the Inspector General may be appointed to conduct the investigation. The choice of method to be used will depend, of course, upon the facts of each case. For instance, it would not be necessary or cost effective to appoint a Board of Officers to investigate a small dollar overobligation.

Whatever method is selected for the conduct of the investigation, the inquiry should be complete and accurate. The officer (officers)

³⁷⁶See Army Reg. No. 37-103, Finance and Accounting for Installations Disbursing Operations, para. 3-157c (C68, 15 May 1972) [hereinafter cited as AR 37-103].

³⁷⁷See 54 Comp. Gen. 112, 114 (1974).

³⁷⁸See 32 Comp. Gen. 332 (1953); 15 Comp. Gen. 962 (1936).

³⁷⁹46 Comp. Gen. 135 (1966); 14 Comp. Gen. 578, 583 (1935).

³⁸⁰See 31 U.S.C. § 82c (1970).

³⁸¹31 U.S.C. § 82e (1970).

³⁸²See AR 37-103, *supra* note 376, para. 3-157.

³⁸³*Id.*

³⁸⁴AR 37-20, *supra* note 40, para. 17a.

³⁸⁵*Id.*

³⁸⁶Army Reg. No. 15-6, Procedure for Investigating Officers and Boards of Officers (24 Aug. 1977).

responsible for the inquiry should become fully acquainted with the provisions of the Anti-Deficiency Act and implementing regulations. All of the facts surrounding the violation should be assembled. Most importantly, any recommendation related to responsibility for the violation must be fully supported by hard facts produced by the investigation. Too many investigations fall short in this respect. The Department of Defense Accounting Guidance Handbook notes this deficiency, as follows: "Reports of violations [of R.S. 36791 indicate the need for more careful consideration of facts and circumstances in fixing responsibility for violations."³⁸⁷ Failure to fully document and properly fix responsibility for violations can result in outbursts of indignation in Congress such as that of Congressman Addabbo during hearings on certain R.S. 3679 violations.

I remember when . . . [a violation of R.S. 36791. . . happened once before, one of the top members in the Department of the Army was made the scapegoat. I am just wondering if you are looking for another scapegoat to take the responsibility for someone's failure in not having properly kept . . . records. If someone is responsible, fine. I just hope that for the purpose of complying with the law, one name and one man is not made the scapegoat for this . . .³⁸⁸

C. MITIGATION OF VIOLATIONS OF R.S. 3679

Once a violation of R.S. 3679 occurs, it cannot be cured or eliminated. Many attempts to find a defense or excuse for such violations have fallen short. An overobligation or overexpenditure is not avoided by failure to post accounting records, by delay in such posting or by transferring charges or funds between accounts.³⁸⁹ If a violation occurs, the receipt of additional funds or a change in a limitation in the use of particular funds before the end of an accounting period does not mitigate the violation or eliminate reporting requirements.³⁹⁰ Allegations of good faith,³⁹¹ honest mistake,³⁹² or misinterpretation of regulation³⁹³ by the responsible individual will not relieve that party from responsibility for any violation he may have caused.

This is not to say that the extent and ultimate amount of a violation of R.S. 3679 cannot be reduced or that efforts to mitigate the

³⁸⁷ DoD Handbook 7220.9-H, *supra* note 83, para. 21004.B.

³⁸⁸ 1978 Hearings, *supra* note 356, at 631.

³⁸⁹ AR 37-20, *supra* note 40, para. 16f.

³⁹⁰ *Id.* at para. 16g.

³⁹¹ Ms. Comp. Gen. B-129004, Oct. 25, 1956.

³⁹² 35 Comp. Gen. 356 (1955).

³⁹³ *Id.*

effects of a violation should not be taken. Any effort to mitigate a violation must be made only after the circumstances of each violation are carefully considered.³⁹⁴ For example, if an overobligation results from a contract, mitigation efforts could include termination of the contract for convenience³⁹⁵ or an agreement with the contractor to accept a no-cost stop work order.³⁹⁶ Whatever the circumstances, every effort must be made to reduce or prevent growth of the amount of the violation.

D. PENALTIES OF VIOLATIONS OF R.S. 3679

Revised Statutes 3679 is a criminal statute. Criminal penalties under the statute include the possibility of a fine of not more than \$5000, imprisonment of not more than two years, or both.³⁹⁷ A violation is criminal only where an officer or employee of the United States knowingly or willfully violates the statute.³⁹⁸ However, for any other violation of R.S. 3679 the statute states: “. . . any officer or employee of the United States who shall violate subsections (a), (b), or (h) of this section [3679] shall be subject to appropriate administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office.”³⁹⁹

The Department of Defense (DoD) implementation of this provision of R.S. 3679 is broader than the statute. DoD Directive 7200.1 provides:

The Secretary of the appropriate military department, or his authorized designee, or the designated official for the Office of the Secretary of Defense, will, upon the basis of such report [of violation of R.S. 3679] or other data which may be obtained, take appropriate disciplinary action, including, when circumstances warrant, suspension from duty without pay, removal from office where applicable, or appropriate action under the Uniform Code of Military Justice.⁴⁰⁰

³⁹⁴ 55 Comp. Gen. 768, 772 (1976).

³⁹⁵ *Id.* at 722. A termination for convenience would limit the actual deficiency to “those costs payable to the contractor under the Termination for Convenience clause. However, there may be cases in which this approach would be inconsistent with the best interests of the Government or where more flexible alternatives exist.”

³⁹⁶ *Id.* at 775.

³⁹⁷ 31 U.S.C. § 665(i) (1) (1970).

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ DoDD 7200.1, *supra* note 40, para. XII.A.

IX. RECOMMENDATIONS AND CONCLUSIONS

The Anti-Deficiency Act is significant legislation that is not well understood or applied. Too little guidance, too little interpretation and too little assistance in applying the statute are available from the Department of Defense or the Department of the Army in the field at all levels, but particularly at the installation level. Guidance is erratic and at times inconsistent. To fill this information gap the Army needs a new, clear and concise implementing regulation incorporating the policies enunciated in the October 1977 message from the Office of the Comptroller of the Army.⁴⁰¹ For instructional purposes actual violation reports and determinations, cleansed, if necessary, of names and places, should be distributed periodically to **all** subordinate elements of the Army. Indeed, illustrations of actual violations are an excellent way to educate officials in the proper use of funds and to prevent similar violations from occurring in the future.

Officials at all levels of the Department of Army have a duty to insure that the system of administrative controls established to prevent violations of R.S. 3679 works. This can be effectively done when comptrollers, financial personnel, contracting and purchasing personnel, and legal counsel work together. It is simply not acceptable for an attorney when confronted with a question related to appropriations or funding to say, "That is the Comptroller's function." It is unacceptable for a comptroller to assume the role of an attorney and attempt to rule on the legality of questionable obligations or expenditures. It is unacceptable for a contracting officer to hide behind "just any fund cite" to support a particular purchase. Anti-Deficiency Act violations are preventable when staff relationships are used by the various officials involved in the procurement process. Common purpose, common vocabulary and common rules should make it easy to recognize the "legal" problems and act on that recognition—reporting and correcting along the way.

APPENDIX A
DEFINITIONS

Each of the following definitions is excerpted from one of the following documents:

A. Office of Management and Budget Circular A 34, *Instructions on Budget Execution*, July 1976,

⁴⁰¹Absolute Limitations Message, *supra* note 124.

B. Department of Defense Directive **7200.1**, *Administrative Control of Appropriations Within the Department of Defense*, August **18, 1955**, as amended.

C. Army Regulation **37-20**, *Administrative Control of Appropriated Funds*, **16 July 1965**.

D. Army Regulation **37-21**, *Establishing and Recording of Commitments and Obligations*, **26 May 1977**.

1. *Administrative limitation*. A limitation imposed upon the use of an appropriation or other fund or subdivision thereof, having the same effect as a fund subdivision in the control of obligations and expenditures. (AR **37-20**, para **5**.)

2. *Administrative subdivision of funds*. Any subdivision of an appropriation which makes funds available in a specified amount for the purpose of incurring obligations, or which can be further subdivided to make funds available in a specified amount for the purpose of incurring obligations, subject to limitations contained in the funding documents, statutes, regulations or other applicable directives. (AR **37-20**, para **5**.)

3. *Allocation*. An authorization by a designated official of a component of the Department of Defense making funds available within a prescribed amount to an operating agency for the purpose of making allotments. (DoDD **7200.1**, para **IV**.)

4. *Allotment and Sub-Allotment*. An authorization by the head or other authorized employee of an agency to incur obligations within a specified amount pursuant to an appropriation or other statutory provision. (DoDD **7200.1**, para **IV**.)

5. *Appropriation*. Includes appropriations, funds and authorizations to create obligations by contract in advance of appropriations or any other authority making funds available for obligation or expenditure. (DoDD **7200.1**, para **IV**.)

6. *Appropriation or fund account*. An account established in the Treasury to record amounts available for obligation and outlay. Each such account provides the framework for the establishment of a set of balanced accounts on the books of the agency concerned. These accounts include not only those to which money is directly appropriated but also those to which revenues are available for use without current Congressional appropriation action, such as revolving funds and trust funds.

A *one-year account* is available for incurring obligations only during a specified fiscal year.

A *multiple-year account* is available for incurring obligations for a definite period in excess of one fiscal year.

A *no-year account* is available for incurring obligations for an indefinite period, usually until the objectives have been accomplished.

An *unexpired account* is one in which authority to incur obligations has not ceased to be available.

An *expired account* is one in which authority to incur obligations has ceased to be available but from which outlays may be made to pay obligations previously incurred, as well as valid adjustments thereto. This includes successor accounts established pursuant to **31 U.S.C. 701-708** ("M" accounts). (OMB Cir. A **34**, § **21.1**).

7. Apportionment. A determination by the Director of the Bureau of the Budget as to the amount of obligations which may be incurred during a specified period under an appropriation, contract authorization, other statutory authorizations, or a combination thereof, pursuant to Section **3679** of the Revised Statutes as amended (**31 U.S.C. 665**). An apportionment may relate either to all obligations to be incurred during the specified period within an appropriation account or to obligations to be incurred for an activity, function, project, object or combination thereof. (DoDD **7200.1**, para IV.)

8. Commitment. Administrative reservation of funds, based upon firm procurement directives, orders, requisitions, or requests which authorize the creation of an obligation without further recourse to the official responsible for administrative control of funds. The term refers also to the authorization action. (AR **37-21**, para **13**.)

9. Expenditure. The charges incurred for goods and services received and other assets acquired, whether or not payment has been made and whether or not invoices have been received. (DoDD **7200.1**, para IV.)

10. Fiscal year. The period beginning October **1** and ending September **30** of the following calendar year. The fiscal year is designated by the calendar year in which it ends, e.g., fiscal year **1977** is the year beginning October **1, 1976**, and ending September **30, 1977**. (OMB Cir. A **34**, § **21.1**.)

11. Funds. Accounting units established for segregating revenues and assets in accordance with law and for assuring that revenues and other assets are applied only to financial transactions for which they are appropriated or otherwise authorized. Funds are of different types and designed for different purposes:

Federal. Funds collected and used by the Federal Government for the general purposes of the Government. There are four types of Federal fund accounts:

General. The fund credited with all receipts that are not earmarked by law and charged with payments out of appropriations of (“any money in the Treasury not otherwise appropriated” and out of general borrowings).

Special. A fund credited with receipts of the Government that are earmarked for a specific purpose. Generally, if the purpose of the fund is to carry out a cycle of business-type operations, it will be classified instead as a “public enterprise fund.”

Public enterprise. A revolving fund credited with collections, primarily from outside of the Government, that are earmarked to finance a continuing cycle of business-type operations.

Intragovernmental. Federal funds that facilitate financing of transactions within and between Federal agencies. “Intragovernmental funds” are of two types.

Intragovernmental revolving. A revolving fund credited with collections, primarily from other agencies and accounts, that are earmarked by law to carry out a continuing cycle of intragovernmental business-type operations.

Management (including consolidated working funds). A fund in which there are merged monies derived from two or more appropriations, in order to carry out a common purpose or project, but not involving a cycle of operations. “Management funds” include consolidated working funds, which are set up pursuant to law to receive advance payments from other agencies or bureaus for agreed-upon undertakings, primarily for the benefit of the paying account. (OMB Cir. A 34, § 21.1.)

12. Invalid withdrawal. A withdrawal of funds in excess of the unallotted or unobligated balance, less amounts for outstanding contingent liabilities, e.g. price redetermination and quality variances. (This does not preclude the allotter from revising a program or directing the allottee to reduce obligations or contingencies so as to make funds available for withdrawal in consonance with the reduced requirements of the revised program.) (AR 37–20, para 5.)

13. Obligations incurred. Amounts of orders placed, contracts awarded, services received, and similar transactions during a given period that will require payments during the same or a future period. Such amounts will include outlays for which obligations had not been previously recorded and will reflect adjustments for differ-

ences between obligations previously recorded and actual outlays to liquidate those obligations. See Section 22 for a more detailed explanation of the concept of obligations and Section 25 for its application to specific types of transactions. (OMB Cir. A 34, § 21.1.)

14. *Open allotment.* An allotment made by the head of an operating agency for a specific project and in a specific amount, the account number of which is published for charge without specific limitations as to amounts, by any officer or employee authorized to charge such account. (DoDD 7200.1, para IV.)

APPENDIX B
ANTI-DEFICIENCY ACT
Section 3679, Revised Statutes
TITLE 31, UNITED STATES CODE

§ 665. APPROPRIATIONS

**Expenditures or contract obligations in
excess of funds prohibited**

(a) No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

Voluntary service forbidden

(b) No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property.

**Apportionment of appropriations; reserves;
distribution; review**

(c) (1) Except as otherwise provided in this section, all appropriations or funds available for obligation for a definite period of time shall be so apportioned as to prevent obligation or expenditure thereof in a manner which would indicate a necessity for deficiency or supplemental appropriations for such period; and all appropriations of funds not limited to a definite period of time, and all au-

thorizations to create obligations by contract in advance of appropriations, shall be so apportioned as to achieve the most effective and economical use thereof. As used hereafter in this section, the term "appropriation" means appropriations, funds, and authorizations to create obligations by contract in advance of appropriations.

(2) In apportioning any appropriation, reserves may be established solely to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements or greater efficiency of operations. Whenever it is determined by an officer designated in subsection (d) of this section to make apportionments and reapportionments that any amount so reserved will not be required to carry out the full objectives and scope of the appropriation concerned he shall recommend the rescission of such amount in the manner provided in the Budget and Accounting Act, 1921, for estimates of appropriations. Except as specifically provided by particular appropriations Acts or other laws, no reserve shall be established other than as authorized by this subsection. Reserves established pursuant to this subsection shall be reported to the Congress in accordance with the Impoundment Control Act of 1974.

(3) Any appropriation subject to apportionment shall be distributed by months, calendar quarters, operating seasons, or other time periods, or by activities, functions, projects, or objects, or by a combination thereof, as may be deemed appropriate by the officers designated in subsection (d) of this section to make apportionments and reapportionments. Except as otherwise specified by the officer making the apportionment, amounts so apportioned shall remain available for obligation, in accordance with the term of the appropriation, on a cumulative basis unless reapportioned.

(4) Apportionments shall be reviewed at least four times each year by the officers designated in subsection (d) of this section to make apportionments and reapportionments, and such reapportionments made or such reserves established, modified, or released as may be necessary to further the effective use of the appropriation concerned, in accordance with the purposes stated in paragraph (1) of this subsection.

Officers controlling apportionment or reapportionment

(d) (1) Any appropriation available to the legislative branch, the judiciary, the United States International Trade Commission, or the District of Columbia, which is required to be apportioned under subsection (e) of this section, shall be apportioned or reapportioned

in writing by the officer having administrative control of such appropriation. Each such appropriation shall be apportioned not later than thirty days before the beginning of the fiscal year for which the appropriation is available, or not more than thirty days after approval of the Act by which the appropriation is made available, whichever is later.

(2) Any appropriation available to an agency, which is required to be apportioned under subsection (c) of this section, shall be apportioned or reapportioned in writing by the Director of the Office of Management and Budget. The head of each agency to which any such appropriation is available shall submit to the Office of Management and Budget information, in such form and manner and at such time or times as the Director may prescribe, as may be required for the apportionment of such appropriation. Such information shall be submitted not later than forty days before the beginning of any fiscal year for which the appropriation is available, or not more than fifteen days after approval of the Act by which such appropriation is made available, whichever is later. The director of the Office of Management and Budget shall apportion each such appropriation and shall notify the agency concerned of his action not later than twenty days before the beginning of the fiscal year for which the appropriation is available, or not more than thirty days after the approval of the Act by which such appropriation is made available, whichever is later. When used in this section, the term "agency" means any executive department, agency, commission, authority, administration, board, or other independent establishment in the executive branch of the Government, including any corporation wholly or partly owned by the United States which is an instrumentality of the United States. Nothing in this subsection shall be so construed as to interfere with the initiation, operation, and administration of agricultural price support programs and no funds (other than funds for administrative expenses) available for price support, surplus removal, and available under section 612(c) of Title 7, with respect to agricultural commodities shall be subject to apportionment pursuant to this section. The provisions of this section shall not apply to any corporation which obtains funds for making loans, other than paid in capital funds, without legal liability on the part of the United States.

**Apportionment necessitating deficiency or
supplemental estimates**

(e) (1) No apportionment or reapportionment, or request there-

fore by the head of an agency, which in the judgment of the officer making or the agency head requesting such apportionment or reappportionment, would indicate a necessity for a deficiency or supplemental estimate shall be made except upon a determination by such officer or agency head, as the case may be, that such action is required because of (A) any law enacted subsequent to the transmission to the Congress of the estimates for an appropriation which require expenditures beyond administrative control; or (B) emergencies involving the safety of human life, the protection of property, or the immediate welfare of individuals in cases where an appropriation has been made to enable the United States to make payment of, or contributions toward, sums which are required to be paid to individuals either in specific amounts fixed by law or in accordance with formulae prescribed by law.

(2) In each case of an apportionment or a reappportionment which, in the judgment of the officer making such apportionment or reappportionment, would indicate a necessity for a deficiency or supplemental estimate, such officer shall immediately submit a detailed report of the facts of the case to the Congress. In transmitting any deficiency or supplemental estimates required on account of any such apportionment or reappportionment, reference shall be made to such report.

Exemption of trust funds and working funds expenditures from apportionment

(f) (1) The officers designated in subsection (d) of this section to make apportionments and reappportionments may exempt from apportionments trust funds and working funds expenditures from which have no significant effect on the financial operations of the Government, working capital and revolving funds established for intragovernmental operations, receipts from industrial and power operations available under law and any appropriation made specifically for—

- (1) interest on, or retirement of, the public debt;
- (2) payment of claims, judgments, refunds, and draw-backs;
- (3) any item determined by the President to be of a confidential nature;
- (4) payment under private relief Acts or other laws requiring payments to designated payees in the total amount of such appropriation;

(5) grants to the States under subchapters I, IV, or X of chapter 7 of Title 42, or under any other public assistance subchapter in such chapter.

(2) The provisions of subsection (c) of this section shall not apply to appropriations to the Senate or House of Representatives or to any Member, committee, Office (including the office of the Capitol), officer, or employee thereof.

Administrative division of apportionment; simplification of system for subdividing funds

(g) Any appropriation which is apportioned or reapportioned pursuant to this section may be divided and subdivided administratively within the limits of such apportionments or reapportionments. The officer having administrative control of any such appropriation available to the legislative branch, the judiciary, the United States International Trade Commission, or the District of Columbia, and the head of each agency, subject to the approval of the Director of the Office of Management and Budget, shall prescribe, by regulation, a system of administrative control (not inconsistent with any accounting procedures prescribed by or pursuant to law) which shall be designed to (A) restrict obligations or expenditures against such appropriation to the amount of apportionments or reapportionments made for each such appropriation, and (B) enable such officer or agency head to fix responsibility for the creation of any obligation or the making of any expenditure in excess of an apportionment or reapportionment. In order to have a simplified system for the administrative subdivision of appropriations or funds, each agency shall work toward the objective of financing each operating unit, at the highest practical level, from not more than one administrative subdivision for each appropriation or fund affecting such unit.

Expenditures in excess of apportionment prohibited; penalties

(h) No officer or employee of the United States shall authorize or create any obligation or make any expenditure (A) in excess of an apportionment or reapportionment, or (B) in excess of the amount permitted by regulations prescribed pursuant to subsection (g) of this section.

Administrative discipline; report on violations

(i) (1) In addition to any penalty or liability under other law, any officer or employee of the United States who shall violate subsec-

tions (a), (b), or (h) of this section shall be subjected to appropriate administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office; or any officer or employee of the United States who shall knowingly and willfully violate subsections (a), (b) or (h) of this section shall, upon conviction, be fined not more than \$5,000 or imprisoned for not more than two years, or both.

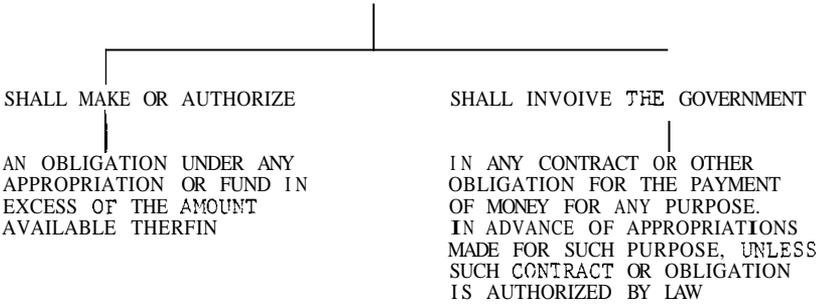
(2) In the case of a violation of subsection (a), (b), or (h) of this section by an officer or employee of an agency, or of the District of Columbia, the head of the agency concerned or the Commissioners of the District of Columbia, shall immediately report to the President, through the Director of the Office of Management and Budget, and to the Congress all pertinent facts together with a statement of the action taken thereon.

APPENDIX C

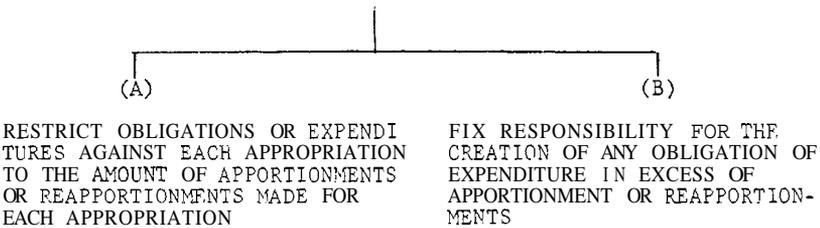
THE BASIC PROVISIONS OF R.S. 3679--31 U.S.C. § 665a

PRIMARY PURPOSE: TO PREVENT OVEROBLIGATION OR OVEREXPENDITURE OF PUBLIC FUNDS

31 U.S.C. § 665a
NO OFFICER, OR EMPLOYEE
OF UNITED STATES



31 U.S.C. I 665(g)
HEAD OF AGENCY SHALL PRESCRIBE REGULATIONS NOT INCONSISTENT WITH STATUTE THAT ESTABLISH A SYSTEM OF ADMINISTRATIVE CONTROLS TO



AR 37-20 PRESCRIBED PURSUANT TO
SUBSECTION (g)

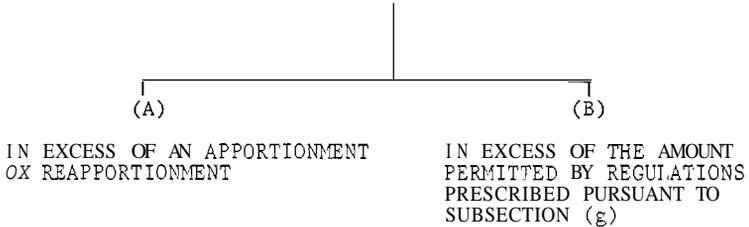
----- Para. 16a -----AR 37-20

A VIOLATION OF R.S. 3679 OCCURS WHEN
ANY ACTION RESULTS IN

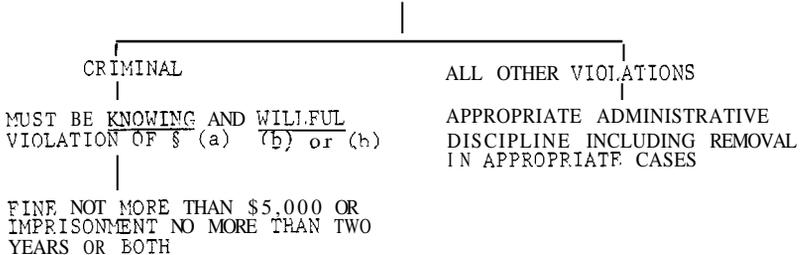


31 U.S.C. § 665(h)

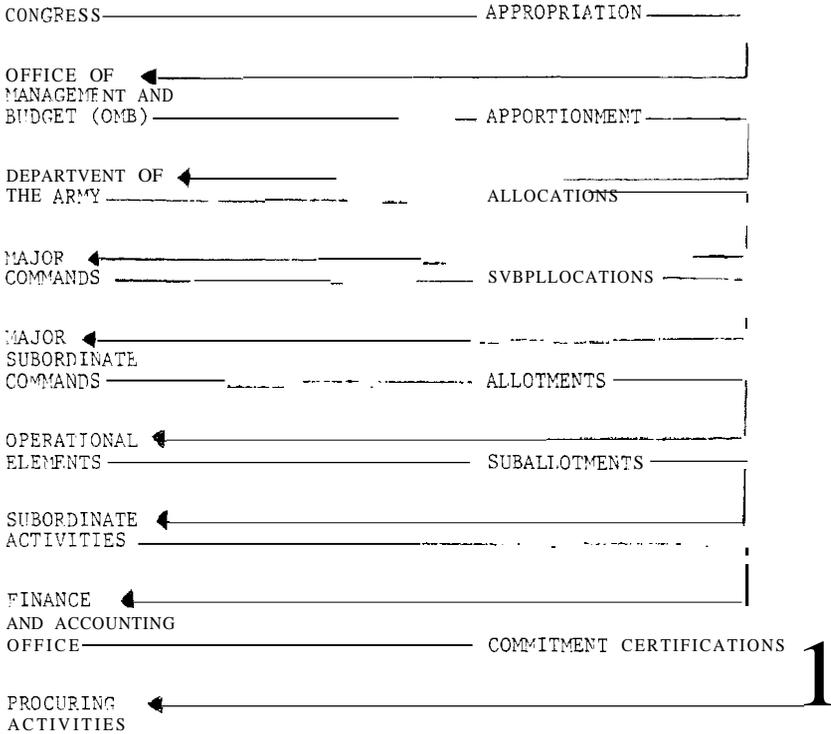
NO OFFICER OR EMPLOYEE OF THE UNITED STATES SHALL
MAKE OR AUTHORIZE ANY OBLIGATION OR EXPENDITURE



PENALTIES FOR VIOLATION
31 U.S.C. § 665(i)(1)



APPENDIX D
FUND DISTRIBUTION CHART



1

AN ANALYSIS OF ASPR SECTION XV BY COST PRINCIPLE *

Captain (P) Glenn E. Monroe **

The principles governing allowability of contract costs are set forth in Section XV of the Armed Services Procurement Regulation. Captain Monroe reviews thirty-four of the cost principles and relevant case law to discover what rules of interpretation are likely to be followed by the Armed Services Board of Contract Appeals and the Court of Claims in considering contractor cost reimbursement claims.

The article opens with a brief review of basic accounting concepts necessary to an understanding of cost allowability in government contracting. Thereafter Captain Monroe breaks the cost principles down into three groups.

The first group, general operational expenses, is divided into on-going business expenses, employee costs, and costs of materials. The second group includes expenditures directed at securing and at performing a government contract. The third and last is a miscellaneous category consisting of interest expense and other financial costs, and professional and consultant service costs.

Captain Monroe notes that court and board decisions tend to be noticeably conservative, or favorable to the government, as to some cost principles, and distinctly liberal, or favorable to contractors, as to other principles. In a few of the liberal decisions the plain language of the

*This article is based upon a seminar paper submitted by the author in partial fulfillment of the requirements for the degree of Master of Laws (LL.M.) at the School of Law of the University of Virginia, Charlottesville, Virginia. The opinions and conclusions presented in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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cost principles involved has apparently been disregarded by the decisionmakers.

The author concludes that the Armed Services Board of Contract Appeals probably is sympathetic toward contractor claims based upon ordinary on-going business expenses. The opposite is likely to be true for claims based upon contractor expenditures to secure a government contract, and also to confer personal benefits directly on contractor employees. Captain Monroe recommends that the board and the Court of Claims strive to articulate more clearly the policy considerations underlying their decisions.

I. INTRODUCTION

Notwithstanding the obvious importance imparted by its title, Contract Cost Principles and Procedures, Section XV of the Armed Services Procurement Regulation [hereinafter cited as ASPR Section XV] has been accorded infrequent scholarly attention.¹ And the

¹The Armed Services Procurement Regulation [hereinafter cited as ASPR] is being replaced by the Defense Acquisition Regulation [DAR]. The designation "ASPR" will be used in this article instead of the new designation "DAR." This is consistent with guidance provided in a memorandum from Dale W. Church, Deputy Under Secretary of Defense for Research and Engineering (Acquisitions Policy), to various addressees, subject: DoDD 5000.35, Defense Acquisition Regulatory System, 8 March 1978, which reads as follows:

Effective immediately the designation of the Armed Services Procurement Regulation (ASPR) is changed to the Defense Acquisition Regulation (DAR). The first issue of the DAR is planned for late 1978.

Pending the initial publication of the DAR all policies and procedures contained in the current issue of ASPR and in related Defense Procurement Circulars (DPC) remain applicable to the DAR. References to policies and procedures in ASPR will be identified as DAR, DAR (ASPR) or ASPR. Each of these references may be used in conjunction with the appropriate paragraph identification in the current ASPR until the DAR is published. Consistent with the use of the new designation DAR, the DPC will be designated the Defense Acquisition Circular (DAC).

Action is under way to establish the Defense Acquisition Regulatory Council (DARC) to replace the ASPR Committee. The ASPR Committee will continue to operate until the DARC is in full operation.

[1978] FED. CONT. REP. (BNA) A-18.

ASPR has in the past been issued by the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), formerly the Assistant Secretary of Defense (Installations and Logistics), pursuant to authority delegated by the Secretary of Defense under 10 U.S.C. 2202 (1976) and other provisions of Title 10, United States Code. The currently effective edition of ASPR, soon to be replaced by DAR, is the edition of 1 July 1976. This has been updated from time to time by Defense Procurement Circulars. The ASPR is found in Title 32 of the Code of Federal Regulations, Subtitle A, Chapter 1.

The new DAR will be issued under authority of Dep't of Defense Directive No. 5000.35, Defense Acquisition Regulatory System, para. D.2 (8 Mar. 1978).

principles outlined in the Section, although generally understandable, are not arranged in a manner conducive to easy assimilation. The goal of this article is to respond to both problems by reviewing, according to expenditure classification, contract appeals board and, in a few instances, Court of Claims decisions in the area.

In addition to structuring the ASPR Section XV information in a more readable form, the study demonstrates varying approaches to interpretation of ASPR § 15-205 cost principle language according to expenditure category. From these observations it will be possible to develop general guidelines for predicting board and Court of Claims reaction to the requirements under the ASPR cost principles. Indeed, the category into which an expenditure falls may prove to be a more reliable indicator of administrative board and judicial determination than the actual wording of the applicable cost provision!

This failure to adhere strictly to the generally clear wording of the ASPR § 15-205 provisions is an obvious source of difficulty for anyone endeavoring to discover the current development of the law. By segregating the ASPR Section XV cost principles according to cost category and outlining the probable rationale underlying the treatment afforded cases involving these categories, the task of accurately predicting the outcome of cost principle litigation will be simplified. The approach, therefore, is to first divide the ASPR § 15-205 cost provisions into major groups. These groups are subdivided; the subdivisions are further broken down and considered by examining each cost principle (e.g., advertising costs) placed within the category. The cost principle examination consists of an explanation of the requirements imposed by the regulation followed by a consideration of the more important, as well as representative, decisions in which the principle is discussed.

Before examining the § 15-205 individual principles, however, it is necessary to review some basic cost accounting concepts. This preliminary task can best be accomplished by considering some of the general concepts found in Part 2 of ASPR Section XV. Included in this section of the article are a review of accounting terms,* a note on the application of cost principles, and a discussion of the

²The author has previously published a short article setting forth some of the most basic terminology of contract costs in government contracts. Discussed are the Concepts of allowability and allocability of costs; direct and indirect costs; costs incurred or yet to be incurred; and price analysis versus cost analysis. Mention is also made of the Truth in Negotiations Act, 10 U.S.C. § 2306(f) (1970), and its relationship with the ASPR Section XV cost principles. Monroe, *Government*

fundamental prerequisites to cost recovery in government contracting.

After this foundation is constructed, the ASPR § 15-205 principles are examined according to this classification scheme: general operational expenses (subdivided as follows: on-going business expenses, employee costs, and costs of material); expenditures directed at securing or performing a government contract (subdivided as follows: costs directed at securing a government contract and costs directly related to performance of a specific government contract); and costs related to several categories (subdivided as follows: interest and other financial costs and professional and consultant service costs). The last classification serves as a vehicle to explore the validity of a rule developed after consideration of other cost principles. A summary of the significant points developed in this article is presented in the conclusion.

11. BASIC ASPR COST ALLOWABILITY CONCEPTS

ASPR § 15-000, "Scope of Section," introduces the cost allowability material: "This Section contains general cost principles and procedures for the pricing of contracts and contract modifications whenever cost analysis is performed (see 3-807.2), and for the determination, negotiation or allowance of costs when such action is required by a contract clause."

The § 3-807.2³ reference concerns the review of cost or pricing

Contract Costs - An Introduction, THE ARMY LAWYER, Feb. 1977, at 4 [hereinafter cited as Monroe, *Introduction*]. For discussion of proposed changes to the requirements of the Truth in Negotiations Act for price and cost data and analysis, see Monroe, *Federal Acquisition Art and Truth in Negotiations*, THE ARMY LAWYER, July 1978, at 7.

³ASPR § 3-807.2(c) states,
(c) *Cost Analysis*.

(1) Cost analysis is the review and evaluation of a contractor's cost or pricing data (see 3407.3) and of the judgmental factors applied in projecting from the data to the estimated costs, in order to form an opinion on the degree to which the contractor's proposed costs represent what performance of the contract should cost, assuming reasonable economy and efficiency. It includes the appropriate Verification of cost data, the evaluation of specific elements of costs (see 16-206), and the projection of these data to determine the effect on prices of such factors as:

- (i) the necessity for certain costs,
- (ii) the reasonableness of amounts estimated for the necessary costs,
- (iii) allowances for contingencies,
- (iv) the basis used for allocation of overhead costs, and
- (v) the appropriateness of allocations of particular overhead costs to the proposed contract.

(2) Cost analysis shall also include appropriate verification that the contractor's cost submissions are in accordance with the Section XV Contract Cost Principles and Procedures.

data submitted pursuant to the Truth in Negotiations Act.⁴ And, as suggested in the foregoing quotation, the cost principles have appli-

(3) Among the evaluations that should be made where the necessary data are available, are comparisons of a contractor's or offeror's current estimated costs with:

- (i) actual costs previously incurred by the contractor or offeror;
- (ii) his last prior cost estimate for the same or similar item or a series of prior estimates;
- (iii) current cost estimates from other possible sources; and
- (iv) prior estimates or historical costs of other contractors manufacturing the same or similar items.

(4) Forecasting future trends in costs from historical cost experience is of primary importance, but care must be taken to assure that the effect of past inefficient or uneconomical practices are not projected into the future. An adequate cost analysis must include an evaluation of trends, and their effect on future costs. In cases involving production of recently developed, complex equipment, even in periods of relative price stability, trend analysis of basic labor and materials costs should be undertaken.

Para. (c)(2) is of course the point of connection between cost analysis and the cost principles. The concept of cost analysis can better be understood if it is compared with price analysis.

The objective of a contracting officer is to negotiate fair and reasonable prices. (Recall that the price is the final amount paid by the government and it includes elements of cost and profit.) The concept that pervades this area is that cost analysis will not be used if a fair and reasonable price will result from adequate price competition, or catalog or market prices.

ASPR 53-807.2 (1 July 1976) distinguishes and describes, in some detail, price analysis and cost analysis. Price analysis involves consideration only of a "prospective price without evaluation of the separate cost elements and proposed profit of the . . . supplier whose price is being evaluated." All that is examined is the total price figure. The examination consists, primarily, of comparing the proposed price to other price data (e.g., other price proposals, published catalog or market prices, and estimates of cost independently developed by personnel within the purchasing activity).

On the other hand, cost analysis involves a much more detailed review of submitted cost data and the contractor's projections of total price based on such data. In addition to the requirement to examine the necessity and reasonableness of costs and overhead rates, cost analysis must "also include appropriate verification that the contractor's cost submissions are in accordance with the Section XV Contract Cost Principles and Procedures."

Monroe, *Introduction, supra* note 2, at 9.

⁴ In very general terms, the Truth in Negotiations Act requires contractors and subcontractors to submit cost and pricing data before the award of any negotiated prime contract (or subcontract if the Act applies at each tier above the subcontractor) where the price of such contract (or subcontract) is expected to exceed \$100,000. Cost or pricing data also is required before the pricing of any contract modification (or subcontract modification if the Act applies at each tier above the subcontractor) where the sum of the adjustments is expected to exceed \$100,000.

The above requirements do not apply "where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or in exceptional cases where the head of an agency determines that the requirements . . . may be waived . . ." 10 U.S.C. 52306(f) (1970).

Monroe, *Introduction, supra* note 2, at 9.

The act reads as follows:

A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete and current—

- (1) Prior to the award of any negotiated prime contract under this title where the price is expected to exceed \$100,000;
- (2) Prior to the pricing of any contract change or modification for which the price adjustment is expected to exceed \$100,000, or such lesser amount as may be prescribed by the head of the agency;

cation to *all* cost reimbursement contracts,⁵ price redetermination and incentive price revision contracts,⁶ government convenience termination actions,⁷ and pricing changes and other contract modifi-

(3) Prior to the award of a subcontract at any tier, where the prime contractor and each higher tier subcontractor have been required to furnish such certificate, if the price of such subcontract is expected to exceed \$100,000; or

(4) Prior to the pricing of any contract change or modification to a subcontract covered by (3) above, for which the price adjustment is expected to exceed \$100,000 or such lesser amount as may be prescribed by the head of the agency.

Any prime contract or change or modification thereto under which such certificate is required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the head of the agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the negotiated price as is practicable), was inaccurate, incomplete, or noncurrent: **Provided**, That the requirements of this subsection need not be applied to contracts or subcontracts where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination.

For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the head of the agency who is an employee of the United States Government shall have the right, until the expiration of three years after final payment under the contract or subcontract, to examine all books, records, documents, and other data of the contractor or subcontractor related to the negotiation, pricing, or performance of the contract or subcontract.

10 U.S.C. § 2306(f) (1970).

⁵A full description of cost reimbursement type contracts is provided at ASPR 3-405. The major subtypes are the cost contract, ASPR 3-405.2; the cost-sharing contract, ASPR 3-405.3; the cost-plus-incentive-fee contract, ASPR 3-405.4; the cost-plus-award-fee (CPAF) contract, ASPR 3-405.5; and the cost-plus-fixed-fee contract, ASPR 3-405.6.

⁶The price redetermination contracts, ASPR 3-404.5 and 3-404.6; the incentive price revision contracts, ASPR 3-404.4; and related types covered by ASPR 3-404 are variations of the firm fixed price contract. They all start with a fixed price, but this price can be modified upward or downward upon the occurrence of contractually defined contingencies.

⁷The various methods which may be used to settle contracts terminated for convenience, and which by implication will require use of the cost principles, are listed at ASPR 8-204:

Methods of Settlement. Settlement of terminated cost-reimbursement type contracts and of fixed-price type contracts terminated for convenience may be effected by (i) negotiated agreement, (ii) determination by the TCO, (iii) in the case of cost-reimbursement type contracts, costing out under vouchers using Standard Form 1034, or (iv) a combination of these methods. Every effort shall be made to reach a fair and prompt settlement with the contractor. The negotiated agreement is the most expeditious and most satisfactory method of settling termination claims and shall be used whenever feasible. Settlement by determination shall be used only when a termination claim cannot be settled by agreement.

The requirement for use of the cost principles is made explicit at ASPR 8-214:

Cost Principles. The cost principles and procedures set forth in the applicable Part of Section XV shall, subject to the general policies set forth in 8-301, (i) be used in claiming, negotiating, or determining costs relevant to termination settlements under fixed price and cost reimbursement type contracts with other than educational institutions; and (ii) be a guide for the negotiation of settlements under fixed price or cost reimbursement type contracts for experimental, developmental or research work with educational institutions (but see 15-103(iii)).

cations.⁸ Such broad coverage demonstrates the frequency of application and, therefore, the significance of the cost principles section.

Because the ASPR Section XV material is so important, careful consideration of its specific requirements is clearly warranted. ASPR § 15-201.1, Composition of Total Cost, informs that “[t]he total cost of a contract is the sum of the *allowable* direct and indirect costs *allocable* to the contract, incurred or to be incurred, less any allocable credits” (emphasis supplied).⁹ The question now centers on the meaning of “allowable.”

