The
DIGEST
National Italian American Bar Association Law Journal

ARTICLES

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The Law Journal of the National Italian-American Bar Association

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THE NATIONAL ITALIAN-AMERICAN BAR ASSOCIATION 1995 OFFICERS AND BOARD MEMBERS

Message from the Editor-in-Chief

It is a great privilege to inform our readers that *The Digest* is taking on a new organizational shape with the publication of this issue. As a professional law journal, *The Digest* is now being edited by students at the Syracuse University College of Law. The student editors work under my direction but operate in an autonomous manner in making editorial decisions and in producing each issue of *The Digest.*

Students involved in the project are members of the NIABA chapter of Central New York which includes a student division at the Syracuse University College of Law. The students are dedicated to promoting the legal profession and to sharing a concern for the preservation of Italian American culture and values. Each year, for instance, our students have conducted an annual St. Joseph's Day Food Drive to benefit poor families in our area. Each year they have successfully raised thousands of dollars which they deliver to Catholic Charities for distribution. Over a four year period more than $10,000 has been raised for this cause. In addition to this activity there is an annual Columbus Day Lecture held at the College of Law and an annual Spring symposium honoring outstanding public service by distinguished Italian American members of the community. It is in this tradition of service and commitment that our students have eagerly taken on the challenge of producing a first rate publication that we all hope will prove to be useful and beneficial to the profession.

As a student edited journal, we welcome submissions from our readers and friends for consideration for future publication. We ask that submissions be made in duplicate and require that, if an article or essay is seslected for publication, the author must provide the editors with a computer disk version of the work in WordPerfect for an IBM compatible computer.

In taking over the editorial work of *The Digest* we wish to acknowledge the tremendous job done by Fran Allegra in putting together the prior issues of our journal. We, at Syracuse, are also indebted to Michael Rainone and the NIABA Board for allowing our students to take on this wonderful opportunity.

With the hope that our work will meet with your approval, we welcome your comments and contributions.

Robin Paul Malloy, J.D., LL.M.
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The Italian Legal System: Adapting to the Needs of a Dynamic Society

LOUIS F. DEL DUCA*
PATRICK DEL DUCA**

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FOREWORD - THE CIVIL LAW TRADITION IN ITALY

In the eleventh century what became the University of Bologna law faculty emerged as a center of the renewed study of Roman legal texts.[1] The activity of reviewing and commenting upon these classical texts brought Bologna to the center of European legal scholarship and led to a civil law tradition that was followed throughout continental Europe and much of Africa, Asia and Latin America. More recently, modern Italy emerged from the dark days of fascism, and in the process evolved from a devastated and heavily rural economy to a prosperous and modern industrial democracy. The constitutional structure which Italy adopted in the early post-war years, its dedicated judiciary as well

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1. MAURO CAPPELLETTI ET AL, THE ITALIAN LEGAL SYSTEM 14-22, 36-38 (1967); G.L. CERTOMA, THE ITALIAN LEGAL SYSTEM 4-7 (1985); K.W. RYAN, INTRODUCTION TO THE CIVIL LAW 15-26 (1962).

as its legal culture, have often been strained by the massive changes in the social fabric. Terrorism from the left and right, organized crime, and political corruption have presented particular challenges. However, Italy's legal institutions have done more than merely survive these and other challenges; they have demonstrated resilience in responding and contributing significantly to their management. This article reviews a few of the essential elements of Italy's legal system which are basic to understanding current developments in Italy.

The United States is said to be a "common law" jurisdiction, while Italy is said to be a "civil law" jurisdiction. Much is often made of the supposedly clear dichotomy between these traditions. However, while legal systems based exclusivly on Codes or case law are theoretically possible and may have been approximated in past centuries, such systems do not exist in the modern world. Massive progress in technology, the information explosion, and the impact of globalization and internationalization of commerce, cultures and communications have all accelerated interaction between legal systems, causing the civil and common law traditions to converge to a significant degree.[2] Common law systems today make extensive use of statutes and Codes amply supplemented with uninhibited use of case law. Civil law systems today make extensive use of case law precedent while carefully insisting that the Code or statute remains the true source of the law.[3]

The new legal tradition of the European Community involves day-to-day active interaction between English-Irish common law traditions and continental European civil law traditions. Code, statute and case law methodologies are used together thereby facilitating increased convergence of the common and civil law traditions. Nevertheless the common law trained lawyer will continue to tend to approach legal problems with an empirically-oriented case law frame of mind; the approach of the civil law lawyer to legal problems will, by comparison, continue to be systematic and deductive and will focus on codes and statutes. However, it is clear that used judiciously and properly, both approaches are capable of producing legal norms responsive to societal needs. Quality legal work requires skillful use of code, statutory, and case law materials in the framework of both the United States "common law" and the Italian "civil law" systems. While authorities have debated the extent to which these systems converge, they are in agreement that significant convergence has occurred.[4]

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2. Konrad Zweigert & Hein Kotz, *Law- Finding and Procedure in Common Law, Civil Law*, in AN INTRODUCTION TO COMPARATIVE LAW 264 (1992); Mauro Cappelletti, *The Doctrine of Stare Decisis and the Civil Law: A Fundamental Difference - or no Difference at All?*, 381-93 (1981).

3. J. Merryman, *The Italian Style III: Interpretation*, 18 Stan. L. Rev. 583, 585-96 (1966); Shapiro, *The Civil System and Pre-Existing Legal Rules*, in COURTS 136-43 (01978).

4. Zweigert & Katz, *supra* note 2; M. Capelletti, *supra* note 2; J. Merryman, *supra* note 3; Shapiro, *supra* note 3.

I. ITALY AS A REGIONAL STATE - QUASI UNITARY STRUCTURE

The unification of Italy from 1860 to 1865 reflected a desire to make one country out of the many kingdoms, city states and foreign occupied territories within which Italians lived. Hence Italy was founded as a unitary state with a strong central government. After World War II, Italy was reconstituted as a regional state for many reasons, but at least partly to reflect the aspirations for greater autonomy of some border areas of Italy, and partly to allow the largest opposition party, the Communists (who were excluded from power at the national level because of cold war concerns), the opportunity to participate in local government. Thus, Italy today is a unitary state subdivided into twenty regions which are further subdivided into numerous provinces and municipalities. Five of the regions (Sicily, Sardinia, Val d'Aosta, Friuli-Venezia Giulia, and Trentino Alto-Adige) enjoy so-called special statutes, which afford them especially broad autonomy because of their comparative geographic isolation, their historic legislative and administrative self-sufficiency, and the presence of linguistic minorities.[5]

The post-war Constitution contemplated that Parliament would transfer legislative and administrative responsibilities within specific subject matters to the remaining fifteen regions.[6] Although the Constitution directly grants regions legislative powers over designated matters,[7] the regions generally remained lit-

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5. Decree Law of May 15, 1946, No. 455, converted into the Constitutional Law of February 26, 1948, No. 2 for Sicily; Constitutional Law of February 26, 1948, No. 3 for Sardinia; Constitutional Law of August 31, 1973, No. 670 for Trentino Alto-Adige; Constitutional Law of January 31, 1963, No. 1 for Friuli-Venezia Giulia; Constitutional Law of February 26, 1948, No. 4 for Val d'Aosta; Presidential Decree of August 31, 1972, No. 670 for Trentino Alto-Adige.

6. Articolo. 114-133. An English translation of the Italian Constitution is found in LOUIS F. DEL DUCA & PATRICK DEL DUCA, COMMERCIAL, BUSINESS AND TRADE LAWS, ITALY (Booklet II 1983) [hereinafter COST.].

7. COST., *supra* note 6, at art. 117 provides:

> "Within the limits of the fundamental principles established by the laws of the State, the Region legislates in regard to the following matters, provided that such legislation is not in contrast with the interests of the nation or other regions:
>
> Organization of the offices and the administrative bodies dependent on the region;
> Town boundaries;
> Urban and rural police;
> Fairs and markets;
> Public charities and health and hospital assistance;
> Vocational training of artisans and scholastic assistance;
> Museums and libraries of local bodies;
> Town planning;
> Tourist trade and hotel industry;
> Tram and motor coach services of regional interest;
> Roads, aqueducts and public works of regional interest;
> Lake navigation and ports;
> Mineral and spa waters;
> Quarries and peat bogs;
> Hunting;

tle more than paper entities until enactment of legislation in the late sixties and seventies providing for the first transfer of substantial responsibilities to them from the central government.[8]

The ramifications of regional government are yet to be fully developed.[9] The Constitutional Court, discussed further below, has often been called upon to determine whether specific Regional laws and regulations conflict with the sphere of activity properly reserved to the central government, and vice versa. Legislation enacted by the regions must be within the "fundamental principles established by the laws of the state [Italy]," and may not "conflict with the interests of the Nation or of other regions."[10] The regions as yet have quite limited financial autonomy, and their sphere of activity is broadly limited to administrative issues, notably land use matters.

II. PARLIAMENTARY GOVERNMENT AND ELECTORAL SYSTEM

Executive power resides in the Council of Ministers (also referred to as the "government"), headed by the President of the Council of Ministers.[11] The President of the Council of Ministers, named by the President of the Republic and subject to Parliamentary vote of confidence, is analogous to a prime minister. Failure to win a vote of confidence in Parliament is cause for the entire Council of Ministers to resign.[12]

The President of the Republic, elected for a seven year term by a special session of Parliament,[13] has the power to appoint a new President of the Council of Ministers should a resignation occur, and new ministers on proposal of the President of the Council of Ministers.[14] The President of the Republic may also dissolve the whole Parliament or one of the Chambers—thereby causing early elections to occur.[15]

Fishing in lake and river waters;
Agriculture and forestry;
Artisanship;
Other matters indicated by constitutional law.
The laws of the Republic may delegate power to the Regions to issue norms for their enforcement."

8. Law of February 17, 1968, No. 108; Law of May 16, 1970, No. 281; D.P.R. of January 14, 1972, No. 1; No. 2; No. 3; No. 4; No. 5; No. 6; D.P.R. of January 15, 1972, No. 7; No. 8; No. 9; No. 10; No. 11; Law of July 22, 1975, No. 382; D.P.R. July 24, 1977, No. 616 in *Gazzetta Ufficiale della Republica Italiana*. *See* Martines-Ruggeri, Lineementi di diritto regionale (1987).

9. ROBERT D. PUTNAM, MAKING DEMOCRACY WORK - CIVIL TRADITIONS IN MODERN ITALY 17-62 (1993).

10. *See supra* note 7.

11. COST., *supra* note 6, at art. 92.

12. *Id.* at art. 94.

13. *Id.* at art. 85.

14. *Id.* at art. 92.

15. *Id.* at art. 88.

The 1948 constitution adopted an elaborate system of proportional representation to ensure that no one political party could dominate national life. As a result, both the national and regional legislative bodies closely reflected the electoral strength of the various political parties throughout the post-war period. Because the only possible government was by coalition which excluded the main opposition party (i.e. the communists), until recently variations on the same coalition governed Italy, with no alternation of parties in power since the first elections under the 1948 constitution.

The national parliament consists of the Chamber of Deputies (630 members) and the Senate (315 members), in which all members are elected for five year terms.[16] In a referendum held in April 1993,[17] over 82% of the thirty-five million people voting endorsed a shift from proportional representation to a majority system for the election of three-quarters of the 315 members of the Senate.[18] On June 30, 1993, the House of Deputies approved a new electoral system for itself by a wide margin of 311 in favor, 127 against and 99 abstentions.[19] The reform provides for three-quarters of the House members (472 out of a total of 630) to be elected on a "first past the post" basis.[20] The other 158 seats will be allotted on a proportional basis among all parties polling at least 4% of the nationwide vote, with the votes polled by the winners under the majority system to be excluded from the total available to the same party's candidates to the seats allotted under the proportional system.[21]

This new procedure attempts to reconcile the main benefits of the majority system while offering some protection to the interests of minor parties. The House reform also initially would have allotted twenty extra seats for Italians

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16. *Id.* at arts. 56, 57, and 60.

17. Use of the referendum procedure is authorized by Art. 75 of the Constitution which in part provides that "A popular referendum may be held on demand of 500,000 voters or by five Regional Councils."

The referendum vote of April, 1993, was implemented by Presidential Decree of February 25, 1993 "Rules for referendum for partial amendment of the Law of February 6, 1948, n. 29, containing rules for election of Senators of the Republic, and subsequent amendments", in *Gazzetta Ufficiale della Republica Italiana*, March 2, 1993, n.50.

18. Leo J. Wollenborg, *The Political Scene: An Update, Dossier 52nd Government*, 7 Italian Journal 4 (1993); Presidential Decree of June 5, 1993, n. 170 "Abrogazione parziale, a seguito di Referendum Popolare, della legge 6 febbraio 1948, n. 29 e successive modificazioni, recante norme per le Elezioni al Senato della Repubblica (Partial annullment in accord with the referendum of April 1993 of the Law of February 6, 1948, n. 29 and subsequent amendments, containing rules for election of Senators of the Republic), in Gazz. Uff., June 5, 1993, n. 130; Martin Jacques, *Italy's Rejection of PR is a Valuable Lesson for Britain*, SUNDAY TIMES, Aug. 3, 1993, Features.

19. John Phillips, *Rome Parliament Approves Bill on Electoral Reform*, THE TIMES, July 1, 1993, Overseas News.

20. *Italian Lower House Approves Senate Reform*, REUTERS, July 21, 1993, Money Report; Phillips, *supra* note 19.

21. *Italy's Lower Chamber Approves Electoral Reform*, AGENCE FRANCE PRESSE, June 30, 1993; Haig Simonian, *Voting Reforms Approved in Italy*, FINANCIAL TIMES, Aug. 5, 1993, at 2.

living abroad.[22] Since both branches of Parliament had to approve each other's new electoral system before the reforms became law, the amendments passed by a single house were subject to being dropped or revised before final enactment.[23] [24]

Another major electoral reform aimed at curbing the deficiencies of proportional representation provide for direct popular election of the mayor in larger cities and middle-sized towns, with a run-off between the two candidates receiving the most votes if no candidate receives more than half the votes in the first round.[25] The results of the first local elections held under these rules in June 1993 indicates a major reshuffling of the strength of the established political parties and emergence of several new parties.[26]

III. SOURCES OF LAW

The Italian Civil Code, adopted in 1942, provides that the sources of Italian law include legislation, regulations and usages.[27] The 1948 Constitution put constitutional law at the head of this list while adding the further concept of regional law. The additional layer of European Community law was added upon Italy's accession to the European Coal and Steel Community at its founding in 1953 and to the European Economic and Atomic Energy Communities at their founding in 1958. While making clear that the Italian constitution is preemanant in the areas of fundamental human rights and constitutional values, the Italian Constitutional Court has otherwise determined that the Italian constitution allows the supremacy of European Community law over Italian law.[28]

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22. Wollenborg, *supra* note 18; Keith Weir, *Italy Heads For Bitter Electoral Reform Battle*, REUTERS, June 30, 1993, Money Report. This provision of the law was defeated by a vote of the Senate on November 10, 1993. *See* Sebastiano Messina, "Hanno Affondato Una Pessima Legge", LA REPUBLICA, November 11, 1993, at 1, col. 6.

23. COST., *supra* note 6, at art. 70 provides that "The legislative power shall be exercised jointly by both houses and parliament"; *Italian Senate Approves Electoral Reform*, REUTERS, Aug. 3, 1993, Money Report.

The laws for the electoin of the members of the House of Deputies and the Senate were adopted in the summer of 1993 (Valerio Zanone, *La Riforma Elettorale*, Il Sole 24 ORE, Aug. 4, 1993, at 6) and elections were held on March 27 and 28, 1994 (F. Co., *Alle Urne 48 Milioni Di Italiani Per Eleggere Il Primo Parlamento Maggioritaio*, Il Sole 24 ORE, March 27, 1994, at 1).

24. Simonian, *supra* note 21

25. Wollenborg, *supra* note 18; Art. 6, Law of March 25, 1993, n. 81, "Direct Election of Mayors, Provincial Presidents, and legislatures of the Municipalities and Provinces" (Elezione diretta del Sindaco, del Presidente della Provincia, del Consiglio Comunale e del Consiglio Provinciale), in *Gazzetta Ufficiale della Republica Italiana*, March 27, 1993, n. 72.

26. Wollenborg, *supra* note 18; *Italy's lower chamber approves electoral reform, supra*, note 21.

27. Art. I, Provisions of the Law in General, Civil Code.

28. *See* Antonio La Pergola and Patrick Del Duca, *Community Law, International Law, and the Italian Constitution*, 79 AMERICAN JOURNAL OF INTERNATIONAL LAW 598 (1985).

The European Community is composed of 12 European nations consisting of Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain and the United Kingdom. Operating under various treaties, the most important of which is the Treaty of Rome Estab-

A variety of procedures for enacting legislation and adopting administrative regulations exist under the Italian Constitution and parliamentary system. "Constitutional laws" may amend or supplement the Constitution. They are enacted by passing both houses of Parliament, initially by a simple majority, then by a favorable absolute majority vote in both houses three or more months

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lishing the European Economic Community *done* March 25, 1957, 298 U.N.T.S.79, as amended, most notably by the Single European Act, O.J. 1987, No. L169/1, and the recently effective Treaty of European Union (also popularly known as the Maastricht Treaty) 7 Feb. 92; Council of the European Communities, Treaty on European Union 24-44 (1992) [hereinafter EEC Treaty], the major institutions of the EEC are the Commission, the Parliament, the Council of Ministers and the European Court of Justice.

The Commission proposes and supervises laws and policies which are adopted by the Council of Ministers with participation from the Parliament. See EEC Treaty, as amended, Art. 189(b)&(c). The EEC promulgates both regulations and directives. Regulations directly bind member states and also individuals in the member states. Directives, while binding, allow member states a specified time period within which the law of each member state must be adjusted so that it achieves the objectives set forth by the particular directive. In general, while directives are binding on each member state, they leave to national legislation the details of their implementation. EEC Treaty, *id.* at art. 189. Directives not implemented in timely fashion by member states may have direct applicability in national courts if they are unconditional and sufficiently precise. *See* Van Gend & Loos Case 26/62 [1963] ECR, 2 CMLR 105 (1963); Public Prosecutor v. Ratti 148/78 [1979] ECR, 1 CMLR 96 (1980); Francovich v. Italian Republic C-6/90 [1993] ECR, 2 CMLR 66 (1991); Marleasing v. La Commerciale Internacionale De Alimentacion C-106/89 (1992) ECR, 1 CMLR 305 (1992).

The structure and jurisdiction of the European Court of Justice is provided for by Articles 164 to 188 of the Treaty of Rome, EEC Treaty, *id.* at arts. 164 to 188. The provisions of the Treaty grant broad jurisdiction to the court over actions involving interpretations and applications of the Treaty, regulations, directives, and other actions of the Institutions of the Community. Such actions may be initiated by (a) member states; (b) the Commission, Council or other Institutions of the Community; or (c) natural or legal persons. Of particular interest is Article 177 of the Treaty which provides:

> The Court of Justice shall have jurisdiction to give *preliminary rulings* (emphasis supplied) concerning:
>
> (a) the interpretation of this Treaty,
>
> (b) the validity and interpretation of acts of the institutions of the Community;
>
> (c) the interpretation of the statutes of bodies established by an act of Council, where those statutes so provide.
>
> Where such a question is raised before any court or tribunal of a member state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

The literature on the EEC is vast and impossible to adequately list here, however; a concise yet thorough and highly readable overview introduction to the EEC is available in the following sources. *See* Noel, Working Together - The Institutions of the European Community, Office for Official Publication Of The European Community (1991); Paolo Mengozzi, European Community Law - From Common Market to European Union (Patrick Del Duca trans., 1992); P.J.G. Kapteyn & P. Verloren Van Themaat, Introduction to the Law of the European Communities (Laurence W. Gormley ed. 1989); Paolo Cecchini, et. al., The European Challenge 1992: The Benefits of a Single Market (The Cecchini Report), Wildwood House, 1988; Richard Owen and Micheal Dynes, The Times Guide To The Single European Market (1992); T.C. Hartley, The Foundations of European Community Law (2d ed. 1988); P.S.R.F. Mathijsen, A Guide To European Community Law (5th ed. 1990).

later.[29] Constitutional laws are equal in rank to the Constitution and superior to all other Italian legislation.

The next level of legislation consists of "ordinary laws" and "acts having the force of law." "Ordinary laws" are passed by Parliament by a simple majority while "Acts having the force of law" are either delegated legislative decrees (decreti legislativi delegati) or decree laws (decreti leggi). Within constitutional limits, Parliament may delegate the authority to issue laws to the Council of Ministers.[30] These are the delegated legislative decrees. In extraordinary cases the government may issue decree laws without parliamentary delegation; however, unless such laws are approved by Parliament within sixty days, they are void *ab initio*.[31] This decree method has been used extensively in recent years to avoid the political paralysis otherwise present in the Parliament. To be effective, both delegated legislative decrees and decree laws must be issued under the signature of the President of the Republic.[32] They then become "Decreti del Presidente della Repubblica" (i.e., D.P.R. or Decrees of the President of the Republic).

Many bodies of law have been statutorily codified. The Civil Code, adopted in 1942, contains 2969 articles (i.e., sections) divided into six books entitled Persons and Family, Succession, Property, Obligations (which include contract and tort law), Labor, and Protection of Rights.[33] The Code of Civil Procedure and the Code of Navigation were also adopted in 1942. The Penal Code and a Code of Criminal Procedure were adopted in 1931. The 1931 Penal Code was extensively amended by a variety of laws and substantially modified by decisions of the Constitutional Court. The new Code of Criminal Procedure took effect on October 24, 1989. This new Criminal Procedure Code contains several features of the adversarial system typical of the United States.[34] Other bodies of law are from time to time unofficially compiled and published as "Codes," and particular subject areas of the law are occasionally systematized and reenacted in the form of a consolidated statute designated as a Unified Text (i.e. Testo Unico).[35] It is interesting to note that many Italian laws predate the present Constitution of 1948.

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29. COST., *supra* note 6, at art. 138. Art. 138 also provides that if on second reading the amendment is approved by a majority of less than two-thirds, the amendment must be submitted to popular referendum if within three months of their publication a demand is made by "one-fifth of the members of either Chamber or by 500,000 electors or by five Regional Councils."

30. *Id.* at art. 76.

31. *Id.* at art. 77.

32. *Id.* at art. 87.

33. M. CAPPELLETTI, *supra* note 1, at 439-52.

34. See Louis Del Duca, *The New Italian Criminal Procedure Code: Italy's Adoption of a New "Adversarial" System Marks a Historic Convergence of Civil and Common Law Systems*, 10 DICK. J. INT'L L. 73 (1992).

35. Examples include: R.D. of April 14, 1910, No. 639, (consolidated statute on the provisions of the law relating to enforcement procedures in collection of amounts due to the State and other public

Regulations may be enacted by the State, the Regions, and other public entities. State regulations are usually enacted by the Council of Ministers, which has a general power to enact regulations.[36] The power of other state agencies to enact regulations is subject to ordinary laws.[37] Individual ministers may also issue administrative decrees known as "decreti ministeriali" (ministerial decrees). These subordinate regulations may not contain provisions inconsistent with laws or regulations enacted by the Council of Ministers.[38]

The procedure for promulgating regulations usually starts with a proposal by the competent Minister upon which the Council of State, the supreme administrative court, renders an opinion. After approval by the Council of Ministers, the regulation is promulgated under the signature of the President of the Republic.

Regional laws and regulations are enacted by the regional legislatures in the subject areas delegated to them by the Constitution and Parliament.[39] European Community law may also be directly applied by Italian courts. European Community treaty provisions, regulations, and directive provisions whose time for implementation has passed will be applied by Italian judges over conflicting national law.[40] Hence, no understanding of Italian law is complete without a review of any directly applicable European Community law.

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entities, income due on public property and services, and business taxes); D.P.R. of February 13, 1959, No. 499 (consolidated statute on private insurance); R.D.L. of October 8, 1931, No. 104 (consolidated statute on fishing as amended by R.D.L. of November 4, 1938, No. 1183); R.D. of June 26, 1924, No. 1054 (consolidated statutes on the Council of State); D.P.R. of June 1959 No. 343 (consolidated statutes on traffic laws). *Testo Unico delle Leggi Sanitarie* [TULS] (consolidated statutes on health law), arts. 216-17, approved by Royal Decree no. 1265 of July 27, 1934, Suppl. Ord. Gaz. Uff. no. 186 of Aug. 9, 1934.

36. *Id.*

37. Art. 4 of the Provisions of the Law in General, Civil Code provides:

> 4. *Limits of Regulatory Authority.* Regulations (3) shall not contain rules contrary to the provisions of statutes.
>
> Regulations issued pursuant to the second paragraph of Article 3 cannot state rules contrary to those of regulations issued by the Government. (3).

38. Art. 3, Provisions of the Law in General, Civil Code provides:

> 3. *Regulations.* The regulatory power of the Government is governed by *constitutional laws.*
>
> The regulatory power of other authorities (Const. 121, 123, 128) is exercised within the limits of their authority, in conformity with particular statutes.

39. *See* notes 6-10.

40. LA PERGOLA, *supra* note 28.

IV. THE JUDICIAL SYSTEM

1. IN GENERAL

Parts of the Italian judicial system are inspired by aspects of the French model of civil and administrative courts. With respect to Constitutional review, Italy goes far beyond the French model.