ASPR § 15-201.2, Factors Affecting Allowability of Costs, lists several tests, *all* of which must be considered. They are: “reasonableness, allocability, standards promulgated by the Cost Accounting Standards Board, if applicable, otherwise, generally accepted accounting principles and practices appropriate to the particular circumstances, and any limitations or exclusions set forth in this Part 2. . .” (most notably, the § 15-205 cost principle).¹⁰

Various standard ASPR contract clauses also make ASPR Section XV applicable to termination settlements. These provisions are: para. (f) of the clause at ASPR § 7-103.21(b), used in firm fixed price supply contracts; para. (f) also of the clause at ASPR § 7-203.10, used in cost-reimbursement type supply contracts; para. (d) of the clause at ASPR § 7-302.10(b), for fixed price research and development contracts; para. (f) of the clause at ASPR § 7-602.29(a) for construction and architect-engineer contracts; para. (f) of the clause at ASPR § 7-702.22, for facilities contracts; and para. (f) of the clause at ASPR § 7-901.4, for time and material and labor hour contracts.

⁸The contract clause at ASPR § 7-103.26 reads as follows:

PRICING OF ADJUSTMENTS (1970 JUL)

When costs are a factor in any determination of a contract price adjustment pursuant to the “Changes” clause or any other provision of this contract, such costs shall be in accordance with Section XV of the Armed Services Procurement Regulation as in effect on the date of this contract.

⁹The entire text of ASPR § 15-201.1 is:

Composition of Total Cost. The total cost of a contract is the sum of the allowable direct and indirect costs allocable to the contract, incurred or to be incurred, less any allocable credits. In ascertaining what constitutes costs, any generally accepted method of determining or estimating costs that is equitable under the circumstances may be used, including standard costs properly adjusted for applicable variances.

¹⁰The complete text of ASPR § 15-201.2 is:

Factors Affecting Allowability of Costs. Factors to be considered in determining the allowability of individual items of cost include (i) reasonableness, (ii) allocability, (iii) standards promulgated by the Cost Accounting Standards Board, if applicable, otherwise, generally accepted accounting principles and practices appropriate to the particular circumstances, and (iv) any limitations or exclusions set forth in this Part 2, or otherwise included in the contract as to types or amounts of cost items. (But see 15-201.2(b)(4).) When a contractor has disclosed his accounting practices in accordance with Cost Accounting Standards Board Rules, Regulations, and Standards and any such practices are inconsistent with any of the provisions of this Part 2, costs resulting from such inconsistent practices shall not be allowed in excess of the amount that would have resulted from the use of practices consistent with this Part 2.

Before examining these criteria it is important to note the requirement of ASPR § 15-204(b):

Costs shall be allowed to the extent that they are reasonable (see 15-201.3), allocable (see 15-201.4), and determined to be allowable in view of the other factors set forth in 15-201.2 and 15-205. These criteria apply to all of the selected items of cost which follow [ASPR § 15-205, Cost Principles], notwithstanding that particular guidance is provided in connection with certain specific items for emphasis or clarity. (emphasis supplied)

Thus, it should be abundantly clear that cost allowability depends upon satisfaction of *all* the enumerated tests. As fundamental as this requirement is, it is often curiously overlooked in board decisions concerning cost allowability issues.

However, the Armed Services Board of Contract Appeals (ASBCA) has recognized this mandate in several decisions. For example, it was determined in *General Dynamics Corporation*¹¹ that if an expenditure were prohibited under a cost principle (ASPR § 15-205), questions of allocability and reasonableness are not even relevant.¹² Furthermore, if not in accordance with the contractor's consistent accounting practices, costs are not necessarily allowable, even if in harmony with the ASPR § 15-205 cost principles.¹³ Even prior approval of a contractor's accounting system does not guarantee reimbursement.¹⁴ Therefore, notwithstanding the apparent finality and conclusiveness of the language in the ASPR § 15-205 cost pronouncements, it is essential to keep in mind that the contractor must *also* meet the *other* ASPR § 15-201.2 criteria. What requirements, then, are imposed by these other criteria?

ASPR § 15-201.3, definition of reasonableness, informs that a "cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by an ordinarily prudent person in the conduct of competitive business."¹⁵

¹¹General Dynamics Corp., ASBCA Nos. 12814 and 12890, 68-2 B.C.A. para. 7297.

¹²See also Lockheed Aircraft Co., ASBCA No. 11424, 66-2 B.C.A. para. 5948.

¹³Federal Electric Corp., ASBCA No. 11324, 67-2 B.C.A. para. 6416.

¹⁴Chrysler Corp., ASBCA No. 14385, 71-1 B.C.A. para. 8779.

¹⁵The portion of ASPR § 15-201.3 of most interest in this context is para. (a), which reads as follows:

General. A cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by an ordinarily prudent person in the conduct of competitive business. The question of the reasonableness of specific costs must be scrutinized with particular care in connection with firms or separate divisions thereof which may not be subject to effective competitive restraints. What is reasonable depends upon a variety of considerations and circumstances

Court and board determinations rarely deny cost recovery pursuant to this limitation. The decisions rendered in *Bruce Construction Corporation*¹⁶ and *General Dynamics Corporation*¹⁷ teach that the reasonableness of an expenditure should not be measured against any universal (objective) standard; rather, the contractor's actions under the *particular circumstances* must be considered, and if reasonable, the expenses incurred pursuant thereto are to be so classified. Moreover, it has been held that the *incurrence* of a cost by a contractor establishes a presumption of reasonableness.¹⁸

Although government success is unusual when contesting reasonableness, in *Optimum Designs, Inc.*,¹⁹ it was decided that expenses resulting from "unnecessary management" were not reasonable. More indicative of disputes concerning reasonableness, however, is the determination in *Cyro-Sonics, Inc.*,²⁰ that an attorney's fee of \$100 per hour, under circumstances where particular expertise was required, was not unreasonable.

In summary, then, the general run of cases indicates that in the absence of truly outlandish business behavior on the part of a contractor, it is safe to assume that his actions will meet the reasonableness requirement.

The second general test is that the cost be *allocable* to the government contract. ASPR § 15-201.4 provides this definition:

A cost is allocable if it is assignable or chargeable to one or more cost objectives . . . in accordance with the relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it: (i) is incurred specifically for

involving both the nature and amount of the cost in question. In determining the reasonableness of a given cost, consideration shall be given to—

- (i) whether the cost is of a type generally recognized as ordinary and necessary for the conduct of the contractor's business or the performance of the contract;
- (ii) the restraints or requirements imposed by such factors as generally accepted sound business practices, arm's length bargaining, Federal and State laws and regulations, and contract terms and specifications;
- (iii) the action that a prudent business man would take in the circumstances, considering his responsibilities to the owners of the business, his employees, his customers, the Government and the public at large; and
- (iv) significant deviations from the established practices of the contractor which may unjustifiably increase the contract costs.

The remainder of ASPR § 15-201.3 sets forth rules for application of a formula for testing cost reasonableness, the "contractor weighted average share in cost risk," or CWAS.

¹⁶ *Bruce Construction Corp. v. United States*, 324 F.2d 516 (Ct. Cl. 1963).

¹⁷ *General Dynamics Corp. (Corvair Division)*; ASBCA Nos. 8759, 9264, 9265, and 9266, 66-1 B.C.A. para. 5368.

¹⁸ *Bruce Construction Corp. v. United States*, 324 F.2d 516 (Ct. Cl. 1963).

¹⁹ ASBCA No. 15441, 73-2 B.C.A. para. 10,072.

²⁰ ASBCA No. 13219, 70-1 B.C.A. para 8313.

the contract; (ii) benefits both the contract and other work, or both Government work and other work, and can be distributed to them in reasonable proportion to the benefits received; or (iii) is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

As the definition is in the disjunctive, only one of the criteria need be satisfied. Indeed, disputes in this area usually do not involve the question whether an expenditure is allocable, but rather the issue of allocability category (i.e., *how* is it allocable). If direct (clause (i))²¹, the entire amount of the cost is recoverable; if indirect (para. (ii)),²²

²¹*Direct cost* is defined at ASPR § 15-109(f) as follows:

Direct Cost. Any cost which is identified specifically with a particular final cost objective. Direct costs are not limited to items which are incorporated in the end product as material or labor. Costs identified specifically with a contract are direct costs of that contract. All costs identified specifically with other final cost objectives of the contractor are direct costs of those cost objectives.

The concept is further explained at ASPR § 15-202(a) as follows:

A direct cost is any cost which can be identified specifically with a particular final cost objective. (See 15-109(f).) No final cost objective shall have allocated to it as a direct cost any cost, if other costs incurred for the same purpose, in like circumstances, have been included in any indirect cost pool to be allocated to that or any other final cost objective. Costs identified specifically with the contract are direct costs of the contract and are to be charged directly thereto. Costs identified specifically with other final cost objectives of the contractor are direct costs of those cost objectives and are not to be charged to the contract directly or indirectly.

The major types of direct cost are material and labor, and these may be explained as follows:

Direct Materials. Although the term is simple in concept, its application is more difficult. In this group are included such components as sheet steel and subassemblies. Other direct materials may not so readily come to mind. These include such items as adhesives, bolts and screws. . . .

Direct Labor. The second major element in the cost of a manufactured product is the cost of direct labor. Again there is a traceability problem; but, that labor which is related to and specifically traceable to the product (e.g., the labor of machine operators or assemblers) would be considered direct labor and accounted for accordingly. Conversely, dock workers who handle various types of materials, including the material for a government contract, janitors and plant guards would be considered indirect labor because of either the difficulty or impracticability of tracing these cost items to a specific contract or project.

Monroe, *Introduction, supra* note 2, at 7.

²²*Indirect cost* is defined thusly at ASPR § 15-109(i):

Indirect Cost. Any cost not directly identified with a single final cost objective, but identified with two or more final cost objectives or with at least one intermediate cost objective.

The concept expands with the addition of a related concept defined at ASPR § 15-109(j):

Indirect Coat Pools. Grouping of incurred costs identified with two or more cost objectives but not identified specifically with any final coat objective.

Finally, the following explanation is given at ASPR § 15-203(a):

An indirect cost (see 15-109(i)) is one which, because of its incurrence for common or joint Objectives, is not readily subject to treatment as a direct cost. Any direct cost of minor dollar amount may be treated as an indirect cost for reasons of practicality under the circumstances set forth in 15-202(b). After direct costs have been determined and charged directly to the contract or other work as appropriate, indirect costs are those remaining to be allocated to the several cost objectives. No final cost objective shall have allocated to it as an indirect cost any

cost, if other costs incurred for the same purpose, in like circumstances, have been included as a direct cost of that or any other final cost objective.

Indirect costs and their relationship to direct costs may be explained as follows:

(D)irect costs are those related exclusively to a particular project, and they include the contractor's costs for materials used and labor employed on that project. Indirect costs are those which pertain to more than one project. These costs include general and administrative expenses, material overhead and manufacturing overhead. In general, a pro rata share of a contractor's indirect costs are to be assigned to each cost objective in which the contractor is involved. Direct and indirect costs may overlap in the costing of some projects. For example, if a contractor is devoting the entire resources of one of his plants to the performance of a government project, all the costs of that plant may be considered direct costs, including costs which would normally be indirect.

Monroe, *Introduction*, *supra* note 2, at 6.

Factory Overhead. This is the "all other" category of the cost of a manufactured product. Lumped into this denomination are all factory costs other than direct materials and direct labor. Perhaps a more accurate description of this cost element would be indirect manufacturing costs. Synonymous terms include manufacturing overhead, manufacturing expenses or factory burden.

The principles that pervade any discussion of overhead are those of accumulation and allocation. ASPR § 15-203(b) (1 July 1976) states that such "costs shall be accumulated by logical cost groupings with due consideration of the reasons for incurring the costs. Each grouping should be determined so as to permit distribution of the grouping on the basis of the benefits accruing to the several cost objectives." For government contract purposes four groupings of indirect costs generally are used: (1) material overhead (2) engineering overhead (3) manufacturing overhead and (4) general and administrative expenses.

Having accumulated the indirect costs into various groups, the next consideration is that of allocating these costs to specific cost objectives, that is, spreading indirect costs around the plant in a logical fashion so that each cost objective bears its proportionate share of these costs. This allocation must be done in accordance with generally accepted accounting principles or the Cost Accounting Standards (CAS).

This allocation process requires the selection of a distribution base common to all cost objectives to which the cost grouping (*e.g.*, material overhead) is to be allocated. The goal is to have the cost objectives, (*e.g.*, a government contract) carry only its fair share of the overhead. With these broad generalizations noted, it is easier to conceptualize this accumulation and allocation process by understanding how overhead often is computed.

First, the contractor selects a cost base for allocation of his overhead. Alternatives include direct cost of material and cost of sales. There is a presumption that the contractor's method of allocation and his selection of the base are reasonable. Disputes relating to the base used require the government to overcome this presumption of reasonableness and prove that the contractor's method is unreasonable. Second, the overhead rate is normally presented as a percentage which can be expressed as follows:

$$\frac{\text{Total Material Overhead Expense}}{\text{Total Direct Materials Cost}} = \text{Overhead Rate}$$

Material Overhead. This refers to the total overhead expense grouped within this indirect cost category that the company incurs during an accounting period. Material overhead normally includes the costs related to the acquisition, transportation (incoming), receiving, inspection, handling and storage of material.

Direct Material. This refers to the direct cost of material in terms of total dollars for an accounting period.

Using illustrative figures—

$$\frac{\text{Material Overhead } \$1,437,397.00}{\text{Direct Material } \$28,446,900.00} = 5.0\%$$

The overhead rate of 5% would then be applied to the direct costs claimed to be incurred by the contractor, the result being the cost to the government. If the contract had direct material

or necessary to overall business operation (general and administrative expenses) (clause (iii)),²³ only an appropriate portion of the expense can be recovered. Thus, if a contractor proposes to charge, as direct expenses, certain costs which normally are treated as overhead, he must demonstrate by a preponderance of the evidence that

cost of \$18,000,000., the 5% material overhead rate would be applied to these direct costs. The total cost for material to the government is represented by the following:

Direct Material Cost	\$18,000,000.
Material Overhead	+ 900,000.
	\$18,900,000.

This is known as "burdening the cost." The treatment would be the same for figuring the overhead rates for manufacturing overhead and engineering overhead. However, General and Administrative Expenses (G&A) are computed somewhat differently and will be treated independently.

General and Administrative Expenses are most easily defined as all indirect costs necessary for the conduct of business. Such costs generally include salaries and expenses of officers and executives, salaries and expenses of clerical help, the cost of staff services such as legal, accounting and public relations and other miscellaneous expenses related to the overall business. The continuing problem is the determination of the G&A overhead rate, i.e., how these costs are to be allocated to a cost objective. The primary distinction between G&A and other overhead accounts is the base used for allocation. For engineering overhead one might use direct engineering labor; for manufacturing overhead one might use direct manufacturing labor; and, for material overhead, as discussed, one might use direct material costs. However, since G&A costs are spread throughout the entire plant, the base for computing the G&A rate is the total manufacturing costs of the plant. This includes direct as well as overhead expenses.

Total GIA	= GAA Rate
Total Manufacturing Costs	
\$6,148,431.	
\$70,993,247.	= 8.66%

Having identified this rate, it is applied, or allocated, to each contract in proportion to the total manufacturing costs charged to each contract. If the total manufacturing costs for the product production is \$25,000,000, the GIA expense allocated to the contract would be 8.66% of \$26,000,000, or \$2,165,000. The contractor's total cost is \$25,000,000 plus \$2,165,200.

Monroe, *Introduction, supra* note 2, at 7-8.

There is yet another way of looking at direct and indirect costs, depending upon the facts of a firm's cost experience:

Variable and Fixed Costs. Within the total costs incurred in the production of any item are changes that relate to fluctuations in the activity of a chosen cost objective. As the rate of production of goods changes, a cost that changes corresponding to that rate is referred to as a variable cost. An example of such costs is the cost of material used to produce the item. There is generally a direct correlation between the cost of materials and the ups and downs of a production line. Conversely, certain costs are fixed and remain unchanged despite wide fluctuations in the activity of a certain cost objective. Examples of such fixed costs are depreciation, interest and rent.

To further illustrate that there are few certainties in the world of contract costs, another related term should be mentioned—semivariable costs. Depending on the activity and the type of production line, such costs as electricity or water may or may not increase as the production line increases in volume.

Monroe, *Introduction, supra* note 2, at 7.

²³Expenses necessary to overall business operation, or general and administrative expenses, are a grouping of indirect costs. See ASPR § 15-203(b), *infra* note 45, and ASPR § 15-203(c).

such action was based on sound business judgment.²⁴ If successful, the contractor is required by ASPR § 15-202(a)²⁵ to exclude costs of a similar nature (but not directly allocable to the government contract) from any indirect cost pool or overhead account for which the government bears financial accountability.

Not infrequently, though, litigation in this area is focused on whether there was "benefit" to the government. The contractor usually does not have too much difficulty with this question. For example, in *Riblet Tramway Co.*,²⁶ it was held that legal fees incurred in the defense of a claim which, if successful, would have been an allowable cost, were recoverable because the government received a *benefit*. There is no requirement that the benefit to the government be susceptible of precise mathematical measurement.²⁷

Notwithstanding the foregoing, there have been several instances in which an expenditure has been considered unallowable due to nonallocability. Contractors have experienced difficulty primarily as a result of performance as "mere volunteers," or by running afoul of the terms of a specific ASPR § 15-205 cost principle. If, for example, a contractor incurs a cost for which there was no underlying legal obligation and which was not necessary to the overall operation of the business, recovery from the government for such generosity should not obtain. There should be no obligation to refund expenditures incurred on a purely voluntary basis because this would permit a contractor to usurp the responsibility of the contracting officer with respect to the appropriate expenditure of government funds. However, other than violating this "mere volunteer" rule, a contractor need not be too concerned about the allocability tests unless there is conflict with a specific ASPR § 15-205 cost principle.

The third test established under ASPR § 15-201.2²⁸ (and made a prerequisite to cost recovery under ASPR § 15-204(b)²⁹) is compliance with "standards promulgated by the Cost Accounting

²⁴ *Planetronics, Inc.*, ASBCA Nos. 7202 and 7535, 1962 B.C.A. para. 3356.

²⁵ Note 21, *supra*.

²⁶ ASBCA No. 11164, 66-1 B.C.A. para. 5488.

²⁷ *General Dynamics/Astronautics*, ASBCA No. 6899, 1962 B.C.A. para. 3391.

²⁸ Note 10, *supra*.

²⁹ ASPR § 15-204(b) states:

Costs shall be allowed to the extent that they are reasonable (see 15-201.3), allocable (see 15-201.4), and determined to be allowable in view of the other factors set forth in 15-201.2 and 15-205. These criteria apply to all of the selected items of cost which follow, notwithstanding that particular guidance is provided in connection with certain specific items for emphasis or clarity.

Standards Board, *if applicable*, otherwise generally accepted accounting principles and practices appropriate to the particular circumstances. . . ." (emphasis supplied)

This Cost Accounting Standards Board, created as an agent of Congress by amendment to the Defense Production Act of 1950,³⁰ is composed of five members and is chaired by the Comptroller General.³¹ The board was accorded the authority to "promulgate cost accounting standards designed to achieve uniformity and consistency in the cost-accounting principles followed by defense contractors and subcontractors under federal contracts."³²

It is important to note that these standards (CAS) pertain to allocability, not allowability. That is, CAS has no direct bearing on the allowability of particular expenditures; it establishes basic *accounting* principles with which government contractors must comply, if (and *only if*) statutorily applicable. Defense contractors are to use CAS in estimating, accumulating, and reporting costs.

³⁰Pub. L. No. 81-744, 64 Stat. 798, codified at 50 App. U.S.C. 2061, 2062, 2071 to 2073, 2091 to 2094, 2151 to 2163, and 2164 to 2168. By Act of July 1, 1968, Pub. L. 90-370, § 3, 82 Stat. 279, codified at 50 App. U.S.C. § 2167 (1970), the Comptroller General of the United States was directed to "undertake a study to determine the feasibility of applying uniform cost accounting standards to be used in all negotiated prime contract and subcontract defense procurements of \$100,000 or more."

This study led to the creation of the Cost Accounting Standards Board in 1970. Act of Aug. 15, 1970, Pub. L. 91-379, § 103, 84 Stat. 706, codified at 50 App. U.S.C. § 2168 (1970).

³¹The membership of the Board is prescribed as follows:

There is established, as an agent of the Congress, a Cost-Accounting Standards Board which shall be independent of the executive departments and shall consist of the Comptroller General of the United States who shall serve as Chairman of the Board and four members to be appointed by the Comptroller General. Of the members appointed to the Board, two, of whom one shall be particularly knowledgeable about the cost accounting problems of small business, shall be from the accounting profession, one shall be representative of industry, and one shall be from a department or agency of the Federal Government who shall be appointed with the consent of the head of the department or agency concerned.

50 App. U.S.C. § 2168(a) (1970).

³²The relevant paragraph states in full:

The Board shall from time to time promulgate cost-accounting standards designed to achieve uniformity and consistency in the cost-accounting principles followed by defense contractors and subcontractors under Federal contracts. Such promulgated standards shall be used by all relevant Federal agencies and by defense contractors and subcontractors in estimating, accumulating, and reporting costs in connection with the pricing, administration and settlement of all negotiated prime contract and subcontract national defense procurements with the United States in excess of \$100,000 other than contracts or subcontracts where the price negotiated is based on (1) established catalog or market prices of commercial items sold in substantial quantities to the general public, or (2) prices set by law or regulation. In promulgating such standards the Board shall take into account the probable costs of implementation compared to the probable benefits.

50 App. U.S.C. § 2168(g) (1970).

ASPR 9 3-1204(a) informs that two clauses³³ requiring compliance with CAS must be included in every negotiated contract over \$100,000 unless "the price is based on established catalog or market prices of commercial items sold in substantial quantities to the general public or is set by law or regulation."³⁴ The Cost Accounting Standards Board has granted some exceptions to this requirement, the most important of which is the establishment of a

³³ ASPR § 7-104.83(a) and (b). The first of the two clauses, Cost Accounting Standards (1975 FEB), requires contractors to submit disclosure statements setting forth their cost accounting practices, as required by CAS regulations. Contractors must agree to follow consistently the cost accounting practices thus disclosed, and to comply with all cost accounting standards in effect on the date of contract award or final agreement on price. The clause contains additional provisions concerning changes either to the contract price or cost allowances, or to cost accounting practices themselves. General provisions concerning subcontractors are also included.

Substantially the same clause appears at Defense Procurement Circular [DPC] No. 76-2, at 5 (31 Aug. 1976), as part of ASPR Appendix O, and at 4 C.F.R. § 331.50 (1977). The DPC and C.F.R. clause lacks one minor provision concerning procedures for submission of disclosure statements by subcontractors which appears as Note (1) to para. (d) of the ASPR clause.

The second ASPR clause, ASPR 7-104.83(b), Administration of Cost Accounting Standards (1977 Oct), contains instructions for contractors seeking approval for changes in their cost accounting practices. This clause also contains provisions affecting subcontractors.

³⁴ ASPR § 3-1204(a)(i). The entire text of ASPR 3-1204.1(a) is:

(a) The clauses in 7-104.83 shall be inserted in all negotiated contracts exceeding \$100,000, except the following:

(i) when the price is based on established catalog or market prices of commercial items sold in substantial quantities to the general public, or is set by law or regulation. Catalog or market price exemption is determined to exist even though the award is made on the basis of adequate competition. It is the offeror's responsibility to request and to provide justification for a catalog or market price exemption. In providing such justification, the offeror shall (A) indicate in his proposal, and in any changes in his offered price, that the proposed price is based on an established catalog or market price of a commercial item sold in substantial quantities to the general public, rather than derived from the stimulus of competition which may be present in the particular procurement; and (B) complete and submit a DD Form 633-7 or otherwise furnish the necessary information in accordance with 3-807.3(j). However, the procuring activity must make a determination whether or not the exemption applies in each case;

(ii) contracts awarded pursuant to Small Business Restricted Advertising (see 1-706.5(b) and 1-706.7(c));

(iii) contracts awarded pursuant to Partial Small Business Set-Aside (see 1-706.6);

(iv) contracts awarded pursuant to the authority of Section 8(a) of the Small Business Act (15 U.S.C. 637(a) see 1-705.5);

(v) contracts awarded pursuant to the Labor Surplus Area Set-Aside Procedure (1-804);

(vi) Contracts for which the Cost Accounting Standards Board has approved a waiver or exemption pursuant to paragraph 331.30 of Appendix O; or

(vii) contracts which are executed and performed in their entirety outside the United States, its territories and possessions.

This provision was amended by Item III of DPC No. 76-10 (26 Sept. 1977).

\$500,000 threshold in many instances.³⁵ The standards are accumulated in Appendix O of ASPR³⁶ while supplemental guidance com-

³⁵ ASPR § 3-1204.1(b), which reads as follows:

Consistent with (vi) above, the Cost Accounting Standards Board has provided for the exemption of contracts of \$500,000 or less under certain circumstances. Paragraph 331.30(b)(8) of Appendix O prescribes the circumstances under which such an exemption is applicable. In order to effectively administer the requirements of that paragraph, the solicitation notice in 7-2003.67(b) shall be inserted in all solicitations requiring the inclusion of the solicitation notice in 7-2003.67(a).

Para. 33.30(b)(8) of ASPR Appendix O states:

(8) Any contract or subcontract of \$500,000 or less, unless it is awarded to a contractor who, on the date of such award, (i) has already received a contract or subcontract in excess of \$600,000 and (ii) has not received notification of final acceptance of all items of work to be delivered on that contract or subcontract and on all other contracts or subcontracts awarded after January 1, 1975, which were subject to the Cost Accounting Standards clause. For the purposes of this paragraph (b)(8), an intra-corporate transfer shall be considered to be a subcontract. Notwithstanding this exemption, any contractor entitled to an exemption under this paragraph (b)(8) may elect to comply with the Cost Accounting Standards clause. The contractor may elect to comply in connection with the receipt of its first contract or subcontract awarded after January 1, 1975, which but for this paragraph (b)(8) would be subject to the clause. A contractor who does not elect to comply with the clause in connection with the receipt of the first contract or subcontract, may thereafter make such an election only if it receives a contract or subcontract of the type described, at a time when it has no other contract or subcontract of that type on which notification of final acceptance of all items or work to be delivered has not been received.

DPC No. 76-2, *supra* note 32, at 3; 4 C.F.R. § 33.30(b)(8).

³⁶ The complete text of ASPR Appendix O is contained in DPC No. 76-2, *supra* note 32, amending the 1 July 1976 edition of ASPR. The appendix duplicates the text of subchapters C, E, and G, chapter III of the Code of Federal Regulations (1977).

Parts 331 and 332 of Appendix O set forth definitions, general provisions concerning contract coverage, and the text of various solicitation notices and contract clauses.

Part 351 contains instructions for preparation and filing of contractor disclosure statements, and provides illustrations of the statement forms.

The heart of ASPR Appendix O is subchapter G, Part 400, which contains the text of the fifteen cost accounting standards issued thus far by the CAS Board. The text of the standards is preceded by a definitions section. The standards are numbered 401 through 415. The standards are as follows:

CAS 401, Cost accounting standard— consistency in estimating, accumulating and reporting costs;

CAS 402, Cost accounting standard— consistency in allocating costs incurred for the same purpose;

CAS 403, Allocation of home office expenses to segments;

CAS 404, Capitalization of tangible assets;

CAS 405, Accounting for unallowable costs;

CAS 406, Cost accounting standard— Cost Accounting Period;

CAS 407, Use of standard costs for direct material and direct labor;

CAS 408, Accounting for costs of compensated personal absence;

CAS 409, Cost accounting standard— depreciation of tangible capital assets;

CAS 410, Allocation of business unit general and administrative expenses to final cost objectives;

CAS 411, Cost accounting standard— accounting for acquisition costs of material;

ments are provided periodically in Defense Procurement Circulars.³⁷

If CAS is not applicable, then “generally accepted accounting principles and practices”³⁸ are to serve as the guideline by which the contractor’s accounting system is to be measured. The distinction is critical: CAS sets forth comparatively precise rules which impose a substantial burden on government contractors,³⁹ whereas the generally accepted principles and practices afford considerable accounting leeway.

The final ASPR § 15–201.2 factor consists of “any limitations or exclusions set forth in this Part 2,” the most important of which are the ASPR § 15–205 “cost principles” limitations. In this ASPR section, entitled “Selected Costs,” there appears a discussion of fifty cost pronouncements. It is on this aspect of cost allowability that the primary focus of the article is directed.

CAS 412, Cost accounting standard for composition and measurement of pension cost;

CAS 413, Cost accounting standard for adjustment and allocation of pension cost;

CAS 414, Cost accounting standard—cost of money as an element of the cost of facilities capital;

CAS 415, Accounting for the cost of deferred compensation.

Note that CAS 413 was originally published on 9 Oct. 1975 under the title “Adjustment for Historical Depreciation Costs for Inflation.” It was withdrawn by the CAS Board in the following year on the grounds that it duplicated part of the coverage of CAS 414. See DPC No. 76–2, *supra* note 32, at 150. The current CAS 413 was issued on 20 July 1977, 42 Fed. Reg. 37, 196 (1977).

A new standard has been proposed, CAS 416, Accounting for Insurance Costs, 42 Fed. Reg. 54,296 (1977). Comments are being collected from readers of the Federal Register.

³⁷ Three Defense Procurement Circulars issued since DPC No. 76–2 directly affect the text of ASPR Appendix O. These are: DPC No. 76–7, Item XXXII (29 Apr. 1977), which provides new interpretive material for CAS 401; DPC No. 76–8 (15 June 1977), which provides some revisions to the provisions of Part 331; and DPC No. 76–9, Items XVII and XXVII (30 Aug. 1977). Item XVII revises CAS 410, and Item XXVII, CAS 412.

DPC No. 76–11, Item I (30 Sept. 1977) does not directly change the text of Appendix O. It contains fifteen “guidance papers” developed by the DoD Cost Accounting Standards Working Group to provide instructions concerning the application of specific standards or all of them generally to various types of problems or situations.

Other Defense Procurement Circulars contain revisions to ASPR clauses and provisions implementing the standards.

³⁸ ASPR 9 15–201.2, the complete text of which is set forth at note 10, *supra*.

³⁹ For example, the disclosure statements, set forth at 4 C.F.R. § 351.140 (1977) and DPC No. 76–2 at 19 for most contractors, and at 4 C.F.R. § 351.145 (1977) and DPC No. 76–2 at 55, fill many pages. Completion of one of these statements is merely the beginning of a contractor’s compliance with the standards.

Before the principal task can be undertaken, though, it will be helpful to review a few basic accounting concepts. For example, the ASPR cost principles often make reference to “cost objectives.” Although this term has been accorded a variety of rather complex definitions,⁴⁰ it is most clearly explained as the particular work project, entity or contract to which costs are assigned.

The term “direct cost” also has a particular ASPR connotation which builds upon the cost objective concept. ASPR § 15–109(f) describes it as “[a]ny cost which is identified specifically with a final cost objective.”⁴¹ Such costs, except those of a “minor dollar amount,”⁴² are to be assigned to only one cost objective.⁴³ Thus, if a cost is susceptible of specific identification with one project or contract, it must be assigned only thereto.

In contrast to the foregoing, ASPR § 15–109(f) defines indirect costs as those “not directly identified with a single final cost objective, but identified with two or more final cost objectives.”⁴⁴ Included in this category are expenditures which benefit overall plant operations or more than one cost objective. For government contract purposes four groupings of indirect costing generally are used: material overhead, engineering overhead, manufacturing overhead,

⁴⁰ At ASPR 15–109(e), the expression is defined as “ [a] function, organizational subdivision, contract, or other work unit for which cost data are desired and for which provision is made to accumulate and measure the cost of processes, products, jobs, capitalized projects, etc.” Also of interest is the definition at ASPR § 15–109(h), “Final Cost Objective—A cost objective which has allocated to it both direct and indirect costs, and, in the contractor’s accumulation system, is one of the final accumulation points.”

⁴¹ Note 21, *supra*.

⁴² ASPR § 15–202(b), which states:

Any direct cost of minor dollar amount may be treated as an indirect cost for reasons of practicality where the accounting treatment for such cost is consistently applied to all final cost objectives, provided that such treatment produces results which are substantially the same as the results which would have been obtained if such costs had been treated as a direct cost.

⁴³ ASPR § 15–202(a), the text of which is set forth at note 21, *supra*.

⁴⁴ Note 22, *supra*.

⁴⁵ Monroe, Government Contract Costs—An Introduction, *supra* note 2, at 6. Related insight is provided by ASPR § 15–203(b), which states:

Indirect costs shall be accumulated by logical cost groupings with due consideration of the reasons for incurring the costs. Each grouping should be determined so as to permit distribution of the grouping on the basis of the benefits accruing to the several cost objectives. Commonly, manufacturing overhead, selling expenses, and general administrative expenses are separately grouped. Similarly, the particular case may require subdivision of these groupings, *e.g.*, building occupancy costs might be separable from those of personnel administration within the manufacturing overhead group. The number and composition of the groupings should be governed by practical considerations and should be such as not to complicate unduly the allocation where substantially the same results are achieved through less precise methods.

and general and administrative expenses.⁴⁵ ASPR § 15-203(a) permits direct costs of minor dollar amount to be treated as indirect costs, if the results are equitable.⁴⁶

In government cost reimbursement contracting, the distinction between a direct and indirect cost is most important. The government contract bears the full impact of allowable direct costs whereas only a *pro rata* share of a contractor's indirect costs is to be assigned each of the several cost objectives to which it has application. Just what portion of the total indirect expense a government contract should bear is often the subject of dispute.⁴⁷ These disputes are frequently intensified by the absence of precise formulas by which to calculate indirect cost rates.

This lack of precision is characteristic of the allowability principles examined to this point (i.e., reasonableness;⁴⁸ allocability;⁴⁹ standards promulgated by the Cost Accounting Standards Board;⁵⁰ and generally accepted accounting principles and practices.⁵¹ It is perhaps because of this deficiency that court and board decisions usually do not seize upon these more general strictures in resolving disputes brought before them.

The ASPR § 15-205 principles, in contrast, offer a degree of specificity and apparent (but misleading) finality that invites judicial attention. The attention and adherence accorded by courts is not uniform throughout the ASPR § 15-205 principles, however. Although the clarity and uncompromising directness of the language may be identical among various cost articles, there exists a *patterened* variation in treatment, according to cost category. Not only is there a difference between the treatment of expenses directed at a particular government contract versus those involving the general

⁴⁶ Note 22, *supra*. See also ASPR § 15-202(b), note 42, *supra*, which includes a similar provision.

⁴⁷ If the contractor and the government are unable to agree in such a case, they can, and often do, make use of the ASPR 1-314 procedures for disputes and appeals, made available through the contract disputes clauses at ASPR § 7-103.12. Moreover, in para. (b) of the contract clause at ASPR § 7-104.83(a), 'Cost Accounting Standards (1975 FEB), it is stated:

If the parties fail to agree whether the Contractor or a subcontractor has complied with an applicable Cost Accounting Standard rule, or regulation of the Cost Accounting Standards Board and as to any cost adjustment demanded by the United States, such failure to agree shall be a dispute concerning a question of fact within the meaning of the disputes clause of this contract.

DPC No. 76-2 at 7; 4 C.F.R. 331.50 (1977).

"*Supra* note 15.

⁴⁹ ASPR § 15-201.4, quoted in text above notes 20 and 21, *supra*.

⁵⁰ See generally ASPR Appendix O, DPC No. 76-2, at 95, 4 C.F.R. 400 (1977).

⁵¹ ASPR § 15-201.2, *supra* note 10.

operation of a business, but also between subdivisions of these major categories.

For analysis, the ASPR § 15-205 cost principles can be divided into two major categories: general operational expenses, and expenditures directed at securing or performing a government contract. As earlier explained, these major categories are further subdivided and considered through an analysis of the cost principles grouped thereunder. It should be noted that not all the § 15-205 cost principles will be examined; in fact, only 34 of the articles are considered. Those not discussed involve expense provisions that would add little to the development of this article, usually because there have been no or very few decisions concerning the provision. Others are ignored except for footnote references because their principal provisions are covered by another article.⁵²

111. ASPR § 15-205—GENERAL OPERATIONAL EXPENSES

A. ON-GOING BUSINESS EXPENSES

Under this topic are considered these principles:

1. Advertising Costs (15-205.1).
2. Bad Debts (15-205.2).
3. Contributions and Donations (15-205.8).
4. Entertainment Costs (15-205.11).
5. Cost of Idle Facilities and Idle Capacity (15-205.23).
6. Fines and Penalties (15-205.13).
7. Insurance and Indemnification (15-205.16).
8. Losses on Other Contracts (15-205.19).
9. Maintenance and Repair Costs (15-205.20).
10. Manufacturing and Production Engineering Costs (15-205.21).
11. Organization Costs (15-205.23).
12. Other Business Expenses (15-205.24).
13. Plant Protection Costs (15-205.28).

⁵²Five ASPR Section XV cost principles have been discussed in Monroe, *The Allowability of Attorneys Fees in Government Contracting*. THE ARMY LAWYER, July 1977, at 1 [hereinafter cited as Monroe, *Allowability*]. These five principles, selected by the author for their relevance to recovery of attorneys' fees from the government by contractors performing under cost-type contracts, are: Professional and Consultant Service Costs—Legal, Accounting, Engineering and Other, ASPR § 15-205.31; Bad Debts, ASPR § 15-205.2; Organization Costs, ASPR § 15-205.23; Patent Costs, ASPR § 15-205.26; and Termination Costs, ASPR § 15-205.42.

14. Rental Costs (15-205.34).
15. Trade, Business, Technical and Professional Activity Costs (15-205.43).

1. Advertising Costs⁵³

The first ASPR § 15-205 principle provides an excellent introduction to the overall thrust of this article. ASPR § 15-205.1 directs that only a very narrow range of expenses are allowable under this category.

The only advertising costs allowable are those which are *solely* for (i) recruitment of personnel required for the performance by the contractor of obligations *arising under the contract*, when considered in conjunction with all other recruitment costs, as set forth in 15-205.33, (ii) the procurement of scarce items for the *performance of the contract*, or (iii) the disposal of scrap or surplus materials acquired in the *performance of the contract*. (emphasis added).

This rather clear limitation was accorded unwavering fidelity by the contract appeals boards up to 1973.⁵⁴ In that year, however, the Armed Services Board of Contract Appeals [hereinafter referred to as the ASBCA] decided *The Boeing Company*⁵⁵ and *Aerojet General Corporation*⁵⁶ cases. In both decisions, the board held allowable what normally would be considered typical advertising expenses (e.g., costs of preparing and issuing press releases). The holdings indicated that such costs were recoverable because they were ordinary and necessary for the conduct of business and representative of expenditures an ordinary and prudent businessman would incur. But these “justifications” satisfy only two of the ASPR § 15-201.2 tests, allocability and reasonableness.

With respect to the ASPR § 15-205.1 (cost principle) requirement, the ASBCA, in both decisions, went to tortured lengths to classify disputed costs as “public relations” expenses (allowable) as opposed to advertising costs (unallowable). Careful analysis of the cases, however, makes clear that an adventure in semantics was probably not the principal justification for allowing recovery. The

⁵³These costs are defined as follows at ASPR § 15-205.1(a): “Advertising costs mean the costs of media advertising and directly associated costs. Media advertising includes magazines, newspapers, radio and television programs, direct mail, trade papers, outdoor advertising, dealer cards and window displays, conventions, exhibits, free goods and samples, and the like.”

⁵⁴See, e.g., Cook Electric Co., ASBCA No. 11100, 66-2 B.C.A. para. 6039.

⁵⁵The Boeing Co., ASBCA No. 14370, 73-2 B.C.A. para. 10,325.

⁵⁶Aerojet General Corp., ASBCA No. 13372, 73-2 B.C.A. para. 10,164.

board insisted on discussing the reasonableness and business propriety involved, even though the government never disputed issues relating to reasonableness (or allocability). These gratuitous comments quite likely point to the real explanation underlying the liberal result in *Boeing* and *Aerojet General*.

Thus, the *method* of justifying allowability clearly demonstrates the ASBCA's concern with the contractor's normal business operations expenses. Although never precisely expressed, the approach reveals sympathy for contractor recovery of costs incurred by most firms in the conduct of ordinary business. While this thinking may lead to highly equitable results, it presents difficulty with respect to interpretation of the cost principles and to prediction about litigation concerning them.

In addition, clearly the most honest and efficient approach would be for the board to openly articulate its preference for reimbursing ordinary business expenses. This procedure would allow more relevant argument by counsel in later disputes involving the principle and would permit the Department of Defense to change the cost principle language to expressly accept or reject the board's rationale.

In Defense Procurement Circular No. **76-9**, dated **30 August 1977**, the Department of Defense took just such action by adding this language to the advertising cost principle.

Advertising costs other than those specified . . . are not allowable. Unallowable advertising costs include those related to sales promotion. Such advertising involves direct payment for the use of time or space to promote the sale of products, either directly *by stimulating interest in a product or product line, or indirectly by disseminating messages calling favorable attention to the advertiser for purposes of enhancing his overall image to sell his products.* (emphasis added)⁵⁷

2. *Bad Debts*

ASPR § 15-205.2 provides that "[b]ad debts, including losses

⁵⁷This is incorporated into ASPR § 15-205.1(c) as revised, the text of which previously stated only that "[a]dvertising costs other than those specified above are not allowable." Item XIX, DPC No. **76-9**, explains, "Changes to ASPR § 15-205.1 . . . are included in this DPC in order to clarify the intent of the applicable ASPR cost principles considered in the Boeing Company, ASBCA Case No. 14370 The changes to § 15-205.1 are intended to clarify the definition of advertising costs and to provide a description of unallowable advertising costs." ASPR § 15-205.1(c) as revised goes on to explain that costs for stimulating interest in a product or disseminating messages about the advertiser are unallowable because "[i]n both instances, the advertiser has control over the form and content of what will appear, the medium in which it will appear, and when it will appear."