The Ordinary Courts hear civil and criminal matters. They are staffed by a judiciary constitutionally guaranteed autonomy from the parliament and the government.[41] The administrative courts hear matters involving the so-called legitimate interests of interested parties in the proper administration of government. Although ordinary and administrative judicial districts are organized by region and province, all courts are part of the national government.[42]

Unlike the United States system in which administrative law issues both within the state and the federal systems are generally appealable to courts of general jurisdiction for ultimate resolution, administrative law issues are resolved in Italy by a system of administrative courts not subordinated to the "Ordinary Courts."[43] All constitutional issues raised in a civil, criminal, or administrative proceeding are referred immediately to the Italian Constitutional Court if the referring court determines that the issues are relevant to the controversy at hand and substantial.[44]

2. THE CONSTITUTIONAL COURT

Italy follows the French revolutionary ideology to the effect that judges do not make law; rather, they merely apply it.[45] In Italy, parliament, not judges, is the source of the law. Accordingly, judicial decisions do not have precedential effect in the common law sense. They instead have merely persuasive effect, magnified by the importance of the issuing court and the frequency with which courts take the same position. [46]

One court in Italy, however, has all the powers of an American court to accomplish constitutional review of laws. That court is the Italian Constitutional Court. The Constitutional Court, operating since 1956, like similar courts in Austria;[47] Germany[48] and Spain[49], is the only court competent to review the

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41. COST., *supra* note 6, at art. 101-05.

42. Law of March 31, 1899, No. 5992; Law of March 7, 1907, No. 62; Legislative Decree of May 5, 1948, No. 642 in *Gazzetta Ufficiale dellas Republica Italiana.*

43. MAURO CAPPELLETTI & JOSEPH M. PERILLO, CIVIL PROCEDURE IN ITALY 112 (1965).

44. *Id.* at 73.

45. JOHN H. MERRYMAN, DAVID S. CLARK & JOHN O. HALEY, THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 948 (1994).

46. *See* note 43 at 49.

47. B-VG art. 140. An English translation of the Austrian Constitution is found in ALBERT P. BLAUSTEIN & GISBERT H. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD Vol. I (1993).

48. GG art. 93. An English translation of the German Constitution is found in BLAUSTEIN & FLANZ, *supra* note 42, at Vol. VI.

constitutionality of laws.[50] It is composed of fifteen judges who serve nine year terms.[51] Five are chosen by Parliament, five by the President of the Republic, and five by the Court of Cassation, the Council of State and the Corte dei Conti.[52] Any court may refer a question of the constitutionality of an Italian law to the Constitutional Court. Because of what Italian jurists see as the court's quasi-legislative function in being able to declare the invalidity of laws, the court is selected one-third by the joint houses of parliament.

When a constitutional issue is raised by a party or a court in a civil, criminal, or administrative proceeding, the referring court first determines that the constitutional issue is relevant to the decision of the case and is not manifestly unfounded.[53] The issue is then referred directly to the Constitutional Court.[54] The initial proceeding remains suspended until the Constitutional Court decides the constitutional issue.[55] A decision of constitutionality does not preclude future challenges by other parties.[56]

3. ORDINARY COURTS

a) *In General* The "Ordinary Courts" exercise jurisdiction over general civil, commercial, labor, and criminal matters.[57] The "Pretori" and the Justices of Peace are the small claims lower level judges. The Tribunals ("Tribunali") are the courts of general original proceedings.[58] Appeals are taken to the Courts of Appeal ("Corte d'Appello") and heard de novo. From there, issues of law may be appealed to the Court of Cassation ("Cassazione").[59]

Under a law effective January 2, 1993,[60] the hierarchy of ordinary courts is:

Court of Cassation
Courts of Appeal
Tribunals (Both original jurisdiction and appellate jurisdiction from Pretori and Justices Of Peace)
Pretori - Justices of Peace

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49. C.E. art. 161. An English translation of the Spanish Constitution is found in BLAUSTEIN & FLANZ, *supra* note 42, at Vol. XVIII.

50. COST., *supra* note 6, at art. 134.

51. *Id.* at art. 135.

52. *Id.*

53. Art. 23, Law of March 11, 1953, No. 87.

54. *Id.*

55. *Id.*

56. Art. 24, Law of March 11, 1953 No. 87.

57. *See* note 43 at 69.

58. *Id.* at 78 (citing Royal Decree of Jan. 30, 1941, No. 12, art. 43).

59. *Id.* at 78 (citing Royal Decree of Jan. 30, 1941, No. 12, art. 65).

60. Art. 49, 50 Law of November 21, 1991 n.374 in Gazz. Uff. November 27, 1991 n.278, suppl. ord. For a discussion of the former regime *see* Louis F. Del Duca, *The Expanding Role of International and Comparative Law Studies - An Overview of the Italian Legal System*, 88 DICK. L. REV. 221 (1984).

The "Consiglio Superiore della Magistratura," is the governing body of the magistracy, which includes the judges of the Ordinary Courts and the public prosecutors.[61] This body is composed of the President of the First Section of the Court of Cassation, the "procuratore generale" (public prosecutor) of the Court of Cassation, twenty judges elected by all the ordinary judges, and ten law professors or lawyers, who have been in practice for more than fifteen years and are elected into office by Parliament.[62] The President of the Republic presides over the body.[63] This body is also responsible for promoting judges.[64] Although judges are initially appointed in a career competitive examination basis, promotions often appear to be based more on seniority than on merit. Law school graduates between the ages of twenty-one and thirty may elect to pursue a judicial career.[65] Entrance is by examination supervised by the Consiglio Superiore della Magistratura.

It should be noted that in Italy the public prosecutors are career judges.[66] They are known as "Procuratori della Republica,"[67] and in the course of their careers may alternate between judicial and prosecutorial roles.

b) *Justices of the Peace.* —Effective January 2, 1993,[68] a new law creating the position of Justice of the Peace (Giudice di pace) came into effect.[69] The Justice of the Peace is now required to be a law school graduate between the ages of 50 and 71 and preferably should be a former judge, lawyer, law school professor, police commissioner, or a high level administrator in the public sector.[70] The jurisdiction of the Justice of the Peace covers the following:[71]

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61. COST., *supra* note 6, at art. 104-05.

62. *Id.* at art. 104-06.

63. *Id.* at art. 104.

64. *Id.* at art. 105.

65. M. CAPPELLETTI & P. RESCIGNO, *Italy*, International Encyclopedia of Comparative Law, 1, 94-95, (National Reports, J.C.B. Mohr (Paul Siebeck), (1972)).

66. Art. 74, R.D. of January 30, 1941, No. 12.

67. Lawyers serving their apprenticeship are also known as procuratori, but there is no connection between the two roles.

68. *Supra* note 60. Prior to 1993 the Conciliator was the judge at the lowest level of the Ordinary Courts who sat as a single small claims judge and was not required to have a formal legal education. Cappelletti & Rescigno, *supra* note 56, at 95; Royal Decree of January 30, 1941, No. 12, art. 23. The Conciliator was charged with conciliation rather than strict application of legal norms. Jurisdiction was limited to controversies involving less than 1,000,000 lire (about $625), Codice di Procedura Civile art. 7(1). The new jurisdictional amounts are derived from Art. 1, Law N. 399 (1984), although the parties could jointly agree to permit the conciliator to decide larger cases. There were approximately 8,000 conciliators, *id.*, all of whom served without pay for three-year renewable terms. M. Cappelletti, J. Merryman & J. Perillo, The Italian Legal System, 79 (1967); Royal Decree of January 30, 1941, No. 12, art. 21. They were appointed by the Court of Appeal presiding over the area in which the conciliator sits.

69. Art. 1, 44 Law of November 21, 1991 n.374.

70. Art. 5(1)(4) Law of November 21, 1991 n.374.

71. Art. 7 C.P.C., as amended by Art. 17 Law of November 21, 1991 n. 374.

(i) Contracts for goods (i.e., movables) up to 5 million lire ($3125)[72] in cases not otherwise subject to the jurisdiction of other courts;
(ii) Tort damage cases up to 30 million lire (approximately $18,750) involving vehicles or boats;
(iii) With stated exceptions, contested administrative law cases up to 30 million lire ($18,750);
(iv) Cases involving (1) trees; (2) boundary disputes; (3) condominium disputes; (4) nuisances such as smoke, heat, gas fumes and noise;
(v) Litigation concerning administrative sanctions for drug violations;[73]
(vi) Crimes and misdemeanors punishable solely by fines as well as crimes and misdemeanors also punishable by incarceration, provided that such crimes and misdemeanors do not raise "particular difficulties" of interpretation or application.[74]

c) *Minor Judiciary* (Pretori). —The "Pretore" sits as a single judge in each of the 900 pretorial districts. Pretore are career judges who preside over various kinds of civil matters generally involving small claims of up to 20 million lire[75] and criminal matters punishable by fine or by less than four years imprisonment.[76] The Pretori have jurisdiction over labor law disputes.[77]

In order to reduce backlogs, the career Pretori are frequently supplemented by practicing attorneys and notaries[78] who are appointed on a part-time basis to serve unpaid three-year terms as vice-pretori.[79]

d) *Tribunals* (Tribunali). —The 159 Tribunals[80] are courts with jurisdiction in civil cases not handled by the Justices of the Peace and the Pretori.[81] They have exclusive jurisdiction on matters of tax,[82] personal status and capac-

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72. The exchange rate of 1600 lire per dollar was the approximate rate in November 1993 when this article was submitted for publication. All references to dollars throughout this article are based on this exchange rate.

73. Items (i) through (v) are provided for by Art. 7 C.P.C., as amended by Art. 17 Law of November 21, 1991 n.374.

74. Art. 36 Law of November 21, 1991 n.374. Art. 35 Law of November 21, 1991 n.374 provides for delegation of power to the Government (i.e., the Council of Ministers) to specify rules for the Justice of the Peace to exercise such jurisdiction. Such legislation is enacted through adoption of a "delegated legislative decree" (i.e., decreto legislativo delegato) by the Council of Ministers (i.e., the Government). *Supra* text at n.30.

75. Art. 8(1) as amended by Art. 18 Law of November 21, 1991 n.374.

76. As provided by Art. 7 C.P.P.

77. C.P.C. art. 413(1).

78. For a definition of notary, *see infra* text accompanying note 132.

79. Royal Decree of January 30, 1941, No. 12, art. 32, 34. As modified by art. 6 Presidential Decree Law of September 22, 1988 n.449.

80. Di Federico, *The Italian Judicial Profession and its Bureaucratic Setting*, 21 JURIDICAL REV. 40, 43 (1976); DiFederico, *Crisis of the Justice System and the Referendum on the Judiciary* in ITALIAN POLITICS: A REVIEW, III, at 25 (R. Leonardi and P. Corbetta eds. 1989).

81. C.P.C. art. 9(1).

82. *Id.* at art. 9. *See also* Presidential Decree Law of October 26, 1972, No. 636, art. 1, 40.

ity,[83] the authenticity of documents,[84] cases involving redress for undetermined monetary damages,[85] and execution of judgments on real property.[86]

The Tribunals exercise criminal jurisdiction over crimes not within the jurisdiction of the Courts of Assize and Pretori.[87] For criminal cases involving possible incarceration for more than twenty-four years or life imprisonment except for attempted homicide, special panels of the Tribunals called Courts of Assize ("Corti d'Assise") have jurisdiction.[88]

Until 1993 criminal and civil cases were decided by three judge panels, the number of which varies from district to district, depending on the volume of cases handled.[89] These panels are formed annually within a district, and individual judges may develop a de facto specialization in a particular matter. As in all collegial courts in Italy, however, dissenting opinions are not recorded and only one opinion signed by all judges in the panel is issued for each proceeding.[90] Within each Tribunal, special panels including lay experts decide cases involving minors[91] and agricultural disputes.[92]

Under the new law, effective January 2, 1993, each Tribunal is reconstituted into a court of two divisions. One division consists of single judges, and the other division operates with three-judge panels. A three-judge panel will, by itself, have jurisdiction over criminal law matters. In civil law cases, the three-judge panel has exclusive jurisdiction over appeals from the pretori and justices of the peace, in cases in which the intervention of the public prosecutor is obligatory, in all cases such as juvenile cases which require hearing by specialized panels, in all cases in which the proceedings are held in chambers rather than in open court, in contested and uncontested bankruptcy cases, in all actions against administrators, directors and liquidators of corporations, in cases covered by Article 784 of the Civil Procedure Code, and also in cases covered by the law no. 177 of April 13, 1988.[93] In all other cases, the tribunal may operate with only one judge per panel.

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83. C.P.C. arts. 9, 706-742.

84. *Id.* at arts. 9, 221-227; The "querela di falso" procedure (governed by articles 221-227) challenges the validity of a "public act", or authentication of a private writing by a public notary (i.e. notaio).

85. *Id.* at art. 9.

86. *Id.* at art. 16.

87. Art. 6 C.P.P.

88. Art. 5 C.P.P. providing also for specified subject matter jurisdiction.

89. Royal Decree of January 30, 1941, No. 12, art. 48.

90. *See* note 45 at 1020.

91. Royal Decree of January 30, 1941, No. 12, art. 50.

92. Legislative Decree of April 1, 1947, No. 273; Law of June 25, 1944, No. 353; Law of June 3, 1950, No. 392; Law of July 11, 1952, No. 765; Law of March 28, 1957, No. 244.

93. Art. 48 of Reg. Dec. January 30, 1941, No. 12 as modified by Art. 88 of Law November 26, 1990 n.353 in Gazz. Uff. December 1, 1990 n.281, ord. suppl. n.76.

e) *Courts of Appeal* (Corti d'Appello). —In addition to their appellate jurisdiction over all matters within the jurisdiction of the Tribunali, Courts of Appeal have original jurisdiction over cases involving recognition of a foreign judgment.[94] The twenty-three Courts of Appeal also work in three judge panels.[95]

Criminal matters that may involve more than twenty-four years imprisonment are decided by the Courts of Assize (Corti d'Assise), special panels of the Tribunals, and on appeal by special panels of the Courts of Appeal called Courts of Appeal of Assize.[96] The special panels, both in the Tribunals and Courts of Appeal, consist of two professional judges, one of whom serves as president of the panel, and six lay judges.[97] Lay judges must have graduated from secondary school and be between thirty-five and sixty-five years old.[98] The professional judges are generally responsible for drafting the court's opinion.

Unlike jurors in the common law system whose role is limited to fact finding, the civil law lay judges not only make findings of fact, but also apply and interpret the law. Although the six lay judges have the voting power to override the views of the two career professional judges, this rarely happens.[99]

f) *Court of Cassation* (Corte di Cassazione). —The Court of Cassation is the highest "Ordinary Court." Its purpose is to insure the unity and uniformity of national law and to regulate conflicts of jurisdiction.[100] Unlike the Courts of Appeal, only questions of law may be appealed to it,[101] and its decision is legally binding on the lower court which receives the case on remand.[102] Under the new law, effective January 2, 1993 the Court of Cassation in civil cases will have the final decision in the merits where no additional findings of fact are required.[103] In criminal cases, where a conviction is overturned the court in ten

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94. C.P.C. art. 796.

95. Art. 56 of R.D. January 30, 1941, No. 12, *amended by* Law of August 8, 1977, No. 532 art. 1.

96. Art. 596 C.P.P.

97. Art. 3 of Law of April 10, 1951, No. 287, *amended by* Decree-Law February 14, 1978, No. 31, art. 1, converted into Law of March 24, 1978, No. 74.

98. Art. 9 of Law of April 10, 1951, No. 287.

99. Although no study of possible differences between professional and lay judges in deciding cases in the Italian legal system has been found, interesting studies of the German system are available. *See* Casper and Zeisel, *Law Judges in the German Criminal Courts*, 1 Journal of Legal Studies 135 (1972); Casper and Zeisel, Der Laienrichter im Straiprozess (1979). A study of Austrian lay judges was reported in Frassine, Piska, Zeisel, Die Rolle der Schoffen in der Osterreichischen Strafgerichtsbarkeit (1970).

100. Art. 65 of R.D., January 30, 1941, No. 12. The court regulates jurisdiction conflicts among the ordinary courts as well as those between the administrative and the ordinary courts.

101. C.P.C. art. 360.

102. C.P.C. art. 384 provides that "When the court remands a case because of error of law, the lower court is bound by its ruling of law."

103. As provided by article 384 of the civil procedure code, modified by article 66 of Law November 26, 1990 n.353 in Gazz. Uff. December 1, 1990 n.281, ord. suppl. n.76.

enumerated situations is also granted power to make a final decision without remanding the case to the lower court.[104] The right of appeal to the Court of Cassation is constitutionally guaranteed with regard to final judgments and certain intermediate orders affecting personal liberties.[105]

The Court of Cassation currently has 698 members made up of four supervising officials (First President, General Prosecutor, Magistrate of Public Waters, and First Consigliere), 108 Presidents (of five-member panels) and 586 Counsellors and Associate Judges, and is divided into five judge panels.[106] There are four civil sections and six criminal sections. In certain types of cases representatives of all the civil panels or all the criminal panels may sit together[107] on a panel composed of nine civil or nine criminal law judges.[108]

4. ADMINISTRATIVE COURTS

The administrative courts are composed of judges who are part of the executive rather than the judicial branch of government. Each of the twenty regions has an administrative court (tribunale amministrativo regionale, referred to as T.A.R.) with jurisdiction over administrative actions arising in that region. Because of the increased work volume resulting from the location of the national government in Rome in the region of Lazio, there are five sections in the regional administrative court of Lazio. Other regions which have an additional

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104. This power applies where:

1) The accused's action is not considered a crime by the law, or the statute of limitations has run for the crime charged, or no charges should have been filed.
2) A military court rather than the ordinary court has jurisdiction.
3) A foreign court rather than the ordinary court has jurisdiction.
4) The verdict of conviction was obtained without adhering to procedural requirements of law.
5) The decision is void because specific charges were not timely filed.
6) The decision is void because notice was not given to the defendant regarding new relevant fact discovered during the proceedings.
7) The conviction was based on mistaken identity.
8) The person convicted was previously acquitted of the same charge.
9) The conviction is issued by a judge of appeal in a case where appeal was not allowed in such a case.
10) The Court deems it superfluous to remand the case. In such a case the court may impose the sentence. See article 620 of the new Criminal Procedure Code.

105. COST., *supra* note 6, at art. 111(2).

106. Art. 67 of R.D., January 30, 1941, No. 12.

107. Under C.P.C. art. 374 joint sections sit in cases dealing with jurisdictional issues involving the so-called "ordinary courts" (*supra* note 48 et seq.) - See C.P.C. art. 360 n.1, or cases dealing with jurisdictional issues involving special courts such as the administrative courts (*infra* notes 103-110). See C.P.C. art.362. Joint sessions also sit in cases of conflict of jurisdiction between ordinary and special courts. C.P.C. art. 362. Under C.P.C. art. 374 joint sessions also hear: (a) petitions raising matters of law decided differently between five judge panels and (b) petitions raising matters of the most "serious importance".

108. Art. 67, R.D., January 30, 1941, No. 12.

section in their administrative court are: Lombardia, Trentino-Alto Adige, Emilia-Romagna, Abruzzi, Campania, Calabria, Puglia and Sicilia.[109]

The selection of administrative judges, like ordinary judges, is on the basis of educational qualifications and competitive examination as required by the legislation creating the regional courts and the Council of State. All administrative law judges must be graduates of an Italian law school. However, they need not be members of the practicing bar.[110]

The Council of State (Consiglio di Stato), which serves as an advisory body on administrative matters, is also the supreme administrative court and is divided into six sections. Three of these sections hear appeals from the lower administrative courts. Three of them provide advisory opinions, some of which are binding, to government ministers.

The membership of the Council consists of one hundred eleven administrative judges, whose advisory functions are performed by three sections and the General Assembly of the Council.[111] The General Assembly consists of all one hundred eleven magistrates except for those who either preside or are otherwise assigned to the regional administrative courts. The judicial functions of the Council are performed by thirteen magistrates who constitute the "Plenum" of the Council and three sections of the Council.[112]

The criteria for allocating jurisdiction between the ordinary courts and the aforesaid administrative courts are theoretical. The basic idea, however, is that the ordinary courts have jurisdiction over controversies involving vindication of "subjective rights," i.e., rights of a particular person. Conversely, administrative courts have jurisdiction over cases brought by individual plaintiffs when such cases serve to vindicate the individual's "legitimate interest" in assuring that collective rights are respected.[113] For example, a job applicant's suit to invalidate the results of a competitive examination for public employment because of alleged improprieties would involve protection of the public interest in

109. Art. 1, Law of December 6, 1971, No. 1034.

110. Art. 14-20, Presidential Decree-Law, April 21, 1973, No. 214; Art. 9-18, Law of December 6, 1971, No. 1034 for the Tribunali amministrativi regionali; R.D. of June 26, 1924, No. 1054; R.D. of Pril 21, 1942, No. 444; D.P.-L. of September 29, 1973, No. 579 for the Council of State; G. LANDI & G. POTENZA, MANUALE DI DIRITTO AMMINISTRATIVO 479 (1978).

111. GUIDO LANDI & GIUSEPPE POTENZA, MANUALE DI DIRITTO AMMINISTRATIVO 367 (1978).

112. *See* R.D. of June 26, 1924, No. 1054 *amended by* Laws of October 23, 1924, No. 1672; February 8, 1925, No. 88; May 6, 1948, No. 654; December 21, 1950, No. 1018; December 6, 1971, No. 1034. *See also* R.D. of April 21, 1942, No. 444; D.P.-L. of September 29, 1973, No. 579; COST., *supra* note 6, at art. 100.

113. P.VIRGA, LA TUTELA GIURISDIZIONALE CONFRONTI DELLA PUBBLICA AMMINISTRAZIONE 19 (1982); *see also* CONST. at art. 103.

maintaining an appropriate examination system, as well as protection of the individual's "legitimate interest."[114]

The administrative courts have the power to annul or modify administrative acts found illegal.[115] In some cases they can evaluate the substantive merit of the administrative act.[116] In contrast, when a subjective right is involved and an action against the public administration is brought in an ordinary court, the power of the ordinary court is limited to setting aside the application of the administrative act to the particular case and awarding damages.[117]

There are a number of other special administrative courts. The most important is the "Corte dei Conti," whose primary functions are review of public finances, auditing, and prosecution of misconduct regarding public assets.[118]

V. LEGAL PROFESSIONS

As in most civil law countries, choice of a particular legal career is normally made on graduation from law school. Career choices include law professor, lawyer, notary, state attorney, magistrate (which includes civil judges and prosecutors), and administrative judge. Specialized training, apprenticeship, and examination are required for each of these categories. Rarely will a person change from one career category to another in mid-career.[119]

In 1991-92, the thirty-three law schools in Italy had 257,190 students of which 135,911 were women.[120] As is true in most civil law countries, only a small percentage of students enrolled will complete their law studies. Even smaller percentages meet the additional requirements for eligibility to practice law.

All Italian law schools are state law schools except for the Sacred Heart Catholic Universities in Milan and the Pontifical University for Canon Law in Rome and the Libera Universita Internazionale Studi Sociali (LUISS) in Rome.[121] The University of Rome La Sapienza Law School, with 20,392 students, is the largest.[122]

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114. Regarding the distinction between "subjective rights" and "legitimate interests," see G. LANDI & G. POTENZA, MANUALE DI DIRITTO AMMINISTRATIVO, 144-65 (1978). *See also* COST., *supra* note 6, at art. 113.

115. COST., *supra* note 6, at art. 113.

116. R.D. of June 26, 1924, No. 1054, art. 27. Law of Dec. 6, 1971, No. 1034.

117. Art. 4, Law of March 20, 1965, No. 2248.

118. *See* R.D. of July 12, 1945, No. 1214 *amended by* R.D. of June 28, 1941, No. 856, D.L. of May 4, 1958, No. 589; D.L. of May 6, 1948, No. 655; D.L. March 21, 1953, No. 161; D.L. March 21, 1958, No. 259; D.L. December 20, 1961, No. 1345; October 13, 1969, No. 691.

119. *See* note 45 at 842; G. LEROY CERTOMA, THE ITALIAN LEGAL SYSTEM 43 (1985).

120. Istituto Italiano Statistica, Statistiche dell 'Istituzione Universitarie, page 9 (1992). For an earlier review of the Italian Legal Professions *see* Louis F. Del Duca, *The Expanding Role of International and Comparative Law Studies - An Overview of the Italian Legal System*, 88 Dick. L. Rev. 221 (1984).

121. *Id.*

122. *Id.* at 10.

Law schools are the most popular faculty in Italian universities.[123] Unlike the system of selective admission used in the United States law schools, admission is granted to all Italian students with a secondary school diploma.[124] This is also the usual procedure in most European civil law countries where the screening process occurs subsequently through the examination procedure, i.e., many students never move beyond the first years of study.

The academic program, consisting chiefly of a series of lecture courses and a thesis supplemented by tutorial small group sessions led by younger assistants to professors, is designed to be completed in four years.[125] However, of the 14,276 law graduates in 1992 (including 7,157 women) only 1,664 (which included 830 women) had completed their studies in four years.[126] Only a small fraction of students actually attend classes. Exams are mostly oral and stress mastery of doctrine. Although students may repeat exams as many times as they desire until they receive a satisfactory grade, and although usually only the final grade is recorded,[127] only a small percentage of students enrolling actually graduates.