(whether actual or estimated) arising from uncollectible customers' accounts and other claims, related collections costs, and related legal costs, are unallowable."

Again, the prohibition appears clear and without exception. Despite this clarity it was held in *Wyman-Gordon Company*⁵⁸ that collection expenses to recover an uncollectible loan advanced to a "necessary subcontractor" under the same contract should not be disallowed as a bad debt, if reasonably incurred. In response to the government's cost principle argument the Armed Services Board of Contract Appeals indicated that the cost principles in ASPR Section XV, Part 2, were prepared in contemplation of the usual and did not neatly fit this "unusual situation." The board explained that the principles did not account for "*business realities*." A like decision was rendered in *American Electronic Laboratories, Inc.*,⁵⁹ wherein the same board determined that a cost-plus-fixed-fee contractor was entitled to legal fees related to collection expenses incurred in the *normal course of business* as ASPR § 15-205.2 does not include "normal collection expenses."⁶⁰

The language in ASPR § 15-205.2 offers no exception for business realities or expenses incurred in the normal course of business. Nevertheless, the ASBCA has applied (and apparently will continue to do so) a liberal standard with respect to on-going business costs under this principle as well as several others (as we shall see).

Again, the application of a liberal standard does not create as much difficulty as is brought about by the failure to clearly identify the important choice factors in the decision making process.

3. *Contributions and Donations*

ASPR § 15-205.8 provides very simply that "[c]ontributions and donations are unallowable." But as early as 1962 the ASBCA displayed some measure of liberality. In *General Dynamics/*

⁵⁸ *Wyman-Gordon Co.*, ASBCA No. 5100, 59-2 B.C.A. para. 2344.

⁵⁹ *American Electronic Laboratories, Inc.*, ASBCA No. 9879, 65-2 B.C.A. para. 5020.

⁶⁰

These cases illustrate that it is unsatisfactory to rely solely upon the language of an ASPR provision. Close attention to the analysis of and possible reaction to particular language is critical. Where do we stand with respect to ASPR § 15-205.2? Obviously, there is conflict between the apparent message and recent interpretations. Legal fees under this category probably will be disallowed at the contracting officer level; however, if the contractor can marshal strong equitable arguments with respect to reasonableness and necessity an appeal board may allow recovery.

Monroe, *Allowability*, *supra* note 52 at 5.

*Astronautics*⁶¹ the board held that *voluntary* payments to expedite a highway overpass project to relieve traffic problems at the contractor's plant were allowable and not a prohibited contribution or donation. The decision placed substantial significance on the appropriateness of the *business judgment involved* ("an exercise of sound business judgment, from [the standpoint] of efficiency in the conservation of employee working time").⁶²

The propriety of the business decision also led the ASBCA in *The Boeing Company*⁶³ to declare that voluntary services furnished the city of Seattle were not "contributions or donations" but public relations costs necessary for the contractor's business operations. Included in this assistance were expenses incurred in refurbishing the city's historical museum and sending delegates to a trade fair in Japan. In discussing the ASPR § 15-205.8 prohibition, the board commented that the questioned expenses represented "no more than any ordinarily prudent person would do in the conduct of competitive business and thus the cost was of a type generally recognized as ordinary and necessary for the conduct of the contractor's business."⁶⁴ And so ended the discussion! The specific ASPR § 15-205 language was not even mentioned.

The Court of Claims indicated agreement with the approach in *Blue Cross Association v. United States*⁶⁵ wherein it was determined that the contractor's (completely voluntary) grant to a research organization was not a donation but an ordinary cost of doing business, hence reimbursable under a cost-type contract. The court remarked that "payments made over a sustained period of time which enable a contractor to receive services which are an integral and necessary part of the *overall operation of the contractor's business* and are directly beneficial to the contract, are not 'contributions and donations'. . . ." ⁶⁶ (emphasis added) (Under this test, of course, all sorts of behind the scenes "contributions" would apparently qualify for government reimbursement!)

The three cases evidence an almost total disregard of a very straightforward ASPR § 15-205 cost principle. To justify the approach, the ASBCA and the Court of Claims rely principally on an ASPR § 15-201.4 *allocability* test: necessity to the overall opera-

⁶¹ *General Dynamics/Astronautics*, ASBCA No. 6899, 1962 B.C.A. para. 3391.

⁶² *Id.*, at 17,436.

⁶³ *The Boeing Co.*, ASBCA No. 14370, 73-2 B.C.A. para. 10,325.

⁶⁴ *Id.*, at 48,743.

⁶⁵ *Blue Cross Assn. v. United States*, 474 F.2d 654 (Ct. Cl. 1973).

⁶⁶ *Id.*, at 659.

tion of the business. But what about the other allowability criteria, specifically ASPR § 15-201.8? Not only were they never discussed, there was no indication of which facts or circumstances peculiar to these decisions led to the failure to consider them.

4. Entertainment Costs

ASPR § 15-201.11 informs that “[c]osts of amusement, diversion, social activities and incidental costs relating thereto, such as meals, lodging, rentals, transportation, and gratuities are unallowable.”

Under this provision, the restraints imposed on “normal business expenditures” have often been eased by the simple expedient of refusing to *classify* thereunder. Thus, in *Manual M. Liodas, Trustee in Bankruptcy for Argus Industries, Inc.*,⁶⁷ the ASBC *classified* certain luncheon and conference expenses as ASPR 9 15-205.11 “entertainment costs” and denied contractor recovery. (It would have been possible to categorize these expenditures under one of several other provisions, any one of which would have allowed recovery.)

On the other hand, in *The Boeing Company*,⁶⁸ the contractor’s expenses incurred for membership in and *attendance at meetings* of the Society of Experimental Test Pilots were held recoverable under ASPR 9 15-205.43, Trade, Business, Technical and Professional Activity Costs. A principal justification advanced regarding the classification involved the value of the expenditures with respect to overall business operations. The board argued that the primary purpose of the meeting was the dissemination of technical information and considered the banquet to be an integral part of the *affair*.⁶⁹

5. Costs of Idle Facilities and Idle Capacity

In general, ASPR § 15-205.12 declares “idle facilities” costs to be unallowable whereas “idle capacity” expenses are recoverable. The former is defined as “completely unused facilities that are excess to

⁶⁷ *Manual M. Liodas, Trustee in Bankruptcy for Argus Industries, Inc.*, ASBCA No. 12829, 71-2 B.C.A. para. 9015.

⁶⁸ *The Boeing Co.*, ASBCA No. 14370, 73-2 B.C.A. para. 10,325.

⁶⁹ The text of ASPR § 15-205.11 includes a note explicitly recognizing ASPR §§ 15-205.10 and 15-205.43, discussed in the text *infra*, as alternative classifications of the costs of meals, lodging, and so forth, which are in principle allowable. ASPR § 15-205.10 concerns employee morale, health, welfare, and food service and dormitory costs and credits.

the contractor's current needs" while the latter has reference to the "unused capacity of partially used facilities."⁷⁰

The ASBCA reviewed, in *Aerojet General Corporation*,⁷¹ idle facilities costs stemming from an unforeseeable closing of one of the contractor's plants. Recovery was allowed because this expense had been properly *allocated* to the contractor's main plant's general and administrative (G&A) cost pool. The board explained that the idle plant had operated as "part of the main division" (although physically separate) which had *benefitted* from its operation. Here, allowability was granted based upon satisfaction of a two-part test: allocability and business necessity.

The allocability hurdle, however, represents but one of the four ASPR § 15-201.2 criteria. Business necessity is only *one factor* to

⁷⁰The text of this cost principle is as follows:

15-205.12 Cost of Idle Facilities and Idle Capacity.

(a) As used in this paragraph, the words and phrases defined in this subparagraph (a) shall have the meanings set forth below.

(1) Facilities means plant or any portion thereof (inclusive of land integral to the operation); equipment individually or collectively; or any other tangible capital asset, wherever located, and whether owned or leased by the contractor.

(2) Idle Facilities means completely unused facilities that are excess to the contractor's current needs.

(3) Idle Capacity means the unused capacity of partially used facilities. It is the difference between that which a facility could achieve under 100 percent operating time on a one shift basis* less operating interruptions resulting from time lost for repairs, setups, unsatisfactory materials, and other normal delays, and the extent to which the facility was actually used to meet demands during the accounting period.

*A multiple shift basis may be used if it can be shown that this amount of usage could normally be expected for the type of facility involved.

(4) Cost of Idle Facilities or Idle Capacity are costs such as maintenance, repair, housing, rent, and other related costs, e.g., property taxes, insurance, and depreciation.

(b) The costs of idle facilities are unallowable except to the extent that:

(i) they are necessary to meet fluctuations in workload; or

(ii) although not necessary to meet fluctuations in workload, they were necessary when acquired and are now idle because of changes in program requirements, contractor efforts to produce more economically, reorganization, termination, or other causes which could not have been reasonably foreseen.

Under the exception stated in (ii) of this subparagraph (b), costs of idle facilities are allowable for a reasonable period of time, ordinarily not to exceed one year, depending upon the initiative taken to use, lease, or dispose of such facilities (but see 15-205.42(b) and (e)).

(c) The costs of idle capacity are normal costs of doing business and are a factor in the normal fluctuations of usage or overhead rates from period to period. Such costs are allowable, provided the capacity is reasonably anticipated to be necessary or was originally reasonable and is not subject to reduction or elimination by subletting, renting, or sale, in accordance with sound business, economic, or security practices. Widespread idle capacity throughout an entire plant or among a group of assets having substantially the same function may be idle facilities.

(d) Any costs to be paid directly by the Government for idle facilities or idle capacity reserved for defense mobilization production shall be the subject of a separate agreement.

⁷¹*Aerojet General Corp.*, ASBCA No. 15703, 73-1 B.C.A. para. 9932. Other examples of ASBCA liberality in this area include: *Big Three Industries, Inc.*, ASBCA Nos. 16949 and 17331, 74-1 B.C.A. para. 10,483, and *Southland Mfg. Corp.*, ASBCA No. 16830, 75-1 B.C.A. para. 10,994.

be considered under another ASPR § 15–201.2 test: reasonableness. Strangely absent from the opinion was any serious discussion of the ASPR § 15–205 cost principle requirements. Thus, there is evidence that satisfaction of a reasonable businessman standard alone may, in many instances, be sufficient to overcome the failure to comply with the ASPR § 15–205 principles! Unfortunately, there is rarely any indication of those circumstances prompting such result.

6. *Fines and Penalties*

ASPR § 15–205.13 imposes the following limitation.

Costs of fines and penalties resulting from violations of, or failure of the contractor to comply with. Federal, State and local law *and regulations* are unallowable except when incurred as a result of compliance with specific provisions of the contract, or instructions in writing from the contracting officer. (emphasis added)

The limitation has not enjoyed consistently strict application. For example, in *Olin Corporation*⁷² costs incurred by a contractor in satisfying workmen's compensation awards made by a State Industrial Accident Board to two of the contractor's employees for on-the-job injuries were determined not to be a "fine or penalty." The board found them to represent a reimbursable expense because there was no evidence of negligence, willful misconduct or bad faith by any of the contractor's managerial personnel. In *McDonnell-Douglas Corporation*,⁷³ the NASA Board of Contract Appeals employed similar reasoning with respect to a like fact pattern to reach the same result.

Other evidence of this liberal approach appears in disputes involving expenses connected with the defense of alleged employee discrimination litigation. In *Ravenna Arsenal, Inc.*,⁷⁴ the costs of *conciliation agreements* settling suits brought against the contractor for alleged violations of the Civil Rights Act of 1964 were allowed as there had been no finding of the statutory violation. A comment concerning the recovery of these expenses is indicative of the board's general approach.

The two settlement agreements in this appeal did not result from what have been shown to be unlawful employment practices on the part of (the contractor). They were entered into on the basis of a *reasonable business decision* to settle the controversies at a minimum of cost rather than incur the relatively expensive costs of litigation.***

⁷²Olin Corp., ASBCA Nos. 15688 and 15818, 72–2 B.C.A. para. 9539.

⁷³McDonnell-Douglas Corp., NASA BCA No. 865–28, 68–1 B.C.A. para. 7021.

⁷⁴Ravenna Arsenal, Inc., ASBCA No. 17802, 74–2 B.C.A. para. 10,937.

In choosing not to litigate we think (the contractor) made a *prudent decision* which subserved not only its best interest, but that of the Government as well. (emphasis supplied)

But in *Hirsch Tyler Company*,⁷⁶ expenses relating to the defense of litigation concerning allegations of employment discrimination were allowed. Here, the recoverable costs included legal expenses, court costs, and the cost of satisfying a judgment for back wages. The ASBCA explained that there had been no *willful* misconduct and *punitive* damages had not been awarded.

Even though the (stated) primary justification for the board's decisions in the above cases was the lack of intentional misconduct, an underlying reason appears to be implicit recognition of such expenditures as a type of those periodically confronting all normal business operations of any magnitude. To recognize the weight accorded the "ordinary business expense" argument, it is instructive to review a few sentences of the decision:

[W]e conclude that an *ordinarily prudent person* in the conduct of *competitive business* is often obliged to defend lawsuits brought by third-parties, some of which are frivolous and others of which have merit. In either event, the *restraints or requirements* imposed by *generally-accepted sound business practices* dictate that, except under the most extraordinary circumstances, a prudent businessman would incur legal expenses to defend a litigation and that such expenses are generally of the type *generally recognized as ordinary and necessary for the conduct of a competitive business*.⁷⁷ (emphasis supplied)

Although perhaps equitable such a philosophy tends to bury the ASPR § 15-205 provisions.

7. Insurance and Indemnification⁷⁸

Recovery of most insurance (premium) expenses is allowed under ASPR § 15-205.16. Thus, there have been few decisions where a

⁷⁵*Id.*, 74-2 B.C.A. para. 10,937, at 52,067.

⁷⁶*Hirsch Tyler Co.*, ASBCA No. 20962, 76-2 B.C.A. para. 12,075.

⁷⁷*Id.*, 76-2 B.C.A. para. 12,075, at 57,985.

⁷⁸The text of this principle is:

15-205.16 *Insurance and Indemnification*.

(a) Insurance includes (i) insurance which the contractor is required to carry, or which is approved, under the terms of the contract. and (ii) any other insurance which the contractor maintains in connection with the general conduct of his business.

(1) Costs of insurance required or approved. and maintained. pursuant to the contract. are allowable.

(2) Costs of other insurance maintained by the contractor in connection with the general conduct of his business are allowable subject to the following limitations:

(i) types and extent of coverage shall be in accordance with sound business practice and the rates and premiums shall be reasonable under the circumstances;

contract appeals board has managed to display more generosity than that permitted by regulation. One decision, though, offers an interesting insight with respect to the ASBCA's dim view of interference with a reasonable business decision. In *Capitol Engineering Corporation*,⁷⁹ the contractor's request to obtain insurance for certain items was denied. The board held that because the premiums would have been an allowable (*indirect*) expense, the loss of the concerned items, by theft, represented a recoverable *direct* cost. Note the frequent references to "the expense of doing business" which appear in the short discussion concerning the stolen items.

We think a corporation may, as a matter of *business judgment*, decide to carry insurance against possible loss by theft or to risk an uninsured **loss** by theft, in which case it would stand the entire **loss** itself. Depending on which route it chose, either the insurance premium or the amount of any loss would be an *expense of doing busi-*

(ii) costs allowed for business interruption or other similar insurance shall be limited to exclude coverage of profit;

(iii) costs of insurance or of any provision for a reserve covering the risk of loss of or damage to Government property are allowable only to the extent that the contractor is liable for such loss or damage and such insurance or reserve does not cover loss or damage which results from willful misconduct or lack of good faith on the part of any of the contractor's directors or officers, or other equivalent representatives, who has supervision or discretion of (A) all or substantially all of the contractor's business, or (B) all or substantially all of the contractor's operations at any one plant or separate location in which the contract is being performed, or (C) a separate and complete industrial operation in connection with the performance of the contract;

(iv) provisions for a reserve under an approved self-insurance program are allowable to the extent that the types of coverage, extent of coverage, and the rates and premiums would have been allowed had insurance been purchased to cover the risks except that provisions for known or reasonably estimated self-insured liabilities, such as, liabilities for workmen's compensation, which do not become payable for more than one year after such provision is made, shall not exceed the present value of the liability, determined by using a rate of 6%, compounded annually; and

(v) costs of insurance on the lives of officers, partners, or proprietors are allowable only to the extent that the insurance represents additional compensation. (See 15-205.6).

(3) Actual losses which could have been covered by permissible insurance (through an approved self-insurance program or otherwise) are unallowable unless expressly provided for in the contract, except—

(i) cost incurred because of losses not covered under nominal deductible insurance coverage provided in keeping with sound business practice, are allowable; and

(ii) minor losses not covered by insurance, such as spoilage, breakage, and disappearance of small hand tools, which occur in the ordinary course of doing business, are allowable.

(b) Indemnification includes securing the contractor against liabilities to third persons and any other loss or damage, not compensated by insurance or otherwise. The Government is obligated to indemnify the contractor only to the extent expressly provided for in the contract, except as provided in (a)(8) above.

(c) Late premium payment in charges related to employee deferred compensation plan insurance, incurred pursuant to Section 4007 or Section 4023 of the Employee Retirement Income Security Act of 1974, are unallowable.

⁷⁹ *Capitol Engineering Corp.*, ASBCA No. 11453, 68-1 B.C.A. para. 6833.

ness. In this instance, it is an *expense of doing business* in Vietnam.⁸⁰
(emphasis added)

But, whether a cost represents an “expense of doing business” is not the question. The whole point of ASPR Section XV is to point out which business expenses can be recovered from the government. The real issue is whether all the requirements (including the § 15-205 principles) for allowability were satisfied.

8. *Losses on Other Contracts*

By prohibiting the recovery of losses on other contracts, ASPR § 15-205.19⁸¹ merely affirms the principle set out equally clearly in ASPR § 15-202(a): “[C]osts identified specifically with other final cost objectives of the contractor are direct costs of those cost objectives and are not to be charged to the contract directly or indirectly.”

Notwithstanding the twice-found proscription, however, the ASBCA refused to go along with strict enforcement in *General Dynamics Corporation*.⁸² Concerning this very issue a dissent was filed, a somewhat unusual procedure in board decisions. Two sentences therefrom provide interesting reading.

But when most of the costs are paid for by other organizations under contract, I do not think the contractor’s contributed portion is allowable. I do not think ASPR 15-205.19 would have referred specifically to “the contractor’s contributed portion under cost-sharing contracts” if its coverage were meant to be limited to “loss in the normal sense,” as the majority construes it.⁸³

In a later decision, the same board held that certain capitalized expenses under an earlier research and development contract could be recovered in the definitization of a fixed price letter contract, where the latter contract was entered into on that basis.⁸⁴ The ASBCA explained that the business practice was customary and, as such, was recognized under ASPR § 15-205.35, Independent Research and Development Costs.⁸⁵ It was noted further that “good

⁸⁰*Id.*, 68-1 B.C.A. para. 6833, at 31,588.

⁸¹The text of this principle is as follows:

15-205.19 *Losses on Other Contracts*. An excess of costs over income under any other contract (including the contractor’s contributed portion under cost-sharing contracts), whether such other contract is of a supply, research and development, or other nature, is unallowable.

⁸²*General Dynamics Corp.*, ASBCA No. 10254, 66-1 B.C.A. para. 5680.

⁸³*Id.*, 66-1 B.C.A. para. 5680, at 26,503.

⁸⁴The G. C. Dewey Corp., ASBCA No. 13221, 69-1 B.C.A. para. 7732.

⁸⁵This cost principle will not be discussed in the text. However, some information concerning ASPR § 15-205.35 must be provided for the sake of completeness.

business judgment would dictate exactly the course followed by the company's management (and that) the procedure followed was in accordance with sound accounting principles and *business judgment*.”⁸⁶ (emphasis added)

9. Maintenance and Repair Costs⁸⁷

ASPR § 15-205.20 informs that “normal expenses” in this category are allowable but prohibits the current expensing of costs

The general concept of contractor independent research and development effort is defined at ASPR § 15-205.35(a) as:

A contractor's independent research and development effort (IR&D) is that technical effort which is not sponsored by, or required in performance of, a contract or grant and which consists of projects falling within the following three areas: (i) basic and applied research, (ii) development, and (iii) systems and other concept formulation studies. IR&D effort shall not include technical effort expended in the development and preparation of technical data specifically to support the submission of a bid or proposal.

There follow five subsidiary definitions, of basic research; applied research; development; systems and other concept formulation studies; and company.

Concerning composition of costs, it is stated at ASPR § 15-205.35(b) that these costs “shall include not only all direct costs, but also all allocable indirect costs except that general and administrative costs shall not be considered allocable to IR&D. Both direct and indirect costs shall be determined on the same basis as if the IR&D project were under contract.”

Allocation of independent research and development costs is dealt with thusly in ASPR § 15-205.35(c):

As a general rule, IRBD costs shall be allocated to contracts on the same basis as the general administrative expense grouping of the profit center (see 8-1008.3) in which such costs are incurred. However, where IRBD costs clearly benefit other profit centers, or the entire company, such costs shall be allocated through the G&A of such other profit centers or through the corporate GBA, as appropriate. In those instances when allocation of IRBD through the G&A base does not provide equitable cost allocation, the contracting officer may approve use of a different base. Where allowable IRBD is established by advance agreement pursuant to (d)(1) below, the advance agreement shall specify the allocation procedures.

Allowability of independent research and development costs is dealt with at length in ASPR § 15-205.35(d). The rules governing allowability differ according to whether a contractor is or is not required to negotiate an advance agreement with the government. The requirement is specified as follows:

Any company which received payments, either as a prime contractor or subcontractor, in excess of \$2 million from the DoD for IRBD and BBP in a fiscal year, is required to negotiate an advance agreement with the Government which establishes a ceiling for allowability of IRBD costs for the following fiscal year.

The text of this cost principle closes with a provision concerning deferred costs, ASPR § 15-205.35(e), which states that costs for independent research and development incurred in previous accounting periods are unallowable, except when the contractor involved “has developed a specific product at his own risk in anticipation of recovering the development cost in the sale price of the product,” with certain specified conditions.

⁸⁶The G.C. Dewey Corp., ASBCA No. 13221, 69-1 B.C.A. para. 7732, at 35,921.

⁸⁷The text of this principle is as follows:

15-205.20 Maintenance and Repair Costs

(a) Costs necessary for the upkeep of property (including Government property unless otherwise provided for), which neither add to the permanent value of the property nor appreci-

which under generally accepted accounting principles should be capitalized and depreciated over *more than one* accounting period.

The regulation follows the normal accounting pattern and thus offers little material for dispute. The few decisions in the area certainly do not reflect any indication of treatment more strict than the regulatory provision. And at least a suggestion of a reasonably liberal view appears in *The Boeing Company*,⁸⁸ where the ASBCA did allow interior painting costs to be recovered as a current expense.

10. Manufacturing and Production Engineering Costs

ASPR § 15-205.21⁸⁹ offers a fairly liberal treatment, allowing recovery for most types of expenditures in this category. It is noted primarily because of the relative frequency of incurrence by many businesses. No court or board decisions indicate any desire to restrict the liberal ASPR § 15-205 cost principle provision.

11. Organization Costs

The regulatory provision (ASPR § 15-205.23) dealing with this expense, on the other hand, proscribes recovery of costs related to corporate organization and reorganization, including mergers and acquisitions and raising capital.⁹⁰ ASPR § 15-205.23 informs that

ably prolong its intended life, but keep it in an efficient operating condition, are to be treated as follows (but see 15-205.9):

- (i) normal maintenance and repair costs are allowable;
- (ii) extraordinary maintenance and repair costs are allowable, *provided* such are allocated to the periods to which applicable for purposes of determining contract costs. (But see 15-107.)
- (b) Expenditures for plant and equipment, including rehabilitation thereof, according to generally accepted accounting principles as applied under the contractor's established policy, should be capitalized and subjected to depreciation. are allowable only on a depreciation basis.

⁸⁸The Boeing Co., ASBCA No. 13625, 71-1 B.C.A. para. 8619.

⁸⁹The text of this provision is:

15-205.21 Manufacturing and Production Engineering Costs Costs of manufacturing and production engineering including engineering activities in connection with the following, are allowable:

- (i) current manufacturing processes such as motion and time study, methods analysis, job analysis, and tool design and improvement; and
- (ii) current production problems, such as materials analysis for production suitability and component design for purposes of simplifying production.

⁹⁰The text of ASPR § 15-205.23, Organization Costs, currently reads:

Expenditures in connection with (i) planning or executing the organization or reorganization of the corporate structure of a business, including mergers and acquisitions, or (ii) raising capital (net worth plus long-term liabilities), are unallowable. Such expenditures include but are not limited to incorporation fees and costs of attorneys, accountants, brokers, promoters and organizers, management consultants and investment counsellors, whether or not employees of the contractor. Unallowable "reorganization" costs include the cost of any change in the

such unallowable costs “include but are *not limited to* incorporation fees and costs of *attorneys*, accountants, brokers, promoters and organizers, management consultants and investment counselors. . . .” (emphasis supplied)

Notwithstanding the above, the ASBCA determined in *Navgas, Inc.*⁹¹ that *legal fees* for efforts to obtain a favorable classification for state tax purposes were allowable because such efforts ultimately resulted in a lower cost to the contracting agency. And in *The Boeing Company*,⁹² the same board held that fees connected with the conversion and redemption of outstanding debentures and issuance of stock in a stock split operation were recoverable under the more liberal “Other Business Expenses” category.⁹³

12. Other Business Expenses

This section permits recovery of expenses of a *recurring* nature connected with miscellaneous “other” costs of operating an enter-

contractor’s financial structure, excluding administrative costs of short-term borrowings for working capital, resulting in alterations in the rights and interests of security holders whether or not additional capital is raised.

This provision, together with ASPR § 15-205.1 concerning advertising costs, *supra* note 57, was revised by DPC No. 76-9, dated 30 August 1977. Item XIX of DPC No. 76-9, explains,

Changes to . . . ASPR § 15-205.23 . . . are included in this DPC in order to clarify the intent of the applicable ASPR cost principles considered in the Boeing Company, ASBCA Case No. 14370 The changes to § 15-205.23 are intended to clarify the principle that the costs of any corporate financial structure change resulting in alterations to the rights and interests of the security holders, are unallowable whether or not additional capital is raised.

ASPR § 15-205.23 previously did not include the parenthetical definition of capital as “net worth plus long-term liabilities,” or the wholly new final sentence which discusses costs of changes in a contractor’s financial structure.

⁹¹*Navgas, Inc.*, ASBCA No. 9240, 65-1 B.C.A. para 4533. The classification effort was carried out in connection with the firm’s incorporation.

ASPR § 15-205.23 makes no exception for financially beneficial expenditures. Although perhaps an equitably correct solution, there is little support therefor under the cost principle. It is again apparent that reliance on ASPR provisions is unsatisfactory. If the contractor can provide a sound equitable argument, as in *Navgas* reimbursement is possible.

Monroe, *Allowability*, *supra* note 52, at 5. The result in *Navgas* may be partly explained if ASPR § 15-205.23 is considered in the light of ASPR § 15-205.24, Other Business Expenses, wherein it is stated that “recurring expenses [such] as . . . preparation and submission of required reports and forms to taxing and other regulatory bodies . . . and similar costs are allowable when allocated on an equitable basis.”

⁹²The Boeing Co., ASBCA No. 14370, 73-2 B.C.A. para. 10,325.

⁹³Note that organization costs are also disallowed under ASPR § 15-205.31(d), which states in relevant part, “Costs of legal, accounting and consulting services, and related costs, incurred in connection with organization and reorganization, defense of antitrust suits, and the prosecution of claims against the Government, are unallowable.” But these are not costs of a recurring nature which clearly could be allowed as “other business expenses.”

prise. ASPR § 15-205.24 lists specific types of allowable expenditures, for example: registry and transfer charges with respect to contractor issued securities, costs of shareholder meetings, normal proxy solicitations, preparation and submission of reports to regulatory bodies and incidental costs of directors' and committee meetings.⁹⁴

Although the expenses referred to in *The Boeing Company*,⁹⁵ considered under Organization Costs, above, would appear to be more closely related to that principle and thus unallowable, the board permitted recovery under this (ASPR § 15-205.24) provision.

Another example of avoiding cost reimbursability restrictions by selection of a more liberal principle under which to classify an expense appears in *Aerojet General Corporation*,⁹⁶ mentioned in the discussion of advertising costs. In this case, the ASBCA allowed recovery of the costs of publication and distribution of semi-monthly technical reports and brochures, photographs and fact sheets for news releases, salaries of public relations department personnel, and liaison with the news media. To reach this unexpected result, the board agreed with the contractor that these costs fell under the category "public relations expenses." And, because the board was able to distinguish this classification from "advertising costs,"⁹⁷ recovery was granted.

Again, it seems more appropriate to categorize these expenses under another provision (here, advertising costs) than other business expenses. But this approach should be recognized as another mechanism to hold allowable certain expenses which are incurred by businesses in the ordinary course of operation. Again, however, the factors causing the board to select a particular cost principle are not revealed.

13. Plant Protection, Costs

Another fairly liberal provision is embodied in ASPR § 15-205.28 which allows recovery of expenses such as "wages, uniforms and

⁹⁴The text of the principle reads in its entirety:

Included in this item are such recurring expenses as registry and transfer charges resulting from changes in ownership of securities issued by the contractor, cost of shareholders' meetings, normal proxy solicitations, preparation and publication of reports to shareholders, preparation and submission of required reports and forms to taxing and other regulatory bodies; and incidental costs of directors and committee meetings. The above and similar costs are allowable when allocated on an equitable basis.

⁹⁵The Boeing Co., ASBCA No. 14370, 73-2 R.C.A. para. 10,325.

⁹⁶Aerojet General Corp., ASBCA No. 13372, 73-2 B.C.A. para. 10,164.

⁹⁷ASPR § 15-205.1, *supra* note 53 and surrounding text.

equipment of personnel employed in plant protection” and “depreciation on plant protection capital assets. . . .”⁹⁸

Although such a principle offers little chance of additional liberality, there is one interesting case in the area. The ASBCA in *Rich Company, Inc.*,⁹⁹ held that a construction contractor was entitled to reimbursement of costs incurred in providing police and fire protection for a building during a period subsequent to the contractually required completion date. This holding, of course, runs counter to the ASPR prohibitions on contractor compensation with respect to performance *following* the time established for contract completion.¹⁰⁰

14. Rental Costs¹⁰¹

In general, ASPR § 15-205.34 permits recovery of “short-term” leasing expenses.¹⁰² Subparagraph (f) of this principle, however, directs attention to a specific rental procedure:

Rental costs under a sale and leaseback arrangement shall be allowable only up to that amount the contractor would be allowed had he retained title to the property [except where the sale and leaseback immediately followed purchase of the property or is otherwise in the

⁹⁸The text is as follows: “Costs of items such as (i) wages, uniforms and equipment and personnel engaged in plant protection, (ii) depreciation on plant protection capital assets, and (iii) necessary expenses to comply with military security requirements, are allowable.”

⁹⁹*Rich Co., Inc.*, ASBCA No. 13234, 70-2 B.C.A. para. 8599.

¹⁰⁰Once the contractually agreed performance has been completed and the term of the contract has expired, there is no longer a contract in effect which could support further payments for further performance, in the absence of an extension or other agreed contract modification.

¹⁰¹Rental costs include costs for sale and leaseback of property. In accordance with ASPR § 15-205.34(a), this principle “is applicable to the cost of renting or leasing all property, real and personal, except automatic data processing equipment,” the rental of which is governed by ASPR § 15-205.48.

¹⁰²*Short-term leasing* is defined at ASPR § 15-205.34(b)(1) as follows:

“*Short-term leasing* means leasing where the cumulative term of the use or occupancy (initial term plus additional term whether or not pursuant to a renewal option) is 2 years or less for personal property and 5 years or less for real property.” Allowability is explained thusly at ASPR § 15-205.34(c):

Rental costs under short-term leasing are allowable to the extent that:

(i) the rates are reasonable at the time of the decision to lease in light of such factors as rental costs of comparable property, if any, and market conditions in the area, the type, life expectancy, condition, and value of property leased, alternatives available, and other provisions of the agreement; and

(ii) they do not give rise to a material equity in the property (such as an option to renew or purchase at a bargain rental or price) other than that normally given to industry at large, but represent charges only for the current use of the property including, but not limited to, any incidental service costs such as maintenance, insurance and applicable taxes.

best interests of the Government and specifically authorized in the contract].

Nonetheless, in *HRB-Singer, Inc.*¹⁰³ the ASBCA determined that the contractor could include rental costs (in an overhead account) for buildings constructed by another party on *land previously owned by the contractor*. The board explained that the sale of the land and subsequent lease of the building did not amount to a "sale and leaseback," because the contractor never owned the buildings. Of course, it is reasonable to assume that the lessor would attempt to recoup the purchase price for the land through the leasing arrangement. The board's reply to the argument was to state that the *relative value* of the unimproved land . . . was so small in comparison to the value of the buildings that it cannot be considered a *material factor* in the question."¹⁰⁴ (emphasis added)

Even more surprising is the result in *LTV Aerospace Corporation*.¹⁰⁵ In this decision, the ASBCA examined an arrangement under which a contractor sold and leased back a building he had earlier constructed. The board determined that the deal was not a "sale and leaseback" (the costs of which would have been unallowable) because it closely *resembled* an allowable building lease and did not represent the type of expense the ASPR Committee *intended* to prohibit. It was further explained that the contractor needed to use the freed capital for production purposes and, in any event, his loan agreements prohibited such a building purchase.

Of course, ASPR provides no exception for capital shortage or restrictive loan agreements. And it is clear that the *intentions* of the ASPR Committee are not somehow made part of the binding agreement with a government contractor, especially in a situation where there is a clear language covering the issue. On the other hand, the result is not particularly surprising if the ASBCA's con-

¹⁰³ *HRB-Singer, Inc.*, ASBCA No. 10799, 66-2 B.C.A. para. 5903.

¹⁰⁴ *Id.*, 66-2 B.C.A. para. 5903, at 27,383.

¹⁰⁵ *LTV Aerospace Corp.*, ASBCA No. 17130, 76-1 B.C.A. para. 11,840.

¹⁰⁶ The text of this principle is:

15-205.43 Trade, *Business*. Technical and Professional *Activity Costs*

(a) *Memberships*. This category includes costs of memberships in trade, business, technical, and professional organizations. Such costs are allowable.

(b) *Subscriptions*. This item includes cost of subscriptions to trade, business, professional, or technical periodicals. Such costs are allowable.

(c) *Meetings and Conferences*. This item includes cost of meals, transportation, rental of facilities for meetings, and costs incidental thereto, when the primary purpose of the incurrance of such costs is the dissemination of technical information or stimulation of production. Such costs are allowable.

cern about disallowing defense contractor recovery of normal business expenses is understood.

*15. Trade, Business, Technical and Professional Activity Costs*¹⁰⁶

Under ASPR § 15–205.43 are allowed the expenses of activities (e.g., meals, transportation, and rental of meeting facilities) related to this category “when the primary purpose of the incurrence of such costs is the dissemination of technical information or stimulation of production.”

This principle is reasonably lenient; accordingly, there have been few cases in which its provisions have been discussed. In those few situations, the ASBCA has demonstrated no desire to be restrictive. For example, in *The Boeing Company*¹⁰⁷ the board permitted recovery of expenses related to membership in and attendance at meetings of the Society of Experimental Test Pilots.

In a more recent decision, though, the same board refused to allow recovery of some particularly questionable costs. In *Lulejian and Associates, Znc.*¹⁰⁸ the contractor claimed reimbursement for air transportation expenses for the firm’s president, vice-president, and their wives to and from Hawaii. The board did not think well of their argument that they needed this seclusion to discuss company business and denied recovery under ASPR § 15–205.11, *Entertainment Costs*.¹⁰⁹ The ASBCA observed that the meeting could have been held elsewhere with no real damage to any legitimate business purpose. (Another explanation for disallowance, direct personal benefit, is discussed in the next section of the article.)

Although the holding was unfavorable to the contractor, the extravagance of the cost is obvious. Furthermore, this type of expense is not necessary to the conduct of ordinary business. In this regard, a particularly revealing statement was advanced.

Although there is no objection to appellant’s enabling its executives, *accompanied by their wives*, to take a *combined business and pleasure trip*, we are *not persuaded* that this should be at the Government’s expense when appellant has failed to establish a *primary business need or justification* for the *trip*.¹¹⁰ (emphasis added)

Thus it appears that if such practice had been more in harmony with current business custom, the result might well have been in

¹⁰⁷The Boeing Co., ASBCA No. 14370, 73–2 B.C.A. para. 10,325.

¹⁰⁸Lulejian and Associates, Inc., ASBCA No. 20094, 76–1 B.C.A. para. 11,880.

¹⁰⁹“Costs of amusement, diversion, social activities, and incidental costs relating thereto, such as meals, lodging, rentals, transportation, and gratuities, are unallowable.” See also note 69 *supra*.

the contractor's favor, as this justification has often been cited to allow recovery under one of the on-going business expenses provisions. Similar lines of reasoning have been encapsulated in such phrases as: ordinary and necessary for the conduct of business; business realities; business necessity; incurred in the normal course of business; and the proper business judgment of an ordinary and prudent businessman. Other ploys utilized to allow reimbursement of on-going business expenses that were advanced included classification under a more liberal cost principle and deference to ASPR Committee intent.

Each verbal technique to permit recovery has been attacked when it appeared on the scene. In summary, the criticism followed these lines: With respect to the ordinary business expenses justification, it was noted that this represented only one factor to be *considered* when determining the reasonableness of an expenditure. Satisfaction of the reasonableness test, of course, does not meet the requirement to comply with the ASPR § 15-205 cost principles.

The reclassification manoeuvre is more difficult to attack because of the overlapping coverage among the ASPR § 15-205 cost principles themselves. But the ASPR set up does not fully account for all the classification problems. In several instances the boards have simply gone to elaborate lengths to classify under a principle having a questionable relationship to the type of expenditure involved. Finally, resort to ASPR Committee intent is particularly inappropriate because of the extreme difficulty in ascertaining just *what* it is and its absence from the contractual provisions which bind the parties.

The confusion and uncertainty generated by the development of these several techniques could be eliminated by a clear articulation of the policy desired to be advanced by the holdings in the cost area. If the board and court of claims decisions would simply lay a precise policy foundation on which to construct rules and apply them in a consistent pattern, the state of the law in this area would be greatly enhanced. Such procedure would allow accurate evaluation by the Department of Defense and more relevant argument by counsel. In short, the underlying policy position would enjoy the benefits of open and pointed appraisal. The advantages of this approach become more apparent as the treatment of other cost principles is considered.

B. EMPLOYEE COSTS

Under this topic are considered these ASPR cost principles:

1. Compensation for Personal Services (15-205.6)
2. Employee Morale, Health, Welfare and Food Service and Dormitory Costs and Credits (15-205.10).
3. Labor Relations Costs (15-205.18).
4. Relocation Costs (15-205.25).
5. Recruitment Costs (15-205.33).
6. Severance Pay (15-205.39).
7. Training and Education Costs (15-205.44).
8. Travel Costs (15-205.46).

1. Compensation for Personal Services ¹¹¹

In general terms, ASPR 15-205.6 allows recovery for the cost of personal services compensation to the extent it is reasonable in relation to the services rendered. However, the compensation must not be in excess of the amount which the contractor is allowed to deduct under the Internal Revenue Code and its implementing regulations.¹¹² Recoverable compensation includes everything paid or payable to employees during the contract performance period except for the cost of employee stock *option plans*.¹¹³ In order to be

¹¹⁰ Lulejian and Associates, Inc., ASBCA No. 20094, 76-1 B.C.A. para. 11,880.

¹¹¹ ASPR § 15-205.6(a)(1) defines this expression as follows:

Compensation for personal services includes all remuneration paid currently or accrued, in whatever form and whether paid immediately or deferred, for services rendered by employees to the contractor during the period of contract performance (except as otherwise provided in 15-205.6(f)). It includes, but is not limited to, salaries, wages, directors' and executive committee members' fees, bonuses (including stock bonuses), incentive awards, employee stock options, employee insurance, fringe benefits, contributions to pension, annuity, and management employee incentive compensation plans, allowances for off-site pay, incentive pay, location allowances, hardship pay and cost of living differential.

Note that pension plans, named but not discussed at ASPR § 15-205.27, are covered by paragraph (f), Deferred Compensation, of ASPR § 15-205.6.

¹¹² "Except as otherwise specifically provided in this 15-205.6, such costs are allowable to the extent that the total compensation of individual employees is reasonable for the services rendered and they are not in excess of those costs which are allowable by the Internal Revenue Code and regulations thereunder." *Id.*

Further, concerning reasonableness of compensation, it is stated at ASPR § 15-205.6(a) (2) that:

Compensation is reasonable to the extent that the total amount paid or accrued is commensurate with compensation paid under the contractor's established policy and conforms generally to compensation paid by other firms of the same size, in the same industry, or in the same geographic area, for similar services. In the administration of this principle, it is recognized that not every compensation case need be subjected in detail to the above tests. Such test need be applied only to those cases in which a general review reveals amounts or types of compensation which appear unreasonable or otherwise out of line.

¹¹³ ASPR § 15-205.6(e) states, "The cost of options to employees to purchase stock of the contractor or of any affiliate is unallowable."

reimbursed for the cost of bonuses, though, a bonus compensation plan must have been in existence prior to the making of such payments.¹¹⁴

Although this expense category clearly is a type of general operational expense, decisions involving this ASPR § 15-205 cost principle have been less generous to contractors. The unexpressed yet reasonably discernable concern underlying many of the decisions under this principle (as well as the remaining "employee costs" principles) involves the direct funneling of government funds into the pockets of certain (often higher level) employees.