The teaching staff in Italian law faculties consists of 2,852 persons, of which 863 are tenured professors.[128] There are 355 associate professors, 255 researchers, and 355 tenured assistants. Most law professors also practice law. To achieve the very prestigious rank of professor, a law graduate has traditionally found a professor who will accept him or her as an unpaid assistant.[129] After a number of years under the professor's tutelage, the assistant can hope to win a professional post in national competitions based principally on evaluation of the assistant's publications.[130]

To become a lawyer, a law graduate must serve a two year apprenticeship in the office of a lawyer.[131] After a two-year apprenticeship, the law graduate is qualified to take a state examination to qualify as a Procuratore,[132] successful

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123. *Id.*

124. Art. 1, Law of December 11, 1969, No. 910. For a discussion of admission procedures for various types of secondary school graduates, *see* A.M. Sandulli, MANUALE DI DIRITTO AMMINISTRATIVO 722-25 (11th ed.).

125. By way of example, courses required at the University of Florence include: Public Law, Private Law, Roman Law, Political Economy, The Philosophy of Law, History of Italian Law, Civil Law, Administrative Law, Commercial Law, Constitutional Law, Criminal Law, Civil Procedure, Criminal Procedure, Labor Law, International Law. Elective Courses include: Bankruptcy, Tax Law, Administrative Procedure, Criminal Law II, Comparative Law, European Community Law.

126. Istituto Italiano Statistica, Ann. Stat. Ital. p. 10 (1992), *supra* note 111.

127. For a discussion of these features of Italian legal education, *see*, *supra* note 1, at 86-91.

128. *Supra* note 126, at 144.

129. Perillo, *The Legal Professions of Italy*, 18 J. LEGAL ED. 274, 275 (1966).

130. *Id.*

131. Art. 2, Law of July 24, 1985, n.406. *See* Azzolina, *L'avvocatura nella giurisprudenza*, 139 Pavado (1974).

132. R.D.L. December 27, 1944, No. 1578, converted into law of January 27, 1934, No. 36 as modified by D.L.L. September 7, 1944, No. 215. *See* Azzolina, *supra* note 121, at 151-53.

completion of which entitles him or her to practice law within the territorial district of the court of appeal where he or she resides.[133] A procuratore is limited to representation in certain areas.[134] There are two methods by which a Procuratore can become an Attorney. The first one is simply by practicing more than six years as Procuratore.[135] The second one, more rapid but rarely used, is the successful completion of a state examination after two years of practice as procuratore.[136] An additional eight years of practice is required for admission to practice before the highest courts.[137] There are about 60,000 avvocati and procuratori in Italy.[138]

The Bar Association fixes allowable fees for procuratori and avvocati.[139] Contingent fees are forbidden,[140] although avvocati may by agreement charge fees above the allowable fees. Losers in litigation are required to reimburse the winner for counsel fees.[141]

Notaries (Notaii) are responsible for drafting and authenticating important legal instruments including wills, corporate charters, conveyances, and contracts.[142] To become a notary, a law graduate attends a Notary school for two years, such as those in Naples, Rome or Florence, serves an apprenticeship with a notary for two years and then must pass a difficult national examination.[143] Each notary is assigned a specific territory[144] and must deal with all who require his or her services.[145] Fee schedules are fixed by law.[146] In 1989, there were 5,184 notaries.[147]

State attorneys (Avvocatura dello Stato) represent the state and most state organs, including governmental corporations.[148] Generally, three years experience as a procuratore is the prerequisite to sit for the competitive entrance examination.[149]

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133. Art. 5, R.D.L. December 27, 1933, No. 1478, converted into law of January 27, 1934, No. 39. In 1986, of 9,407 persons who took this examination, 189 passed. See ISTITUTO ITALIANO STATISTICA, PROSPETTI STATISTICI PROFESSIONALI (1989).

134. *See* Azzolina, *supra* note 131, at 53.

135. R.D.L. November 27, 1933, No. 1578, art.29.

136. *Id.*

137. Art. 4(2), R.D.L. December 27, 1933, No. 1578, converted into law of January 27, 1934, No. 36.

138. Carta Avvocati 1992.

139. *See* Perillo, *supra* note 129, at 282. *See also* Azzolina, *supra* note 118, at 304-09.

140. *Id.*

141. *Id.*

142. Perillo, *supra* note 129, at 286-89.

143. GIULIANI, LE SCUOLE DI NOTARIATO (1965); MORELLO, LE SCUOLE DI NOTARIATO (1972).

144. *Id.*

145. *Id.*

146. *Id.*

147. Carta Avvocati 1992.

148. Perillo, *supra* note 129, at 285-86.

149. *Id.*

VI. CONTINUING EVOLUTION OF THE ITALIAN LEGAL SYSTEM

An ancient and historically complex amalgamation of cultures is reflected in modern Italy. But paradoxically, Italy in many ways is a young country. When Rome became the capital of a newly unified Italian state in 1870, the United States had already dedicated almost a century of efforts (including a great war among its constituent states) to the cause of nation-building. Moreover, Italy's legal culture long predates its status as a nation. And, its cultural roots are by no means uniform. For example, the civic traditions of the city-state republics of medieval and Renaissance Italy (Florence, Genoa and Venice, to name but three) differ greatly from the bureaucratic centralism adopted to run southern Italy from the imperial city of Naples.[150]

Lawyers were important in the early development of the Italian state, and they were influenced by the then state-of-the-art notions of Napoleonic codes and administrative centralism already current in southern Italy. Although the Italian jurists attempted to import and create the best of legal tools for the purpose of building an Italian society, they were limited by the constraints of the era in which they lived. Universal suffrage, constitutional protection of minority rights and much more of the good things characteristic of contemporary Italy did not arrive in time to prevent the debacle of Fascism.

The post-World War II Italian constitution attempted to remedy many of these failings. Among the guarantees of democracy offered were the "rigid" nature of a constitution which for the first time permitted amendment only by procedures above and beyond passage of ordinary legislation; an independent judiciary; a constitutional court with authority to strike down laws which conflicted with the constitution; the possibility of "regionalizing" Italian government; a system of voting to insure that all parties participated in Parliament in proportion to their popular support; and a host of "guaranteed" rights broader in scope than our own bill of rights (e.g., the rights to health, to work, etc.). In the forty-five years since the adoption of the 1948 constitution, much that is good has happened in Italy. Italy can be proud, among many other achievements, for having developed one of the world's most successful economies and maintaining the rule of law. Respect for due process and the rights of the accused have been protected in the face of terrorist challenges of the sort that have led to revolution, civil war, authoritarian rule and anarchy in other countries. However, even before the recent revelations of massive corruption throughout much of the Italian political leadership, there was a growing consensus that Italy needed new legal and political institutions.

What shape the reforms will take is difficult to foresee. Some, such as the withdrawal of the Italian state from its massive ownership in the private sector, or the conversion to a "first past the post-voting" system more likely to produce

150. *Supra* note 9.

an alternation in power of political parties, have already begun. It is also clear that some elements of the present system will survive. Indeed, the Italian judiciary, understood in the broad sense of the corps of magistrates (sitting criminal and civil judges and prosecutors), the administrative judges and the constitutional court have as a group been one of the most consistently active and successful components of the Italian state. Further development of Italy's regions is also likely. As Professor Putnam's research has found, although the experiment of regional government has fared best in those regions with the traditions of local self-government and broad participation in civic life, in all of Italy's regions the allocation of significant governmental responsibilities to the regions has resulted in the development of a new and more responsive political system.[151] The juxtaposition of the often activist judiciary and the government of those regions which have flourished with the all too often sclerotic and clientelist public administration of the Italian state, has been striking.

Italy is without doubt a country to watch. The basic elements of its legal system reviewed in this article—its constitutional system, judiciary and legal professions—are relevant to understanding what has happened in Italy since the end of the last war and to anticipating the developments forthcoming in the near future. Although there will be significant change, it will build upon the legal institutions and professionals described in this article.

151. *Id.*

The Reformed Italian Code of Criminal Procedure: What Happened to Its "Accusatorial Soul", Five Years After Its Adoption?

BY: DONATELLA CUNGI*

First of all, let me deeply thank Professor Malloy for having invited me to Syracuse University, the College of Law to host this friendly talk, and you, above all, for having decided to spend some time here.

Let me start with a provocative thought. We are here today because a significant judicial revolution is occurring all over Europe. Do you think, as Americans, you should be mere spectators to this process or rather, do you think it may somehow affect American legal and philosophical thought? What are the implications of such a reform in the everyday lives of Italians and Americans?

Allow me to make one point clear with which I am sure you are familiar. Most of the countries in Europe have a so-called civil law tradition while the United States, like the United Kingdom, has a so-called common law tradition. In the area of criminal procedure, a civil law judge participates (from a semantic point of view, the use of this word means that he is a party) in the process of gathering the evidence, because the aim of the trial is to ascertain the truth (we have the binomyus "justice and truth"). In the common law adversary system, the central determination is instead whether the prosecution can prove the accused guilty beyond any reasonable doubt. The judge preserves his "thirdness" (a word taken from the semiotic "dictionary"), for example, by not being familiar with the pretrial file.

The protection of the defendant's rights in the United States is considered to be a more important issue than the finding of the truth. While in Italy, it is not inconsistent with a defendant's rights to find the truth. We will come back to this important issue, later, since I am referring to the pre-trial detentions we are presently facing in Italy to obtain confessions.

Another main difference between the two systems is that in the civil law tradition prosecution is mandatory, whereas in the common law adversary system it is discretionary.

As you certainly know, the civil law countries have their system of law codified. This means that the laws and rules covering a particular area or subject of

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law have been collected and arranged systematically. The principal codes of a civil law country, particularly if they have been in effect for sometime, form the paradigmatic matrix of its legal system and culture.

The various functionaries of the law, such as lawyers, judges, prosecutor, police, etc., tend to be familiar and comfortable with such a matrix, and generally do not welcome drastic changes or reforms in the codes. When Italy, a civil law country by tradition, recently reformed its Code of Criminal Procedure by injecting certain Anglo-American concepts and procedures, in addition to other technical changes, the Italian law functionaries resisted these changes to their legal culture. This was true especially while large-scale Mafia and organized crime trials were in progress.

In short, a government can not, with a stroke of a pen, change the paradigms of its legal culture. Unless the underlying attitudes of the people demand change, reformation of the code is ineffective.

As I have tried to point out before, it is well known that the Anglo-American system of criminal procedure is characterized as accusatorial and adversarial, while the civil law tradition of criminal procedure is characterized as inquisitorial. Italy is a civil law country, and until 1989, Italian criminal procedure was regulated by a typical inquisitorial Code of Criminal Procedure.

In 1989, Italy decided to reform its Code of Criminal Procedure. In order not to shock those functionaries I mentioned above, the reformers imported some of the principles of the accusatorial system, but decided not to infringe upon any of the basic constitutional principles regulating Italian criminal procedure. This merger of the two traditions (adversary-non adversary systems) has been referred to as "an accusatorial soul in a European body."[1]

This experiment of reforming the Code by injecting certain accusatorial elements into the Italian Civil Law system, required courage on the part of Italian law makers, as the reformation received staunch opposition. In fact, there are some constitutional principles in the Italian law system that are inconsistent with a pure accusatorial system. For example, again, prosecution for all crimes is mandatory in Italy.[2] Prosecutors, at least in theory, have no discretion in dropping cases when there is sufficient evidence that a crime has been committed. Given the particular facts, as recorded in the pretrial investigation file, the prosecutor can only charge the accused with the crime arising from such evidence and no other. For the same reason, the Italian prosecutor has no power to prosecute selectively.

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1. Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 TEMP. L. REV. 1211, 1212 (1989); Professor Ennio Amodio is professor of criminal procedure at the University of Milan (Italy) and has been one of the members of the last ministerial commission on criminal procedure (Pisapia Commission).

2. *See* ITALIAN CONSTITUTION (hereinafter COST.) Article 112.

One of the fundamental issues of the adversarial model (that the Italian law makers meant to import) is that prosecutor and defense counsel should be equal in front of a neutral fact-finding judge. The prosecutor in Italy, however, is still a magistrate, and enjoys the same guarantees of independence as well as the same powers constitutionally granted to judges. Prosecutors and judges are both part of the corps of magistrates (which we call *magistratura*) and individuals may be assigned, during their career, from a prosecutor to a judgeship and vice versa.[3] Because the defense attorney is not a magistrate, the prosecutor and the defense attorney still are not on the same footing, as the reform intended.[4] The issue of the role of the prosecutor has become a main topic of discussion at almost every legal meeting, but it seems that the solution has nothing to do with the legal principles, and has to be found in the political arena. This means that the power presently granted to the prosecutors (being part of the *magistratura*) could be modified and reduced if they would become anonymous parties like the defense counsel.

Another major difference with the Anglo-American system is the issue of the trial. In the civil law tradition, the goal is not to prove the accused guilty beyond a reasonable doubt, but rather, to ascertain the truth.[5] The truth-seeking process is left to the judge and depends upon his even-handed initiative.[6] Thus, the judge must use his unfettered discretion (*libero convincimento*)[7] in the evaluation of the evidence admitted at the trial.

Today, after five years of the Code's enforcement, it is time to evaluate whether or not the reform has succeeded. It may be of some interest to inquire whether or not a real reform has even taken place.

Allow me to give you a rough overview of how Italian lawmakers arrived at this Code of Criminal Procedure and mention some of the major changes it brought.

As I told you before, Italy, like the other civil law countries, has a codified system of law (The four main codes are: the code of civil law, civil procedure, criminal law and criminal procedure). The new Code of Criminal Procedure

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3. *See* COST. Article 107; *see also* Louis F. Del Duca, *An Historic Convergence of Civil and Common Law Systems - Italy's New "Adversarial" Criminal Procedure System*, 10 DICK. J. INT'L L. 73, 75 n.5 (1991).

4. A recent decision of the Italian Supreme Court held that the prosecutor in charge of the preliminary investigation is entitled to find all inculpatory as well as exculpatory evidence. Thus, the prosecutor is not considered a party, but rather a fact-finder resembling more a judge, rather than a party. CORTE CASS. n. 3066/92. Recently, Mr. Cusani, the first "excellent defendant" of Tangentopoli ("Clean-hands" investigation), has filed a complaint against Mr. A. Di Pietro, the most famous Italian Prosecutor. Mr. Cusani has accused Mr. Di Pietro of not disclosing and actually hiding the exculpatory evidence he had found during the pre-trial investigation.

5. *See* CORTE COST. 3.26.1993 n. 111; CORTE CASS. 11.21.1992.

6. Martin Marcus, *Above the Fray or Into the Breach: The Judge's Role in New York's Adversarial System of Criminal Justice*, 57 BROOK. L. REV. 1193, 1194 (1992).

7. The judge's freely (unfettered) developed conviction and interpretation of evidence.

was approved on September 22, 1988 by the President of the Italian Republic,[8] and came into effect on October 24, 1989. It represents the first major change in the Italian system of codification since after the Second World War. The reluctance to drastically revise the code may be attributed to the fact that "in the criminal procedure the freedom of the citizen is much more involved and needs more protection."[9]

The former Code of Criminal Procedure, known as Code "Rocco" after the name of the Minister of Grace and Justice of the time, was enacted during the 1930's and contained all the inconsistencies of the Fascist era. This Code, however, continued to apply in post-war Republican Italy. Under the Code Rocco, during pretrial investigation, evidence was gathered solely by the prosecutor, and recorded in the *dossier* under judicial supervision. The dossier was the primary source of evidence for the investigating judge as well as the trial judges. They relied on it for questioning the witnesses and the defendants, and did not rely on the parties to develop the facts of the case.[10]

A dossier contained all the records and materials collected during the investigative phase. The dossier was put together, with the aid of the judicial police, by the prosecutor and the investigating judge (*giudice istruttore*).[11] It should be noted, however, that this dossier was confidential, and it was made only available to defense counsel just before the trial began.

Before the trial began, the trial court studied the dossier in order to obtain a proper understanding of the case. The study of the dossier was intended to aid in the "search for truth," because the court was supposed to have its own understanding of the case, and should not be misled by the presentations made by the different parties at the trial. In many cases, this resulted in a *de facto* bias against either the prosecutor's or the defendant's presentation. As it is presently, the trial phase was public and the entire proceeding was subject to the principle of orality. Under the provisions of the old Code, the presiding judge would completely conduct the trial orally. He would do this by reviewing the evidence against the accused based on the contents of the dossier and by calling and questioning the witnesses. Both prosecutor and defense counsel, respectively, only had the opportunity to reinforce or dispute evidence. In reality, the court had sometimes already made a decision based on its prior study of the dossier.

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8. D.P.R. 22.9.1988 n. 447

9. G.D. Pisapia, *Lezioni sul Nuovo Processo Penale*, GIUFFRE (1990).

10. Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L. J. 240, 266 (1977).

11. The judicial police is a branch of the police force which conduct investigations and aid the magistrates. COST. Article 109.

In order to avoid some of these abuses[12] resulting from the Code Rocco's inquisitorial mentality, great Italian scholars have several times in the past tried to reform the Code of Criminal Procedure. The first important attempt at reform was conducted by Professor Carnelutti (who headed a ministerial commission formed for this purpose) in 1963.[13] This ministerial commission pointed out some of the outrageous limitations on the rights of defense contained in the Code Rocco, and suggested profound structural changes that were intended to bring the Code of Criminal Procedure out of the dark-age of the inquisitorial system. Italy, however, was not ready for a criminal procedure system other than the inquisitorial one, and this study did not succeed. It should be remembered, however, that a large part of the Code Rocco had already been modified in 1955 following the suggestions of another ministerial commission.[14] Nevertheless, we can not call those modifications a reform, because they were more technical changes and did not affect the entire philosophical approach of the inquisitorial system of criminal procedure.

In 1974 the Italian Parliament approved the first *Legge Delega*[15] to reform the Code of Criminal Procedure. After the draft was finished, however, it was not enacted into law because of the great social and crime problems Italy (like most other parts of Europe) was facing in the 1970's. Crime of all types (especially acts of the terrorist group *Red Brigade*) was undermining the political order, and at that time, it was felt too dangerous, for the sake of the security of the State itself, to abandon the inquisitorial system. Stated another way, it was thought to be too dangerous to take away complete control of the criminal proceedings from the judicial power.[16]

On February 16, 1987, the Italian Parliament approved another Legge Delega[17] and created another ministerial commission to reform the Code of Criminal Procedure. This commission was headed by Professor G.D. Pisapia (Commission Pisapia). Finally, in 1988, when Italy's political situation had stabilized, its economy had become stronger, and the people's faith in the govern-

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12. Such as the inequality between the parties, particularly the inability of the defense to put its findings into the dossier; the Court's dossier-oriented bias; and the impossibility to cross-examine a witness previously interrogated by the court.

13. This pioneer work was called by the author himself "just a draft."

14. The so-called Commission Tupini (after the name of the person who headed it).

15. The legislation which enables the government to prepare a draft conforming to the instructions given to it by the Parliament.

16. In fact, even though at the beginning of the 70's there was a clear trend in favor of greater personal guarantees, because of the political and social situation, Italy ended by outrageously extending the period of pre-trial detention and the use of search and seizure. The police officers were given great powers that were often abused. All this was done in the name of "internal security," but abuses created a general impression of judicial arrogance. *see* Lawrence J. Fassler, Note, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, COLUM. J. TRANSNAT'L L. 245 (1991).

17. Law 16.2.1987 n. 81.

ment had been restored, the new Code of Criminal Procedure was enacted by the Parliament and approved by the President of the Republic. It became the law of the Republic on September 22, 1988 and went into effect on October 24, 1989.

Unfortunately, soon after the reforms took effect, a series of very important proceedings addressing the newly formed criminal procedures involved the very foundation of the Italian social system and endangered the stability of the State itself. This is the situation we should consider today, because this is the climate that has some believing the reform to be a failure.

Putting aside the preliminary investigation phase we have touched upon before, already, allow me to give you a sample of the main changes Italy has experienced in her criminal procedure by examining another important phase.

THE CLOSURE OF THE PRELIMINARY INVESTIGATION PHASE

When the preliminary investigation, conducted by the prosecutor with the help of the judicial police, is over[18] the prosecutor today has basically two choices: either to drop the case (*archiviazione*)[19] or to initiate a prosecution (*esercitare l'azione penale*).

Following the principle of mandatory prosecution still present in Italy, the prosecution is only entitled to ask the G.I.P. (Judge of the preliminary investigation) for an order to drop the case when there is: 1) inadequate evidence to pursue the case, 2) the evidence does not show that a crime has been committed, 3) the statute of limitation applies,[20] or 4) when the crime was committed by an unknown person not identified during the six month investigation.

The G.I.P. has three different options. First, he may grant a judicial order to drop the case or set a hearing held *in camera*. Second, at the end of this hearing he may ask the prosecutor to conduct a new investigation.[21] Third, the G.I.P. may force the prosecution to lodge a formal criminal charge.[22] Once the formal charge has been filed by the prosecutor, the G.I.P. will set a date for the preliminary hearing.[23]

Once the prosecutor has decided he has sufficient evidence against the accused, he will initiate the prosecution by asking the G.I.P. either to grant one of

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18. 2 C.P.P. Article 405; Generally this period is within six months from the inscription of the suspect's name in the court register. This term may also be renewed up to a maximum of eighteen months.

19. *See supra* text accompanying note 2.

20. C.P.P. Articles 408, 411.

21. The G.I.P. may require development of relevant facts, may introduce an issue neither side has chosen to address, or may point out an inadequately developed issue.

22. C.P.P. Article 409; Even though the prosecutor does not consider that the file justifies filing a formal charge.

23. CORTE CASS. Sez. 1.5.3 1991, *Romani.*

the simplified proceedings[24] or to grant a preliminary hearing. If the preliminary hearing is granted, the judge will decide whether the charges are consistent with the probative material gathered and, as a consequence, whether or not to send the case to trial.[25]

Unlike the Anglo-American preliminary hearing, the Italian version is basically a review by the G.I.P. of the probative material in the prosecutor's "raw file."[26] Consequently, when the prosecutor requests a preliminary hearing, he must deposit in the G.I.P. office the file compiled during the investigation. This "raw file" contains all the written reports, documents, and other types of evidence collected. At this stage, the defense has the right to receive a legal notice within ten days before the preliminary hearing takes place that this file has been deposited with the office of the G.I.P. This provides the defense attorney with the opportunity to see the complete contents of this raw file and to make copies of all the documents.[27] Through this process, the defense is given the opportunity to discover the substance of the prosecution's case and may gather enough information to mount a defense.

As the Italian Constitutional Court has pointed out,[28] the preliminary hearing's primary function is to afford the defendant the right to have the finding reviewed by a judge to establish whether probable cause[29] exists which would warrant the filing a criminal charge against the defendant. Because there is no objective standard for probable cause, the defendant may waive this right and decide to forego the preliminary hearing and go directly to the trial stage by asking for a *giudizio immediato*[30]

Another benefit to the defense of the preliminary hearing is, at least in theory, an opportunity to determine whether the prosecutor has gathered some exculpatory evidence. But this, unfortunately, is almost never the case.

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24. C.P.P. Article 438.

25. This proceeding is quite different in the *pretorile* procedure, where the prosecutor, at the end of the preliminary investigation, will refer to the G.I.P. only in cases that he would ask for *archiviazione*. If the prosecutor decides instead to institute a prosecution, there will be no preliminary hearing and he will issue the order to go to trial and will have to serve it on the defendant.

26. The raw file is the one the prosecutor puts together during the preliminary investigation. It contains all the evidence gathered, including those non admissible at the trial such as transcript of statements made without the presence of counsel or of invalid wiretapping.

27. C.P.P. Article 419.

28. CORTE COST. 305.1991, *Battaglini,* in Cass. pen., 1991, II. 242-243.

29. In Italy, there is no objective standard of probable cause because of the principle of the "free convictions of the judge" Lawrence J. Fassler, Note, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, COLUM. J. TRANSNAT'L L. 245, 263 n.122 (1991).

30. 5 C.P.P. Article 419; Immediate trial is available when a) the defendant gives up his right to a preliminary hearing (This option is sometimes chosen to prevent the disclosure of the strategy the defense wants to pursue at the trial.), or b) the prosecutor has strong evidence and has already interrogated the defendant. These options are not available, however, in a proceeding before the *Pretore* because here, in order to have an expedited trial, the preliminary hearing is ordinarily skipped and granted only if required.

If during the preliminary hearing the prosecutor should realize that the evidence which supported a particular charge actually supports another, he may modify the original charges and, at this time, file the new charges against the defendant. If the defendant is not present at the preliminary hearing (a defendant has the right to be present or not), the new code gives the prosecutor the power to notify his defense attorney of the modified charges.[31]

During the preliminary hearing, the prosecutor briefly shows the results of the preliminary investigation and the facts supporting the request to go to trial. The defendant, when present, can always ask to be interrogated by the judge. If witnesses are called to the preliminary hearing, they are questioned by the G.I.P., and not by the parties.[32]

At the end of this hearing after each party has presented their evidence to the judge, the prosecutor makes a "closing argument". The defense may then reply as well as the lawyers for the other parties.[33] They base their arguments on the material in the raw file deposited with the office of the G.I.P. as well as on any other documentary evidence admitted by the G.I.P. during the hearing.[34]

When the G.I.P. believes there is insufficient evidence to decide the case, he may ask the parties to develop certain issues or to bring in additional evidence on relevant facts.