Good examples of the ASBCA's unwillingness to entertain arguments based on the reasonableness of expenditures (a favorite justification for *allowing* recovery of on-going business costs) appears in *Chrysler Corporation*¹¹⁵ and *General Dynamics Corporation*¹¹⁶ wherein compensation in excess of that permitted under the Internal Revenue Code was disallowed. A comment taken from the *Chrysler* decision is illustrative of a rather remarkable shift in sentiment with respect to "business necessity." "*Regardless of appellant's valid business or general accounting reasons for recording accruals, they create no right to reimbursement under the contract. Allowability as a tax deduction is a basic requirement which must be met.*"¹¹⁷ (emphasis added) In *General Dynamics*, the board was even willing to rely on a revenue ruling *interpreting* the Internal Revenue Code provision.¹¹⁸

This same board, in *Singer Company, Kearfott Division*¹¹⁹ displayed no reluctance in applying the prohibition against recovery for stock option compensation. (It is important to keep in mind the direct personal compensation involved in these cases.)

More important, however, is the conservative attitude evidenced in litigation where the regulatory prohibition was not as clear cut.

¹¹⁴ ASPR § 15-205(c), **Cash Bonuses and Incentive Compensation, states:**

Incentive compensation for management employees, cash bonuses, suggestion awards, safety awards, and incentive compensation based on production, cost reduction, or efficient performance, are to be reasonable and such costs are paid or accrued pursuant to an agreement entered into in good faith between the contractor and the employees before the services were rendered, or pursuant to an established plan followed by the contractor so consistently as to imply in effect, an agreement to make such payment (but see 15-107). Bonuses, awards, and incentive compensation when any of them are deferred are allowable to the extent provided in (f) below.

¹¹⁵ *Chrysler Corp.*, ASBCA No. 14385, 71-1 B.C.A. para. 8779.

¹¹⁶ *General Dynamics Corp.*, ASBCA No. 8867, 1964 B.C.A. para. 4270.

¹¹⁷ *Chrysler Corp.*, ASBCA No. 14385, 71-1 B.C.A. para. 8779, at 40,767.

¹¹⁸ Rev. Rul. 60-330, 1960-2 C.B. 46, cited at *General Dynamics Corp.*, ASBCA No. 8867, 1964 B.C.A. para. 4270, at 20,649-50.

¹¹⁹ *Singer Co., Kearfott Division*, ASBCA No. 18857, 75-1 B.C.A. para. 11,185.

For example, in *Capital Engineering Corporation*,¹²⁰ the ASBCA refused to allow contractor recovery of payments to a stockholder's widow and son because there was not demonstrated any ('established policy' therefor. The board was careful to note the direct payment (to *certain individuals*) aspect. "The *widow* performed no services whatsoever for Capital Engineering. The only duties the *son* had were in letting people know he was 'associated' with the firm."¹²¹ (emphasis added)

In *Norman M. Giller & Associates*¹²² the same board refused to go along with a "constructive salary" claim submitted on behalf of the contractor and his wife because of proof that no money had actually been paid out by the company to the two employees. And, where the contractor had recorded and allocated in a G&A (indirect)¹²³ expense pool the salaries of personnel working *directly* on a termination claim the ASBCA would not permit reclassification of such expenditures to reflect the direct charge.¹²⁴

Other examples of board conservatism include *Webster-Martin, Inc.*,¹²⁵ cash bonuses to officers not allowed because not shown to be reasonable nor paid pursuant to an established agreement; *Raymond-Morrison-Knudson*,¹²⁶ fringe benefits not allowed as contractor was under no legally enforceable obligation to pay; and *Republic Aviation Corporation*,¹²⁷ unplanned paid holiday costs not allowed as not in accordance with established policy even though the contractor had good reason to suspect high absenteeism (July 3rd falling on Monday).

Notwithstanding the more liberal attitude displayed for "on-going business expenses" than for personal services compensation, not all litigation concerning the latter has been unfavorable to contractors. Not surprisingly though, these more lenient decisions have involved situations where there has been found an exercise of "prudent business judgment." Thus in *Martin-Marietta Corporation*¹²⁸ the ASBCA determined that a contractor was entitled to recover bonus

¹²⁰ *Capitol Engineering Corp.*, ASBCA No. 11453, 68-1 B.C.A. para. 6833.

¹²¹ *Id.*, at 31,582.

¹²² ASBCA No. 73-1 B.C.A. para. 10,016.

¹²³ For an extended discussion of indirect costs, including general and administrative expenses, see note 22, *supra*.

¹²⁴ *Bermite Division of Tasker Industries*, ASBCA No. 18280, 77-1 B.C.A. para. 12,349.

¹²⁵ *Webster-Martin, Inc.*, IBCA No. 778-5-69, 70-1 B.C.A. para. 8120.

¹²⁶ *Raymond-Morrison-Knudsen*, ASBCA No. 10611, 65-1 B.C.A. para. 4811.

¹²⁷ *Republic Aviation Corp.*, ASBCA No. 9868, 65-2 B.C.A. para. 4811.

¹²⁸ *Martin-Marietta Corp.*, ASBCA Nos. 12143 and 12371, 69-1 B.C.A. para. 7506.

payments, despite the absence of an established plan (as required by ASPR § 15-205.6(c)¹²⁹), where such payments were made to ensure the retention of key employees. The board explained that the contractor had reasonable grounds to consider the compensation necessary to prevent significant losses. Heavily emphasized in the opinion was the *business reasonableness* involved. In this regard the ASBCA offered these comments:

Upon consideration of the record as a whole, we find that . . . the appellant had *reasonable* grounds for concern that the launching program might be adversely affected by the loss of launch crew personnel.

Having recognized the problem, a competent contractor was justified, and indeed obligated, to take *reasonable steps* to solve the problem.¹³⁰ (emphasis added)

In litigation involving an almost identical fact pattern, the NASA Board of Contract Appeals allowed recovery of “field adjustment payments” designed to retain key personnel during a critical period of contract performance.¹³¹ These comments were made in support of allowability.

Although, as we have noted, the question is exceedingly close, we consider the plan bona fide, *reasonable* and the cost reimbursable. . . . In 1971, it was *reasonable* to take a course such as that pursued by (the contractor), and we consider the costs reimbursable. The Contractor’s actions were those “a *prudent businessman* would take in the circumstances, considering his responsibilities to the owners of the business, his employees, his customers, the government and the public at large.” (NASA PR 15.201-3(iii)¹³²) (emphasis added)

As previously discussed, the *reasonableness* of an expenditure is but *one factor* to be considered in determining the allowability of a particular expense. In these two cases, concern over direct payments to employees was apparently outweighed by considerations of business necessity.

2. *Employee Morale, Health, Welfare and Food Service and Dormitory Costs and Credits*

The provisions of ASPR § 15-205.10 allow recovery for most expenses falling within this category. Such costs include those related

¹²⁹The text of this provision is set forth in note 114, *supra*.

¹³⁰*Martin-Marietta Corp.*, ASBCA Nos. 12143 and 12371, 69-1 B.C.A. para. 7506, at 34,798.

¹³¹*Id.*, at 34,798.

¹³²The text of NASA PR § 15.201.3, the definition of cost reasonableness, is identical with that of ASPR § 15-201.3(a), quoted *supra* in note 15.

to the improvement of working conditions, employer-employee relations and employee morale.¹³³

Most decisions concerning this principle follow a pattern similar to that established for personal services compensation. For example, in *Aro, Inc.*,¹³⁴ travel and other expenses associated with employees' participation in a *golf tournament* were disallowed. Yet in *The Boeing Company*,¹³⁵ the same board (ASBCA) sustained the contractor's claim for reimbursement of expenses incurred in publishing and mailing a monthly company magazine to its employees and *hundreds of nonemployees* and in presenting on local television a movie depicting its operation and growth. The board found the expenditures necessary to employee morale and *overall business operations*. Again, business necessity is found to play a major role in determining the outcome of cost principle litigation.

It goes without saying that little business justification for golf tournament expenses could be discovered; however, the relationship

¹³³The text of ASPR § 15-205.10, Employee Morale, Health, Welfare and Food Service and Dormitory Costs and Credits, is as follows:

(a) Employee morale, health and welfare activities are those services or benefits provided by the contractor to its employees to improve working conditions, employer-employee relations, employee morale and employee performance. Such activities include house publications, health or first-aid clinics, recreations, employee counseling services and, for the purpose of this paragraph 16206.10, food and dormitory services. Food and dormitory services include operating or furnishing facilities for cafeterias, dining rooms, canteens, lunch wagons, vending machines, living accommodations or similar types of services for the contractor's employees at or near the contractor's facilities.

(b) Except as limited by (c) below, the aggregate of costs incurred on account of all activities mentioned in (a) above, less income generated by all such activities is allowable to the extent that the net amount is reasonable.

(c) Losses from the operation of food and dormitory services may be included as cost incurred under (b) above, only if the contractor's objective is to operate such services on a break-even basis. Losses sustained because food services or lodging accommodations are furnished without charge or at price or rates which obviously would not be conducive to accomplishment of the above objective, are not allowable, except that a loss may be allowed to the extent the contractor can demonstrate that unusual circumstances exist (e.g., (i) where the contractor must provide food or dormitory services at remote locations where adequate commercial facilities are not reasonably available or (ii) where it is necessary to operate a facility at a lower volume than the facility could economically support) such that, even with efficient management, operation of the services on a break-even basis would require charging inordinately high prices or prices or rates higher than those charged by commercial establishments offering the same services in the same geographical areas. Cost of food and dormitory services shall include an allocable share of indirect expenses pertaining to these activities.

(d) In those situations where the contractor has an arrangement authorizing an employee association to provide or operate a service such as vending machines in the contractor's plan, and retain the profits derived therefrom, such profits shall be treated in the same manner as if the contractor were providing the service (but see (e)).

(e) Contributions by the contractor to an employee organization, including funds set over from vending machine receipts or similar sources, may be included as cost incurred under (b) above only to the extent that the contractor demonstrates that an equivalent amount of the costs incurred by the employee organization would be allowable if incurred by the contractor directly.

¹³⁴ASBCA Nos. 13623 and 13726, 69-2 B.C.A. para. 7868.

¹³⁵ASBCA No. 14370, 73-2 B.C.A. para. 10,325.

to employee morale (ASPR § 15-205.10,¹³⁶ the provision under which the *Boeing Company* expenses were allowed) appears reasonably valid. The key distinction between these two cases is the difference in the direct personal benefit accorded. In *Aro*, only a select few participated in the golfing event whereas in *Boeing Company*, the costs were of benefit to “hundreds of” people and enhanced the overall business operations.

3. Labor Relations Costs

ASPR § 15-205.18 informs the reader that “[c]osts incurred in maintaining satisfactory relations between the contractor and his employees, including costs of shop stewards, labor management committees, employee publications, and other related activities, are allowable.”

Although there has been a paucity of litigation in this area, the *Machine Products Company*¹³⁷ case provides another example of the business realities philosophy observed throughout this paper. The board held allowable costs incurred by the contractor in submitting to arbitration proceedings for settlement of employee grievances under a collective bargaining agreement. While the holding is not surprising, the “reasonable business judgment” language employed to support cost recovery is indicative of the probable basis for the decision. (As suggested earlier, though, it would be most helpful to have the basis specifically identified.)

4. Relocation Costs

Pursuant to ASPR § 15-205.25 such expenses incurred incident to a permanent change (at least 12 months) of employee duty assignment are allowable¹³⁸ provided the move is for the *benefit of the*

¹³⁶Supra note 133.

¹³⁷*Machine Products Co.*, ASBCA No. 4577, 58-1 B.C.A. para. 1704.

¹³⁸Relocation costs are defined thusly at ASPR § 15-205.25(a):

Relocation costs, for the purpose of this Part, are costs incident to the permanent change of duty assignment (for an indefinite period or for a stated period of not less than 12 months) of an existing employee or upon recruitment of a new employee. These costs may include but are not limited to:

- (i) cost of travel of the employee and members of his immediate family (see 15-205.46) and transportation of his household and personal effects to the new location;
- (ii) cost of finding a new home, such as advance trips by employees and spouses to locate living quarters, and temporary lodging during the transition period;
- (iii) closing costs (i.e., brokerage fees, legal fees, appraisal fees, etc.) incident to the disposition of actual residence owned by the employee when notified of transfer;
- (iv) other necessary and reasonable expenses normally incident to relocation, such as cost of canceling an unexpired lease, disconnecting and reinstalling household appliances, and purchase of insurance against damage to or loss of personal property;

employer and the reimbursement is under an *established plan or policy*.¹³⁹

Here, the direct funneling of government funds into employee pockets is more obvious than, for example, in the arbitration proceedings case just mentioned. Accordingly the ASBCA in *Page Communications Engineers, Inc.*¹⁴⁰ refused to grant recovery for expenses connected with the transfer of employees to a foreign country job location and their voluntary return to the United States in less than one year. Four years later, in a similar fact pattern, this same board again adhered to the 12 month “permanent change” requirement.¹⁴¹ And in *Douglas Aircraft Company, Inc.*¹⁴² the ASBCA upheld the government’s refusal to reimburse relocation expenses which the contractor was under no obligation to pay. In all

(v) loss on sale of home;

(vi) acquisition of a new home in a new location and all costs incident thereto;

(vii) continuing costs of ownership of the vacant former actual residence being sold, such as maintenance of building and grounds (exclusive of fixing-up expenses), utilities, taxes, property insurance, etc., after settlement date or lease date of new permanent residence; and

(viii) continuing mortgage principal and interest payments on residence being sold.

¹³⁹This is provided by ASPR § 15-205.25(b):

Subject to (c) and (d) below, relocation costs of the type covered in (a)(i), (ii), (iii), (iv) and (vii) above are allowable, provided:

(i) the move is for the benefit of the employer;

(ii) reimbursement is in accordance with an established policy or practice consistently followed by the employer, and such policy or practice is designed to motivate employees to relocate promptly and economically;

(iii) the costs are not otherwise unallowable under the provisions of 15-205.33, or any other paragraph of Part 2 (see 15-107 as related to large scale contractor relocation); and

(iv) amounts to be reimbursed shall not exceed the employee’s actual (or reasonably estimated) expenses:

Some further conditions are imposed by ASPR § 15-205.25(c), (d) and (e), as follows:

(c) Costs otherwise allowable under (b) above are subject to the following additional provisions:

(i) the transition period for incurrence of costs of the type covered in (a)(ii) above shall be kept to the minimum number of days necessary under the circumstances, but shall not, in any event, exceed a cumulative total of 30 days including advance trip time;

(ii) allowance for the combined total of costs of the type covered in (a)(iii) and (a)(vii) above shall not exceed 8% of the sales price of the property sold; and

(iii) costs of canceling an unexpired lease under (a)(iv) shall not exceed 3 times the monthly rental.

Costs of the type covered in (a)(iii), (a)(iv) and (a)(vii) above are allowable only in connection with the relocation of existing employees.

(d) Costs of the type covered in (a)(v) and (vi) and (a)(vii) above are not allowable. Costs of the type covered in (a)(iii) and (iv) above are not allowable for newly recruited employees.

(e) Payments for employee income taxes incident to reimbursed relocation costs are unallowable.

¹⁴⁰ ASBCA No. 15076, 71-2 B.C.A. para. 9088.

¹⁴¹ Pacific Architects and Engineers, Inc., ASBCA No. 15380, 75-1 B.C.A. para. 11,155.

of the cases under this principle, the tenuous business necessity involved was insufficient to overcome the personal benefit aspect.

5. *Recruitment Costs*

It is provided in ASPR § 15-205.33 that such costs are allowable if reasonable and incurred pursuant to a well-managed recruitment program.¹⁴³

Two cases in this area provide still other illustrations of the business operations approach taken under the cost principles. In *Aerojet General Corporation*¹⁴⁴ the ASBCA allowed recovery of expenses incurred in printing and mailing brochures to individuals making inquiries about the company. This clearly represents a type of normal, on-going business expense, without any direct funding to individuals.

Where such direct funding does occur, it should not be surprising to learn that the ASBCA may not be as lenient. In fact, in *Lulejian and Associates*¹⁴⁵ (considered earlier) this same board did not allow

¹⁴² ASBCA No. 5654, 60-2 B.C.A. para. 2844.

¹⁴³ The text of this cost principle is as follows:

(a) Subject to (b), (c), and (d) below, and provided that the sire of the staff recruited and maintained is in keeping with workload requirements, costs of help-wanted advertising, operating costs of an employment office necessary to secure and maintain an adequate labor force, costs of operating an aptitude and educational testing program, travel costs of employees while engaged in recruiting personnel, travel costs of applicants for interviews for prospective employment, and relocation costs incurred incident to recruitment of new employees are allowable to the extent that such costs are incurred pursuant to a well managed recruitment program. When the Contractor uses employment agencies, costs not in excess of standard commercial rates for such services are allowable.

(b) Cost of help-wanted advertising is unallowable if the advertising:

(1) is for other than for personnel required for the performance of obligations under a defense contract (see 15-205.1);

(2) does not describe specific positions or classes of positions;

(3) is excessive in relation to the number and importance of the positions, or in relation to the practices of the industry;

(4) includes material that is not relevant for recruitment purposes, such as extensive illustrations or descriptions of the company's products or capabilities;

(5) is designed to "pirate" personnel from another defense contractor; and

(6) includes color (in publications).

(c) Costs of excessive salaries, fringe benefits and special emoluments that have been offered to prospective employees, designed to "pirate" personnel from another defense contractor, or in excess of the standard practices in the industry, are unallowable.

(d) Relocation costs incurred incident to recruitment of new employees are subject to 15-205.25. When such costs have been allowed either as an allocable direct or indirect cost and the newly hired employee resigns for reasons within his control within 12 months after hire, the contractor shall be required to refund or credit such relocation costs to the Government. However, costs of travel to an overseas location shall be considered travel costs in accordance with 15-205.46 and not relocation costs for the purpose of this subparagraph, if (i) dependents are not permitted at that location for any reason, and (ii) such costs do not include costs of transporting household goods.

¹⁴⁴ ASBCA No. 13372, 73-2 B.C.A. para. 10,164.

¹⁴⁵ ASBCA No. 17130, 76-1 B.C.A. para. 11,880.

the cost of meals and travel by certain contractor employees and their wives incurred in connection with out-of-state recruiting. Here, the on-going business test was satisfied and no violence would have been done to the cost principle language to have directed reimbursement. Nevertheless, the concern about unwarranted compensation, directly to employees, was sufficient to deny the contractor's appeal. It is interesting to note that recovery for the expenses was denied because they were considered *unreasonable*, a standard for cost allowability pursuant to which costs are rarely denied.

6. *Severance Pay*

This type of payment is an allowable cost, states ASPR § 15-205.39, provided it is made pursuant to law, employer-employee agreement or established contractor policy.¹⁴⁶

According to form, close scrutiny is afforded expenses incurred within this category because they are channeled directly to employees. Thus, although a contractor's policy need not be in writing¹⁴⁷ (which the cost principle does not require), the ASBCA stands **firm** on the requirement for an *established* policy.¹⁴⁸

¹⁴⁶The text of the cost principle of severance pay is as follows:

15-205.39 *Severance Pay.*

(a) Severance pay, also commonly referred to as dismissal wages, is a payment in addition to regular salaries and wages, by contractors to workers whose employment is being terminated. Costs of severance pay are allowable only to the extent that, in each case, it is required by (i) law, (ii) employer-employee agreement, (iii) established policy that constitutes, in effect, an implied agreement on the contractor's part, or (iv) circumstance of the particular employment.

(b) Costs of severance payments are divided into two categories as follows:

(i) actual normal turnover severance payments shall be allocated to all work performed in the contractor's plant; or, where the contractor provides for accrual of pay for normal severances such method will be acceptable if the amount of the accrual is reasonable in light of payments actually made for normal severances over a representative past period, and if amounts accrued are allocated to all work performed in the contractor's plant; and

(ii) abnormal or mass severance pay is of such a conjectural nature that measurement of costs by means of an accrual will not achieve equity to both parties. Thus accruals for this purpose are not allowable. However, the Government recognizes its obligations to participate, to the extent of its fair share, in any specific payment. Thus, allowability will be considered on a case-by-case basis in the event of occurrence.

¹⁴⁷Telecomputing Services, Inc., ASBCA No. 10644, 68-1 B.C.A. para. 7023.

¹⁴⁸National Fireworks Ordnance Corp., ASBCA No. 2245, 56-2 B.C.A. para. 1067. The contract in this case, with an effective date of 1 July 1951, contained a forerunner of the present provision concerning severance pay, then designated ASPR § 15-204, which read as follows:

[The following items of costs are considered allowable within the limitations indicated:

(x) Vacations, holiday and severance pay, sick leave and military leave, to the extent required by law, by employer-employee agreement or by the contractor's established policy.

7. *Training and Education Costs*

A liberal allowance for recovery of such expenses, if within specific guidelines, is provided by ASPR § 15-205.44.¹⁴⁹ Although the ASBCA generally goes along with the regulatory provision, as

¹⁴⁹This provision deals with several widely differing types of training or education. Its **text** is as follows:

15-205.44 Training and Educational Costs.

(a) Costs of preparation and maintenance of a program of instruction at non-college level, including but not limited to on-the-job, classroom and apprenticeship training, designed to increase the vocational effectiveness of bona fide employees, including training materials, textbooks, salaries or wages of trainees (excluding overtime compensation which might arise therefrom), and

(i) salaries of the director of training and staff when the training program is conducted by the contractor; or

(ii) tuition and fees when the training is in an institution not operated by the contractor;

are allowable.

(b) Coats of part-time education, at an under-graduate or post-graduate college level, including that provided at the contractor's own facilities, are allowable only when the course or degree pursued is relative to the field in which a bona fide employee is now working or may reasonably be expected to work, are limited to—

(i) training materials;

(ii) textbooks;

(iii) fees charged by the educational institution;

(iv) tuition charged by the educational institution, or in lieu of tuition, instructors' salaries and the related share of indirect cost of the educational institution to the extent that the sum thereof is not in excess of the tuition which would have been paid to the participating educational institution;

(v) salaries and related costs of instructors who are employees of the contractor; and

(vi) straight-time compensation of each employee for time spent attending classes during working hours not in excess of 156 hours per year where circumstances do not permit the operation of classes or attendance at classes after regular working hours.

(c) Costs of tuition, fees, training materials and textbooks (but not subsistence, salary, or any other emoluments) in connection with fulltime education, including that provided at the contractor's own facilities, at a post-graduate (but not under-graduate) college level, are allowable only when the course or degree pursued is related to the field in which a bona fide employee is now working or may reasonably be expected to work, and are limited to a total period not to exceed one school year for each employee so trained. In unusual cases where required by military technology, the period may be extended.

(d) Costs of attendance of up to 16 weeks per employee per year at specialized programs specifically designed to enhance the effectiveness of executives or managers or to prepare bona fide employees for such positions are allowable. Such costs include enrollment fees, training materials, textbooks and related charges, employees' salaries, subsistence and travel. Costs allowable under this subparagraph do not include those for courses that are part of a degree oriented curriculum, which are allowable only to the extent set forth in (b) and (c) above.

(e) Maintenance expense, and normal depreciation or fair rental, on facilities owned or leased by the Contractor for training purposes are allowable to the extent set forth in 15-205.20, 15-205.9, and 15-205.34, respectively.

(f) Grants to educational or training institutions, including the donation of facilities or other properties, scholarships, or fellowships, are considered contributions and are unallowable.

(g) Training and education costs in excess of those otherwise allowable under (b) and (c) above may be allowed to the extent set forth in an advance agreement negotiated pursuant to 15-107 (the limitation of 15-107(b) notwithstanding). To be considered for an advance agreement, the contractor must demonstrate that such costs are consistently incurred pursuant to an established engineering or scientific training and education program, and that the course or degree pursued is relative to the field in which a bona fide employee is now working or may reasonably be expected to work.

shown by *The Boeing Company*, not the famous 1973 decision cited repeatedly above, but a much more obscure one issued in 1969,¹⁵⁰ nevertheless the board does not shy away from denying recovery for expenses incurred for programs not in conformance therewith.¹⁵¹ In the 1969 *Boeing* case, great weight was attached to the *business benefit* eventually to be derived from upper management educational programs (Sloan Fellowships). The following comments by the board are particularly revealing in this regard.

As indicated by the broad representation from industry and Government, it is evident that the program is recognized as a valuable experience for top management candidates to undertake. *** Although it cannot be concluded from the record that (the contractor's) operations would have seriously suffered had the Sloan Fellowship program not be available, we do find that the *management competence* of (the contractor) was *enhanced* by the program through an educational experience widely recognized. . . as valuable for this purpose.¹⁵² (emphasis added)

Thus, even though personal benefit aspects were present, the business advantage to be derived was sufficient to allow recovery.

8. *Travel Costs* ¹⁵³

Although somewhat involved, ASPR § 15–205.46 in general permits recovery of these expenses whether for the overall business (indirect cost)¹⁵⁴ or for the government contract in particular (direct cost).¹⁵⁵

(h) Costs of tuition, fees, textbooks, and similar or related benefits provided for other than bona fide employees are unallowable except that—

(i) such costs incurred for educating employee dependents (primary and secondary level students) when the employee is working in a foreign country where public education is not available and where suitable private education is inordinately expensive may be included in overseas *differential* provided for in 15–205.6(a)(1); or

(ii) when a contractor, prior to the effective date of this revision has had an employee dependent education plan providing for the college education of employees' dependents, the costs incurred under such plans for students already attending college under these plans will be allowable until such students have completed the equivalent of four academic years of study under the plan.

¹⁵⁰ *The Boeing Co.*, ASBCA No. 12731, 69–2 B.C.A. para. 7980. This is only one of a number of cases that could be cited.

¹⁵¹ *General Dynamics Corp.*, ASBCA No. 6811, 61–1 B.C.A. para. 3086.

¹⁵² *The Boeing Co.*, ASBCA No. 21731, 69–2 B.C.A. para. 7980, at 37,113.

¹⁵³ ASPR § 15–205.46(a) defines these costs to “include costs of transportation, lodging, subsistence, and incidental expenses, incurred by contractor personnel in a travel status while on official company business.” The greater part of the text of this principle deals with air travel and travel on contractor-controlled aircraft.

¹⁵⁴ In accordance with ASPR § 15–205.46(c), “Travel costs incurred in the normal course of overall administration of the business are allowable and shall be treated as indirect costs.”

¹⁵⁵ ASPR § 15–205.46(d) states, “Travel costs directly attributable to specific con-

The ASBCA, however, has routinely rejected claims for such expenses when *associated with* other unallowable costs (e.g., travel costs in connection with an appeal to the ASBCA¹⁵⁶ and travel costs associated with “entertainment” expenses).¹⁵⁷ More revealing of the board’s approach is the decision in *R.S. Topas & Co., Inc.*¹⁵⁸ wherein it was held that travel costs to bring employees home on weekends to visit families were not allowable because there was no benefit to the overall performance of the contract. In contrast where a legitimate business purpose is demonstrated recovery is possible. Thus in *Vare Industries, Inc.*¹⁵⁹ travel expenses incurred by the corporation’s president were allowed even though such activity had no relation to the performance of government contracts.

Under the heading of general operational expenses there have been considered to this point two topics: on-going business expenses and employee costs. Principles under the former topic have been accorded much more lenient consideration in litigation than have those under the latter. It seems clear that the principal explanation for the variance can be attributed to a reluctance to sanction a direct government subsidy of personal compensation. Accordingly a tentative “rule” of cost principles interpretation can be advanced: if an expense is for the benefit of a business operation alone, lenient interpretation can be expected; where the expense represents a direct benefit to a contractor employee, conservative treatment can be anticipated; and where there is a mixture of benefits, it can be assumed that a weighing process will be employed to determine allowability.

C. COSTS OF MATERIAL

Under this topic are considered these cost principles:

1. Depreciation (15–205.9).
2. Material Costs (15–205.22).
3. Transportation Costs (15–205.45).

tract performance are allowable and may be charged to the contract in accordance with the principle of direct costing.” This provision includes a citation to ASPR § 15–202, which defines *direct cost*. ASPR § 15–202(a) is quoted at note 21, *supra*, and ASPR § 15–202(b) at note 42, *supra*.

¹⁵⁶*Keco Industries, Inc.*, ASBCA Nos. 7882, 8002, and 8092, 1963 B.C.A. para. 3992.

¹⁵⁷*Capitol Engineering Corp.*, ASBCA No. 11453, 68–1 B.C.A. para. 6833. Entertainment costs are disallowed in accordance with ASPR § 15–205.11, discussed at note 69, *supra* and surrounding text.

¹⁵⁸*R.S. Topas & Co., Inc.*, ASBCA No. 13250, 68–2 B.C.A. para. 7399.

¹⁵⁹*Vare Industries, Inc.*, ASBCA Nos. 12126, 12127, and 12128, 68–2 B.C.A. para. 7120.

1. Depreciation

Such charges, provides ASPR § 15-205.9,¹⁶⁰ represent a reimbursable expense, to the extent the method of depreciation is consistent with one which is acceptable for federal income tax purposes.¹⁶¹ However, if the contractor's book treatment would result in a lower cost to the government, that method is to be used.¹⁶²

At the outset, it should be noted that such costs represent a normal business operation expense, with no personal compensation aspects. Therefore if the previously established "rule" enjoys validity there should be evidence of liberal treatment in litigation involving this principle.

In line with prediction, decisions have been reasonably favorable to contractors. For example, the Veteran's Administration Contract Appeals Board held in *Gilmatic*¹⁶³ that the government's rejection of an accelerated depreciation method was improper because it was not prohibited by the Internal Revenue Code and was in compliance with generally accepted accounting procedures. The board commented that it was irrelevant that the contractor may have failed to select the "most appropriate" depreciation method.

The ASBCA has also demonstrated a predilection to accord

¹⁶⁰ Not surprisingly, this provision is lengthy. However, its core is contained in the first paragraph and part of the second paragraph, as follows:

(a) Depreciation is a charge to current operations which distributes the cost of a tangible capital asset, less estimated residual value, over the estimated useful life of the asset in a systematic and logical manner. It does not involve a process of valuation. Useful life has reference to the prospective period of economic usefulness in the particular contractor's operations as distinguished from physical life and shall be evidenced by the actual or estimated retirement and replacement practice of the contractor.

(b) Normal depreciation on a contractor's plant, equipment, and other capital facilities is an allowable element of contract cost provided the contractor is able to demonstrate that such costs are reasonable and properly allocable to the contract

¹⁶¹ ASPR § 15-205.9(b)(i) states,

Depreciation will ordinarily be considered reasonable if the contractor follows depreciation policies and procedures which:

(A) are consistent with the policies and procedures he follows in the same cost center in connection with his business other than Government business;

(B) are reflected in his books of accounts and financial statements; and

(C) are used by him for Federal income tax purposes, and are acceptable for such purposes;

¹⁶² ASPR § 15-205.9(b)(ii) prescribes,

Where the depreciation reflected on a contractor's books of account and financial statements differs from that used and acceptable for Federal income tax purposes, reimbursement shall be based upon the cost of the asset to the contractor amortized over the estimated useful life of the property using depreciation methods (straight line, sum of year's digits, etc.) acceptable for income tax purposes. Allowable depreciation shall not exceed the amounts used for book and statement purposes and shall be determined in a manner consistent with the depreciation policies and procedures followed in the same cost center in connection with his business other than Government business.

¹⁶³ *Gilmatic*, VACAB No. 700, 68-2 B.C.A. para. 7341.

generous treatment under this principle. For example, in *Lowell O. West Lumber Sales*¹⁶⁴ this board had occasion to review the depreciation expense of a facility constructed primarily for the performance of a government contract. Even though the contract was terminated for government convenience, the ASBCA permitted recovery of the facility depreciation cost through the date the contract would have expired had there been no termination. The holding of course runs counter to the termination for convenience philosophy normally espoused by the boards and embodied in the regulations. The contractor's overall business operations played a role in the decision. ". . . [T]he termination resulted in extraordinary obsolescence of the facility and [the contractor] could no longer amortize the capital investment from proceeds realized from *business use* of the property."¹⁶⁵ (emphasis added)

In *Big Three Industries, Inc.*¹⁶⁶ the same board allowed a contractor to alter its method of depreciation from straight line to double declining balance, explaining that either method was acceptable for federal income tax purposes. Great emphasis was accorded the *reasonableness* of utilizing the accelerated depreciation method.

2. *Material Costs*

Allowed under ASPR § 15-205.22 are such costs as raw materials, parts, in-bound freight charges, subassemblies, components, spoilage, and reasonable overruns.¹⁶⁷ If the materials are issued from contractor stores, any generally acceptable pricing technique (e.g., LIFO, FIFO, etc.), if consistently applied, is permitted.¹⁶⁸

¹⁶⁴ *Lowell O. West Lumber Sales*, ASBCA No. 10879, 67-1 B.C.A. para. 6101.

¹⁶⁵ *Id.* at 28,258.

¹⁶⁶ *Big Three Industries, Inc.*, ASBCA Nos. 16949 and 17331. 74-1 B.C.A. para. 10,483.

¹⁶⁷ ASPR § 15-205.22 (a) states,

Material costs include the costs of such items as raw materials, parts, subassemblies, components, and manufacturing supplies, whether purchased outside or manufactured by the contractor, and may include such collateral items as inbound transportation and intransit insurance. In computing material costs consideration will be given to reasonable overruns, spoilage, or defective work (unless otherwise provided in any provision of the contract relating to inspection and correction of defective work) These costs are allowable subject, however, to the provisions of (b) through (e) below.

¹⁶⁸ This is provided by ASPR § 15-205.22(d):

When the materials are purchased specifically for and identifiable solely with performance under a contract, the actual purchase cost thereof should be charged to the contract. If material is issued from stores, any generally recognized method of pricing such material is acceptable if that method is consistently applied and the results are equitable. When estimates of material costs to be incurred in the future are required, either current market price or anticipated acquisition cost may be used, but the basis of pricing must be disclosed.

Again, because of the nature of the expense, it would be surprising to discover significant limitations imposed by the boards on this principle. The cases do not provide any surprises.

For example, in *American Potash & Chemical Corporation*¹⁶⁹ the ASBCA determined that increased payments for materials in order to insure prompt delivery were justified (as a prudent business judgment) and therefor recoverable.

And although this same board did require compliance with the principle's restrictions regarding intracompany transfers¹⁷⁰ in *Westinghouse Electric Corporation*.¹⁷¹ in *Yardney Electric Corporation*¹⁷² the ASBCA held that an advance agreement to the contrary (of this same provision) should be allowed to stand. The failure to incorporate the advance agreement into the contract was not enough to persuade the board to reach a contrary conclusion, even though the principle in question is itself "part of the contract."

3. Transportation Costs

Such expenses, declares ASPR § 15-205.45, are allowable.¹⁷³ The real issue addressed by the principle concerns whether such costs

¹⁶⁹ *American Potash & Chemical Corp.*, ASBCA No. 6144, 61-1 B.C.A. para. 2859.

¹⁷⁰ Such transfers are covered by ASPR § 15-205.22(e), which states:

Allowance for all materials, supplies and services which are sold or transferred between any division, subsidiary or affiliate of the contractor under a common control shall be on the basis of cost incurred in accordance with this Part 2, except that when it is the established practice of the transferring organization to price interorganization transfers of materials, supplies and services at other than cost for commercial work of the contractor or any division, subsidiary or affiliate of the contractor under a common control, allowance may be at a price when:

(i) it is or is based on an "established catalog or market price of commercial items sold in substantial quantities to the general public" in accordance with 3-807.1(b)(2); or
 (ii) it is the result of "adequate price competition" in accordance with 3-807.1(b)(1)a and b (i) and (ii), and is the price at which an award was made to the affiliated organization after obtaining quotations on an equal basis from such organization and one or more outside sources which normally produce the item or its equivalent in significant quantity:

provided that in either case:

(1) the price is not in excess of the transferor's current sales price to his most favored customer (including any division, subsidiary or affiliate of the contractor under a common control) for a like quantity under comparable conditions, and

(2) the price is not determined to be unreasonable by the contracting officer.

The price determined in accordance with (i) above should be adjusted, when appropriate, to reflect the quantities being procured and may be adjusted upward or downward to reflect the actual cost of any modifications necessary because of contract requirements.

¹⁷¹ ASBCA No. 11932, 67-1 B.C.A. para. 6361.

¹⁷² ASBCA No. 10788, 66-2 B.C.A. para. 5760.

¹⁷³ "Transportation costs include freight, express, cartage, and postage charges relating either to goods purchased, in process, or delivered. These costs are allowable." ASPR § 15-205.45.

should be a direct¹⁷⁴ or indirect¹⁷⁵ charge against the particular government contract.

Few decisions have involved a dispute under this principle. What litigation there has been, however, as expected, demonstrates a permissive attitude.¹⁷⁶

This completes the review of ASPR § 15-205 cost principles under the "cost of materials" topic, the third and last to be considered as a "general operational expense." In contrast to "employee costs," there was no reason for concern about direct personal compensation. Thus the treatment accorded this topic is in complete harmony with the first part of the rule: lenient consideration of cost principles which involve business operations with no personal compensation benefits.

IV. ASPR § 15-205—EXPENDITURES DIRECTED AT SECURING OR PERFORMING A GOVERNMENT CONTRACT

A. COSTS DIRECTED AT SECURING A GOVERNMENT CONTRACT

Under this topic are considered these principles:

1. Bid and Proposal Costs (15-205.3).
2. Precontract Costs (15-205.30).
3. Selling Costs (15-205.37).

These cost principles involve, to be sure, a type of business operational expense. They are considered under a separate category because of their direct applicability to a particular government contract. The issue is whether this relationship affects the treatment that otherwise would be accorded business expenses having no personal compensation aspects.

¹⁷⁴"When such costs can readily be identified with the items involved, they may be directly costed as transportation costs or added to the cost of such item." *Id.* This portion of the provision includes a citation to ASPR § 15-205.22. See particularly note 168, *supra*. Also, -- [o]utbound freight, if reimbursable under the terms of the contract, shall be treated as a direct cost." ASPR § 15-205.45.

¹⁷⁵"Where identification with the materials received cannot readily be made, inbound transportation costs may be charged to the appropriate indirect costs accounts if the contractor follows a consistent, equitable procedure in this respect." ASPR § 15-205.45.

¹⁷⁶See, e.g., *Missile Systems Corp. of Texas, ASBCA No. 8306, 1964 B.C.A. para. 4434.*

1. Bid and Proposal Costs

ASPR § 15-205.3 informs that such expenses are allowable, as an indirect cost, if they fall within the current accounting period whether or not the bid is ultimately successful.¹⁷⁷ These costs are recoverable for both government and commercial projects.¹⁷⁸

Litigation under this cost principle reveals a fairly conservative approach, with emphasis on close scrutiny with respect to allocability questions. That is, even following a determination that an expenditure is an otherwise allowable cost, the ASBCA often looks very closely at the question whether the expenditure is properly identifiable with (allocable to) the government contract. For example, in *Stanley Aviation Corporation*¹⁷⁹ this board held that bid and proposal costs must be included in the contractor's general and administrative expense (not engineering department overhead) for pro rata allocation to *all business expenses*.

Most of the allocation issues though involve the classification of expenses as independent research and development costs (covered under ASPR § 15-205.35, a very restrictive provision¹⁸⁰) as opposed to bid and proposal expenses. Thus in *General Dynamics Corporation*¹⁸¹ the contractor's unnecessary through desirable construction of a prototype or experimental airplane to support a proposal was determined to be independent development, not a bid and proposal cost. The board commented that, "as bid and proposal costs, we believe there is an insurmountable question of *reasonableness*."¹⁸² (emphasis added)

¹⁷⁷As in the case of independent research and development costs, discussed at ASPR § 15-205.35, the allowability of bid and proposal costs differs according to whether a contractor is or is not required to negotiate an advance agreement with the government. See note 85, *supra*. Allowability of bid and proposal costs is discussed at great length at ASPR § 15-250.3(d).

¹⁷⁸This is provided in the definition of bid and proposal costs, as follows:

Bid and proposals (B&P) costs are the costs incurred in preparing, submitting, and supporting bids and proposals (whether or not solicited) on potential Government or non-Government contracts which fall within the following:

- (A) *Administrative costs* including the cost of the nontechnical effort for the physical preparation of the technical proposal documents and also the cost of the technical and nontechnical effort for the preparation and publication of the cost data and other administrative data necessary to support the contractor's bids and proposals, and
- (B) *Technical costs* incurred to specifically support a contractor's bid or proposal, including the costs of system and concept formulation studies and the development of engineering and production engineering data.

ASPR § 15-205.3(a)(1).

¹⁷⁹*Stanley Aviation Corp.*, ASBCA No. 12292, 68-2 B.C.A. para. 7081.

¹⁸⁰*Supra* note 85.

¹⁸¹*General Dynamics Corp.*, ASBCA Nos. 12814 and 12890, 68-2 B.C.A. para. 7297.

¹⁸²*Id.* at 33.930.

In a later case,¹⁸³ it was decided that certain low altitude land observation units, built at a cost of \$200,000, had to be charged to independent research and development even though not fully fledged “prototypes.” The cost of producing movie films of the units was also declared an unallowable bid-and-proposal expense because of (again) “questions of reasonableness.” This explanation marks one of the rare instances in which the ASPR § 15-201.2 reasonableness requirement for allowability has been used to *deny* recovery. Indeed, the ASBCA was most emphatic in its decision.