According to an original provision of the new Code, only when there was indisputable or obvious evidence that 1) a crime had not been committed, 2) the defendant did not commit it, or 3) the time period of the pertinent statute of limitation had expired may the judge dismiss the case (*sentenza di non luogo a procedere*).[35] With a recently approved law, the G.I.P. has broader discretion in the evaluation of the preliminary investigation. The judge may now dismiss the case even if the evidence is nonobvious or indisputable.[36] In all other cases, the G.I.P. will issue a formal written accusation and send the case to trial (*decreto di rinvio a giudizio*).[37]

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31. C.P.P. Article 423.

32. C.P.P. Article 422; The reason for this provision is so that the G.I.P. may pose appropriate questions to a witness in order to keep the proceeding within the proper issues and to help the development of the proof.

33. Examples of "other parties" include: the civil party and the persons responsible for economic damages deriving from the crime (*responsabile civile* and *civilmente obbligaio*) which may or may not be parties in the proceeding.

34. C.P.P. Article 421.

35. C.P.P. Article 425.

36. This also means the judge can use as evidence facts gathered by the prosecutor that have not been established. This could be very dangerous as it could bring back the figure of the *Giudice d'Istruzione*. Thus, the preliminary hearing could become an anticipation of the trial, instead of being a phase of control over the prosecutor's investigation and finding. Presently, a defendant who goes to trial (having passed through a preliminary hearing) has more chance to face a conviction than he had before this law was enacted. In fact, an actual trial may mean to the trial judge that there was no evidence of the defendant's innocence in the raw file.

37. C.P.P. Article 424.

Contrary to what previously happen under the Code Rocco, when the G.I.P. sends the case to trial he is now in charge of preparing a trial file[38] using the prosecutor's "raw file." According to the law, this file prepared for the trial court contains only the following: 1) all the documents supporting that a prosecution must be pursued, 2) the damage claim (if any), 3) the transcript of the "non repeatable" acts performed by or on behalf of the judicial police officers or the prosecutor, 4) the transcript of the acts accomplished during the *incidente probatorio* and the evidence therein, 5) the evidence obtained from or accomplished abroad, 7) the record of previous convictions and charges against the defendant, and 8) the physical evidence related to the committed crime.[39]

Let's now go through the "special proceedings" as they exist today in Italy (Tangentopoli).

SPECIAL PROCEEDINGS

Another very important characteristic of this new procedure is the provision of the so-called alternative procedures. This procedure has been conceived to cope with the enormous judicial backlog Italian justice has faced for many years.

There are basically two types of special proceedings: those which avoid the preliminary hearing (*giudizio direttissimo* and *giudizio immediato*[40]) and those which offer an alternative to going to trial (*giudizio abbreviato, applicazione della pena su richiesta delle parti* and *decreto penale di condanna*).

Our focus will be on the most popular among these alternative proceedings: the *applicazione della pena su richiesta delle parti.* This is probably the most remarkable new element introduced in Italian criminal procedure by the reform. It is comparable to American plea bargaining, however, there are differences between these two procedures largely due to strict Italian Constitutional provisions.[41]

According to this new provision, the defendant and the prosecutor may agree (at any time until the trial starts) on a sentence to be imposed.[42] If the judge (either the G.I.P. or the trial judge) consents, he will impose the agreed upon sentence. The benefit to the defendant is a reduction of one third of the sentence normally imposed. There is, however, a condition to fulfill that the final sentence must not exceed two years of imprisonment.

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38. The trial-file in the Tribunale and Assise Courts is filed by the G.I.P. at the end of the preliminary hearing. In the Pretore Court, it is filed by the prosecutor when he issues an order to prosecute. Under the former Code, the entire dossier, with the evidence gathered during the inquiry, would have been available to the trial judge who would have been familiar with the details of the evidence.

39. C.P.P. Article 431 (The gun in the case of a murder).

40. *See supra* note 30.

41. *See supra* text accompanying note 2.

42. C.P.P. Article 444.

The prosecutor's agreement to the "bargain" is required, however, if the judge finds unjustifiable his denial then the defendant's request will be honored regardless.

The judge is required, before granting the plea bargain, to verify that the defendant understands the result of the agreement and to determine if the bargain is consistent with the charges against the defendant. Consequently in Italian plea bargaining, the judge has to inquire into the relevant facts and circumstances surrounding the proposed plea and sentence. In fact, the Italian judge can even decide to grant the agreed sentence only at the end of the trial, after having reviewed questions of fact and law.

Moreover, the parties can not bargain on the nature of the crime or the number of the charges because of the principle of mandatory prosecution. Finally, the defendant does not have to plead guilty to get the bargain. This is because the presumption of innocence can not be waived and must be guaranteed to all defendants until final judgment.[43] Theoretically, a judge requested to grant the plea bargain could decide to acquit the defendant if the defendant is found not guilty.

Similar to the American plea of *nolo contendere*, the Italian plea bargain can not be used by the defendant in a civil case based upon the same acts.[44]

CONCLUSION

I assume you have heard that Italy is facing another major crisis besides its political one. I am taking for granted that you are acquainted with the monumental investigation called "Clean Hands" which commenced in February 1992.

In Italy, we have reached the point where the prosecutors themselves have realized they have commenced an investigation which calls into question the entire Italian business, social, and political life-style of the last twenty years. This investigation has certainly been very useful, maybe even indispensable, but Italy currently needs to be reconstructed and led out of the storm.

There have recently been different proposals which strive for a beneficial result in the outcome of the existing proceedings. Hopefully, these will aid in turning this painful page of modern Italian history. In fact, even from a practical point of view, the prosecutors are absolutely overwhelmed by the quantity and variety of evidence, and they are no longer able to end the preliminary investigations within the time limits. Consequently, this may mean that all their work has been done for nothing, since when the statute of limitations approaches, the prosecutor has to decide whether to drop the case or send it to trial. In an attempt to avoid this and to pacify a general public uninterested in

43. COST. Article 27.
44. C.P.P. Article 445.

procedural problems, the most recent and possibly more practical proposal by the Government is to apply the plea-bargaining procedure to these types of crime as well. As I mentioned previously, the defendant can currently bargain only if the final sentence is less than two years of imprisonment. Bribery and unlawful financing of government officials, however, bring a higher sentence upon conviction (Bribery carries a sentence of one to twelve years).

We, as Italian functionaries of the law, are aware that the whole legal world is watching Italy to see how this problem will be solved. The "Clean Hands" investigation has increased the judicial backlog and, as I said before, you can not bring to trial the whole national system which has existed for the last twenty years. This proceeding, however, has been very useful in making people realize some of the major problems affecting our economy, financial situation, and judiciary. "Moralization", however, is not the purpose of criminal procedure and should not belong to the judiciary.

In conclusion, after five years of enforcement of the new Code of Criminal Procedure, there still is not unanimous consensus among Italian scholars.

This reform has certainly been drastic and courageous,[45] but the results are probably not as encouraging. As a matter of fact, the judicial backlog has even increased in the last two years. Moreover, the trial judge has been given back some of his former inquisitorial powers to investigate in the name of the "search for the truth."[46] Also, the parties are still not on equal footing. This is evidenced by the fact that the judge's objectivity has not been completely realized, the defense counsel only has a limited role in the fact-finding proceeding, and the power of the prosecutor is even greater due to the fact that he is currently the only one in charge of the preliminary investigation because the G.I.P. failed as the "supervisor" of the investigative phase. Further, the trial is no longer the only phase when evidence may be admitted. Thus, this is bringing back the "ghost" of the inquisitorial system.

There also may have been a large cultural gap to fill before enacting the reform. Many of the magistrates had difficulties with the details of the new Code, and possibly felt they would lose some of their power. Further, many defense attorneys were reluctant to study the new procedure and, consequently, were not adequately acquainted with it to make this new system of criminal procedure a success.

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45. *See generally* Amodio & Selvaggi, *supra* note 1; Del Duca, *supra* note 3; Fassler, *supra* note 16; Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 521-522 (1992).

46. *See* CORTE COST. 111/93; In case of failure of counsel or prosecutor to render effective or adequate performances, the trial judge can point out an unraised issue, ask for more witnesses to question, or introduce and develop an area neither side wanted to address. What the Supreme Court and the Constitutional Court, however, don't specify is what "truth" has to be found: the procedural one or the absolute truth? Would torture be restored in the name of the search for truth?

The reform has not failed completely, but there is no denying that the Italian Code of Criminal Procedure is presently in the middle of a big storm. It may either re-emerge as the new system or the entire inquisitorial system could again be restored.

The drafters of the 1988 Code did a very good job, however, they underestimated the power of a passive resistance. Until a new generation of lawyers come out of law school with an accusatorial mentality, the reform will be very difficult to implement. When this occurs the constitutional issues raised will finally be addressed, and the "accusatorial soul" of this reform will finally be shown.

Waste Characterization and Treatment Alternatives for Lead Base Paint Contaminated Debris: Destruction and Demolition of Manufacturing Plants and Facilities Under RCRA's Land Disposal Restrictions

JOSEPH M. SETTIPANE†

I) INTRODUCTION

The purpose of this article is to identify the proper procedures and protocols for characterizing and disposing of lead base paint contaminated debris generated from the destruction or dismantling of old manufacturing plants and facilities. Under RCRA's land disposal restrictions, debris that tests in excess of regulatory thresholds for lead will be characterized as hazardous and thus would be prohibited from land disposal unless treated by an EPA authorized technology. However, the EPA has currently granted a capacity variance for hazardous debris which expires on May 8th of 1994.

Thus this article will detail the proper procedure for characterizing debris, identify anticipated characterizations of waste streams and recommend allowable treatment technologies. Consistent throughout, this article will recommend cost effective solutions in compliance with existing and future implemented regulations.

II) BACKGROUND

A. HEALTH RISKS

Lead is a highly toxic metal which produces a range of adverse health effects, particularly in children and fetuses.[1] Effects from lead exposure commonly include nervous and reproductive system disorders, delays in neurological and physical development, cognitive and behavioral changes and hypertension.[2]

The three most common sources of lead exposures are lead base paints (LBP), lead dust (urban soil) and drinking water.[3] Among these, LBP presents the most serious health risk with 12 million children being exposed.[4] Adverse

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1. *See e.g.* EPA, *Strategy for Reducing Lead Exposures*, 1 (1991).
2. *See id.*
3. *See id.* at 5; *See also e.g. Lead Base Paint: Interim Guidelines for Hazardous Identification And Abatement in Public and Indian Housing*, 55 Fed. Reg. 14561 (1990).
4. *See* EPA, *supra* note 1.

health effects in children continue to be observed in lower and lower blood lead levels.[5] Recently, the Center for Disease Control lowered its level of concern from 25/dl to a level within the range of 10 to 15 ug/dl.[6] Blood lead levels in excess of 30 ug/dl are of concern in abatement workers and other adults, especially women of child bearing age.[7]

B. LEAD BASE PAINTS

Lead was a major ingredient in paints used prior and through World War II.[8] In the early 1950's, other pigmented materials became more popular, but lead compounds were still used in some pigments and as drying agents.[9] Federal regulatory efforts addressing lead hazards began with the enactment of the Lead Base Paint Poisoning Act of 1971 which provided incentives for painting buildings, homes and structures with paints containing lower lead concentrations.[10] In 1973, the Consumer Product Safety Commission (CPSC) established a maximum lead content in paint of 0.5%.[11] In 1978, CPSC lowered the allowable lead level in paint to 0.06 percent.[12] All manufacturing plants and facilities painted prior to this time will contain higher concentrations of lead.[13]

C. ENACTMENTS AND REGULATIONS

In 1984, Congress passed the Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act (RCRA) which prohibited land disposal of hazardous materials.[14] The Act specified dates when particular groups of hazardous wastes would be prohibited from land disposal and allowed for an exemption only if "it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous".[15] In addition, the Act required the EPA to set "* * * levels or methods of treatment, if any, which substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and

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5. *See e.g. Lead Base Paint: Interim Guidelines for Hazardous Identification and Abatement in Public and Indian Housing*, 55 Fed. Reg. 14561 (1990).

6. *See id.*

7. *See id.*

8. *See id.*

9. *See* EPA, *supra* note 1, at 5.

10. 42 U.S.C. §§ 4801-4846 (1983).

11. *Lead Base Paint: Interim Guidelines for Hazardous Identification and Abatement in Public and Indian Housing*, 55 Fed. Reg. 14561.

12. *Id.*

13. *See id.*

14. 42 U.S.C. §§ 6921-6939(E) (West Supp. 1993).