Were it argued that the flight tests and the construction of the hardware therefor were a necessary B&P expense, because without it the film presentation of (the product’s) feasibility would not have been possible, the Board would not hesitate to find that such B&P expenditure would not be a reasonable one within the meaning of ASPR 15-205.3.¹⁸⁴

In a more recent case,¹⁸⁵ the ASBCA did permit recovery, under this cost principle, of the cost of preparing an *analysis* of the performance characteristics of an aircraft prototype. Such costs were deemed more reasonable and this factor, coupled with “the fact that all of the effort involved was directed toward satisfaction of the government’s several requests for proposals to design and develop the . . . weapon system,”¹⁸⁶ prompted the determination of allowability.

2. *Precontract Costs*

Such costs, declares ASPR § 15-205.30, are those incurred prior to contract award, “directly pursuant to the negotiation and in anticipation of the award of the contract where such incurrence is necessary to comply with the proposed delivery schedule.” These expenses are recoverable to the extent allowable if incurred *after* contract award.¹⁸⁷

¹⁸³General Dynamics Corp., ASBCA No. 13869, 70-1 B.C.A. para. 8143.

¹⁸⁴*Id.* at 37,835.

¹⁸⁵General Dynamics Corp., ASBCA Nos. 15394 and 15858. 72-2 B.C.A. para. 9533.

¹⁸⁶*Id.* at 44,404.

¹⁸⁷The complete text of ASPR § 15-205.30, Precontract Costs, reads, as follows:

Precontract costs are those incurred prior to the effective date of the contract directly pursuant to the negotiation and in anticipation of the award of the contract where such incurrence is necessary to comply with the proposed contract delivery schedule. Such costs are allowable to the extent that they would have been allowable if incurred after the date of the contract.

(But see 15-107.)

ASPR § 15-107 deals with advance agreements between the government and a contractor concerning the reasonableness and allowability of special or unusual

Cases decided in this area reveal a tendency to interpret narrowly the language of this principle. In *United Technology Center*,¹⁸⁸ the ASBCA would not permit recovery of certain special tooling (direct costs because they did not represent a “proper”) precontract expense. Other decisions by this same board have also indicated a conservative approach.¹⁸⁹

3. *Selling Costs*

ASPR § 15-205.37 informs, quite simply, that such expenses, which include the cost of sales promotions, negotiation, and liaison between government representatives and contractor personnel, are allowable to the extent they are reasonable and allocable to government business.¹⁹⁰

As with bid and proposal costs and precontract costs, the ASBCA follows a rather conservative line. In fact, expenses for which re-

costs. The purpose of advance agreements is to avoid later disputes. In ASPR § 15-107(g), it is stated that precontract costs are one example of the type of cost for which advance agreements may be particularly important.

¹⁸⁸ *United Technology Center*, ASBCA No. 12007, 68-2 B.C.A. para. 7350.

¹⁸⁹ See, e.g., *Channell Splicing Machine Co.*, ASBCA No. 10209, 66-2 B.C.A. para. 6061, and *Capitol Engineering Corp.*, ASBCA No. 11453, 68-1 B.C.A. para. 6833.

¹⁹⁰ ASPR § 15-205.37, *Selling Costs*, states:

(a) Selling costs arise in the marketing of the contractor's products and include costs of sales promotions, negotiation, liaison between Government representatives and contractor's personnel, and other related activities.

(b) Selling costs are allowable to the extent they are reasonable and are allocable to Government business (but see 15-107 and 15-205.1). Allocability of selling costs will be determined in the light of reasonable benefit to the Government arising from such activities as technical, consulting, demonstration, and other services which are for purposes such as application or adaptation of the contractor's products to Government use.

(c) Notwithstanding (b) above, salesmen's or agents' compensation, fees, commissions, percentages, retainer or brokerage fees, whether or not contingent upon the award of contracts, are allowable only when paid to bona fide employees (see 1-505.3) or bona fide established commercial or selling agencies (see 1-505.4) maintained by the contractor for the purpose of securing business.

ASPR § 15-107 is the provision on advance agreements on particular cost items, discussed *supra* in note 187. Selling and distribution costs are listed as another example of the type of cost for which advance agreements may be particularly important. ASPR § 15-107(g). ASPR § 15-205.1 is the principle of advertising costs, discussed *supra* at notes 53 and 57 and surrounding text. ASPR §§ 1-505.3 and 1-505.4 are definitions of the terms “bona fide employees” and “bona fide established commercial or selling agencies,” respectively.

ASPR § 15-205.37(c) was amended by Item XXIII of Defense Procurement Circular No. 76-7, dated 29 April 1977. At page 11 of DPC No. 76-7 it is explained:

As a result of publicized disclosures concerning questionable payment of consultant fees, agents' commissions and entertainment of Government personnel, several provisions of ASPR have been given additional consideration. A review by a DoD Task Force, established to study the areas involved, resulted in various recommendations that would further clarify the intent of DoD with regard to these areas and enhance the effectiveness of DoD safeguards against

covery was not permitted under the bid and proposal costs were also denied under the selling cost principle. Specifically, construction costs for prototypes and demonstration aircraft have been disallowed because they lacked a sufficient nexus to marketing.¹⁹¹ In fact, in the *General Dynamics Corporation (Corvair Division)* decision the board significantly restricted the language of the selling costs provision.

ASPR 15-205.37 does not define "selling costs." It states that they "arise in the marketing" of products. We take the quoted expression to *confine* this category of costs to those DIRECTLY attributable to marketing efforts. The examples used in ASPR confirm this conclusion, *even though they themselves are extremely broad and lend themselves to high-flying when used out of context.*¹⁹² (emphasis added)

When one considers litigation relative to the three principles under the topic "Cost Directed at Securing a Government Contract," a conservative attitude on the part of the ASBCA is evident. Although the approach in this area is less negative than that displayed with respect to direct personal compensation, there is a clear tendency to carefully scrutinize expenses under this topic.

B. COSTS DIRECTLY RELATED TO PERFORMANCE OF A SPECIFIC GOVERNMENT CONTRACT

Under this topic are considered these principles:

1. Patent Costs (15-205.26).
2. Royalties and Other Costs for Use of Patents (15-205.36).
3. Termination Costs (15-205.42).

The distinction between the expense category represented by these principles and the immediately preceding topic is simply one of timing. Here, the contract has already been awarded; does this factor lead to a variation in approach?

reimbursement for improper expenditures. In this regard, revisions have been made to 15-205.37 "Selling Costs "

15-205.37 has been revised to indicate that salesmen's or agents' compensation, fees, commissions, percentages, retainer or brokerage fees, regardless of whether or not they are contingent upon the award of contracts, are allowable only when paid to bona fide employees or bona fide agencies.

The phrase "whether or not contingent," in the second line of ASPR § 15-205.37(c), formerly read "which are contingent."

¹⁹¹General Dynamics Corp., ASBCA Nos. 15394 and 15858, 72-2 B.C.A. para. 9533.

¹⁹²*Id.* at 33,930.

1. Patent Costs

The principle concerning this expense, ASPR § 15-205.26, states that if such costs are required to be incurred pursuant to the contract, they are allowable; if not required under the contract, they are not allowable.¹⁹³

The ASBCA has demonstrated a very liberal attitude with respect to the relatively few disputes concerning the principle. In *American Electronic Labs, Inc.*¹⁹⁴ this board held that patent searches, including attorneys' fees, were allowable as a *reasonable and necessary business expense*. Similar reasoning was employed in *TRW Systems Group of TRW, Inc.*,¹⁹⁵ where the ASBCA determined that the cost of obtaining certain domestic patents was recoverable as it was a "necessary" cost of doing business. However, with respect to foreign patents, the board noted that there was "nothing in the record which is sufficient to support a conclusion that these patents are *necessary for the conduct of* (the contractor's) *business as it is now conducted.*"¹⁹⁶ (emphasis added) Additionally in *The Boeing Company*¹⁹⁷ the same board displayed wide latitude

¹⁹³The text of ASPR § 15-205.26, Patent Costs, is as follows:

(a) Costs of (i) preparing disclosures, reports, and other documents required by the contract and of searching the art to the extent necessary to make such invention disclosures; (ii) preparing documents and any other patent costs, in connection with the filing and prosecution of a United States patent application where title or royalty free license is required by Government contract to be conveyed to the Government; and (iii) general counseling services relating to patent matters, such as advice on patent laws, regulations, clauses, and employee agreements, are allowable. (But see 15-205.31.)

(b) Costs of preparing disclosures, reports and other documents and of searching the art to the extent necessary to make invention disclosures, if not required by the contract, are unallowable. Costs in connection with (i) filing and prosecuting any foreign patent application, or (ii) any United States patent application with respect to which the contract does not require conveying title or a royalty free license to the Government, are unallowable. (Also see 15-205.36.)

ASPR § 15-205.31 is the principle governing professional and consultant service costs, and ASPR § 15-205.36, royalties and other costs for use of patents, both discussed in the text *infra*. Note that ASPR § 15-205.31(d) reinforces ASPR § 15-205.26(b): "Costs of legal, accounting, and consulting services, and related costs, incurred in connection with patent infringement litigation, are unallowable unless otherwise provided for in the contract."

¹⁹⁴*American Electronic Laboratories, Inc.*, ASBCA No. 9879, 65-2 B.C.A. para. 5020.

¹⁹⁵*TRW Systems Group of TRW, Inc.*, ASBCA No. 11499, 68-2 B.C.A. para. 7117.

¹⁹⁶*Id.*, at 32,971. This concept of necessity to the overall operation of the business is derived from ASPR § 15-201.4, pertaining to *allocability*, a test completely separate from and in *addition* to the § 15-205 principles. ASPR §§ 15-205.26 and 15-205.3(d) make no reference to a benefitting government work test. Monroe, *Allowability*, *supra* note 52, at 6.

¹⁹⁷*The Boeing Co.*, ASBCA No. 12731, 69-2 B.C.A. para. 7980.

with regard to allowable patent costs (e.g., for *non-government contracts* and the cost of maintaining a patent office) because again they represented a *necessary business expense* and were beneficial to the contractor's entire *business operation*. In this decision, though, *foreign* patent costs were allowed.

. . . Boeing's foreign operations were extensive, both in terms of commercial sales and in connection with foreign military and space programs. Thus, while TRW's (*supra*) foreign patent costs were disallowed because of the lack of business requiring the protection of foreign patents, the rationale of the TRW decision warrants sustaining the allowability of Boeing's foreign patent costs as necessary to Boeing's over-all business and having an equitable relationship to the Government as a class of customer.¹⁹⁸

In each of the above-mentioned cases, emphasis was accorded business "necessity" or "benefit" considerations. Obviously they carried great weight, overcoming the close scrutiny afforded other expenses bearing directly on government contracts, specifically, "Costs Directed at Securing a Government contract."

2. *Royalties and Other Costs for Use of Patents*

Such expenses, informs ASPR § 15-205.36, are allowable if necessary for contract performance, e.g., the government does not have a right to free use or the patent has not been adjudicated invalid.¹⁹⁹

¹⁹⁸*Id.* at 37,111.

¹⁹⁹The text of this principle is as follows:

(a) Royalties on a patent or amortization of the cost of acquiring by purchase a patent or rights thereto, necessary for the proper performance of the contract and applicable to contract products or processes, are allowable unless—

- (i) The Government has a license or the right to free use of the patent;
- (ii) The patent has been adjudicated to be invalid, or has been administratively determined to be invalid;
- (iii) the patent is considered to be unenforceable;
- (iv) the patent is expired.

(b) Special care should be exercised in determining reasonableness where the royalties may have been arrived at as a result of less than arm's length bargaining; e.g. :

- (i) royalties paid to persons, including corporations, affiliated with the contractor;
- (ii) royalties paid to unaffiliated parties, including corporations, under an agreement entered into in contemplation that a Government contract would be awarded; or
- (iii) royalties paid under an agreement entered into after the award of the contract

(c) In any case involving a patent formerly owned by the contractor, the amount of royalty allowed should not exceed the cost which would have been allowed had the contractor retained title thereto.

(d) See 15-107, regarding advance understandings.

There has been a paucity of litigation concerning this principle. In those few decisions,²⁰⁰ though, the ASBCA has evidenced the same liberal sentiment developed under ASPR § 15-205.26, *Patent Costs*.

3. Termination Costs

One of the most important cost principles, ASPR § 15-205.42, provides that costs brought about by the termination of a government contract, for the most part, are allowable. Such recoverable expenses include: initial costs (starting load and preparatory);²⁰¹ loss of useful value with respect to special tooling, special machinery and equipment;²⁰² rental costs under unexpired leases;²⁰³ sub-

²⁰⁰ See, e.g., Channell Splicing Machine Co., ASBCA No. 10209, 66-2 B.C.A. para. 6061, and Raytheon Co., ASBCA No. 16097, 73-1 B.C.A. para. 9945.

²⁰¹ ASPR § 15-205.42(c) discusses initial costs:

(c) *Initial costs*, including starting load and preparatory costs, are allowable, subject to the following:

(1) Starting load costs are costs of a nonrecurring nature arising in the early stages of production and not fully absorbed because of the termination. Such costs may include the cost of labor and material, and related overhead attributable to such factors as—

- (i) excessive spoilage resulting from inexperienced labor,
- (ii) idle time and subnormal production occasioned by testing and changing methods of processing,
- (iii) employee training, and
- (iv) unfamiliarity or lack of experience with the product, materials, manufacturing process and techniques.

(2) Preparatory costs are costs incurred in preparing to perform the terminated contract, including costs of initial plant rearrangement and alterations, management and personnel organization, production planning and similar activities, but excluding special machinery and equipment and starting load costs.

(3) If initial costs are claimed and have not been segregated on the contractor's books, segregation for settlement purposes shall be made from cost reports and schedules which reflect the high unit cost incurred during the early stages of the Contract.

(4) When the settlement proposal is on the inventory basis, initial costs should normally be allocated on the basis of total end items called for by the contract immediately prior to termination; however, if the contract includes end items of a diverse nature, some other equitable basis may be used, such as machine or labor hours.

(5) When initial costs are included in the settlement proposal as a direct charge, such costs shall not also be included in overhead.

(6) Initial costs attributable to only one contract shall not be allocated to other contracts.

²⁰² This is covered by ASPR § 15-205.42(d), as follows:

(d) *Loss of useful value of special tooling, special machinery and equipment* is generally allowable, *provided*—

- (i) such special tooling, machinery or equipment is not reasonably capable of use in the other work of the contractor;
- (ii) the interest of the Government is protected by transfer of title or by other means deemed appropriate by the contracting officer; and
- (iii) the loss of useful value as to any one terminated contract is limited to that portion of the acquisition cost which bears the same ratio to the total acquisition cost as the terminated portion of the contract bears to the entire terminated Contract and other Government contracts for which the special tooling, special machinery and equipment was acquired.

²⁰³ ASPR § 15-205.42(e) states:

(e) *Rental cost under unexpired leases* are generally allowable where clearly shown to have

contractor claims;²⁰⁴ and settlement expenses, which include accounting, legal and clerical services necessary for the presentation of claims, termination and settlement of subcontracts, and costs for disposition of material related to the contract.²⁰⁵

It is important to note that some of the recoverable expenses, e.g., legal, are covered in other cost principles which provide for different treatment. Notwithstanding the varied treatment, several ASBCA decisions fully support allowability pursuant to the termination costs principle.²⁰⁶ Some of the more frequent types of termi-

been reasonably necessary for the performance of the terminated contract, less the residual value of such leases, if—

- (i) the amount of such rental claimed does not exceed the reasonable use value of the property leased for the period of the contract and such further period as may be reasonable; and
- (ii) if the contractor makes all reasonable efforts to terminate, assign, settle, or otherwise reduce the cost of such lease.

There also may be included the cost of alterations of such leased property, *provided*, such alterations were necessary for the performance of the contract, and of reasonable restoration required by the provisions of the lease.

204 Subcontractor claims are covered by ASPR § 15-205.42(g):

(g) Subcontractor claims, including the allocable portion of claims which are common to the contract and to other work of the contractor are generally allowable. An appropriate share of the contractor's indirect expense may be allocated to the amount of settlements with subcontractors, *provided*, that the amount allocated is reasonably proportionate to the relative benefits received and is otherwise consistent with 15-201.4 and 15-208(c). The indirect expense so allocated shall exclude the same and similar costs claimed directly or indirectly as settlement expenses.

205 Settlement expenses are dealt with in ASPR § 15-205.42(f):

(f) *Settlement expenses* including the following are generally allowable:

- (1) accounting, legal, clerical, and similar costs reasonably necessary for—
 - (i) the preparation and presentation to contracting officers of settlement claims and supporting data with respect to the terminated portion of the contract, and
 - (ii) the termination and settlement of subcontracts;
- (2) reasonable costs for the storage, transportation, protection, and disposition of property acquired or produced for the contract; and
- (3) indirect costs related to salary and wages incurred as settlement expenses in (1) and (2); normally, such indirect costs shall be limited to payroll taxes, fringe benefits, occupancy cost, and immediate supervision.

Legal expenses incurred to convert the government's default termination to a termination for convenience are recoverable under this provision, if they are reasonable in amount. *See* Southland Mfg. Corp., ASBCA No. 16830, 75-1 B.C.A. para. 10,994; Sunstrand Turbo, A Division of Sunstrand Corp., ASBCA No. 9112, 65-1 B.C.A. para. 4653; and Baifield Industries, Division of A-T-O, Inc., ASBCA No. 20006, 76-2 B.C.A. para. 12,096; *aff'd on motion for reconsideration*, 76-2 B.C.A. para. 12,203. However, legal fees probably will not be allowed if related to an appeal of the contracting officer's decision concerning quantum of a termination settlement. Thus, in E.A. Cowen Construction, Inc., ASBCA No. 10669, 66-2 B.C.A. para. 6060, a contractor whose work was terminated for government convenience was allowed counsel fees allocable to the preparation of a settlement proposal; but such expenses related to the presentation of a claim upon appeal were not granted. *See also* Acme Coppersmithing & Machine Co., ASBCA No. 4473 and 5016, 59-2 B.C.A. para. 2314. Monroe, *Allowability*, *supra* note 52, at 6.

²⁰⁶*See, e.g.*, Atlantic, Gulf & Pacific Co. of Manila, Inc., ASBCA No. 13533, 72-1

nation claims the ASBCA has had occasion to review were disputed in the following cases.

In *R.D. Mounts, Inc.*²⁰⁷ the ASBCA held recoverable costs incurred by a contractor in defending a suit initiated by a subcontractor and arising out of a government contract termination. The same board allowed, in *American Electric, Inc.*,²⁰⁸ the full useful-value loss of machinery, special tooling and equipment where such items had been fabricated solely for use in performance of the terminated contract. Finally, in *Southland Manufacturing Corporation*,²⁰⁹ the ASBCA reacted particularly forcefully with respect to costs incurred following a wrongful contract termination. These expenses were determined to be recoverable: idle equipment costs, expenses incurred in the reconversion and shipment of company records, and payments in satisfaction of a judgment for unpaid rents as well as for rental payments already made.

Under the topic "Expenditures Directed at Securing or Performing a Government Contract," two expense categories were considered: those costs devoted to *obtaining* a government contract, and those directed specifically at *performance*, following award. Litigation involving the former was marked by a rather conservative approach whereas a review of cases under the latter revealed a very liberal attitude. As earlier noted, this topic concerned expenditures of an on-going business operation nature, the principal distinction being the timing of the cost incurrence. If incurred after contract award, the "rule" with respect to lenient treatment holds; however, where incurred before award, the rule does not stand. Although never explicitly advanced, the reason for this approach may well be the reluctance to financially support the efforts of those (usually larger and more "government contract wise") firms which are awarded government contracts.

Thus, the rule must be amended to provide as follows: if an expense is for the benefit of a business operation alone, lenient interpretation can be expected, *except where incurred in order to secure a specific government contract*; where the expense represents a benefit to a contractor employee, conservative treatment can be

B.C.A. para. 9415, and *Bailey Specialized Buildings, Inc.*. ASBCA Nos. 15076, 10633, and 14748, 71-1 B.C.A. para. 8699.

²⁰⁷ *R.D. Mounts, Inc.*. ASBCA Nos. 17422, 17668, and 17669, 75-1 B.C.A. para. 11,077.

²⁰⁸ *American Electric, Inc.*, ASBCA No. 16635, 76-2 B.C.A. para. 12,151.

²⁰⁹ *Southland Mfg. Corp.*, ASBCA No. 16830, 75-1 B.C.A. para. 10,994.

anticipated; and where there is a mixture, it can be assumed that a weighing process will be employed to determine allowability.

V. COSTS RELATED TO SEVERAL CATEGORIES

The final cost principles topic to be considered serves as a test of the newly defined rule. Two ASPR § 15-205 provisions will be examined for this purpose:

1. Interest and Other Financial Costs (15-205.17).
2. Professional and Consultant Service Costs—Legal, Accounting, Engineering and Other (15-205.31).

A. INTEREST AND OTHER FINANCIAL COSTS

Such costs, provides ASPR § 15-205.17, are unallowable. Included under this provision are “interest on borrowings (however represented), bond discounts, costs of financing and refinancing capital (net worth plus long-term liabilities), legal and professional fees paid in connection with the preparation of prospectuses, costs of preparation and issuance of stock rights, and costs related thereto.”²¹⁰

Decisions relating to this straightforward principle offer the clearest example of regulatory language being subordinated to considerations of on-going operational expenses of businesses engaged in government contract work.

Four cases clearly demonstrate the approach of the ASBCA. The earliest evidence of a lenient attitude occurred in *Loral Electronics*

²¹⁰ ASPR § 15-205.17 provides as an exception to the general rule, that “interest assessed by State or local taxing authorities under the conditions set forth in 15-205.41” is allowable. ASPR § 15-205.41 is the cost principle concerning taxes. “In general, taxes (including State and local income taxes . . .) which the contractor is required to pay and which are paid or accrued in accordance with generally accepted accounting principles are allowable . . .” ASPR § 15-205.41(a). One major exception is federal income taxes, which are not allowable. ASPR § 15-205.41(a)(i).

ASPR § 15-205.17 also includes a citation to ASPR § 15-205.24, the principle entitled “other business expenses,” quoted *supra* note 94, and discussed in the surrounding text and also *supra* note 91.

The text of ASPR § 15-205.17 has been amended by Item XIX of Defense Procurement Circular No. 76-9, dated 30 Aug. 1977, at 12. The purpose of the amendment is to clarify the intent of the cost principles considered in *The Boeing Co.*, ASBCA No. 14370, 73-2 B.C.A. para 10,325. The phrase “capital (net worth plus long-term liabilities)” replaced the single word “operations.” This change makes the text of ASPR § 15-205.17 consistent with the revised text of ASPR § 15-205.1, Advertising Costs, *supra* notes 53 and 57, and ASPR § 15-205.23, Organization Costs, *supra* notes 90, 91, and 93, both amended by Item XIX also. ASPR § 15-205.41, Taxes, has also been amended in minor respects by Item XIX.

Corporation.²¹¹ There the board held allowable rental payments by a contractor for use of leased buildings in performance of cost-plus-fixed-fee contracts, which payments included a mortgage *interest* cost component ultimately paid by the lessor.

A few years later, in *The Boeing Company*,²¹² the ASBCA declared that this cost principle did not prohibit the recovery of the costs of redeeming and converting outstanding debentures (designed to make contractor's stock more attractive) and costs relating to a stock split and issuance of additional certificates pursuant thereto. Instead, these expenses were determined to be allowable under ASPR § 15-205.24, Other Business Expenses,²¹³ notwithstanding the clear prohibition in the interest cost principle.

Perhaps the most blatant departure from the cost principle, however, occurred in *New York Shipbuilding Company*.²¹⁴ The ASBCA allowed the contractor, as profit, the "imputed interest" on equity capital it used to finance government initiated changes in the contract work. The board explained that the equitable adjustment concept required a contractor to be compensated in some fashion for the use of private capital on changes. And, continues the explanation, because the recovery of interest is prohibited as a cost, the expense "must" be allowed as an item of *profit*!

The decision reflects the culmination of the ASBCA's determination to recognize the normal business expenses of a commercial enterprise *notwithstanding* ASPR cost principle restrictions. Heavy emphasis is accorded considerations of "fairness" to government contractors.

. . . [W]e have no difficulty in concluding that the equitable adjustment in the present case must include a fair return or compensation for the use of [contractor's] equity capital *regardless* of whether the capital demonstrably would have been invested elsewhere absent the changes. Without such a return or compensation, the price adjustment for the changed work would not be an "equitable adjustment" as required by the changes clause. We also emphasize that the earnings that could have been had absent the changes, while of some use as evidence of fair value, are not determinative of fair value.²¹⁵ (emphasis added)

By allowing compensation for use of private capital, not automatically as a *cost* but rather in *profit* or elsewhere as a part of the total

²¹¹Loral Electronics Corp., ASBCA No. 9174, 66-2 B.C.A. para. 5752.

²¹²The Boeing Co., ASBCA No. 14370, 73-2 B.C.A. para. 10,325.

²¹³*Supra* note 94.

²¹⁴New York Shipbuilding Co., ASBCA No. 16164, 76-2 B.C.A. para. 11,979.

²¹⁵*Id.* at 57,428.

equitable adjustment where dictated by the particular facts, we are doing essentially the same thing that parties do when they negotiate a profit in initial contract pricing that includes a *fair* return for the use of whatever private capital the contractor will invest in the contract work.²¹⁶ (emphasis added)

While the result may be equitable in terms of compensation for a normal and unavoidable business expense, it is difficult to square with the ASPR language as well as the underlying statutory prohibition.²¹⁷ To confirm that the decision was not a fluke, the ASBCA held in *Fischbach & Moore International Corporation*²¹⁸ that the contractor should be allowed an “extra profit factor” because he had invested either personal or borrowed capital in connection with the performance of government-changed contract work.

These opinions represent the most remarkable departure from the restraints imposed by the ASPR cost principles, all in the name of deference to ordinary, on-going business expenses. Again, the business *equity* of the decisions may be obvious; however, the disregard for what amounts to contract language renders prediction and reliability in the entire cost allowability area, at best, uncertain. Certainly a clearer means of achieving the same result would have been to have effected a change in contract *language*, via ASPR Committee redrafting of ASPR § 15-205.17²¹⁹

B. PROFESSIONAL AND CONSULTANT SERVICE COSTS — LEGAL, ACCOUNTING, ENGINEERING AND OTHER

In general, informs ASPR § 15-205.31, these expenses are allowable if reasonable and not contingent upon recovery of the costs from the government.²²⁰ This general rule applies whether or not

²¹⁶*Id.* at 57,435. Note that Cost Accounting Standard No. 414, Cost of Money as an Element of the Cost of Facilities Capital, does give recognition to imputed interest. *Supra* note 36.

²¹⁷“Interest on a claim against the United States shall be allowed in a judgment of the Court of Claims only under a contract or Act of Congress expressly providing for payment thereof.” 28 U.S.C. § 2516(a) (1970).

²¹⁸*Fischbach & Moore International Corp.*, ASBCA No. 18146, 77-1 B.C.A. para. 12,300.

²¹⁹This has been done in part, *supra* note 210.

²²⁰At ASPR § 15-205.31(a) it is stated:

Costs of professional and consultant services rendered by persons who are members of a particular profession or possess a special skill and who are not officers or employees of the contractor are allowable, subject to (b), (c), (d), and (e) below when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government (but see 15-205.26).

such services were provided by employees of the contractor.²²¹ However, these costs are specifically declared unallowable where incurred in connection with organization and reorganization, defense of antitrust suits, prosecution of claims against the govern-

This provision was amended in minor respects, not here relevant, by Item XXIII of DPC No. 76-7, dated 29 Apr. 1977, at 11. ASPR § 15-205.26, cited in the quoted provision, concerns patent costs, *supra* note 193. Eight factors are to be considered in determining whether costs of professional and consultant services are allowable in particular cases:

(b) In determining the allowability of costs in a particular case, no single factor or any special combination of factors is necessarily determinative. However, the following factors among others may be relevant:

- (i) the nature and scope of the service rendered in relation to the service required;
- (ii) the necessity of contracting for the service considering the contractor's capability in the particular area;
- (iii) the past pattern of such costs, particularly in the years prior to the award of Government contracts;
- (iv) the impact of Government Contracts on the contractor's business (*i.e.*, what new problems have arisen);
- (v) whether the proportion of Government work to the contractor's total business is such as to influence the Contractor in favor of incurring the cost, particularly where the services rendered are not of a continuing nature and have little relationship to work under Government contracts;
- (vi) whether the service can be performed more economically by employment rather than by contracting;
- (vii) the qualifications of the individual or concern rendering the service and the customary fees charged, especially on non-government contracts;
- (viii) adequacy of the contractual agreement for the service (*e.g.*, description of the service; estimate of time required; rate of compensation; termination provisions).

ASPR § 15-205.31(b).

Retainer fees are also allowable if the contractor can prove them:

- (c) In addition to (b) above, retainer fees to be allowable must be supported by evidence that:
- (i) the services covered by the retainer agreement are necessary and customary;
 - (ii) the level of past services justifies the amount of the retainer fees (if no services were rendered, fees are not automatically unallowable); and
 - (iii) the retainer fee is reasonable in comparison with maintaining an inhouse capability to perform the covered services, considering factors such as cost, and level of expertise.

ASPR § 15-205.31(c). This provision was greatly expanded by Item XXIII of DPC No. 76-7, "to identify the evidence that must be supplied by contractors to support the fees charged to Government contracts." See note 190, *supra*. Formerly ASPR § 15-205.31(c) read, "In addition to (b) above, retainer fees to be allowable must be supported by evidence of bona fide services available or rendered." A new paragraph (e) was also added by Item XXIII of DPC No. 76-7, as follows: "Except for retainers (see (c) above), fees for services rendered shall be allowable only when supported by evidence of the nature and scope of the services furnished. (Also see 15-205.37(c).)"

ASPR § 15-205.37(c) is part of the principle governing selling expenses and declares that such expenses are allowable "only when paid to bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business." *Supra* note 190.

²²¹ ASPR § 15-205.31 deals with costs of professional and consultant services purchased from people who are not employees of the contractor. Compensation to

ment, and patent infringement litigation, unless otherwise permitted under the contract.²²²

Under this cost principle, the problem of direct personal compensation is again presented. Thus it is not surprising that the ASBCA, in *Lulejian and Associates, Inc.*,²²³ held unallowable legal expenses relating to estate planning for a corporate executive.

Another verification of the rule relating to efforts to secure a specific government contract appears in *Hayes International Corporation*.²²⁴ In this decision, the ASBCA refused to allow recovery of legal fees and related costs incurred by the contractor in seeking in federal district court an injunction to prevent award of a government contract to another firm. The board explained that these costs represented an unallowable claim against the government.

In several earlier decisions, this same prohibition was used to deny similar expenses incurred during contract performance.²²⁵ However, as early as 1965, the ASBCA displayed concern about the business necessity surrounding claims against the government. In *Sundstrand Corporation*,²²⁶ the board allowed recovery of legal

contractor employees is covered by ASPR § 15-205.6, Compensation for Personal Services, without distinction as to the type of services performed. *Supra* notes 111, 112, 113, and surrounding text; Monroe, *Allowability*, *supra* note 52, at 3.

²²²So provides ASPR § 15-205.31(d), as follows:

Costs of legal, accounting and consulting services, and related costs, incurred in connection with organization and reorganization, defense of antitrust suits, and the prosecution of claims against the Government, are unallowable. Costs of legal, accounting, and consulting services, and related costs, incurred in connection with patent infringement litigation, are unallowable unless otherwise provided for in the contract. (Also see 15-205.23.)

ASPR § 15-205.23 states that costs of organization or reorganization and raising capital are unallowable. *Supra* notes 90, 91, 93, and 210.

There is no proscription against recovery of legal expenses incurred in connection with the defense by a contractor of a government defective pricing claim, even though "the Disputes clause requires that the contractor present the claim and be characterized as the appellant." *Hayes International Corp.*, ASBCA No. 18447, 75-1 B.C.A. para. 11,076. Nor is there any disallowance for expenses related to the defense of a civil rights suit. *Hirsch Tyler Co.*, ASBCA No. 20962, 76-2 B.C.A. para. 12,075. Nor for expenses of prosecution of a claim against an insurance carrier. *Farrell Lines, Inc.*, ASBCA No. 15768, 73-2 B.C.A. para. 10,177. Monroe, *Allowability*, *supra* note 52, at 4.

²²³*Lulejian and Associates, Inc.*, ASBCA No. 20094, 76-1 B.C.A. para 11,880.

²²⁴*Hayes International Corp.*, ASBCA No. 18447, 75-1 B.C.A. para. 11,076.

²²⁵*See, e.g.*, *Keco Industries, Inc.*, ASBCA Nos. 7882, 8002, and 8092, 1963 B.C.A. para. 3992. In *Keco*, the ASBCA denied a contractor's claim for litigation expenses incurred in prosecuting its appeal before the ASBCA. *See also*, *Cook Electric Co.*, ASBCA No. 11100, 66-2 B.C.A. para. 6039. In *Cook*, the ASBCA disallowed recovery of legal fees paid in connection with a claim against the government. The fees were paid partly for prosecution of an appeal and partly for the conduct of settlement proceedings.

²²⁶*Sundstrand Turbo, A Division of Sundstrand Corp.*, ASBCA No. 9112, 65-1 B.C.A. para. 4653.

fees associated with a termination settlement proposal as an “exception” to the general rule proscribing fees associated with claims against the United States. Since *Sundstrand*, several decisions have made it clear that the ASBCA intends to look favorably on this type of “ordinary and necessary business cost.” Some of the more striking examples are: *Southland Manufacturing Corporation*²²⁷ (contractor held entitled to reimbursement for expenses incurred in paying the *contingent fee* of an attorney representing the firm in litigation in which a default termination was converted to a termination for convenience); *Grumman Aerospace Corporation*²²⁸ (legal fees and accounting costs associated with presentation of a claim to the Renegotiation Board held recoverable by NASA Board of Contract Appeals); and *Lulejian and Associates, Inc.*²²⁹ (legal and accounting expenses incurred in overhead rate negotiations declared allowable).

An even more unexpected result was reached in the recent *Baifield Industries*²³⁰ decision. The board determined that legal expenses incurred in preparing a “settlement” memorandum for a government contracting officer, work-product material from which was later used by the contractor to establish before the ASBCA the impropriety of a default termination, were recoverable. Note the frequent references to business reasonableness in the board’s discussion of the issue.

. . . [The managements of Baifield and A-T-O lacked experience in Government contract termination matters. It was reasonable for management personnel to rely heavily on the [outside law] firm personnel for assistance, as well as guidance, in gathering and analyzing the factual material relevant to support appellant’s settlement proposals.*** It was certainly reasonable for management to rely upon the judgment of the . . . attorneys in determining which facts needed to be ascertained and how best to ascertain them. It was further reasonable to rely upon them to undertake a significant part of the fact gathering effort. . . .²³¹

And only a few months before *Baifield*, a contractor was awarded the cost of legal fees relating to the submission of an application for increased progress payment rates and a request for equitable ad-

²²⁷ *Southland Mfg. Corp.*, ASBCA No. 16830, 75-1 B.C.A. para. 10,994.

²²⁸ *Grumman Aerospace Corp.*, NASA BCA Nos. 873-11 and 1073-15, 76-1 B.C.A. para. 11,763.

²²⁹ *Lulejian and Associates, Inc.*, ASBCA No. 20094, 76-1 B.C.A. para. 11,880.

²³⁰ *Baifield Industries, Division of A-T-O, Inc.*, ASBCA No. 20006, 76-2 B.C.A. para. 12,096.

²³¹ *Id.* at 68,105.

justment.²³² Regarding the application for increased progress payments, the board explained that legal fees related thereto were recoverable because such application was not a claim of right, albeit a request of a type for money. Of course *earlier payment* of a sum due represents, itself, an additional cost. Again the language employed to justify allowability provides interesting reading.

That the [contractor] under the circumstances retained an attorney to present the [claim for] adjustment was a *prudent business decision* and a reasonable one.***

Whatever the demarcation line may be between the ordinary interchanges between a supplier and the Government as a customer which have inherent differences in point of view and a claim against the Government we are satisfied in the facts before us that conflict between the parties never became *so* disputatious as to reach the level of a claim against the Government within the terms of ASPR as incorporated by reference in the termination clause.²³³ (emphasis added)

Similarly, the Court of Claims ruled in *Kalvar Corporation v. United States*²³⁴ that recovery of legal fees in suits against the government should be permitted where a claim (by the government) for contract breach is converted to a termination for convenience. The court explained that when a government breach is treated as a constructive termination, the contractor is entitled to legal expenses equal to those he would have incurred in preparing an *actual termination settlement*. The court did make a small concession regarding its holding.

Admittedly, our allowance of legal expenses in this case rests upon a liberal reading of the termination clause and upon an analogy drawn between termination costs in administrative proceedings and similar costs resulting from a court-imposed convenience termination. The use of such an analogy has been specifically approved by this court for solving the uncertain and difficult questions that arise in constructive termination-for-convenience cases.²³⁵

In addition, the court has allowed recovery of legal fees incurred in an *unsuccessful* termination settlement attempt even though the expenses were related to work performed *after* the filing of an administrative appeal.²³⁶

The Interest and Professional and Consultant Service Costs principles, as seen, provide confirmation of the rule. Specifically, con-

²³² *Allied Materials and Equipment Co., Inc.*, ASBCA No. 17318, 75-1 B.C.A. para. 11, 150).

²³³ *Id.* at 58, 087.

²³⁴ *Kalvar Corp. v. United States*, 543 F.2d 1298 (Ct. Cl. 1976).

²³⁵ *Id.* at 1306.

²³⁶ *Acme Process Equipment Co. v. United States*, 347 F.2d 538 (Ct. Cl. 1965).

cern about "business necessity" requirements plays a major role with respect to the outcome of litigation. The two principal caveats still apply however: direct personal compensation and expenses devoted to securing a government contract.

VI. CONCLUSIONS

As developed in the initial paragraphs of the introduction the goals of this article were to group the ASPR Section XV cost principles into a more accessible arrangement and to develop a rule of cost principle interpretation.

To satisfy these goals, the principles were discussed pursuant to this classification scheme: general operational expenses (on-going business expenses, employee costs, costs of material); expenditures directed at securing or performing a government contract (costs directed at securing a government contract, costs directly related to performance of a specific government contract); and costs related to several categories (interest and other financial costs, professional and consultant service costs).

Under the general operational expenses category, a pattern began to take shape. With respect to on-going business expenses and costs of materials, a very liberal board of contract appeals sentiment was discernible. The language of the opinions in which cost recovery was granted often heavily emphasized the importance of considering such factors as on-going business operations, the judgment of a prudent businessman, and the propriety of business decisions. Even though the *method* to achieve allowability sometimes changed (*e.g.*, classification under a more liberal principle and reference to ASPR Committee intent), the sympathy for costs "incurred in the ordinary course of business" was apparent.

However, the reaction to employee costs litigation proved not to be as generous. In cases involving this expense category, it became clear that recovery of expenditures involving aspects of direct personal benefit would invite close scrutiny. In fact, even in situations where routine business costs were concerned, there was unmistakable evidence of reluctance to sanction a direct government subsidy of personal compensation.

A second caveat emerged from the review of expenditures directed to securing a government contract. Although the explanation was only a matter of speculation (concern about supporting "government contract wise" contractors), the conservative nature of the opinions was obvious.

On the other hand, consideration of cases involving costs directly related to performance of a specific government contract revealed a more liberal attitude. The more generous approach was understandable because of the on-going business nature of expenses coupled with the absence of personal compensation or claims based upon efforts to procure a government contract.

The final major classification topic, costs related to several categories, served as a test of the rule developed pursuant to evaluation of the other cost groups. The examination of the interest and the financial and professional and consultant service costs principles did more than merely validate the "rule" however.

The decisions involving interest expenses revealed the most blatant departure from the requirements of the governing cost principle. Indeed, the *New York Shipbuilding*²³⁷ and *Fischbach & Moore*²³⁸ opinions marked the culmination of years of ASBCA concern regarding recovery of normal on-going business expenses. It is interesting to note that the Court of Claims has recently evidenced strong reluctance to go along with the board's previous holdings in these decisions.²³⁹

Cases considered under the professional and consultant service cost principle also clearly manifested deference to ordinary business expenses. Yet even under this provision there were examples of the two principal exceptions previously discovered: direct personal benefit and securing a government contract.²⁴⁰

Thus a rule of cost principle interpretation has been established and confirmed. Of course it would be folly to even suggest that it has been or will be perfect in application. Nonetheless the rule should be of assistance, when employed as an adjunct to the relevant cost principle language, in accurately predicting board of contract appeals reaction to ASPR Section XV disputes.

²³⁷ *New York Shipbuilding Co.*, ASBCA No. 16164,76-2 B.C.A. para. 11,979.

²³⁸ *Fischbach & Moore International Corp.*, ASBCA No. 18146,77-1 B.C.A. para. 12,300.

²³⁹ *In The Singer Co., Librascope Div. v. United States*, No. 132-75, slip. op. at 40-45 (Ct. Cl. Dec. 14, 1977), the Court of Claims upheld a denial by the ASBCA of an interest claim in ASBCA No. 13241, 73-2 B.C.A. para. 10,268. *In Framlau Corp. v. United States*, No. 274-74, slip. op. at 11-13 (Ct. Cl. Dec. 14, 1977) the Court of Claims upheld a similar denial in ASBCA No. 14666, 72-1 B.C.A. para. 9279 at 43,005.

²⁴⁰ *In The Singer Co., Librascope Div. v. United States*, No. 132-75 slip. op. at 45-47 (Ct. Cl. Dec. 14, 1977), the Court of Claims upheld a denial by the ASBCA of a contractor's claim for consultation and legal fees and other expenses of a disputed claim for an equitable adjustment in ASBCA No. 13241,73-2 B.C.A. para. 10,258. The court distinguished *Allied Materials & Equip. Co.*, ASBCA No. 17318, 75-1 B.C.A. 11,150.

It would be improper to conclude this article without offering some thought as to how the present confusion and uncertainty regarding cost principle litigation could be reduced. As seen, the boards and Court of Claims have developed different rules of interpretation with respect to broad cost categories. However, the policy considerations underlying the rules are never clearly articulated. This failure is the principal source of difficulty in the area. Surely the understanding and development of the law would be enhanced if the policy foundations were plainly stated. This would allow more accurate appraisal by counsel involved in litigation and those responsible for development of the cost principle provisions. And, clearly, the task of accurately predicting cost litigation would be greatly simplified.

SETTLEMENT OF CLAIMS ARISING FROM IRREGULAR PROCUREMENTS*

Major Percival D. Park**

In this article Major Park reviews various methods of settling contractor claims against the government based upon unauthorized procurements. He focuses on one type of claim, the no-doubt claim, which derives from quasi-contractual transactions in which the government receives benefits without previously consenting to be bound to pay for them.

Major Park urges caution in the use of the no-doubt claims theory as a basis for paying claims. He then reviews the history of the no-doubt claims concept, its relationship with ratification, and possible standards for use of the concept.

Major Park concludes that the no-doubt claim is lawful, but suggests that new legislation would be desirable to settle the question. He urges, at a minimum, that regulatory provisions be developed for the guidance of procurement and finance personnel and their legal advisors. Major Park closes by repeating that care should be exercised in using the theory.

I. INTRODUCTION

The Armed Services Procurement Regulation (ASPR), which is being renamed the Defense Acquisition Regulation (DAR), and its supplements establish procedures for buying supplies which in-

*This article is an adaptation of a thesis entitled "No-Doubt Claims in the Procurement Process" which was presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Twenty-Fifth Judge Advocate Officer Advanced Class, 1976-77. The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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cludes construction, and services within the Department of Defense. One of the least complicated provisions states that contracting officers are authorized to enter into contracts on behalf of the government.¹ Additionally, in the Army, a provision of the Standards of Conduct prohibits those who are not contracting officers, or their authorized representatives,² from creating obligations or entering contracts.³ Yet contracting officers are often presented invoices from commercial contractors who have performed work or furnished goods in response to orders from government personnel who were

umbia, the United States Army Court of Military Review, the United States Court of Military Appeals, the United States Tax Court, the United States Court of Appeals for the Third Circuit, the United States Court of Claims, and the United States Supreme Court.

¹Armed Services Procurement Reg. § 1-402 (1 Oct. 1976) [hereinafter cited as ASPR], which states: "Contracting officers at purchasing offices . . . are authorized to enter into contracts for supplies or services on behalf of the Government, and in the name of the United States of America, by formal advertising, by negotiation, or by coordinated or interdepartmental procurement. . . ."

The inclusion of construction within the concept of supplies is based upon ASPR § 1-201.19, which states: "*Supplies* means all property except land or interest in land. It includes public works, buildings, and facilities . . ." This provision implements 10 U.S.C. 2303 (b) (1976), which states: "This chapter does not cover land. It covers all other property including— (1) public works; (2) buildings; (3) facilities . . ."

Note that the name "Armed Services Procurement Regulation" is being replaced by the name "Defense Acquisition Regulation. However, the older name will be used throughout this article. See Monroe, An Analysis of ASPR Section XV by Cost Principle, 80 MIL. L. REV. 148note 1 (1978).

*Army Reg. No. 600-50, Standards of Conduct for Department of the Army Personnel, para. 2-1f (20 Oct. 1977), which states:

Unauthorized statements or commitments with respect to award of contracts. Only contracting officers and their duly authorized representatives acting within their authority are authorized to commit the Government with respect to award of contracts. Unauthorized discussion and commitments may place the Department of the Army in the position of not acting in good faith. Unauthorized personnel will refrain from making any commitment or promise relating to award of contracts and will make no representation which would be construed as such a commitment. Army personnel will not under any circumstances advise a business representative that an attempt will be made to influence another person or agency to give preferential treatment to his concern in the award of future contracts. Any person requesting preferential treatment will be informed by official letter that Department of Army contracts are awarded only in accordance with established contracting procedures.

²Army Procurement Procedure § 1-406 (3 May 1976) [hereinafter cited as APP]. The term "contracting officer" as used in this paper includes "authorized representative" and "contracting officer's representative." But concerning authority of representatives, it is stated at APP 5 1-406.51:

(a) A COR shall not be authorized to award, agree to, or sign any contract or modification thereto, or in any way to obligate the payment of money by the Government; except that—

- (i) a COR may be empowered to issue change orders under the Changes clause in contracts for supplies and services and under the Changed [Standard Form 23-A1 or subparagraph (a) of the Changes and Changed Conditions [Standard Form 191 clauses in construction contracts, provided such change orders do not involve a change in unit price, total contract price, quantity, quality, or delivery schedule; and

not contracting officers. Such transactions are irregular procurements.

The circumstances surrounding irregular procurements are infinitely variable. They may be roughly divided between situations in which the government has in some manner manifested its consent to be bound, and those in which no consent has been given.

Most irregular procurements in government procurement law practice are based on consensual transactions which yield implied-in-fact contracts.⁴ In accordance with ASPR, many irregular pro-

(ii) a COR may be empowered to issue or change shipping and marking instructions which may affect the unit or total contract price within the limits of funding authority certified to him, provided such shipping and marking instructions or changes thereto in no way change the total production quantity in the contract delivery schedule, and provided further that the COR furnishes a copy of each document issuing or changing shipping and marking instructions to the contracting officer concurrently with its release to the contractor.

(b) Within the limitations in (a) above, a COR may be empowered to take any actions under a contract which could lawfully be taken by the contracting officer except where the terms of the contract itself specifically prohibit a COR from exercising such authority.

(c) A COR may not be authorized to initiate procurement actions by use of imprest funds, blanket purchase agreements, or other small purchase methods, nor to place calls or delivery orders under basic agreements, basic ordering agreements, or indefinite delivery type contracts.

‘Contracts are said to be express or implied; and implied contracts are said to be implied in fact or implied in law. An express contract is one in which the parties have stated in words, orally or in writing, that they intend to be bound to the obligations of the contract. In an implied-in-fact contract, the parties have the same intent to be bound, but they have not expressed it in words. Instead, their intent must be inferred from nonverbal facts or circumstances. There is no difference in legal effect between an express contract and one implied in fact. In contrast, a contract implied in law, also called a constructive contract or quasi-contract, is not a true contract at all, because the parties have not agreed to be bound to any obligation. 1 A. CORBIN, CONTRACTS § 18 (1950); 2 J. McBRIDE & T. TOUHEY, GOVERNMENT CONTRACTS § 17.10 (1971); RESTATEMENT OF CONTRACTS § 5, Comment a (1932); 17 C.J.S. *Contracts* § 4 (1963). For discussion of the current significance of implied-in-fact contracts within government procurement, see *Grismac Corp. v. United States*, No. 4-72, both the opinion of the trial judge (Ct. Cl., filed Apr. 22, 1976) (22 C.C.F. 85,297), and the subsequent decision of the Court of Claims (18 May 1977) rejecting the trial judge’s conclusions. The plaintiff Grismac Corporation discovered that money could be saved on wooden pallets used for ammunition storage by making them in smaller dimensions with cheaper wood than in the past. Plaintiff had no contract with the government but submitted its idea as an unsolicited value engineering proposal (as the plaintiff and the trial judge saw it) or a suggestion (as the Court of Claims saw it).

The trial judge discussed at length the law of implied contract and its application in this case. 22 C.C.F. at 85,301-05. His concise summary of that law is useful for review purposes:

The elements of assent and consideration are prerequisite to either an implied or express contract for sale of an idea. . . . Assent is generally manifested by acceptance of the idea. . . . [The traditional elements of acceptance by implication are: use, causation, novelty, and concreteness. . . . Most, but not all, authorities hold that disclosure and use of an idea constitute consideration for an agreement.

curements may be dealt with under the changes clause⁵ by application of the constructive changes doctrine,⁶ or may be adjustable under the disputes clause⁷ or through formalization of an informal commitment.⁸ Ratification by a contracting officer⁹ or a higher offi-

22 C.C.F. at **85,302**. The judge treated authority, both as "basic authority to contract with plaintiff to acquire its proposals" and as "a party authorized to bind the Government by contract," as a separate element. 22 C.C.F. at **85,304**. The judge, finding all elements present in the correct relationship, concluded that plaintiff should recover. The Court of Claims reached the opposite conclusion primarily because of its differing view of the facts. Plaintiff's idea was considered to be a suggestion rather than a design; the Court of Claims found statutory authority for the government to procure designs, but not suggestions, under the facts of the case; and so plaintiff's claim fell. Slip opinion at **5-7**. See also *Padbloc Co. v. United States*, 161 Ct. Cl. **369** (1963), in which the government was held liable under an implied contract to purchase a design.

⁵For fixed-price supply contracts, the clause at ASPR 7-103.2 is used; construction and architect-engineer contracts, ASPR 7-602.3; and service contracts, ASPR 7-1902.2. Each of these clauses lists the types of changes which a contracting officer may make within the general scope of the contract. For example, the clause at ASPR 7-103.2 empowers the contracting officer to change the contract drawings, designs, or specifications; the method of shipment or packing; or the place of delivery. If an irregular procurement is to be regularized under a contract changes clause, it must by necessary implication match one or more of the types of changes permitted by the clause.

⁶U.S. DEP'T OF ARMY, PAMPHLET NO. **27-153**, PROCUREMENT LAW **10-6** (1976) [hereinafter cited as DA PAM 27-153]. Originally, a constructive change was merely a change order issued orally by the contracting officer, rather than in writing as required by the contract changes clause. Whether oral or written, a contracting officer's change order is equally binding on the government. *Len Co. v. United States*, 181 Ct. Cl. **29** (1967). A change may also be found if the government makes some mistake in the preparation or administration of the contract which causes the contractor to perform more work than contractually required. Most litigation in recent years concerning changes has involved changes of this type. DA PAM 27-153, at **10-6**.

⁷Most contracts awarded by agencies of the Department of Defense contain either the disputes clause at ASPR 7-103.12(a), used within the United States, its possessions, and Puerto Rico, or the clause at ASPR 7-103.12(b), used elsewhere. Minor variations from these clauses are available for construction and architect-engineer contracts, at ASPR 7-602.6, and for communication service contracts, at ASPR 7-1701.3. Under the express terms of the various disputes clauses, decisions of contracting officers concerning matters of fact will become final and conclusive unless appealed. Questions of law may be considered by contracting officers if they arise in connection with questions of fact, but no decision of a contracting officer concerning a legal question may become final. An irregular procurement must take place in connection with an existing, valid contract, if it is to be processed under the disputes clause; and if the irregular procurement happens to involve only questions of law, it probably should not be so processed even when clearly linked to a contract.

⁸Formalization of informal commitments is one of several extraordinary contractual remedies authorized by 50 U.S.C. **1431-1435** (1970), implemented by Exec. Order No. **10,789**, 23 Fed. Reg. **8,897** (1958), to facilitate the national defense. Formalization is described at ASPR 17-204.4 and ASPR 17-207.4 (e).

⁹Federal Procurement Regulations, 41 C.F.R. § **1-1.405**.

cial¹⁰ is sometimes possible. The contractor can also initiate a suit against the United States under the Tucker Act.¹¹ In the course of pursuing these remedies, the contractor may be able to rely upon various legal and equitable theories, including estoppel in its various forms;¹² waiver;¹³ accord and satisfaction;¹⁴ or compromise or settlement.¹⁵

With so many potential remedies available, meritorious claims should seldom go unpaid. However, at times these remedies are unavailable or impractical because of deficiencies in the supporting facts. One fact is the presence or absence of government consent. If consent is lacking, the remedies and underlying theories listed above are generally not available for use. What can be done in such a case?

¹⁰ Air Force ASPR Supplement § 1-452, 5 C.C.H. I 41, 512.10 (27 July 1977) [hereinafter cited as AF].

¹¹ 28 U.S.C. 1346 (a) (2) (1970); 28 U.S.C. 1491 (1970 & Supp. V 1975).

¹² The doctrine of equitable estoppel has been applied against the government in contract cases as well as other types of litigation with increasing frequency in recent decades. This is generally known among procurement attorneys and has been the subject of scholarly writing. See, e.g., Saltman, *Estoppel Against The Government: Have Recent Decisions Rounded the Corners of the Agent's Authority Problem in Federal Procurements?* 45 FORDHAM L. REV. 497 (1976). Yet the doctrine itself is poorly understood, as shown by inaccurate use of the term "estoppel." Various fact situations which merit other labels are lumped together under the rubric of estoppel, while genuine estoppel cases are sometimes obscured in being called by different names. As a result of such misapplication, the term "equitable estoppel" has been rendered less useful than it could otherwise be.

Estoppel is a word of medieval French derivation which originally meant literally a stopping up or closing up, as with a bung or plug. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 875 (1966). Within the Anglo-American legal tradition it has been said that a person's own action or acceptance stops or closes his mouth to allege or plead the truth, when such truth is inconsistent with his prior assertion or position. 31 C.J.S. *Estoppel* § 1 (1964). Estoppel is thus not a remedy, like appeal to a board of contract appeals or suit in a court of law, but a line of argument or a tactic, and possibly a factual situation which has objective existence regardless of whether it is recognized and argued by the parties.

The doctrine of estoppel is not merely a rule of evidence or procedure. It is part of the substantive law, determining and regulating primary rights of property and contract. This is true alike of all types of estoppel. As Pomeroy has said, "An estoppel determines the rights which a person may enforce by action or rely on in defense, and not the mere mode and means by which those rights may be proved." 3 POMEROY, EQUITY JURISPRUDENCE § 801 (Symons ed. 1941). Of course, in its practical effect during trial, estoppel operates as a rule of evidence.

Historically, the common law has recognized two types of legal or technical estoppel and one kind of equitable estoppel. The legal types of estoppel are estoppel by deed, i.e., by signature of the party to be estopped on a sealed document, and estoppel by record, or estoppel by judgment, in which the subject matter of the estoppel is found in the records of a court of law, similar to our modern collateral

As a last resort, the contracting officer and his legal advisor may want to explore the possibility that the no-doubt claims theory may fit their case. This theory, though controversial, has been used successfully in a number of procurement offices. At the same time, it must be noted that some government officials consider that the theory is contrary to law and regulation or, more simply, that there is no such theory.

Views are far from uniform. The Department of Defense and the Department of the Army have not established or recognized no-doubt claims procedures, nor have they otherwise given explicit approval for use of the theory. Opinions differ as to whether they could grant approval without specific statutory authority or at least General Accounting Office concurrence. Yet, as noted above, some offices have settled claims under the no-doubt theory without repercussions.

This writer is of the opinion that settlement of procurement claims under a no-doubt theory is lawful at the present time, without need for enactment of a new statute, though some definitive regulatory guidance would be highly desirable.

estoppel. As forms of estoppel, these are now obsolete. Equitable estoppel, at one time called estoppel in pais or estoppel by conduct, still has practical importance. BLACK'S LAW DICTIONARY 649 (rev. 4th ed. 1968); 31 C.J.S. *Estoppel* § 1 (1964); and many other readily available authorities. The importance of equitable estoppel in the present context is based on the fact that, as noted above, it has successfully been asserted against, and sometimes by, the government, in a number of cases during the past couple of decades. For a discussion of this, see Saltman, *supra*. For discussion of a proposal for reform, see Rapp, *Squaring Corners: A Proposal for Legislative Application of Equitable Estoppel Against the Government*, 64 ILL. B.J. 688 (1976).

The variant known as promissory estoppel differs from equitable estoppel in that it is based upon a promise to do something in the future, while the latter is based upon a statement, or other conduct in the nature of representation, concerning facts in the past or present. For recent discussion of the concept of promissory estoppel, see Mooreburger, *Promissory Estoppel Marches On*, 28 BAYLOR L. REV. 703 (1976), and Note, *Promissory Estoppel as a Means of Defeating the Statute of Frauds*, 44 FORDHAM L. REV. 114 (1975).

¹³Waiver is an intentional, voluntary giving up or surrender of a known right, privilege, or power, in contrast with estoppel, which prevents the estopped party from asserting the right, privilege, or power. 4 S. WILLISTON, CONTRACTS § 678 (3d ed., 1961).

¹⁴*Accord and satisfaction* is sometimes understood to mean an agreement between parties in the absence of any dispute, as when both parties to a contract perform all their contractual obligations without incident. However, the phrase is also used interchangeably with *compromise and settlement*, concerning which see n. 15, *infra*. 1 C.J.S. *Accord and Satisfaction* § 1 (1936).

¹⁵"A compromise is an agreement between two or more persons who, to avoid a lawsuit, amicably settle their differences on such terms as they can agree on." 15A C.J.S. *Compromise and Settlement* § 1 (1967).

11. WHAT IS A NO-DOUBT CLAIM?

A no-doubt claim presents no significant questions of law or fact requiring adjudication by the Comptroller General or other authority above local finance and accounting officers and contracting officers.¹⁶ Any transaction involving appropriated funds¹⁷ in any agency or department of the executive branch of the government can give rise to such a claim, although a no-doubt claim in purest form is quasi-contractual.¹⁸

As explained in a 1940 decision of the United States Court of Appeals for the Third Circuit:

A quasi contract arises where the law imposes a duty upon a person, not because of any express or implied promise on his part to perform it, but even in spite of any intention he might have to the contrary. A quasi contract, which is a *fictional* contract, is not to be confused with a contract implied in fact, which is an *actual* contract, and which arises where the parties agree upon the obligations to be incurred, but their intention, instead of being expressed in words, is inferred from their acts in the light of the surrounding circumstances.¹⁹

A quasi-contract lacks the major elements of a true contract, and is sometimes called a contract implied in law, or a constructive con-

¹⁶5 Comp. Gen. 1058 (1926).

¹⁷Procurement procedures for nonappropriated fund instrumentalities are controlled by regulation rather than statute. *See generally* Army Reg. No. 230-1, The Nonappropriated Fund System, para. 1-19 (C3, 19 Apr. 1976), and Army Reg. No. 230-60, The Management and Administration of the U.S. Army Club System, ch. 9 (30 Apr. 1975). NAFI procurement procedures broadly resemble ASPR procedures applicable to procurement of ordinary supplies, services, and construction. However, NAFI procurement does not involve use of appropriated funds except as provided in Army Reg. No. 210-55, Financial Support for Morale, Welfare, and Recreational Programs and Facilities (5 Dec. 1973), and other more specialized sources of authority. As a result, NAFI procurement procedures and NAFI funds control procedures generally have been less closely regulated and have remained administratively simpler and more flexible than appropriated fund procedures.

¹⁸A quasi-contract, also called constructive contract, is not a contract at all, properly speaking, because it is not based upon any promise, express or implied, of the party who is held bound to its terms. It is a fictional contract, resting upon the equitable principle of unjust enrichment, and is imposed by law upon a party who has received money or other benefits under circumstances such that in equity and good conscience he should not be allowed to retain the money or to continue enjoying the benefits without compensating another. SMITH & ROBERSON, BUSINESS LAW 66-67 (4th ed., 1977). Quasi-contracts, and the pure no-doubt claims for which they serve as basis, are rare in government procurement, and are of interest primarily because they enable us to define the concept, "no-doubt claim," in such manner as to distinguish it clearly from other types of claims, such as ratifiable ones.

¹⁹*American La France Fire Engine Co. v. Borough of Shenandoah*, 115 F.2d 866, 867 (3d Cir. 1940).

tract.²⁰ In contrast, “[a] contract implied in fact is founded upon a meeting of minds. . . .”²¹

Because a quasi-contractual claim is not based upon consent of the United States to be bound, such a claim cannot be the subject of a suit under the Tucker Act,²² nor can its underlying transaction be ratified by a contracting officer. Even though a quasi-contractual claim may present no doubtful questions of law or fact, it must be processed for payment through finance or comptroller channels in like manner with a doubtful claim.²³ A no-doubt claim is “doubtful,” from the point of view of procurement personnel, in that it cannot be paid through procurement channels.

In contrast, a claim based upon a transaction in which the government has in some manner consented to be bound may be processed and paid through procurement channels, in general. In most cases a transaction involving consent, though unauthorized or defective in some other manner, yields a contract implied in fact.

By what characteristics, other than its quasi-contractual nature, may a no-doubt claim be identified? In an organization as large and complex as the Department of Defense, it is inevitable that irregular procurements will just happen from time to time. The variety of situations in which unauthorized persons carry out significant procurement actions is almost unlimited. Many of these situations give rise to claims. There is no generally agreed-upon checklist of characteristics which distinguish no-doubt claims from other claims. Views will also differ concerning the relative importance of the items in any suggested list. However, the following characteristics are generally common to no-doubt claims: Supplies and services must be ordered for the account of the government; the government

²⁰ 17 C.J.S. *Contracts* § 4 (1963).

²¹ 55 Comp. Gen. 768 (1976).

²² “The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States. . . .” 28 U.S.C. 1491 (1970 & Supp. V 1975). “The district courts shall have original jurisdiction, concurrent with the Court of Claims, of . . . (2) Any . . . civil action or claim against the United States, not exceeding \$10,000 in amount, founded. . . upon any express or implied contract with the United States . . .” 28 U.S.C. 1346 (a) (2) (1970).

²³ The doubtful-claims procedures are set forth in the GAO Policy and Procedures Manual for the Guidance of Federal Agencies, at 4 GAO 2020, which is implemented within Department of the Army by Army Reg. No. 37-107, Finance and Accounting for Installations: Processing and Payment of Commercial Accounts, para. 5-25 (C18, 27 Nov. 1974). See also Army Reg. No. 37-103, Finance and Accounting for Installations: Disbursing Operations, para. 11-51 and 11-54 (C68, 15 May 1972), concerning claims pertaining to commercial accounts, and claims in favor of foreign governments or nationals.

must have received a benefit; and the purchase must be otherwise lawful.²⁴ Some illustrations of each concept follow.

One common characteristic is that supplies or services which are the basis for the claim must have been ordered for the account of the government. Initially, it may be convenient to focus on the subjective intention of the person placing the order, but this is only one more element of the fact situation and does not necessarily determine the matter. Clearly, an order which is intended to provide purely or primarily personal benefit to some individual in his private capacity can hardly be for the account of the government, except under the most unusual circumstances.

No difficulty is presented by an unauthorized order for typewriter ribbons of a specialized kind which can be used in machines located in a government office. Nor is there any problem with the intent behind an order for the repair of a dictation machine in the same office. An intent to order for the account of the government can readily be inferred from the objective facts in cases such as these, and there would ordinarily be no need to consider the subjective intent of the person placing the order.

However, the question of intent is highly important in some situations, and can be very difficult to resolve. For instance, difficult questions are sometimes raised by improvements to government housing. A typical example is an unauthorized order for installation of a bar. If the housing occupant is a general officer, a post commander, or someone else who because of his position has heavy social obligations, such an investment can easily be justified as serving the government's interests. Justification becomes less easy as the occupant goes down in rank or position, and as the quality of the bar rises.

It is not literally necessary that a specific order be placed by anyone for the specific supplies or services which are the subject of a no-doubt claim. On the other hand, when an order is placed, it is necessary to consider in every case whether there is government consent in some form. If consent is found, then there is no need to rely on a theory of quasi-contract. Some other theory, involving consent, will serve.

Regardless of whether an order has been placed, the facts must indicate that the performance is at least passively desired or ac-

²⁴These characteristics have been drawn from a number of actual cases reviewed by the author or by others. No useful purpose would be served by a more detailed description of the cases, or by a statistical breakout of cases by dominant elements or other characteristics.

cepted by the government, or is merely beneficial to the government, as when a contractor continues making deliveries and the government continues to accept them after the original unauthorized transaction has taken place. If the government's official involvement is more active, the facts might support an inference that consent has been given, again obviating the need for reliance on quasi-contract. The boundaries between consensual and nonconsensual transactions are blurred.

But the provider of goods or services should be more than a mere volunteer if he expects to be paid even on a *quantum meruit* or *quantum valebant* basis. The Anti-Deficiency Act prohibits officers and employees of the government from accepting voluntary services except in certain emergencies.²⁵ The Comptroller General has said, "The general rule is that no person is authorized to make himself a voluntary creditor of the Government by incurring and paying obligations which he is not legally required or authorized to incur and pay."²⁶

If one performs work for the government without any previous authority, by contract or otherwise, the services are voluntary and give rise to no legal claim against the United States.²⁷ "Claims based solely on moral obligations cannot be allowed and paid in the absence of specific appropriations therefore. . . ."²⁸

If services are provided on an emergency basis within the meaning of the statute, then payment may be made if "a tangible service appears to have been rendered for which definite compensation can be computed."²⁹

Compensation is generally not allowed in nonemergency cases, and especially not if the services are beneficial to the volunteer.³⁰ Compensation is rendered still more difficult if the volunteer is already a government employee, and especially if he is the contract-

²⁵ 31 U.S.C. 665 (b) (1970).

²⁶ 3 Comp. Gen. 70 (1923).

²⁷ 3 Comp. Gen. 319 (1923).

²⁸ 3 Comp. Gen. 681 (1924).

²⁹ 2 Comp. Gen. 799 (1923), concerning services to a ship in distress on the high seas; and 3 Comp. Gen. 979 (1924), concerning damages to a fire truck used to save a federal school.

³⁰ 4 Comp. Gen. 367 (1924), in which a prospective contractor inspected certain machinery on a U.S. Navy vessel for purposes of preparing a bid for repair services, and then submitted a bill to the Navy for the inspection services; and 6 Comp. Gen. 273 (1926), in which the Marine Corps was constructing a conduit under a privately owned railroad track, and the owner installed additional supporting structures under the track, although this was a government responsibility.

ing officer, because “[I]t is elementary that a contract requires two or more opposing parties, and that a person cannot contract with himself even though he acts on one side in a representative capacity.”³¹

In recent decades the importance of the volunteer principle in government contracting has greatly diminished, and its primary application is found in the area of compensation for government employment.³²

Another characteristic is that the government must have received a benefit. The agreed-upon performance must have been completed. It must have some measurable value to the government, and the parties must agree on that value. In other words, the price must be fair and reasonable.

Completion of performance is usually not difficult to establish. The office supplies are consumed, or not. The rug still lies on the floor of a government office, or it does not. The leak in the roof was repaired, or not. In Comp. Gen. Decision B-142716, payment was denied for uncompleted work. A contract for manufacture and delivery of radical saws was cancelled after a determination that it was void *ab initio* for failure of the procuring agency to comply with laws concerning competitive bidding. Payment was allowed on a *quantum valebant* basis for completed saws accepted by the government. However, no payment was authorized for uncompleted saws not delivered to the government, because the government received no benefit from them. The Comptroller General said:

[T]he United States has power to act only through its agents whose authority, and the manner of exercise thereof, is prescribed and limited by statute, regulation, and administrative and judicial determination. To make the Government liable for other than benefits received would, in effect, permit agents of the Government to obligate the United States in direct contravention of those limitations and prescriptions. In effect, the basic purposes of the statutes, regulations, and determinations would be nullified. Such result is opposed to the public interest.³³

In Comp. Gen. Decision B-158902, a contractor obtained payment and performance bonds required by a contract awarded to him. Shortly thereafter, but prior to commencement of performance, the

³¹7 Comp. Gen. 167 (1927).

³²*E.g.*, 45 Comp. Gen. 196 (1965), concerning services performed in Vietnam by Veterans Administration physicians; and 45 Comp. Gen. 197 (1965), concerning a mileage claim submitted by a government employee for driving other employees to their homes in his privately owned vehicle.

³³40 Comp. Gen. 447 (1961).

contract was cancelled as void, and the contractor claimed reimbursement for the cost of the bonds. Repeating the passage quoted above, the Comptroller General denied payment on the grounds of lack of benefit.³⁴

A fair and reasonable price, however, might not be so easy to establish. The Armed Services Procurement Regulation requires competitive bidding because it presumably ensures a fair and reasonable price. The typical irregular procurement is consummated without competition or any attempt to negotiate with the vendor. Other means must be used to evaluate price. In general, a proposed price may be considered acceptable if it is the same as the price charged to the government under a contract with the vendor, or the same price charged to members of the general public. Facilities engineer personnel, or others with the necessary expertise, might be able to appraise the work or supplies involved to verify whether the claimed price is within reasonable limits. Thus, the fact that a price was not obtained through competition should not be considered *per se* a source of doubt.³⁵

Still another important characteristic is that the procurement must be otherwise lawful, both when effected and when processed for payment as a no-doubt claim. For example, the purchase of rugs

³⁴46 Comp. Gen. 348 (1966).

³⁵If price analysis reveals that the claimed price is too high, the claim is doubtful and the local finance and accounting officer cannot settle it on his own authority. 4 Comp. Dec. 332 (1897). This does not necessarily mean that the only possible course of action is to send the claim to the Comptroller General for adjudication. If the claim is in all other respects suitable for local settlement, government procurement personnel might enter negotiations with the claimant to lower the price to a reasonable amount. Negotiation is a normal procurement function, and involves no adjudication of disputed questions of law or fact. In this context, negotiation is merely a tool for defining and clarifying the claim, in preparation for local settlement.

Again, readers are cautioned that some procurement offices take the view that a quasi-contractual claim should not be settled locally without prior approval of the Comptroller General. A quasi-contractual claim may be considered doubtful simply because it cannot be settled through any conventional means available at the local level.

In the case of a claim involving consent of the government to be bound, entry into price negotiations by a contracting officer could constitute ratification of the transaction upon which the claim is based, subject to later agreement on the price.

Cost analysis, consisting of a detailed review of the several elements which comprise total price, should not be necessary. Cost analysis is usually performed only in procurements in excess of \$100,000.00, far too large for credibility as no-doubt claims. For a succinct comparison between price analysis and cost analysis, see Monroe, *Government Contract Costs—An Introduction*, THE ARMY LAWYER, Feb. 1977, at 9, *quoted in* Monroe, *An Analysis of ASPR Section XV by Cost Principle*, 80 MIL. L. REV. 150 n. 3 (1978).

and curtains from United States sources for a general's office would be lawful. It would be unlawful otherwise because for many years annual DoD appropriation acts have prohibited purchase of textiles from foreign sources.³⁶

What if the law were changed, so that a procurement which was unlawful in one fiscal year is lawful in the next? If a formal contract had been issued by a contracting officer during the previous year, it would have been void for illegality, and the contractor would have no legal right to receive payment of the contract price. In equity he could perhaps recover the reasonable value of the goods furnished or the services performed. This value in all probability would be measured by the contract price. It is tempting to suggest that such a claim could be processed under the no-doubt theory. The temptation should be strongly resisted. The significance of a change in the law requires adjudication, a function reserved for the Comptroller General or the Court of Claims.

Many legal limitations exist, and there is no simple way to summarize or classify them. Each individual claim must be researched. Participation of procurement legal counsel in claims review is very important.

In addition to the above characteristics, there are administrative requirements prescribed by the General Accounting Office. Any claim should be submitted in writing, with the signature and address of the claimant or his authorized agent or attorney.³⁷ Naturally, the agent or attorney must have a power of attorney.³⁸ A claim must not be stale. No claim may be considered by the Comptroller General more than ten years after it arises.³⁹ A six-year

³⁶ ASPR 6-300.

³⁷ 4 GAO 2020.10, which states:

FORM OF CLAIM. Unless otherwise specifically provided, claims will be considered only when presented in writing over the signature and address of the claimant or over the signature of the claimant's authorized agent or attorney. Generally, no particular form is required for filing a claim; however, claim forms are prescribed in succeeding chapters of this title for specific classes of claims.

A similar provision appears in the Code of Federal Regulations at 4 C.F.R. 31.2 (1977).

³⁸ 4 GAO 2020.20, which states:

CLAIMED FILED BY ATTORNEY OR AGENT. A claim filed by an agent or attorney must be supported by a duly executed power of attorney or other documentary evidence of the agent's or attorney's right to act for the claimant. See 1 GAO 5020 relating to "Recognition of Persons Representing Claimants."

A similar provision appears at 4 C.F.R. 31.3 (1977).

³⁹ 31 U.S.C. 71A (1970), which states:

(1) Every claim or demand (except a claim or demand by any State, Territory, possession or the District of Columbia) against the United States cognizable by the General Accounting Of-

limitation applies to consideration of claims by the Court of Claims.⁴⁰

In any given case, the importance of each characteristic relative to the others will vary. For example, a procurement might commence as a wholly private transaction for personal benefit, from the point of view of the individual placing the order, but the contractor might mistakenly believe he is dealing with the government and make delivery to some official who shares this belief. The result could be that the government receives all the benefit, and the initiator of the procurement receives none of it. In such a case, the initiator's intent may be disregarded as irrelevant.

In summary, a no-doubt claim is one which presents no material questions of law or fact requiring adjudication by the Comptroller General. This type of claim is quasi-contractual in nature, not based upon consent of the government to be bound in either a formal contract or a contract implied in fact. In general, the goods or services covered by the claim must have been ordered for the account of the government. Moreover, the government must have received a benefit, at a fair and reasonable price. Finally, the procurement must be otherwise lawful, both when effected and when processed for payment.

Such is the description of a no-doubt claim, not derived from any statute, directive, regulation, or procurement manual. Whether and how such a claim may be accepted for payment varies with agency or departmental interpretations of applicable law and regulations. While local autonomy may be desirable in some contexts, the wise approach calls for developing uniform instructions, binding all agencies equally, whether by statute, General Accounting Office regulation, or other means.

111. RATIFICATION AND THE NO-DOUBT CLAIMS THEORY

Ratifiable claims involve consent of the government to be bound,

file under sections 71 and 236 of this title shall be forever barred unless such claims, bearing the signature and address of the claimant or of an authorized agent or attorney, shall be received in said office within ten full years after date such claim first accrued: Provided, That when a claim of any person serving in the military or naval forces of the United States accrues in time of war, or when war intervenes within five years after its accrual, such claim may be presented within five years after peace is established.

(2) Whenever any claim barred by subsection (1) of this section shall be received in the General Accounting Office, it shall be returned to the claimant, with a copy of this section, and such action shall be a complete response without further communication.

⁴⁰28 U.S.C. 2501 (1970), which states in relevant part, part, "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

whereas no-doubt claims are quasi-contractual, not based upon consent.

The major difference between the two types is in the locus of settlement authority. In ratification the contracting officer or some higher official in the chain of procurement authority is the decision-maker, while under the no-doubt claims theory the finance and accounting officer, or someone above him in finance or comptroller channels, perhaps the Comptroller General, decides whether to pay the claim.

Regardless of who is the decision-maker, contracting officers are assigned a large role in the processing of claims under the doubtful-claims procedures. The contracting officer's administrative report, though not a formal contract, is very much like a contract without written clauses. While the many required clauses in a government contract may have great importance when performance follows execution of the document, they generally have no importance in ratification. Here performance has been completed and accepted in many cases; this being so, the clauses might as well be omitted for all the practical significance they have.

In ratification cases, the facts are made known to the contracting officer or other official with authority to ratify who then voluntarily confirms, or ratifies, the contract.⁴¹ In cases involving doubtful or no-doubt'claims, the facts are also made known to the contracting officer. If he finds no doubt, he recommends payment. In case after case involving some element of governmental consent to be bound at the inception of the transaction, the Comptroller General has found such recommendations to constitute ratification.⁴²

⁴¹United States v. North American Co., 253 U.S. 330 (1920); National Electronics Laboratory v. United States, 180 F. Supp. 337 (Ct. Cl. 1960); Ford v. United States, 17 Ct. Cl. 60 (1881); Braden v. United States, 16 Ct. Cl. 389 (1880).

⁴²In one case decided in 1969 by the Comptroller General, a contractor mistakenly interpreted a confirmation of a purchase order as a reorder by the government and duplicated a previous shipment of supplies to Vietnam. The government retained the duplicate supplies and apparently used them, thus arguably providing the necessary element of consent. The price of the goods, \$789.60, which was the same as the contract price for the first shipment, was considered to be the reasonable value of the goods. The facts show consent of the government to be bound, and it is not surprising that the Comptroller General authorized payment, on the usual *quantum valebant* basis. A point of particular interest is that the Comptroller General noted that the contracting officer had *ratified* the unauthorized shipment by recommending payment of the contract price. Ms. Comp. Gen. B-166439, 2 May 1969.

In another case, decided in 1974, the Corps of Engineers received an unsolicited offer from a firm called INTASA, Incorporated, to develop a computer simulation model to assist the Corps' urban studies land planners in the area of land use and

If ratification does not occur, usually because of the contracting officer's refusal to ratify or his lack of authority as an individual to

analysis. Discussions followed, and a Corps employee, not a contracting officer, advised the contractor to proceed with the work. The contractor did *so*. Further meetings followed to discuss progress and to narrow the scope of work and define costs more precisely. The Corps admitted that it intended to execute a formal contract but never did so because of an "administrative breakdown" which was not the fault of the contractor. The work was completed and was considered to be of great benefit to the Corps. The price of \$87,500 was considered entirely fair and reasonable. This is a ratifiable transaction. The amount of money involved seems uncomfortably large, but this does not diminish the merits of the claim. The Comptroller General, citing as authority the case of the duplicate shipment, *id.*, found no difficulty in authorizing payment on a *quantum meruit* basis for the services rendered. The point which clinched the matter for the Comptroller General was that "the unauthorized notification to INTASA to proceed with the work was implicitly ratified both by the Corps' reported intention to 'formalize a contract' and by virtue of the recommendation for payment." Comp. Gen. Dec. B-180876, 26 Mar. 1974, 74-1 C.P.D. 148.

Both cases could have been settled locally as no-doubt claims. They are typical of many similar consensual cases in which mere recommendations of authorized contracting officials in favor of payment have been held to constitute ratification. E.g., Ms. Comp. Gen. B-183878, 20 June 1975; Comp. Gen. Dec. B-182584, 4 Dec. 1974, 74-2 C.P.D. ¶ 310; Comp. Gen. Dec. B-180630, 2 May 1974, 74-1 C.P.D. ¶ 222; Ms. Comp. Gen. B-173765, 18 Nov. 1971; Ms. Comp. Gen. B-164087, 1 July 1968.

No-doubt claims are always paid *quantum meruit* or *quantum valebant*, like the claims in these two cases, because, however definite the claimant's price may be, it is not a contract price. Yet ratification creates a contract, which is a legally binding obligation. The Comptroller General does not explain this mixture of equitable and legal concepts. Perhaps no more is implied than a distinction between formal, written contracts and informal, parole contracts.

Ratification has been found in less straightforward actions of authorized procurement officials, as well. In Comp. Gen. B-184716, Mr. Stoltenberg, a government employee, was sent by the National Bureau of Standards on temporary duty to make acoustical measurements in a remote part of the Colorado River. A boat was needed and, as none other was readily available, Mr. Stoltenberg rented his own to the government. Bureau procurement officials advised that the rental should be paid not by purchase order but as a reimbursible travel expense. The Comptroller General took all this in stride and found ratification. 55 Comp. Gen. 681 (1976). He cited as authority a 1961 case in which the government employed a range rider to patrol the White Sands Missile Range. A horse was needed to perform this duty. The government leased from the range rider his own horse, and then returned it to him as government furnished property. Ms. Comp. Gen. B-146259, 13 July 1961.

In two other cases involving claims for engineering services provided to the government, the contractors in question had contracts which had expired. Both contractors subsequently received follow-on contracts for the same services. The claims were based upon services performed between the expiration dates of the original contracts and the commencement dates of the follow-on contracts, *i.e.*, during gaps in the periods of contractual coverage. The claims in these two cases could be treated also as no-doubt claims, suitable for local settlement. The two government agencies involved both recommended payment of the claims, but the Comptroller General in authorizing *quantum meruit* payment of both claims made no comment concerning the agencies' recommendations. Instead, the General Ac-

counting Office found that the follow-on contracts were ratification. One of the cases, a claim against the Navy in the amount of \$38,290.60, was decided in 1969. Ms. Comp. Gen. B-168228, 26 Nov. 1969. The other, against the Marine Corps in the amount of \$27,000.00, was decided in 1972. Ms. Comp. Gen. B-176513, 26 July 1972.

It is difficult to perceive the distinction between these two cases, on the one hand, and the duplicate-shipment case and the INTASA case, on the other hand. Why did the agencies, recommendations constitute ratification in the latter two cases, but not in the former? Possibly in all the cases the Comptroller General was merely looking for the strongest available evidence of consent. Execution of a follow-on contract might be considered stronger evidence than mere passive acceptance and use of goods not covered by any contract; so, in the latter two cases, reference was made to the follow-on contracts, and not to the use and acceptance of goods not covered by contract, although this also was part of the two fact situations.

Arguably, the Comptroller General would have based his decision on use and acceptance if no firmer basis, such as follow-on contracts, had been available. It may be noted that the timing of the four decisions does not provide any indication that perhaps a change in viewpoint had taken place in the General Accounting Office; the duplicate-shipment case was decided in 1969, as was the Navy case; and the INTASA decision was issued in 1974, two years after the Marine case.

The Comptroller General's reliance upon ratification of any kind seems to be a development of approximately the past eight years. There are many older cases factually similar to those discussed above in which payment was made, or denied, on the basis that the government received, or did not receive, a benefit. No mention is made of ratification. *E.g.*, Ms. Comp. Gen. B-163816, 11 Oct. 1968; 46 Comp. Gen. 348 (1966); 40 Comp. Gen. 447 (1961); 33 Comp. Gen. 533 (1964); 21 Comp. Gen. 800 (1942).

Finally, there is a 1976 decision which seems to reinforce the overlap between ratifiability and the doubt-free character of a claim which is shown by the duplicate-shipment and INTASA cases. The new case involved an indisputably doubtful claim. The claimant contractor, Edfield Research, Incorporated, asserted that it proceeded with development of a special type of receiver for the Army without waiting for award of a contract because it was assured during negotiations that it definitely would receive award as soon as the papers could be put together. In the meantime, Edfield was directed to move ahead with all possible speed because the receiver was urgently needed.

Army officials denied Edfield's assertions and recommended disallowance of the claim. The Army indicated that Edfield was only one of several firms with whom discussions were held, that Edfield was told that any development efforts undertaken would be strictly at its own risk and that the Army had no intention of awarding a contract to the firm. The Army also advised Edfield that the firm's price was too high and that the Army had no funds for the project.

The Comptroller General, accepting the Army's denials, upheld disallowance of the claim. The bases for disallowance, adopted from the Army's original disallowance, are noteworthy. These were, first, the facts as related by the Army, which supported denial of the claim without any further action, and second, "the fact that authorized contracting officials of the Government had declined to ratify the unauthorized work. . . ." Ms. Comp. Gen. B-185709, 28 June 1976.

These two bases seem redundant. The second reason given by the Comptroller General is totally unnecessary to the decision to affirm disallowance. It is surely the weaker of the two bases. If, for example, the contracting officer had attempted to ratify, without a clear showing that the firm's version of the facts was the correct one, surely the Comptroller General would object. Thus, it seems likely that the Comptroller General intended to emphasize that the act of ratifica-

ratify, then, to collect on a ratifiable claim, the contractor must show that the government accepted the benefits of the transaction and that the authorized official either knew about it or should have known and failed to take action to repudiate the attempted contract in time to enable the contractor to minimize losses.⁴³ This is similar to the knowledge of the facts which is attributed to contracting officers in constructive change situations.⁴⁴

That ratification is, in principle, a lawful act cannot be doubted. The various executive departments vary considerably, however, in the extent of their use of this tool and in the level of authority at which they allow ratification to be effected.⁴⁵

tion, or the lack of it, is important in itself. Ratification is of course possible only if the transaction to be ratified involves governmental consent. A quasi-contractual transaction cannot be ratified. In the case of consensual transactions, ratification is a type of adjudication, and is an essential prerequisite to local settlement.

⁴³*Williams v. United States*, 127 F. Supp. 617 (Ct. Cl. 1955). *cert. denied*, 349 U.S. 938 (1955); *New York Mail & Newspaper Transport Co. v. United States*, 154 F. Supp. 271 (Ct. Cl. 1957); *Max Drill, Inc. v. United States*, 192 Ct. Cl. 608 (1970); *Fox Valley Engineering, Inc. v. United States*, 151 Ct. Cl. 228 (1960); 30 Comp. Gen. 490 (1951).

⁴⁴Polen, *The Changes Clause and the Concept of "Constructive Changes": Novel Aspects of Contracts with Uncle Sam*, 3 U. SAN FERNANDO L. REV. 79 (1974), reprinted in 12 Y.P.A. 405 (1975). Claims based upon alleged constructive changes are cognizable by boards of contract appeals because they are related to existing contracts.

⁴⁵The approach taken by the Federal Procurement Regulations (FPR) is a simple, straightforward acceptance and application of the concept of ratification. The FPR provides that ratification must be by a written document clearly expressing an intent to ratify. The document must be signed by one who has authority to ratify and who could have entered into the contract before the unauthorized award was made. The FPR, by necessary implication, indicates that ratification authority is held by contracting officers, or by their superiors in the procurement chain if greater authority is required for a particular procurement. 41 C.F.R. § 1-1.405.

The Air Force ASPR Supplement prescribes general standards for ratification which are similar to those of the FPR, but ratification authority is distributed differently. Ratification may be "by persons having both the power to initiate and approve the unauthorized act." AF § 1-452.1. But ratification may be effected only if it is in the best interests of the government, and if the transaction to be ratified would otherwise have been valid if made by a properly authorized contracting officer. AF § 1-452.3(f). "The individual having committed the unauthorized act" is required to prepare a statement and file for the contracting officer containing full information about the act, including a description of any disciplinary action taken against him or an explanation of why none was considered necessary. AF § 1-452.3(a) and AF § 1-452.3(b). (It may be questioned whether these requirements conflict with the privilege against self-incrimination granted by the fifth amendment to the United States Constitution, and also by Article 31 of the Uniform Code of Military Justice.) The contracting officer is required to perform an extensive review of the statement and file. AF § 1-452.3(d). However, "[c]ontracting officers do not have the authority to ratify unauthorized acts." AF § 1-452.2(f). Ratification authority is reserved to Heads of Procuring Activities, vari-

Ratification is a procurement function. The service Secretaries can delegate ratification authority to subordinate officials at any level in the chain of procurement responsibility, prohibit ratification entirely, or reserve all ratification authority for their use alone.

The processing of no-doubt claims is essentially a funds control function. The no-doubt claims theory has been discussed above only in relation to irregular procurement, but analogous procedures can be applied to claims for pay and allowances,⁴⁶ transportation claims,⁴⁷ and real estate claims.⁴⁸ The processing of such claims is ultimately under the control of the Comptroller General, and the Service Secretaries are limited to implementation of the Comptroller General's instructions. The Secretary of the Army, for example, can withdraw payment authority from finance and accounting officers, reserving it at a higher level, or delegating it to a lower level, but

ous senior commanders, and a few delegees, some of whom are accorded authority to ratify actions involving more than \$10,000; others, \$10,000 or less; and still others, \$2500 or less. AF § 1-452.2(a) and (b). Once a transaction has been ratified, the file must be sent to "the appropriate purchasing office," so that a purchase order or contract can be issued "for payment purposes," with citation either to the small purchase or sole source negotiation authority. AF § 1-452.2(e). 5 C.C.H. ¶ 41,512.10 (27 July 1977).

The FPR provision concerning ratification does not establish any procedure for ratification, but in its simplicity and flexibility it generally resembles the no-doubt claims procedures. The Air Force procedures are much more like the doubtful claims procedures, with an administrative report and recommendation from a contracting officer, but no local settlement authority.

No policy concerning ratification appears in the Army Procurement Procedure or in any Army regulation, although various commands and agencies below the level of Department of the Army have published policies limiting or prohibiting the use of ratification. For example, the former U.S. Army, Pacific, did so in 1971. USARPAC Circular No. 715-2-5, Irregular Procurement Actions, para. 3 (24 Sept. 1971). There is no Department of the Army publication concerning no-doubt claims, either, except to the extent that doubtful-claims publications necessarily imply the existence of no-doubt claims. Again, some lower level commands and agencies have explicit policies on the matter, usually standing operating procedures.

⁴⁶ Army Reg. No. 37-104.3, Military Pay and Allowances Procedures Joint Uniform Military Pay System (JUMPS-ARMY), para. 40472b (C3, 27 May 1974).

⁴⁷ Transportation claims and accounts have long been separated from other types of claims and accounts for administrative convenience, but the same general rules that apply to no-doubt claims in the procurement area apply here also. At 5 GAO 6012.10, it is stated that agencies are to pay only specified types of claims "which are not barred by a statute of limitations or which do not involve a doubtful question of law or fact. . . ." All other claims must go to the General Accounting Office, Transportation Division, under 5 GAO 6015.10.

⁴⁸ A real-estate no-doubt claims procedure is implicitly authorized by Army Reg. No. 405-15, Real Estate Claims Founded Upon Contracts, para. 6a (6 Sept. 1967), where it is stated that among the types of claims which must be submitted to the GAO are those involving doubtful questions of law or fact.

he cannot increase the sum total of that authority. The Secretary cannot authorize finance and accounting officers, or anyone else, to settle doubtful claims. That authority belongs to the Comptroller General at the General Accounting Office, except as otherwise provided in various specialized statutes.⁴⁹

The Armed Services Procurement Regulation is silent concerning ratification, but ratification is a major procurement action, similar to award or modification of contracts. Ratification authority may only be exercised by contracting officers and their superiors in the chain of procurement responsibility and authority.⁵⁰

In doubtful-claims cases, whether or not coupled with the no-doubt claims theory, the primary decision to pay or not to pay is made by the finance and accounting officer, not the contracting officer. As mentioned above, the contracting officer does not direct payment of doubtful or no-doubt claims but only recommends the disposition that should be made of such claims. If a contracting officer recommends payment of a claim on the grounds that it is free of doubt, the finance and accounting officer is at liberty to reject the recommendation and send the claim file to the Comptroller General for adjudication.

This is not to say that, in a proper case, a finance and accounting officer could not decline to pay an invoice certified by a contracting officer under any contract, whether ratified or regularly executed, but the bases upon which the finance and accounting officer could reject such an invoice (find it "doubtful") are much more limited than in the case of a no-doubt claim.

Once more, a word of warning: For convenience, this discussion has assumed that local settlement of no-doubt claims is lawful. Many procurement offices do not share this assumption. Ratification of consensual irregular procurements for which the government is liable is legally permissible through procurement channels. And the procedures applied to no-doubt claims should be those prescribed for doubtful claims submitted to the Comptroller General for adjudication. There are no separate procedures for consensual no-doubt claims as such. The doubtful claims procedures are set forth

⁴⁹*E.g.*, the Military Personnel and Civilian Employees Claims Act of 1964, 78 Stat. 767, 31 U.S.C. 240-243, as amended, and various other statutes implemented by Army Reg. No. 27-20, Claims (18 Sept. 1970).

⁵⁰Superiors of contracting officers include Secretaries (ASPR § 1-201.15), Heads of Procuring Activities (ASPR 5 1-201.7 and 5 1-401), and their Principal Assistants Responsible for Procurement, and Deputy Principal Assistants (APP § 1-201.50).

in title 4 of the GAO Manual,⁵¹ and are recapitulated in Army Regulation 37-107.⁵²

One important step is the preparation of an administrative report by the contracting officer.⁵³ The format of the report is that of a transmittal letter covering the claim file. It must contain a statement of the claim and the facts, reasons for forwarding the claim rather than settling it locally, explanation of all doubtful aspects, and a recommendation concerning disposition of the claim, with reasons therefor, or, alternatively, a statement with reasons that there is no specific recommendation.

A strong recommendation by a contracting officer that a claim be paid may at least arguably constitute ratification by the contracting officer or higher authority in the chain of procurement responsibility. A formal contract is not executed when a no-doubt claim is paid, but an administrative report containing the contracting officer's unequivocal recommendation to pay may serve the same purpose. It may, as a matter of law, be binding on the government even if the contracting officer did not believe that he was performing an act of ratification. Under such an interpretation, the finance and accounting officer is a conduit between claimant and contracting officer. While such an interpretation may be correct as applied to some claims processed under the no-doubt theory, it disregards the differences between, on the one hand, ratifiable claims which are so processed, and, on the other hand, pure no-doubt claims which may not be ratifiable.⁵⁴

⁵¹The six requirements are listed at 4 GAO 2030.20, which reads as follows:

ADMINISTRATIVE REPORTS. When claims are submitted to the Claims Division of the General Accounting Office they should be accompanied by an administrative report containing:

- (1) A statement of the facts out of which the claim arose;
- (2) A statement of the doubt or other reason for forwarding the claim;
- (3) A recommendation as to the disposition believed to be proper;
- (4) A citation to pertinent supporting documents such as contracts and vouchers, if any;
- (5) A statement that the claim has not been paid and will not be paid except pursuant to certification in the name of the Comptroller General; and
- (6) A citation to the applicable appropriation or fund.

⁵²Note 23, *supra*.

⁵³AR 37-107, para. 5-25d, which states:

d. Administrative Report. An administrative report will be prepared in letter form by the contracting officer which will serve as a transmittal letter and contain the following:

- (1) Statement of claim.
- (2) Statement of facts.
- (3) Reason for forwarding claim.
- (4) Explanation of all doubtful aspects.
- (5) Recommendation and reason therefor, or statement that there is no specific recommendation and reason that no recommendation is made.

⁵⁴Most discussions of ratification focus on the act of ratification itself or the authority or knowledge of the ratifying official. However, it should be borne in mind

IV. THE NO-DOUBT CLAIMS CONCEPT: BACKGROUND AND POTENTIAL

The foregoing discussion has provided a description of the no-doubt claim and its current theoretical and factual basis. What use, if any, can be made of this concept, in view of the lack of explicit statutory or regulatory authorization for its operation? Can we at least trace the outlines of a legal foundation upon which a firm structure can in the future be built by statute or regulation?

A. HISTORY

The no-doubt claims theory was originally based upon G.A.O. General Regulation No. 50, "Procedures for the Settlement of Claims and Accounts of the United States," issued in 1926. The opening paragraph provides:

No payment involving a doubtful question of law or fact shall be hereafter made by any disbursing officer or agent of the United States except pursuant to specific statutory authority or by direction given in accordance with the provisions of the Budget and Accounting Act, 1921, . . . and all such doubtful accounts or claims should be promptly transmitted or returned to the GAO . . . for direct settlement.⁵⁵

This was consistent with decisions of the Comptroller of the Treasury,⁵⁶ and early Comptroller General decisions,⁵⁷ holding that disbursing officers had no discretion to settle doubtful claims locally, but had to look to the Comptroller General.

The second paragraph of General Regulation No. 50 was the foundation for the no-doubt claims theory:

Current accounts, excepting transportation claims and accounts, as to which there is *no material doubt* should be paid by the proper disbursing officers or agents from funds available therefore, with due regard for their personal and bonded responsibility, upon whom the burden will rest to establish such legal liability of the United States and availability of funds as will support certification of credit for the expenditures. . . . [Emphasis added].⁵⁸

that, in general, ratification is possible only if some ratifiable act has taken place. In general, such an act consists of an attempt to bind the government by some agent without authority to do so. For a general discussion of the principal elements of ratification, see 1 R. NASH & J. CIBINIC, *FEDERAL PROCUREMENT LAW* 68-71 (1977). A pure no-doubt claim, quasi-contractual in nature, does not involve consent and should not be considered ratifiable. See note 18, *supra*.

⁵⁵5 Comp. Gen. 1068 (1926).

⁵⁶4 Comp. Dec. 332 (1897); 22 Comp. Dec. 350 (1916).

⁵⁷4 Comp. Gen. 56 (1924); 4 Comp. Gen. 283 (1924).

⁵⁸Note 55, *supra*.

General Regulation No. 50 was superseded in 1949. The revision, though similar to the superseded text, deleted all reference to claims having no doubt.⁵⁹ The deletion of this reference led some disbursing officers to conclude that they no longer had authority to settle doubt-free claims locally. This caused the Comptroller General to clarify the matter in a 1952 decision,⁶⁰ concerning claims for refund of discounts improperly deducted by the government when paying contractors' invoices. The decision stated that claims involving no doubtful questions of law or fact should not be sent to the General Accounting Office, because this unnecessarily delayed payment to the claimants and added to the government's cost of administration. The regulation "did not contemplate that claims . . . where there is no question as to the right of the claimant . . . should be forwarded to the GAO for settlement. On the contrary, such cases are for payment administratively, and hereafter should be handled accordingly."⁶¹

Supplement No. 4 to General Regulation No. 50, issued in 1955, added a definition of doubtful claims⁶² which is substantially similar to that which now appears in the GAO Manual.⁶³ This Manual, properly called the "General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies," was issued September 1957, and superseded all the general regulations.

The GAO Manual definition of a doubtful claim indicates that "reasonable prudence" is to be exercised by persons with final responsibility for deciding what administrative action is proper and that if, after exercising this degree of prudence, such persons are unable positively to decide whether a claim is payable, then the claim is doubtful.⁶⁴ A phrase such as "reasonable prudence" permits application of a broad "standard." This is desirable, because no one can anticipate the many fact situations which could give rise to claims against the government. It is better to allow a wide range of discretion to finance and accounting officers who deal with them.

Nevertheless, one cannot help feeling that some additional guidance could be made available without unduly hampering necessary

⁵⁹29 Comp. Gen. 539 (1949).

⁶⁰32 Comp. Gen. 676 (1952).

⁶¹*Id.*

⁶²34 Comp. Gen. 747 (1955).

⁶³4 GAO 2015.20, which states, "DOUBTFUL CLAIMS DEFINED. Claims are doubtful when in the exercise of reasonable prudence a person having final responsibility for deciding appropriate administrative action is unable to decide positively that they are or are not payable."

⁶⁴*Id.*

exercise of discretion. It would be useful, for example, for a finance and accounting officer to be aware that a no-doubt claim, in its purest form, is ultimately quasi-contractual in nature, not based on consent of the government to be bound, while ratification procedures, which resemble the doubtful claims procedures when they are applied to a no-doubt claim, do grow out of at least attempted consent given by an unauthorized agent.⁶⁵

The principal set forth above is now stated in inverted form. The business of the Comptroller General concerns chiefly doubtful claims, and not those without doubt. In the GAO Manual there appears the following definition of doubtful claims: "Claims are doubtful when in the exercise of reasonable prudence a person having final responsibility for deciding appropriate administrative action is unable to decide positively that they are or are not payable."⁶⁶ This clearly offers a flexible standard. Elsewhere the Manual states that claims which must be adjudicated by the General Accounting Office include "those as to which there exists such doubt as to reasonably preclude action by the administrative agency in the absence of specific statutory authority."⁶⁷ This imposes even less restriction on agency discretion than the reasonable-prudence standard.

To summarize, it appears to be clear that a no-doubt claim may be settled by disbursing officers locally, without reference to the Comptroller General. That principle is easily applied to a wide variety of claims based upon government consent irregularly given. Does it apply with equal ease to quasi-contractual claims? Some offices have answered that question for themselves in the affirmative, others negatively. The only way to resolve the issue is to refer quasi-contractual claims to the Comptroller General, at least until there are enough decisions to guide local procurement and finance officers and their legal advisors.

B. AUTHORITY OF FINANCE AND ACCOUNTING OFFICERS

Local finance and accounting officers have the most limited discretion in the processing of doubtful claims. Prior to the creation of the Office of the Comptroller General of the United States and the

⁶⁵Note 18, *supra*.

⁶⁶4 GAO 2015.20.

⁶⁷4 GAO 1030.10.

General Accounting Office in 1921,⁶⁸ claims were routinely adjudicated and decisions routinely issued by an official of the executive branch, the Comptroller of the Treasury, who said as early as 1897:

[T]he authority of disbursing officers of the Executive Departments to make payments is restricted to the payment of fixed salaries, bills for supplies purchased and approved, and other similar demands which do not require for the ascertainment of their validity the exercise of judicial functions in weighing evidence or in the application of general principles of law⁶⁹

The Comptroller of the Treasury cited the foregoing with approval in a 1916 decision.⁷⁰

After succeeding to the decisional function of the Comptroller of the Treasury, the Comptroller General lost little time adopting his predecessor's views concerning the strictly limited discretion of disbursing officers. Two decisions were issued in 1924. In the first decision, Comp. Gen. Dec. A-2719, the language of the 1897 decision quoted above was paraphrased, stating that payable claims are those which do not require "the weighing of evidence or the determination of questions of law or fact."⁷¹ The second decision, Comp. Gen. Dec. A-4023, states the rule somewhat more strongly:

The payments which disbursing officers are authorized to make without prior authorization by this office are those involving definitely fixed obligations of the Government not requiring a determination of questions of law or fact, such as salaries to officials and employees in the public service and payments specifically provided for under valid contracts.⁷²

A no-doubt claim becomes a "definitely fixed obligation" when a local finance and accounting officer decides to pay it, and perhaps as early as the contracting officer's recommendation in favor of payment, depending on the facts of the case. It is arguable that a "valid contract" is only one more type of "definitely fixed obligation" in a list which could include quasi-contractual claims not based upon valid contracts. The case is simpler with irregular procurements involving governmental consent to be bound: The contracting officer or higher authority might ratify the claim by recommending payment, thus transforming the statement of the claim into an invoice under a valid if informal contract by the time the claim is paid.

⁶⁸ Act of 10 June 1921, ch. 18, Title III, § 301. 42 Stat. 23 (current version at 31 U.S.C. 41 (1970)).

⁶⁹ 4 Comp. Dec. 332 (1897).

⁷⁰ 22 Comp. Dec. 350 (1916).

⁷¹ 4 Comp. Gen. 56 (1924).

⁷² 4 Comp. Gen. 283 (1924).

C. THE AUGUST PEREZ CASE

The decisions establishing that the authority of finance and accounting officers is limited have never been overruled. They have received strong indirect support from a January 1977 decision of the Comptroller General concerning local settlement of breach-of-contract claims by contracting officers.⁷³ This decision concerned a series of consensual transactions related to a valid contract.

In this decision, the Comptroller General acknowledged that: "While this Office has jurisdiction to settle a claim based on a breach by the Government, it will only settle claims where there is no doubt as to the liability of the Government and the amount of damages can be determined with reasonable certainty." Citing *Cannon Construction Company*⁷⁴ and *Brock & Blevins Company, Inc.*,⁷⁵ the Comptroller General stated that he believed "the submission of claims for unliquidated damages for breach of contract by the Government in the future to be unnecessary where the contracting agency and the contractor mutually agree to a settlement."

Citing *Utah Construction and Mining Company*,⁷⁶ the Comptroller General concluded that:

Where both parties agree as to the liability of the Government for the breach and agree to a settlement figure, there is no "dispute." Therefore, whether the settlement has a binding effect is irrelevant because both parties have agreed to the terms and even if the contractor later attempted to litigate the issue, the courts treat such an agreement as a binding accord and satisfaction.⁷⁷

The case dealt with breach of a contract for design services which was awarded to August Perez & Associates, Inc. During a performance period of one and one-half years, the contractor was required to submit drawings to the government periodically. The government was given three weeks to approve each set of drawings, so that Perez could move on to the next phase. However, the government took more than its allotted three weeks, with the result that the contract took five and one-half years to complete.

Perez claimed delay costs of \$58,000, which the government agreed was entirely reasonable, except that the contract contained no clause providing an equitable adjustment for suspension of work or any other remedy. Thus, in the view of the contracting agency,

⁷³Comp. Gen. Dec. B-187003 (24 Jan. 1977), 77-1 C.P.D. para. 48.

⁷⁴*Cannon Construction Co. v. United States*, 162 Ct. Cl. 94 (1963).

⁷⁵*Brock & Blevins Co., Inc. v. United States*, 170 Ct. Cl. 52 (1965).

⁷⁶*Utah Construction and Mining Co. v. United States*, 168 Ct. Cl. 522 (1964).

⁷⁷Comp. Gen. Dec. B-187003 (24 Jan. 1977), 77-1 C.P.D. para. 48.

the contractor was left with only a breach claim, which the contracting officer had no authority to settle without direction from the Comptroller General.⁷⁸

The claim of Perez was not a pure no-doubt claim. The government unquestionably consented to everything that gave rise to the claim; and the contractor could have sued in the Court of Claims under the Tucker Act. No-doubt claims normally arise altogether outside the scope of existing contracts, *i.e.*, there is normally no need to process a contract-related claim as one having no doubt, because a contractual remedy can usually be fashioned without difficulty. In the Perez case, such a remedy was not available, but presumably for the sake of economy, the Comptroller General authorized use of the no-doubt theory to fill a gap in the system of remedies created by the clauses found in standard government contract forms.

The case teaches that when there is no dispute between the parties concerning the government's liability and the amount involved, there is no breach, strictly speaking, but only a claim. Whatever it is called, the result is the same. The claim can be settled locally without reference to the Comptroller General. A contracting officer can settle an undisputed claim in the nature of breach of contract as a no-doubt claim. If contracting officers can settle such claims, local finance and accounting officers can pay them without submission to the Comptroller General.

As has been mentioned, the *Perez* case involved a clearly consensual transaction, a transaction which moreover was related to a formal contract. What would be the result in a case involving a quasi-contractual transaction, with no contract in the background and no consent otherwise manifested? Some procurement offices would say that the rationale of *Perez* could be extended to cover a quasi-contractual claim. The element of consent, they would say, is not an essential prerequisite to local settlement; only the lack of any dispute is essential. But the matter may in fact not be so simple. A consensual claim can, in principle, be ratified; a quasi-contractual one cannot; and in several cases the Comptroller General has indicated that ratification is important in the settlement of a claim, as

⁷⁸In general, the settlement and remedy granting authority of contracting officers is based upon applicable contract clauses. Breach of contract requires use of remedies not mentioned in contract clauses; and therefore it has sometimes been said that contracting officers cannot on their own authority settle breach cases. It would be more accurate to say that they cannot settle breach cases in which liability of the government and the amount of damages are in dispute.

discussed in part III, above, in connection with contracting officer recommendations in favor of payment.

D. EXECUTIVE-LEGISLATIVE-JUDICIAL RELATIONSHIP

The local finance and accounting officer is an agent of the executive branch of the government. The Comptroller General is an agent of the legislative as well as the executive branch.⁷⁹ The General Accounting Office is by statute independent of the executive departments.⁸⁰ The Comptroller General and Deputy Comptroller General are appointed by the President, but only with the advice and consent of the Senate.⁸¹ They are appointed for fifteen year terms, and may be removed from office prematurely only by congressional action.⁸² What significance do these facts have for an understanding of the reservation of claims adjudication authority to the Comptroller General?

It would be an overstatement to say that adjudication of doubtful claims is a legislative function and not an executive one. It was purely an executive matter before 1921 and it could be so again if Congress changed the law. The issue is not one of constitutional separation of powers, but only of congressional interest in ensuring that funds are disbursed in accordance with the intent of Congress expressed in annual authorization and appropriation acts.

Nevertheless, the statutory basis for the Comptroller General's authority is stated in clear and succinct language which does not allow any local finance and accounting officer to arrogate to himself the power to adjudicate doubtful claims. Review of the applicable statutes reveals no authority in the Comptroller General to delegate his adjudicative powers outside the General Accounting Office. Claims adjudication is not inherently a legislative function, but Congress has made clear in the statutes mentioned above that it is not necessarily an executive one either.

If a finance and accounting officer settles a doubtful claim locally on his own authority, he might be held pecuniarily liable to the government for the money disbursed if his action is later determined to be unlawful. In a 1935 case, the Comptroller General considered a

⁷⁹United States *ex rel.* Brookfield Const. Co. v. Stewart, 234 F. Supp. 94 (D.D.C. 1964), *aff'd*, 339 F.2d 753 (D.C. Cir. 1964).

⁸⁰31 U.S.C. 71 (1970).

⁸¹31 U.S.C. 42 (Supp. V. 1975).

⁸²31 U.S.C. 43 (1970 & Supp. V 1975).

request from a certifying officer for relief from liability for disbursements made by him in violation of law. A statutory freeze on promotions in the civil service was in effect. However, the President attempted to promote a few minor officials by executive order. The Attorney General reviewed the proposed order and found it legally sufficient, and the certifying officer paid the officials' salaries at the rates prescribed for their higher grades. The Comptroller General denied relief, saying that certifying officers rely at their own risk on the "views of legal officers in the executive branch," when they elect not to exercise their statutory right to request an advisory opinion from the Comptroller General.⁸³ Relief was similarly denied in a 1952 case in which a certifying officer in a field office of the Department of Agriculture, acting upon instructions from departmental headquarters in Washington, paid a temporary employee for annual leave to which he was not legally entitled.⁸⁴

In 1975, the Comptroller General considered a request of the chief certifying officer for the Energy Research and Development Administration for an advisory opinion concerning the extent to which that officer could safely rely upon opinions of the Administration General Counsel recommending local payment of doubtful claims. The Comptroller General answered this question by saying, in effect, that no reliance whatsoever should be placed on the General Counsel's opinions; that the certifying officer is responsible for erroneous payments made by him, and will not be relieved of that responsibility merely because he relies upon the advice of an administrative or legal officer. A good-faith belief on the part of a certifying officer that a claim is not doubtful might lead to relief from liability:

Assuming value received for a payment and the absence of statutory prohibition, the test of good faith regarding legal questions concerning certified vouchers is whether or not the certifying officer was "in doubt" regarding the payment and, if so, whether he exercised his right to request and receive an advance decision from the Comptroller General on any question of law involved in a payment on any voucher presented to him for certification. . . .⁸⁵

There can be no question that doubtful claims should be sent to the Comptroller General for adjudication. However, mistakes will be

⁸³ 14 Comp. Gen. 578 (1935). Advance opinions may be requested under authority of 31 U.S.C. 74 (1970).

⁸⁴ 31 Comp. Gen. 653 (1952).

⁸⁵ 55 Comp. Gen. 297 (1975). See also Ms. Comp. Gen. B-180752, 12 June 1974. The defense of good faith is established by 31 U.S.C. 82c (1970).

made occasionally, and in most such cases it should be considered that imposition of pecuniary liability on the individual certifying officer is impractical and inequitable.

The role of the Comptroller General in claims resolution is so well known to federal procurement attorneys that it is easy to forget an obvious fact: Resolution of doubtful claims is also a function of the courts, and was so long before the advent of the General Accounting Office. However, the Tucker Act, which waives sovereign immunity as to contracts in which the government has in some manner consented to be bound, does not authorize suit on a nonconsensual or quasi-contractual transaction, such as a pure no-doubt claim.⁸⁶ A formal or implied-in-fact contract is necessary to support jurisdiction. Sometimes courts have interpreted the Tucker Act liberally, to take jurisdiction of cases arguably within the penumbra between contractual and quasi-contractual claims,⁸⁷ although judgment, if given for the claimant, may at least nominally be based upon a finding of governmental consent.

As soon as any claim against the United States is docketed, a wholly different set of settlement procedures must be followed.⁸⁸ A claim arguably loses its no-doubt character if, through mistake or otherwise, it becomes the subject of litigation. Such a claim can thus be "perfected" by action of the claimant in initiating suit, as surely as if the claim had been ratified or paid by the government. Money can be obligated to pay an anticipated future judgment against the United States, or an out-of-court settlement.⁸⁹

The Comptroller General has stated that his office has authority to settle quasi-contractual claims involving unjust enrichment of the United States.⁹⁰ Processing of claims to the General Accounting Office is not a form of litigation, and the broad claims settlement authority of the Comptroller General is based upon the Budget and Accounting Act of 1921.⁹¹ However, as a practical matter, the General Accounting Office is the appropriate "forum" to which doubtful or undisputed claims can be sent.

⁸⁶Note 22, *supra*.

⁸⁷*Halvorsen v. United States*, 126 F. Supp. 898, 901 (E.D. Wash. 1954).

⁸⁸*See generally* Army Reg. No. 2740, Litigation (15 June 1973). Under 28 U.S.C. 2414 (1948), judgments and amounts due as a result of settlement of cases out of court are paid by the Comptroller General only upon certification by the Department of Justice.

⁸⁹31 U.S.C. 200 (a) (6) (1954).

⁹⁰Ms. Comp. Gen. B-177416, 8 Feb. 1973.

⁹¹31 U.S.C. 71 (1921).

E. FORMALIZATION OF INFORMAL COMMITMENTS

There are a variety of procedures and theories available for settlement of claims against the government arising out of irregular procurements. One of these is formalization of informal commitments, an extraordinary contractual remedy authorized by Public Law 85-804⁹² to facilitate the national defense in cases in which the use of normal procurement procedures is impracticable. Details of formalization procedures are set forth in ASPR Section XVII.⁹³

An informal commitment arises:

where any person, pursuant to written or oral instructions from an officer or official of a Military Department and relying in good faith upon the apparent authority of the officer or official to issue such instructions, has arranged to furnish or has furnished property or services to a Military Department or to a defense contractor or subcontractor without formal contractual coverage for such property or services.⁹⁴

The legislative history of Public Law 85-804 makes clear that Congress had in mind emergency procurements when enacting this law:

In any situation where time is of the essence, it is not possible for an officer or employee to delay further performance under the contract while awaiting an amendment to it. A contractor may in such a situation furnish material or services without a formal contract but in reliance upon the oral commitment of a representative of the Government.⁹⁵

Formalization is also available as an alternative to application of the constructive-changes doctrine:⁹⁶

Most frequently, however, such situations arise by virtue of changes of existing contracts by technical or other personnel rather than by authorized contracting officers acting through normal contracting procedures.⁹⁷

Both emergency procurements and constructive changes are perceived to pose a dilemma for the government:

The Government in the situation is frequently confronted with conflicting desires. It has need of the materials and services which were

⁹² 50 U.S.C. 1431-35 (1970). Although it has been codified during all the years of its existence, the Act of Aug. 28, 1968 is commonly referred to by its session law designation, Pub. L. 85-804.

⁹³ ASPR sec. 17-204.4 and 17-207.4 (e).

⁹⁴ ASPR sec. 17-204.4

⁹⁵ S. REP. No. 2281, 85th Cong., 2d Sess., *reprinted* in [1958] U.S. CODE CONG. & AD. NEWS 4046.

⁹⁶ Note 6, *supra*

⁹⁷ Note 95, *supra*

rendered by the contractor in good faith, but it likewise has need to maintain a policy of permitting contracting only by authorized personnel through authorized **procedures**.⁹⁸

Public Law 85-804 was intended to resolve the dilemma—

by permitting the formalization of an informal commitment, but requiring a finding by a responsible official within the agency that at the time the commitment was made it was impractical to use normal procurement **procedures**.⁹⁹

Clearly, the claims cognizable under Public Law 85-804 are factually the same as claims which the Comptroller General has said can be settled locally, no-doubt claims based upon consent of the government to be **bound**.¹⁰⁰ Is there any conflict between these two approaches to claims settlement?

The purpose of Public Law 85-804 is not to replace or to limit the availability or use of other means of claims settlement, but rather to provide a last-resort remedy accessible to the widest possible range of claimants with as few disqualifying restrictions as possible. This conclusion is supported by the words in the basic statute, “without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts.”¹⁰¹ The conclusion receives further support in the requirement that formalization facilitate the national defense, with only incidental benefit to contractors, as explained in the legislative history.¹⁰² Strictly speaking, formalization is not a contractor remedy but a means by which the government can ensure itself of sources of supply for future use.

At first glance the requirement for a showing that use of normal procurement procedures was impracticable seems formidable. In fact, “impracticability” is a term of art, at least for the Army Contract Adjustment Board, and is not to be taken literally. That board’s most important decision in this area is *Santini Brothers, Inc.*, issued in 1961, quite early in the board’s history.¹⁰³ The board paraphrased the comments quoted above from the legislative his-

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰As discussed in the text above notes 73 through 78, the Comptroller General has in effect so stated in his decision in the *Perez* case, Comp. Gen. Dec. B-187003 (24 Jan. 1977), 77-1 C.P.D. para. 48.

¹⁰¹50 U.S.C. 1431 (1970).

¹⁰²Note 95, *supra*, at 4044-45.

¹⁰³*Santini Brothers, Inc.*, ACAB No. 1026 (10 Mar. 1961), 1 E.C.R. para. 62. The statute provides for the establishment of departmental contract adjustment boards in all departments or agencies of government which perform functions in connection with the national defense. Note 102, *supra*.

tory of Public Law 85-804 concerning the dilemma faced by the government. The board observed that determination of impracticability must be made on a case-by-case basis, but that—

one of the most important considerations in making this determination necessarily must be whether there is any evidence or indication that the informal commitment was used as a matter of "convenience" to circumvent or evade unnecessarily the statutory or administrative provisions involving military procurement.¹⁰⁴

The test of convenience could lead to resolution of the government's dilemma against the claimant. However,

if the informal commitment resulted from mistake of fact or error on the part of government personnel, the policy of contracting only through authorized procedures would not be prejudiced by formalizing a commitment to a person who has supplied goods or services to the Government in good faith.¹⁰⁵

These views were quoted with approval by the Army board as recently as 1973, in a revision of the board's decision in *Star Publishing Company*.¹⁰⁶ Thus the impracticability requirement is consistent with the purpose of Public Law 85-804 discussed above.

In summary, for claims based upon irregular procurements in which the government has consented to be bound, formalization is a last-resort alternative to local settlement under the Comptroller General's *August Perez* decision. The same is not true for quasi-contractual claims; consent is essential to the use of formalization procedures.

F. THE ANTI-DEFICIENCY ACT

Control of appropriated funds is a complicated process requiring careful attention to detail by those responsible for the task. In the typical irregular procurement, no such care has been taken. The price of the goods or services procured has not been included in the budget of the responsible agency, and no funds have been committed prior to commencement of the transaction. Does this mean that an irregular procurement creates a shortage of funds and therefore a violation of the Anti-Deficiency Act?¹⁰⁷

¹⁰⁴Santini Brothers, Inc., ACAB No. 1026 (10 Mar. 1961). 1 E.C.R. para. 62. at page 8 of the decision.

¹⁰⁵*Id*

¹⁰⁶*Star Publishing Company*, ACAB No. 1145A (16 Aug. 1973). 2 E.C.R. para. 195.

¹⁰⁷31 U.S.C. 665 (1970 & Supp. V 1975). This statute is commonly referred to by its original designation of Revised Statutes 3679.

This problem has been discussed at length elsewhere, and a negative answer has been proposed on the following theory: The United States cannot be bound by the actions of persons who lack contracting officer authority. There is no obligation in the government to pay for goods or services procured in response to orders issued by such unauthorized persons. Those who provide goods or services under such circumstances have at most inchoate claims against the government for the reasonable value of the goods or services provided. Such claims are too uncertain to be recorded as obligations against the account of the government. This being so, there is no possibility of exceeding appropriations available. No obligation arises until some authorized person, such as a contracting officer with ratification authority or a finance and accounting officer who determines that a claim is free of doubt, decides that the claim should be paid. At that time a recordable obligation arises, not at the time of the original irregular procurement.¹⁰⁸

The above is true of claims based upon consent of the government to be bound, because the consent was unauthorized. Payment of such claims is made not because the government is legally bound to pay them, but because the government would be unjustly enriched in the absence of payment. The above is even more clearly true of quasi-contractual claims which involve no governmental consent to be bound, and which will not support a lawsuit under the Tucker Act¹⁰⁹ or other remedial action in favor of the provider of goods or services. The difference between consensual and quasi-contractual claims is that the Comptroller General has authorized local settlement of consensual claims which are free of doubt,¹¹⁰ while he has not done so for quasi-contractual claims.

V. CONCLUSIONS AND RECOMMENDATIONS

Irregular procurements generally give rise to claims against the government in favor of individuals or firms who have provided goods or services to the government in response to orders issued by persons not authorized to bind the government. Some of these claims may be classified as no-doubt claims. A no-doubt claim involves no significant questions of law or fact requiring adjudication by the Comptroller General of the United States or by other au-

¹⁰⁸Hopkins & Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 MIL. L. REV. (1978).

¹⁰⁹28 U.S.C. 1346 (a) (2) (1970) and 28 U.S.C. 1491 (1970 & Supp. V 1975).

¹¹⁰Comp. Gen. Dec. B-187003 (24 Jan. 1977), 77-1 C.P.D. para. 48.

thority above local finance and accounting officers and contracting officers.

Many no-doubt claims are based upon government agreement to pay for the goods or services provided. Such agreement is of course not binding on the government because it was not effected by persons with authority to enter binding agreements. These are consensual claims. A few claims are quasi-contractual in nature, lacking any consent, authorized or unauthorized.

Ratification of an unauthorized contractual action is in principle lawful, although some departments and agencies of the government have chosen to withhold this authority from their contracting officers and others in the chain of procurement authority and responsibility, notably the Department of the Army. However, the Comptroller General has demonstrated an alternative basis for local settlement of claims in his January 1977 decision in the *August Perez* case, discussed above. That case involved a clearly consensual claim in which both the government and the contractor were agreed concerning the fact and amount of liability of the government to pay the claim. The Comptroller General said that, in such a clear case, there is no need to forward the claim file to him for settlement. Claims such as those of the Perez firm can properly be settled locally.¹¹¹

Quasi-contractual claims differ from the rationale of *Perez* because they do not involve consent of the government to be bound. As a result of investigation it may be possible to eliminate all doubt concerning the factual basis for a quasi-contractual claim. As in the case of claims based upon consent given by unauthorized persons, a theory of unjust enrichment may be applicable to the facts, thus eliminating doubts concerning most questions of law. However, there still remains doubt concerning who has authority to settle the claim. The *Perez* claim was not only suitable for ratification, but probably could have been presented in the form of a Tucker Act¹¹² suit against the government. No quasi-contractual claim can be so presented. Congress has not yet seen fit to provide any similar remedy for the quasi-contractual claimant. Fortunately, quasi-contractual claims against the government are rare.

Granting that consensual claims, at least, may lawfully be settled locally, the contracting officer and finance and accounting officer and their legal advisor are still faced with a formidable problem of control. No existing statute or regulation, other than regulations

¹¹¹*Id.*

¹¹²Note 11. *supra*.

which provide for **ratification**,¹¹³ tells them who should settle such claims locally, according to what standards, following what procedures, The doubtful claims procedures set forth in the GAO Manual may be adaptable but they are, after all, intended to deal with an entirely different set of problems.¹¹⁴ Some local commands have standing operating procedures for dealing with no-doubt claims, but these are not sufficiently wide in their application. Other commands refuse to acknowledge that no-doubt claims are payable. A uniform approach is needed, to avoid the inequity of differences in treatment of identical claims arising in different locations.

Local authorities can easily refer quasi-contractual claims to the Comptroller General for settlement. These claims are not numerous. However, it is not clear that the Comptroller General has authority to take any action on such claims except to deny them for lack of power to pay them. Legislation may well be necessary to resolve the question. This could take the form of a minor amendment to the Tucker Act, adding "quasi-contractual claims" to the list of claims cognizable by the courts.¹¹⁵ If the United States clearly waived its sovereign immunity against such claims by this means, the Comptroller General and other authorities could commence developing systems of regulations and bodies of decisional and interpretive law which would in time provide all the guidance necessary to local authorities. However, because of the small volume of quasi-contractual claims and the complexity of the legislative process, this writer sees no hope of such legislation forthcoming. It is probably unavoidable to refer all such claims to the Comptroller General and to hope that his ingenuity will lead to discovery of authority for payment of at least the most deserving claims.

As for consensual claims, ample legal authority for their payment presently exists in the Tucker Act and decisions of the courts thereunder, together with Comptroller General decisions like that in the *Perez* case.¹¹⁶ Adoption within the Department of Defense of a simple ratification procedure would eliminate the need for reliance upon the no-doubt claims theory in most if not all cases of irregular procurement involving governmental consent. This could be accomplished by addition of a paragraph to part 4, section I of the Armed Services Procurement Regulation, similar to that presently found in

¹¹³*E.g.*, notes 9 and 10, *supra*.

¹¹⁴Note 23, *supra*.

¹¹⁵Note 11, *supra*.

¹¹⁶Note 110, *supra*.

the Federal Procurement Regulation.¹¹⁷ Details concerning the practical mechanics of ratification could be left for inclusion in regulations such as the Army Procurement Procedure.

Another avenue of approach is available. Since the Comptroller General has seen fit to recognize that no-doubt claims based upon consent may be settled locally, he could amend the GAO Manual to adapt the doubtful-claims procedures to meet the need for guidance concerning such settlement. Explicit recognition could be given to types of claims considered free of doubt and therefor suitable for local settlement. Again, details could be dealt within regulations issued at lower levels in the chain of finance and accounting responsibility, regulations such as Army Regulation No. **37-107** which implements the doubtful-claims procedures of the GAO Manual within Department of the Army.¹¹⁸

A final word of warning to all readers of this article: Despite the possibility of devising theories in support of local settlement of claims having no doubt, it must be recognized that these theories are largely untested, and that no established procedure for processing no-doubt claims is in existence. The Comptroller General's *Perez* decision does give authority for local settlement of claims which match the *Perez* fact situation, claims in the nature of breach of contract involving no dispute between the parties. It seems entirely reasonable and defensible to assert that the decision may also provide authority for local settlement of ratifiable claims not necessarily related to existing formal contracts. *Perez* does not provide authority for local settlement of quasi-contractual claims.

¹¹⁷Note 9, *supra*.

¹¹⁸Note 23, *supra*

BOOK REVIEWS

Basic Techniques of Public Contracts Practice, edited by Marvin Haiken and W. Harwood Huffcut. Berkeley, CA: California Continuing Education of the Bar, 1977, pp. xx, 507.*

*Reviewed by Robert M. Nutt***

This work, like most anthologies, lacks the luster of continuity one expects from a law school treatise or hornbook. But as a collection of lawyers' helpful hints, it is superb, for its contributors are all practitioners of renown!

In scope, this collection is comprehensive, dealing with contract formation, interpretation, and administration. Many specific problems of performance are covered, as are terminations, closeout, claims, remedies, and choice of forum. Although the book focuses primarily on federal procurement, it contains a large section dealing with problems peculiar to California state procurement. Each section is self-contained in subject matter and is tied to other pertinent sections of the whole by cross references. The book has a complete table of regulations and cases, and a workable subject-matter index.

On the whole, the California Continuing Education of the Bar has made a worthy contribution to the ever increasing mass of procurement literature. Its practical value for the practitioner is in the form exemplars which provide guidance for preparation and filing of documents of every kind in virtually every federal procurement forum known to man. The book provides an answer to the question, "How do I get my problem, in proper format, to a proper forum?"

The real strength of such a work is its usefulness as an issue-recognition device and research tool. Its weakness is the age of its cited cases. None is younger than **1974**. While this does not detract from the value of the book in general, still it suffers somewhat from this lack of currency. Not much has changed greatly since **1974** in most of the procurement law areas, but several significant events merit mention.

*This edition replaces *Government Contracts Practice*, published in **1964** as California Practice Handbook No. 22 by California Continuing Education of the Bar.

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There has been moderate change in the case law dealing with the contractor's entitlement to imputed interest, which, whether defined as cost or profit, is compensation for the use of equity capital to finance changed work.' Moderate change has occurred in the bid process with regard to the government's mishandling of a prospective contractor's bid received late.² The Fulford doctrine, permitting agency boards to take jurisdiction over untimely appeals from a termination for default when there has been a timely appeal from an assessment of excess costs, was extended to construction contracts in 1976 for the first time.³

This work paints a picture of federal procurement as seen by the contractor and his legal advisors. It can serve the federal attorney well by providing him with insight into the expectations of his colleagues across the table.

1. New York Shipbuilding Co., a division of Merritt-Chapman & Scott Corp., ASBCA No. 16664, 76-2 B.C.A. para. 11,979.

2. See Comp. Gen. Dec. B-186766, 76-2 C.P.D. para. 139, and other cases cited and discussed in Hopkins, *Late Bid Prestidigitation: GAO Modifies Reality When Late Bids Arrive*, THE ARMY LAWYER, Oct. 1977, at 3.

3. AIRCO Inc., TBCA No. 1074-8-75, 76-1 B.C.A. para. 11,822.

International Law—The Conduct of Armed Conflict and Air Operations, Dep't of Air Force Pamphlet No. 110-31, written by personnel of the Department of the Air Force. Washington: United States Government Printing Office, 1976. Pp. iii, 169. Appendix "Abbreviations," and Index. Cost: \$2.70.

Reviewed by James A. Burger*

The United States Air Force has recently published and distributed for use in the field its new pamphlet on the law of war—*International Law—The Conduct of Armed Conflict and Air Operations*.¹ This pamphlet is the Air Force equivalent of Army Field Manual 27-10, *The Law of Land Warfare*,² and the Navy publication, *The Law of Naval Warfare*.³

The Army has had its publication for some time. Since the Lieber Code was issued to the Union Forces during the Civil War the Army has followed the practice of issuing detailed instructions to its soldiers concerning their conduct during time of war. There were manuals in effect during both of the World Wars and during the Korean War.⁴ The present manual dates from 1956 and is due for revision.

The Navy manual also has a long tradition. The Navy has its own particular problems during time of war, and there is special coverage of law of the sea, visits and searches of ships, blockades, mines and torpedoes, and other matters of interest to naval personnel. Its present manual dates from 1955.

The Air Force, although it has conformed its practice to the law of war by regulations, training and review of operations, and planning, has never had a manual or other general publication. Now for the first time there is a military publication covering the particular problems of air operations.

There is good reason for the fact that an Air Force manual was not published earlier. A good deal of controversy has existed over what rules apply to air operations, and whether they are different

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¹U.S. DEP'T OF AIR FORCE, PAMPHLET No. 110-31, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (1976) [hereinafter cited as AFP 110-31].

²U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 1956 and C1, 15 July 1976.).

³U.S. DEP'T OF THE NAVY, NAVAL WARFARE INFORMATION PUBLICATION 10-2, LAW OF NAVAL WARFARE (Sept. 1955 and C6, Oct. 1974).

⁴U.S. DEP'T OF THE ARMY, RULES OF LAND WARFARE (1917, 1940, and 1947 editions).

from those rules which apply to land operations. The Hague Treaties of 1907, with the exception of a declaration made in regard to the discharge of projectiles and explosives from balloons, do not mention laws of air warfare, but refer only to rules applying to the land and the sea.⁵ Aerial operations were not seen to be significant until after the experience of World War I. Then, a set of rules on air warfare was proposed in 1923. However, no agreement by the major powers could be reached, and World War II also commenced without any rules applying particularly to air operations.⁶

Despite the terrible devastation which resulted from the massive bombings of World War II there were no war crimes prosecutions for pilots. Neither side could say that its policies were any different than those of its enemy. The bombings of London were no worse than those of Dresden or Berlin. And even today the Geneva Conventions of 1949 do not address themselves to the problem. They cover protected classes of people such as prisoners of war or interned civilians. They do not speak to the problem of the effects of air operations.⁷

In more recent years there has been general agreement that the laws of war apply equally well and in the same manner to air operations as they do to land operations. There is no reason why they should not. There is just as much a duty to determine military needs and to limit the suffering caused by military operations in respect to airplanes as there is in respect to soldiers and tanks. This was rec-

⁵The most important of the Hague Treaties is Hague Convention No. IV. Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539. The text of this treaty may also be found at DEP'T OF ARMY, PAMPHLET No. 27-1, TREATIES GOVERNING LAND WARFARE 5 (1956) [hereinafter cited as DA PAM 27-1]. Article 25 of the Regulations annexed to this treaty is sometimes cited as applying to air operations because it forbids the bombardment of undefended towns, villages, dwellings, or buildings "by whatever means." DA PAM 27-1, at 13. However, even in regard to this provision, it must be remembered that it is contained in a treaty specifically designed for "land" warfare.

⁶The text of the Hague Rules of Air Warfare can be found at 1 L. FRIEDMAN, THE LAW OF WAR, A DOCUMENTARY HISTORY 437 (1972).

⁷There are four Geneva Conventions presently in effect: The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; and the Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

ognized in the just completed conference at Geneva to update and expand the rules applicable to armed conflict.⁸

The Protocols proposed by the Conference would integrate the rules in regard to the use of force found in the Hague Treaties of 1907 with the humanitarian rules found in the Geneva Conventions of 1949. They would make it clear that all the rules concerning armed conflict apply to air as well as to land and sea operations. For example, the provisions in regard to the protection of civilians and civilian property apply specifically now to "land, sea, and air warfare."⁹

Thus, there was special need for an Air Force publication at this time, and AFP 110-31 fills this need well. The language of the new Protocols is to a large extent already integrated into the text of the Air Force pamphlet. This makes it much more up to date than either the Army or Naval manuals. Also, the Air Force pamphlet is written in the form of a general treatise on the law of armed conflict with extensive historical explanation and carefully footnoted references. This contrasts with the manual presentation of the other services which is designed to state policy as briefly as possible.

Even the title of the Air Force publication, "The Conduct of Armed Conflict and Air Operations," indicates that it is designed to take an up-to-date approach to the laws of war. There is a tendency

⁸The full name of this conference is the "Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts." The Conference was held at Geneva, Switzerland, in yearly sessions from 1974 through 1977. The two Protocols written at the Conference will be added to the four Geneva Conventions of 1949, *supra* note 7. The text of the Protocols can be found at [1977] Int'l Rev. of the Red Cross 3 and 89. The United States has signed but not yet ratified the Protocols. For a discussion of the Conference by one of the world's leading authorities on international law, see Baxter, *Modernizing the Law of War*, 78 MIL. L. REV. 165 (1977). Professor Baxter was a member of the United States Delegation to the first three sessions of the Conference. He briefly addresses the work of the Conference on regulation of air warfare. *Id.*, 178. For a discussion of the interest of the United States Army in problems of regulation of air warfare, see Gibb, *The Applicability of the Laws of Land Warfare to U.S. Army Aviation*, 73 MIL. L. REV. 25 (1976). Major Gibb concludes that there are no compelling theoretical or practical reasons or judicial precedent for, or customary practice among nations indicating the existence of, any different legal standard for aerial warfare than that which presently governs land warfare. He further concludes that existing customary and treaty law provides an adequate basis for the regulation of aerial warfare. *Id.*, 62. Finally, Major Gibb recommends amendment of U.S. DEP'T OF ARMY, FIELD MANUAL NO. 27-10, LAW OF LAND WARFARE (1956), "to affirm unequivocally that the basic principles underlying the law of war are the same, regardless of the form of warfare being pursued." *Id.*, 63.

⁹See Article 49, Definition of Attacks and Scope of Application, in Protocol I. [1977] Int'l Rev. of the Red Cross 35.

among current writers, and it was seen in the Geneva Conference which produced the 1977 Protocols, to speak in terms of the "humanitarian rules of armed conflict" and not the laws of war. Stress is placed on humanitarian protections and care is taken to avoid intimating in even the slightest way that the law might be used to justify warfare.

Yet it must be remembered that all the humanitarian rules in the world will do no good if there are not rules which apply to the use of force—how and when can force be used if war does occur? This is recognized in the new Protocols which call for specific consideration of the rules of armed conflict by military commanders in planning and deciding upon attacks.¹⁰ They are required to take precautions against the effects of their attacks upon the civilian populace, and to integrate these precautions into their operation plans and rules of engagement. The Air Force pamphlet, in addition to being scholarly, also takes some positive steps toward making the rules of armed conflict practical as they apply to air operations.

What are some of the specific areas covered? Some are very general such as the status of airspace and military aircraft. There is discussion of the right of overflight of land and sea areas, and the rights of states to set up what are called "air defense zones."¹¹ Also, there is discussion of the rules which apply to outer space.¹² All of these are areas of particular concern to the Air Force, and are not covered in any detail in the other manuals.

There is also, as already indicated, discussion of more specific problems. The chapter on aerial bombardment is particularly interesting. Discussing the mass destruction which took place as a result of air attacks during World War II, it is noted that experience has shown the value of precision rather than area bombing.

The Air Force publication takes the position that neither civilians nor civilian property may be objects of air attack.¹³ Incidental damage may take place, but there must be an effort by military commanders to limit it, and attacks must not be carried out or must be stopped if it becomes apparent that the military gain is to be outweighed by the civilian death and destruction caused. This is clearly the same position taken in the new Protocols and whatever the diffi-

¹⁰ Article 57, Precautions in Attack, Protocol I. [1977] Int'l Rev. of the Red Cross 40.

¹¹ Chapter 2, Status of Airspace and Aircraft, AFP 110-30.

¹² *Id.* para. 2-3.

¹³ *Id.* para. 5-3 in Chapter 5, Aerial Bombardment.

culty of applying the rules to actual operations there is no doubt that it must at least be attempted.¹⁴

The pamphlet also includes an interesting discussion of aerial weapons.¹⁵ Much of the criticism of weapons in recent years has been directed against those which might be considered "indiscriminate" in nature. The destruction caused is not sufficiently limited to military targets. The Air Force pamphlet mentions the German V-1 rockets used during World War II. These had very primitive guidance systems and were launched in a general direction without too much probability of hitting a military as opposed to a civilian target.

Today guidance systems are much more developed, and there would be responsibility to use whatever technology is possessed to limit incidental damage. For example, there are the so-called smart bombs which can be guided in by laser beams. There are no hard rules in this regard, but the writers of the Air Force pamphlet do recognize that the use of indiscriminate weapons would be illegal.

There is clearer advance in regard to the use of chemicals and biologicals. The new U.S. rules in regard to the use of chemical and biological weapons are clearly stated. The use of herbicides to destroy large areas of vegetation, as in Vietnam, is now prohibited.¹⁶

The pamphlet also contains a short discussion of nuclear weapons. The Air Force writers repeat the official U.S. position that explosive nuclear weapons are not considered to be violative of international law.¹⁷ At least on the tactical level, these weapons can be directed against military targets as well as conventional weapons. But how do you resolve the problem of mass destruction on the strategic level? Can you discriminate between military and non-military targets at this level? This question is unanswered except by reference to those areas where agreement has been achieved in regard to nuclear weapons such as the creation of nuclear free zones, nonproliferation and testing limitations.

The fact that certain questions are not answered should not be considered a negative criticism. It is the lack of agreement among nations upon the law and not the Air Force pamphlet which is at fault. The important fact is that the United States in general and its

¹⁴AFP 110-31 reprints almost *verbatim* Article 57, Precautions in Attack, of Protocol I. *Id.*, para. 5-3c.

¹⁵*Id.*, Chapter 6, Aerial Weapons.

¹⁶*Id.*, para. 64.

¹⁷*Id.*, para. 6-5.

military service branches in particular are putting forth great effort to make their policies and practices comply with the law as it exists.

The last chapter of the Air Force pamphlet is an excellent analysis of state and individual responsibility.¹⁸ The authors give a very concise and coherent analysis of the responsibility of the state, commanders, and individual airmen to obey the laws which apply to armed conflict. The discussion is also practical. Acts involving individual criminal responsibility are pointed out and listed. It is further explained, for example, that the targeting of a protected object such as a hospital would be a war crime. Yet an airman is not responsible under the laws of armed conflict if he makes a mistake based upon faulty intelligence, or if he is negligent and misses his target thereby injuring civilians. He might, however, in this last case be responsible under United States military law for dereliction of duty.¹⁹

It might be noted that in addition to publishing this pamphlet the Air Force has also embarked upon a new program to educate every airman in the laws of armed conflict. It involves individual instruction, the preparation of films and literature, and also command emphasis. The Air Force is convinced that the rules are realistic, and that they will be applied to its military practices.

The new Air Force pamphlet is an excellent addition to the literature on the subject of the law of armed conflict as it applies to air operations, and so far as the military is concerned it fills a void where there was not much guidance in the past. It is scholarly and authoritative not only for the military personnel for whom its use is designed, but also for others interested in the field as well. Army and Navy judge advocate personnel may profitably use it as a reference not only on the laws of armed conflict as they apply to air operations but as an up-to-date text on all the laws of armed conflict.

The Army and the Naval manuals will have to be updated in the near future. Of course, when this will be done depends upon the adoption of the new Protocols. If the Protocols are adopted by the United States than the manuals will have to be extensively redone to include the many new rules on armed conflict which have been agreed upon at Geneva. The same is also true of the Air Force Pamphlet because it does not treat these new rules in detail.

There is also discussion at Department of Defense and within the separate services of publishing a tri- or all-service manual. This

¹⁸*Id.*, Chapter 15, State Responsibility and Individual Responsibility.

¹⁹*Id.*, para. 15-4d.

would be particularly useful because it would state a common policy for application of the rules. As the rules become more specific, as they do in the new Protocols, this becomes more necessary. Also much of what would be presented in individual manuals would be repetitive since now there is clearly no law of armed conflict which applies separately to the land, the sea or the air. This does not mean that there are not particular rules which concern only the Navy or only the Air Force. There are; and separate manuals will probably still be necessary, or at least separate coverage within an all-service publication.

Legal Implications of Remote Sensing from Outer Space, edited by Nicholas Mateesco Matte and Hamilton DeSaussure.* Leyden, Netherlands: A.W. Sijthoff's Uitgeversmaatschappij, N.V., 1976. Pp. xiv, 197. \$25.75.

Reviewed by Gary L. Hopkins**

In 1972 the United States launched the first earth resources satellite, later called Landsat, designed to remotely sense and survey earth resources. With the launching of Landsat came new and perplexing problems related to the use of data collected by such satellites, participation by non launching countries in such satellite programs, whether such data collection was an invasion of national sovereignty of the sensed country, and whether earth resources satellites should be regulated. Conferences, meetings and discussions are conducted constantly on such satellites and their related problems. Books and articles in learned journals have proliferated. *Legal Implications of Remote Sensing from Outer Space*, edited by Nicolas Mateesco Matte and Hamilton DeSaussure, is among the latest group of writings in the area. The book is actually a collection of presentations by various experts in space law and on space programs. The presentations were made in 1975 during a conference at the Institute of Air and Space Law, McGill University, Montreal, on "the legal problems which encompass [the] newly emerged [resources satellites]."

The very fact that the book is a collection of presentations by various speakers prevents it from developing a consistent theme or deep analysis of resources satellites and related problems. The book is explanatory rather than critical, descriptive rather than analytical. Readers seeking innovative solutions to the myriad problems of earth resources satellites. After reading these four articles, even or unexpected is found within the 193 pages of writing.

Notwithstanding these shortcomings, the book is useful. It provides a vehicle for readers unacquainted with resources satellites and the positions of various nations on the use of such satellites with a quick method of gathering basic information as to both.

*An article by Mr. DeSaussure, *The Laws of Air Warfare: Are There Any?* 12 JAG L. REV. 242 (1970), was reprinted at MIL. L. REV. BICENT. ISSUE 287 (1975).

**Major, JAGC, United States Army. Senior Instructor, Contract Law Division. The Judge Advocate General's School, Charlottesville, Virginia. While he was a member of the Twenty-Fourth Advanced Class at the JAG School, academic year 1975-76, Major Hopkins wrote a thesis, *Legal Implications of Remote Sensing of Earth Resources by Satellite*, published at 78 MIL. L. REV. 57 (1977).

The text is logically arranged to permit readers to achieve this acquaintance. It commences with two articles, written in language that even a layman can understand, describing the technical and mechanical operation of resources satellites. Following immediately are two articles that discuss the legal questions raised by the use of earth resources satellites. After reading these four articles, even one totally uninitiated in the other than everyday topic of resources satellites will find the remaining articles in the book comprehensible, if not exciting.

However, this book does contain some entertaining aspects. It is interesting, for instance, to review in the same section the views held by governments of Europe versus the views held by governments of Latin America on the question of the legal aspects of remote sensing of earth resources and the use which should be made of remote sensing satellites. Surprisingly, considering the disparity, generally, in economic development on the two continents, the views of the two regions on remote sensing are remarkably similar. Both desire to expand sensing of earth resources by satellite, but only if the sensing is authorized by the sensed nation. Both European and Latin American nations are concerned about the threat to "sovereign rights" that is presented by satellites that can "sense" such things as factory locations, potential undeveloped natural resources and defense installations. The book addresses these questions, and more.

Finally, the book explains satellite data acquisition and dissemination, the possibility of an integrated earth resources satellite program for North America and the role that the United Nations plays, and should play, in controlling and disseminating satellite data, and promoting satellite use.

I would not recommend the book for a day of light reading, but I would earnestly recommend it to those who desire a starting point for understanding the many "Legal Implications of Remote Sensing from Outer Space."

Estate Planning Deskbook. 4th Ed., by William H. Behrenfeld. Englewood Cliffs, N.J.: Institute for Business Planning, 1977. Cost: \$29.95.

Reviewed by Brian R. Price .

Advertised as the entree to the lucrative world of estate planning for wealthy clients and the key to the perpetual three-day weekend,' the Fourth Edition of the Institute for Business Planning's *Estate Planning Deskbook* is now available. Even though the publisher's advertising campaign is aimed at the private practitioner, military attorneys can find this book to be of significant value. Despite the fact that military attorneys cannot increase their income by increasing the quality and volume of their estate planning practice,² they can still enjoy the professional satisfaction of performing sophisticated estate planning services for their clients.

The principal advantage of this new edition of the *Deskbook* is that it considers and analyzes the substantial impact of the Tax Reform Act of 1976 on the field of estate planning. At the same time it updates its coverage of the tax law, the Fourth Edition retains the valuable features of its predecessor edition.³ These valuable characteristics include a "by the numbers" scheme for planning estates, numerous illustrations of planning opportunities, and a series of estate planning tables which consolidate vast amounts of information.

As with most texts prepared for the private practitioner, this book is both over-inclusive and under-inclusive for the military estate planner's practice. It is over-inclusive in the sense that it gives broad consideration to the use of planning techniques for corporate, partnership and other business enterprises;⁴ it is under-inclusive in

Captain, JAGC. USAR. Associated with the firm of Antheil, Link & Pelletier, P.C., of Doylestown, Pennsylvania. Former Editor, *Military Law Review*, The Judge Advocate General's School, Charlottesville, Virginia, 1975-77.

¹Representative quotations from an advertising circular include: "How many of your colleagues can take a three-day weekend—whenever they want—anti still make more than almost anyone around.": "For just about \$30.00 Dave has built-up the most lucrative estate practice in town . . . non-he's making more than ever before, yet . . . Dave works only four days a week!"

²In general, government employees and officers are prohibited from receiving compensation from any source except the government for performing their official duties. Violators may be subject to criminal penalties. 18 U.S.C. 209(a) (1976). In the Army, this statute is implemented by Army Reg. No. 600-50, Standards of Conduct for Department of the Army Personnel (20 Oct. 1977).

³W. CASEY, *ESTATE PLANNING DESKBOOK* (3d ed. 1972).

⁴W. BEHRESFELD, *ESTATE PLANNING DESKBOOK* 38-39; 129-37; 150-82 (4th Ed. 1977).

its failure to address the questions concerning the taxation of military retirement benefits⁵ and the income tax status of various payments and transfers peculiar to military service.⁶

One of the book's best features is that it leaves nothing to chance. It does not assume that all attorneys know how to plan estates, but rather suggests a procedure for planning an estate which begins with an inventory of assets, suggests a method analysis and testing, and concludes with a projection of estate beneficiaries' positions. This scheme is valuable for both the attorney and the client. It requires the attorney to rethink his fundamental assumptions to ensure that he has not omitted crucial assets or items of expense, or has not confused the net estate with the "liquid" estate. The scheme is beneficial to the client because it sets out the estate plan in a schematic, orderly and understandable fashion. Such a presentation demythologizes a process which can easily become confusingly complex.

Even more beneficial to the experienced estate planner is the book's legal content. Although the Tax Reform Act of 1976 has now been in effect for over a year, many experienced estate planners have not rethought their methods of estate planning under the new law. The text includes the estate, gift and income tax transformations wrought by that legislation, and devotes an entire section to the new unified estate and gift transfer tax.⁷ This section explains the dramatic change in the rules concerning transfers in contemplation of death⁸ and transfers which are not complete until the transferor's death.⁹

Of more importance is the discussion of what is known as "minimum marital deduction planning." After the Tax Reform Act of 1976 and the expansion of the marital deduction, an individual can pass the greater of one-half his adjusted gross estate or \$250,000 to his surviving spouse free of federal estate tax.¹⁰ Prior to the Tax Reform Act of 1976, the maximum marital deduction was limited to one-half the decedent's adjusted gross estate. This increase in the maximum allowable marital deduction, when combined with the new unified credit, permits a married taxpayer to avoid federal estate

⁵I.R.C. § 2039 (c) (4) and § 2201.

⁶*Id.* §§ 101(b)(2)(B), 104(a)(4) and 112.

⁷*Id.* § 2001.

⁸*Id.* § 2035.

⁹*Id.* § 2036-2038.

¹⁰*Id.* § 2056(c)(1)(A).

taxes on the first \$425,625 of his estate for years after 1980.¹¹ Prior to the Tax Reform Act of 1976, a married taxpayer could avoid federal estate taxes on only the first \$120,000 of his estate.

Utilization of this increased marital deduction requires thoughtful planning. The text recognizes and recommends that marital deduction planning be based on a "two estate" concept. With the increased marital deduction, it is possible to eliminate the necessity of paying federal estate taxes on an adjusted gross estate of \$350,000 in several different ways. First, the estate planner could make maximum use of the marital deduction.¹² In this way a marital deduction of \$250,000 reduces taxes to zero. However, the \$250,000 which was deducted from the estate is includable in the surviving spouse's estate.¹³ Upon the second death, there is no marital deduction, and the taxable estate will (for purposes of illustration) be \$250,000. The unified credit will not fully offset the tax payable, and there will be considerable taxes due.

On the other hand, if what is called the "minimum marital deduction" had been taken, the first estate would have utilized a deduction limited to the dollar amount necessary to reduce the estate taxes to zero, after having made full use of the unified credit.¹⁴ The principle of fully using the unified credit and then using the marital

¹¹The Unified Credit, I.R.C. § 2010, will be phased in over a period of years. The credit is as follows:

<i>Year</i>	<i>Credit</i>	<i>Exemption Equivalency</i>
1977	\$30,000	\$120,667
1978	34,000	134,000
1979	38,000	147,333
1980	42,500	161,563
1981 and later	47,000	175,625

¹²Should an individual die after 1980, the following results would occur:

	<i>Husband</i>	<i>Wife</i>
Gross Estate	\$350,000	\$250,000
Marital Deduction	250,000	—
Taxable Estate	<u>100,000</u>	<u>250,000</u>
Gross Tax	23,800	70,800
Unified Credit	<u>47,000</u>	<u>47,000</u>
Federal Estate Tax	0	<u>23,800</u>

¹³*Cf.* I.R.C. §§ 2031 & 2056.

¹⁴

	<i>Husband</i>	<i>Wife</i>
<i>Minimum Marital Deduction</i>		
Gross Estate	\$350,000	—
Marital Deduction	<u>174,375</u>	<u>174,375</u>

deduction is an important planning technique which estate planners must recognize and utilize in appropriate cases.

The second technique which is of considerable importance to military estate planners is the treatment of jointly owned property after the Tax Reform Act of 1976. Prior to that Act, the full value of any jointly owned property was included in the estate of the co-owner who died first. The burden was then upon the decedent's representative to demonstrate that the surviving eo-tenant had provided some portion of the property's purchase price. To the extent that the survivor could demonstrate that he or she had provided funds for the property's purchase, the property was then excluded from the decedent's gross estate for tax purposes. This presumption not only created tremendous administrative inconvenience, but often caused structural inconvenience in cases where a significant portion of the estate's value was in the form of a jointly owned personal residence. Because the property was owned jointly by the husband and wife, it was difficult to segment and oftentimes caused the husband's estate to be significantly larger than the wife's. As such, the combined tax payable on both estates was often raised.

The Tax Reform Act of 1976 provided that the "consideration furnished" rule can be avoided if a husband and wife create a joint tenancy and elect to have that creation treated as a taxable event.¹⁵ This election permits an estate planner significant planning latitude which he did not have prior to the Tax Reform Act of 1976.

Estate planners should also familiarize themselves with a third provision added to the tax law by the Tax Reform Act of 1976. That legislation added a new section **2057** to the Internal Revenue Code which provides a method of solving what had been a substantial problem from both a practical and a tax-saving standpoint. Prior to the Tax Reform Act of 1976, if a married individual died, he could shelter a significant part of his estate from the federal estate tax through the use of the marital deduction. However, if his spouse died at or near the same time, the marital deduction was not available and the estate, in all probability, had to bear a fairly high estate tax. The practical side of his problem was that some provision had to be made for the couple's minor children. The Tax Reform Act

Taxable Estate	<u>175,625</u>	<u>174,375</u>
Gross Tax	47,000	46,800
Unified Credit	<u>47,000</u>	<u>47,000</u>
Federal Estate Tax	0	0

ESTATE PLANNING DESKBOOK at 62.

¹⁵I.R.C. §§ 2040 & 2616.

encourages estate planners to make specific provision for orphaned children by allowing a deduction for amounts which would pass to such orphaned children. In the case of families with several young children, this deduction can be substantial inasmuch as the maximum allowable deduction is \$5,000 times the number of years separating each child's present age from the age of **21**. The *Estate Planning Deskbook* makes specific reference to this provision and guides the estate planner in the preparation of appropriate will provisions.

In addition to the structural guidance and legal analysis noted above, the *Estate Planning Deskbook* provides estate planners with material which is not readily available from other sources. In a series of tables, the book presents state death tax rates, typical administration expenses in each state, and the effect of various actions upon the validity of the previously executed will in the various jurisdictions. In addition, the tables list prices and costs of insurance policies, information concerning settlement options for life insurance and annuity contracts and other pertinent information. These tables consolidate information which is of significant importance to estate planners who must deal with clients from many jurisdictions and who do not have a comprehensive library at their disposal.

The *Estate Planning Deskbook* fulfills its purposes well. It is concise, complete and informative. For the practitioner with limited library resources it is a library in itself. Although it may not give a military estate planner a three-day weekend or a dramatic increase in wealth, its utility nonetheless exceeds its cost by a substantial margin.

BOOKS RECEIVED AND BRIEFLY NOTED

With this issue the *Military Law Review* begins adding brief descriptive comments to the standard bibliographic information concerning books received. These comments are not intended to be interpreted as recommendations for or against the books listed. Inclusion of a book in the list below does not preclude later review in the *Military Law Review*.

1. Addlestone, David F., Susan H. Hewman & Fredric J. Gross, *The Rights of Veterans*. New York, N.Y.: Avon Books, 1978. Pp. 269. Cost: \$1.75, paperback.

This handbook covers in question-and-answer format a variety of topics of interest to veterans. The book was produced under the auspices of the American Civil Liberties Union. Covered are such topics as AWOL status; court-martial convictions and appeal; the discharge system and upgrading of bad discharges; backpay claims; veterans' benefits, especially medical and disability benefits; and Veterans Administration procedures.

2. Cottrell, Alvin J. and Thomas H. Moorer, *U.S. Overseas Bases: Problems of Projecting American Military Power Abroad*. Beverly Hills, CA: Sage Publications, Inc., 1977. Pp. 67. Cost: \$3.00 \$3.00.

This paperback is No. 47 in the Washington Papers series of Sage Publications. It provides a brief overview of the military posture of the United States in various parts of the world, with emphasis on sea lanes and the need for naval power.

3. Crump, David and George Jacobs, *Capital Murder*. Waco, TX: Texian Press, 1977. Pp. xii, 278. Cost: \$11.95, hardbound.

In this book the authors contend that there is need for the death penalty in dealing with exceptionally brutal crimes, simply as a means of balancing the scales of justice. Several murder cases are described. The authors are or were assistant district attorneys in Texas.

4. Daly, John Charles, Moderator, *The U.S. Navy: What is its Future?* Washington, D.C.: American Enterprise Institute, 1977. Pp. 38. Cost: \$2.00

This small paperback contains an edited transcript of a roundtable discussion held on 6 October 1977. The moderator, Mr. Daly, is a former ABC News Chief. The four experts who participated in the discussion were U.S. Senator Patrick J. Leahy, U.S. Representative Charles E. Bennett, former Secretary of the Navy John Warner, and Captain John Moore, editor of *Jane's Fighting Ships*.

5. *Defense Law Journal*, Vol. 27, No. 1. Indianapolis, IN: The Allen Smith Co., 1977. Pp. 100. Cost: \$5.00 per issue.

6. Goldblat, Josef, *Arms Control: A Survey and Appraisal of Multilateral Agreements*. London: Taylor & Francis Ltd., 1978. Pp. 238. Cost: Paperback, free; hardcover, £10.50.

Sponsored by the Stockholm International Peace Research Institute, this book is a collection of treaties, agreements, and United Nations General Assembly resolutions concerning arms control. The text of many such documents is provided; others are merely summarized. An introductory essay by the author provides an overview of the subject.

7. Goodpaster, Andrew J. & Samuel P. Huntington, *Civil-Military Relations*. Washington, D.C.: American Institute for Public Policy Research, 1977. Pp. 84. Cost: \$2.50.

This paperback contains four short essays on the role of the military services within American society. General Andrew J. Goodpaster was formerly Supreme Allied Commander in Europe and is now a professor at the Citadel, Charleston, South Carolina. Samuel P. Huntington is a professor of government at Harvard University. Other contributors are Gene A. Sherrill, an Air Force lieutenant colonel, and Orville Menard, professor of political science at the University of Nebraska at Omaha.

8. Hurst, Walter E. & William Storm Hale, *Motion Picture Distribution*. Hollywood, CA: Seven Arts Press, Inc., 1977. Pp. 176. Cost: \$10.00, paperback.

This paperback discusses in hornbook fashion the practical mechanics of production, distribution, and exhibition of motion pictures. Definitions of terms and a few sample forms are provided. Not a legal treatise.

9. Hurst, Walter E., *Tax Planning, Preparation, Audits*. Hollywood, CA: Seven Arts Press, Inc., 1978. Pp. 39. Cost: \$3.00, paperback.

Designed for insertion in a three-ring looseleaf binder, this small book is a collection of checklists and sample forms for use in conjunction with other income tax publications. An annual publication.

10. Levitan, Sar A., & Karen Cleary Alderman, *Warriors at Work*. Beverly Hills, CA: Sage Publishing Inc., 1977. Pp. 216. Cost: \$14.00, hardbound; \$6.95, paper.

11. McHenry, Robert, ed., *Webster's American Military Biographies*. Springfield, MA: G.&C. Merriam Company, 1978. Pp. xi, 548. Cost: \$12.95, hardbound.

This is a biographical dictionary containing entries for over one thousand men and women connected with American military history. Included are appendices consisting of chronological lists of the chief civilian officials and military commanders and officers of the various services.

12. MacNeil, Ian R., *Contracts: Exchange Transactions and Relations: Cases and Materials* (2d ed.). Mineola, N.Y.: The Foundation Press, Inc., 1978. Pp. xlix, 1320. Cost: \$23.00, hardbound.

The first half of this law school textbook reviews basic contract law; the second half, planning for contractual performance, with emphasis on distribution of risks. The book includes appendices dealing with statutory requirements for written contracts, an outline of a real estate transaction, and a discussion of interest on loans. The author is a professor at Cornell Law School.

13. *Mental Health Advocacy*. Washington, D.C.: Department of Health, Education & Welfare, 1977. Pp. 101.

This is a collection of short essays dealing with various aspects of the problem of representation of the mentally disabled. The role of mental health professionals in such representation efforts is stressed.

14. *Military Base Closings: Benefits for Community Adjustments*. Washington, D.C.: American Institute for Public Policy Research, 1977. Pp. 20. Cost: \$2.00.

This short pamphlet provides a review of trends in closing of military bases within the United States. A description is provided of pending legislation which would provide federal grants to aid local governments in adjusting to closings. Arguments in favor of and against the proposed legislation are summarized.

15. Quinlan, Joseph & Julia, with Phyllis Battelle, *The Quinlans Tell Their Story*. New York, N.Y.: Doubleday & Co., 1977. Pp. 343. Cost: \$10.00.

This book provides an account of the efforts of the parents of Karen Ann Quinlan first to accept the fact that she would probably never regain consciousness, and next to compel physicians and hospital administrators to discontinue life-support measures. This is a human-interest story, not a legal treatise.

16. Rivkin, Robert S. & Barton F. Stichman, *The Rights of Military Personnel*. New York, N.Y.: Avon Books, 1977. Pp. 158. Cost: \$1.50, paperback.

This American Civil Liberties Union handbook discusses primarily the rights of military personnel within the military justice system. Chapters are also provided concerning such topics as conscien-

tious objection, administrative discharges, and complaints against superiors under Article 138, U.C.M.J. A question-and-answer format is used.

17. Sabrosky, Alan Ned, *Blue-Collar Soldiers? Unionization and the U.S. Military*. Boulder, CO: Westview Press, 1978. Pp. 166. Cost: **\$14.50**.

This hardbound book contains a collection of essays discussing arguments for and against unionization of the military service. Comparison is made with civilian public sector unionization and with European military unionization.

18. Tahtinen, Dale R., *Arms in the Indian Ocean: Interests & Challenges*. Washington, D.C.: American Institute for Public Policy Research, 1977. Pp. 84. Cost: **\$3.00**.

This paperback discusses the military position of the various states in the vicinity of the Indian Ocean, as well as the United States and the Soviet Union. About half the book consists of tables of statistics concerning the armed forces operating in the area and the weaponry available to them.

19. Taylor, William J., Roger J. Arango, and Robert S. Lockwood, *Military Unions: U.S. Trends and Issues*. Beverly Hills, CA: Sage Publications, Inc., 1977. Pp. 336. Cost: hardbound, **\$17.50**; paper, **\$7.50**.

This book is volume VIII of the Sage Research Progress Series on War, Revolution and Peacekeeping. It is a collection of nineteen essays on various aspects of military unionization, including current trends, the European experience, operational aspects of military unions, arguments for and against military unionization, and alternatives to unionization.

20. Walters, Vernon A., *Silent Missions*. Garden City, N.Y.: Doubleday & Company, Inc., 1978. Pp. 654. Cost: **\$12.95**.

This is an autobiography by a retired Army general who was an advisor to several Presidents on national security matters, and who served for a time as Deputy Director of the Central Intelligence Agency.

21. Walzer, Michael, *Just and Unjust Wars*. New York, N.Y.: Basic Books, 1977. Pp. 384. Cost: **\$15.00**.

22. Watson, Peter, *War on the Mind: The Military Uses and Abuses of Psychology*. New York, N.Y.: Basic Books, 1978. Pp. 534. cost: **\$20.00**.

In this book a clinical psychologist reviews a variety of psychological experiments performed by think tanks and private researchers for the military services. The experiments discussed con-

cern combat performance, stress, captivity, and techniques of counterinsurgency and psychological warfare.

23. Weinstein, Allen, *Perjury: The Hiss-Chambers Case*. New York, N.Y.: Alfred A. Knopf, **1978**. Pp. **674**, including notes & index. Cost: **\$15.00**.

This book is an account of the events leading up to and following the trial and conviction of Alger Hiss in **1950** for giving perjured testimony to the House Unamerican Activities Committee. The author is a professor of history at Smith College.

24. Wexler, David, B., Dr., *Criminal Commitments and Dangerous Mental Patients*. Rockville, MD: DHEW, Public Health Service, **1977**. Pp. **94**.

25. *World Armaments and Disarmament: SIPRI Yearbook 1978*. Stockholm, Sweden: Stockholm International Peace Research Institute, **1978**. Pp. **518**. Cost: **\$18.00**.

This annual publication provides an overview of developments in weaponry and limitations on weaponry worldwide, documented by many charts and graphs. The book contains chapters dealing with nuclear power and weapons, satellites, the arms race in space, expenditures for arms production, trends in the arms trade, disarmament efforts, the test ban, destruction of chemical weapons, mutual force reductions, the SALT agreement, and other subjects.

CUMULATIVE INDEX VOLUMES 75-80

This index includes all articles, comments, book reviews, and other writings published in the six volumes of the *Military Law Review* beginning with DA Pamphlet No. 27-100-75 and ending with the present volume, DA Pamphlet No. 27-100-80. This index consists of an author index; a subject index; a title index; and a two-part book review index, listing books by title and author. Numerical references are to volume numbers and pages. Thus, 8011 means page 1 of volume 80 of the *Military Law Review*, cited 80 *Mil. L. Rev.* 1 (1978).

In the title index, titles of articles are listed in alphabetical order of the first word of each title, disregarding *a*, *an* and *the*. Book reviews are listed similarly, by first major word of the book titles, and also by first major word of the title of the review if different from the book title.

A previous cumulative index covering volumes 1 through 40 was published in volume 40. A second cumulative index covering volumes 41 through 54 was published in volume 54. Thus, readers need not consult the annual indices in volumes 4, 8, 14, 18, 26, 30, 34, 38, 42 (change 1), 46, or 50, or the cumulative indices in volumes 12 and 22. The annual indices in volumes 58, 62, 66, 70 and 74 must still be consulted, but that in volume 78 may be disregarded. A new cumulative index is planned for volume 81 which will cover everything published in volumes 1 through 80, replacing all previous annual and cumulative indices.

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