15. 42 U.S.C. §§ 6924(d)(1), (e)(10), (g)(5) (West supp. 1993).

long term threats to human health are minimized".[16] Waste meeting established treatment standards were not prohibited from land disposal.[17]

A key distinction under RCRA is between solid waste and hazardous waste. Solid waste is regulated by the states under RCRA, is subject to minimum federal standards and is relatively inexpensive to dispose.[18] By contrast, RCRA establishes a "cradle to grave" system for the management of hazardous waste and is substantially more expensive.[19]

Under RCRA, a waste may be hazardous either because of its characteristics or because it is specifically listed as hazardous.[20] Listed hazardous wastes are unlikely to be generated in lead base paint abatement wastes.[21] The four hazardous characteristics are ignitability, corrosivity, reactivity, and toxicity.[22] With regard to toxicity, a waste is defined as exhibiting the toxicity characteristic for lead if a standard testing procedure results in the extraction of lead at a concentration equaling or exceeding 5 milligrams per liter (parts per million).[23] Since many of the manufacturing plants and facilities that are targeted for dismantling or demolition were painted prior to 1978, the resulting debris from these buildings, if not properly managed or tested, could be characterized as hazardous and thus might be required to undergo treatment before being land disposed.[24]

D. LIABILITY

RCRA has provisions for both criminal and civil penalties. Companies which knowingly endanger the health and safety of the general population by violating the transportation, treatment, storage or disposal provisions of RCRA could be criminally fined up to $1,000,000.[25] Civil penalties could also be imposed for any violation of the Act's requirements but are not to exceed $25,000 per violation.[26] However, it is important to note that each day of the violation constitutes a separate action.[27]

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16. 42 U.S.C. §§ 6924(M).

17. *Applicability of Treatment Standards*, 40 C.F.R. § 268.40 (1990).

18. 42 U.S.C. §§ 6921-6939(E); *see also* EPA, *Final Report Applicability of RCRA Disposal Requirements to Lead-Based Paint Abatement Wastes*, 5 (1993) [hereinafter *Applicability of RCRA Disposal Requirements to LBP Wastes*].

19. *Id.*

20. 40 C.F.R. § 261.3.

21. *See* EPA, *Applicability of RCRA Disposal Requirements to LBP Wastes* at 5.

22. 40 C.F.R. § 261.3.

23. *Id.; see also* 40 C.F.R. § 261.24.

24. *See* 40 C.F.R. § 261.3, § 261.24, § 268.40; *Lead Base Paint: Interim Guidelines for Hazardous Identification And Abatement in Public and Indian Housing*, 55 Fed. Reg. 14561.

25. 42 U.S.C. § 6928.

26. *Id.*

27. *Id.*

In addition, full compliance with RCRA regulations does not preclude the possibility of CERCLA liability.[28]

III) THE DESTRUCTION OF ENTIRE MANUFACTURING PLANTS AND FACILITIES

The destruction and renovation of old manufacturing plants and facilities will generate two different types of waste streams. Destruction will result in a voluminous waste stream, comprised of building materials and components while partial demolition and renovation would involve a smaller waste stream comprised of selected segments. Since many of these plants and facilities have been painted with lead base paints (LBP) and federal regulations issued under RCRA classifies debris contaminated with certain threshold levels of lead as hazardous, there is a potential that some debris waste streams could be prohibited from land disposal.[29]

Hazardous debris must be treated before being land disposed.[30] Although there is currently a capacity variance that allows the land disposal of hazardous debris when treatment can not be obtained, all hazardous debris will be precluded from land disposal after May 8, 1994.[31]

Although characterization tests and treatment options have been identified by EPA regulations, there has been little regulatory guidance or analytical studies published with regard to protocols and treatment. In an attempt to clearly identify an effective protocol for waste characterization and recommend treatment options, the differences between the demolition and renovation waste streams must be recognized.

Under current regulations, the duty for properly characterizing debris waste streams is placed on the generator.[32] The regulations allow two options for characterizing LBP waste: (A) classifications based on 'generator knowledge' and (B) the Toxicity Characteristic Leaching Procedure (TCLP).[33]

A) GENERATOR KNOWLEDGE

Under RCRA regulations, generators may characterize waste by applying knowledge of the debris and the existing concentration levels of contaminates.[34]

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28. *See Marden Corp. v. C.G.C. Music, LTD,* 600 F. Supp. 1049, (D.Ariz. 1984), 840 F.2d 1454, 1456 (9th Cir. 1986); *see also Chemical Waste Management v. Armstrong World Industries*, 669 F. Supp. 1285, 1290 (E.D. PA. 1987).

29. 42 U.S.C. §§ 6921-6939(E); *see also* 40 C.F.R. § 261.24(1994).

30. 42 U.S.C. § 6924, *see also* 40 C.F.R. § 268.45.

31. *See Case by Case Variance and Renewal Notice*, 58 Fed. Reg. 28506 (1993).

32. *Hazardous Waste Determination*, 40 C.F.R. § 262.11; *see also Lead Base Paint: Interim Guidelines for Hazardous Identification and Abatement in Public and Indian Housing*, 55 Fed. Reg. 14560 (Stating that responsibility for characteristics can not be contracted away.).

33. *Id.; see also* 40 C.F.R. § 262.24.

34. *Id.*

If a total analysis of the waste demonstrates that individual contaminants are not present, or that they are present but at such low concentrations that the appropriate regulatory levels could not be exceeded, then TCLP testing will be unnecessary and the generator, using knowledge of the waste, could characterize the debris as non-hazardous.[35]

Despite the regulatory allowance of 'generator knowledge', transportation, storage and disposal facilities (TSD's) have traditionally rejected such characterizations and instead have required generators to test their waste before submission.[36] Since there is little regulatory guidance on what constitutes generator knowledge, the EPA has begun drafting a guidance for what the Agency considers to be 'acceptable knowledge' for the characterization of the waste.[37]

In a recently proposed rule, the Agency elaborated on what it considers to be 'acceptable knowledge' by broadly defining the term to include process knowledge, prior testing results and chemical analysis of the waste.[38] 'Process knowledge' could constitute 'generator knowledge' when detailed information of the waste is obtained from existing published or documented waste analysis studies.[39]

Since LBP debris is not a process waste per se, the proposed guideline does not significantly clarify the term 'acceptable knowledge'.[40] However, the spirit of the proposed regulation appears to focus on whether generators have: (1) adequately identified the hazardous waste risk and (2) whether the generator relied on a database or substantially similar studies in reaching its characterization.[41]

1. *Identifying a LBP problem* There are two ways of determining the likelihood of LBP contamination: (a) by evaluating relevant factors and (b) by screening structures and components targeted for destruction or renovation.

a. *LBP Factor Analysis* An initial assessment of a LBP debris scenario could be conducted without the use of any detection equipment or analyzers. An evaluation based on the following factors will indicate the likelihood of LBP contamination.

i. Year of Construction - The year the plant or facility was constructed will be indicative of the lead content of the existing paint. Older buildings painted

35. *See* 40 C.F.R. § 268.
36. *See Demonstrating Acceptable Knowledge of One's Own Waste*, 58 Fed. Reg. 48112 (proposed Sept. 14, 1993).
37. *Id.*
38. *Id.* at 48111.
39. *Id.*
40. *See Demonstrating Acceptable Knowledge of One's Own Waste*, 58 Fed. Reg. 48112.
41. *Id.*

during the time of World War II contain the highest lead concentration while buildings painted closer to 1978 contain lower but still significant levels.[42]

ii. Prior Testing Results - If the same or substantially similar plants or facilities have been tested and the results indicated the anticipated debris to be non-hazardous then the debris from the destruction or renovation may likely be non-hazardous.[43]

iii. Concentration of LBP in the Waste Stream - The smaller the volume ofdebris and the higher the portion of painted components, the greater the likelihood the debris will be characterized as hazardous.[44]

If one or more of these factors suggest the possibility of a hazardous characterization, a LBP problem has been identified and reliance on 'generator knowledge' will be precluded without the corroboration of an adequate database.[45]

b. *Screening for Lead* Screening for the presence of lead is irrelevant for purposes of waste characterization and will not contribute to characterizations based on 'generator knowledge'.[46] Although there are many 'lead kits' and XRF analyzers available on the market, it is important to note that these technologies were designed to evaluate the total amount of lead existing in materials.[47] By contrast, the land disposal restrictions are only concerned with the amount of leachable lead in materials.[48]

The use of XRF analyzers should be avoided because they are an added expense and provide no useful data for characterizing expected debris.[49] According to some studies, it has been shown that there is no correlation between XRF analysis and the required TCLP test results.[50]

Currently, there is little existing data advocating other screening technologies. However, an EPA report has suggested that Atomic Absorption Spectroscopy may be a more useful screening technique.[51] According to the EPA study, 5 of 6 samples (83%) exceeding lead levels of 4.0 mg/cm2 also were characterized as hazardous under the TCLP.[52] Conversely, only 1 of 14 (16%) with lead

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42. The levels of lead concentration gradually decrease from the 1940's until 1978. However, the paint from any these years can still potentially test as hazardous. *See Lead Base Paint: Interim Guidelines for Hazardous Identification and Abatement in Public and Indian Housing*, 55 Fed. Reg. 14561 (1990).

43. *See Demonstrating Acceptable Knowledge of One's Own Waste*, 58 Fed. Reg. 48112.

44. *See* USAEHA, *Lead Base Paint Contaminated Debris - Waste Characterization Study*, G-2 (1993) [hereinafter *LBP Characterization Study*].

45. *See id.* at 8; *see also* 40 C.F.R. § 262.11.

46. *See* EPA, *supra* note 21, at 2; *see also* USAEHA, *supra* note 44, at B-18.

47. *See* EPA, *supra* note 21, at 2; *see also* USAEHA, *supra* note 44, at B-18.

48. 40 C.F.R. § 261, *see also* 40 C.F.R. § 261.24.

49. *See* EPA, *supra* note 21, at 2; *see also* USAEHA, *supra* note 44, at B-18.

50. *See* EPA, *supra* note 21, at 2; *see also* USAEHA, *supra* note 44, at B-18.

51. *See* EPA, *supra* note 21, at 2.

52. *Id.*

levels below 4.0 mg/cm2 failed the TCLP test.[53] More data is necessary before drawing a definitive conclusion on the existence of a TCLP correlation.

2. *Reliance on a Database* The regulatory requirements for 'generator knowledge' will be satisfied where characterizations are made based on a database of prior testing results.[54] By constructing and relying on a database, waste management costs could be reduced as testing costs and characterization protocols become necessary.[55]

In order to construct an adequate database, the generator must test all debris it anticipates regularly encountering.[56] Since waste streams vary depending on the type of project undertaken, separate databases should be constructed for demolition, renovation and individual components.[57]

If proposed regulations are adopted, 'generator knowledge' may also be satisfied by reliance on published or documented studies.[58] In order to rely on external studies, the generated debris must be substantially similar in type and proportion to the debris characterized in the study.[59]

This report contains both a published and a documented study of waste characterizations. However, for reasons that will be discussed in more detail under the subheading *Waste Types and Typical Characterization*, it is unlikely that either could substantially contribute to 'generator knowledge'.[60]

B. THE TOXICITY CHARACTERISTIC LEACHING PROCEDURE

If 'generator knowledge' can not be used, a generator must characterize the destruction or renovation debris by an EPA approved testing method.[61] Since lead exhibits the toxicity characteristic, the required method for testing LBP debris is the TCLP test.[62] The TCLP has replaced the EP-tox test and must be used for all debris potentially exhibiting a toxicity characteristic.[63]

The TCLP is an extraction procedure and technically does not yield numerical results.[64] However, it is common to refer to the analysis of the extract as the 'TCLP result'.

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53. *Id.*
54. *See* 40 C.F.R. § 262.11.
55. *See id.*; *see also* Telephone Interview with Veronique Hauschild, environmental scientist, *U.S. Army Environmental Hygiene Agency*, (Jan. 21, 1994) (*"The Army no longer TCLP tests W.W.II barracks . . . we now use 'generator' knowledge' to dispose of the debris as solid waste"*).
56. *See Demonstrating Acceptable Knowledge of One's Own Waste*, 40 C.F.R. § 261.
57. *See id.; see also* USAEHA, *supra* note 44, at G-2.
58. *Demonstrating Acceptable Knowledge of One's Own Waste*, 55 Fed. Reg. 48111.
59. *See id.*
60. *Id.*
61. 40 C.F.R. § 261(c)(1).
62. 40 C.F.R. § 261.24.
63. *See* 40 C.F.R. § 261.24; *see also Toxicity Characteristic Revisions*, 55 Fed. Reg. 11798 (1990).
64. 40 C.F.R. § 261, Appendix II.

The TCLP is designed to extract the maximum amount of leachable constituents from a sample.[65] Essentially, a representative sample of the debris is ground up, placed through the steps of the procedure and analyzed.[66] If the amount of leachable lead exceeds 5 mg/l, then the debris is characterized as hazardous.[67]

The main criticism of the test is that the grinding procedure exaggerates the lead surface far in excess of what will occur in land disposal.[68] Furthermore, evidence suggests that the low solubility of lead and its tendency to be trapped by organic matter in the soil results in much less migration then assumed by the TCLP.[69] Despite this criticism, the TCLP test is the only allowable EPA procedure for testing toxicity characteristic constituents.[70]

1. *The Decision to TCLP Test* The decision between TCLP testing and simply disposing of the waste as hazardous depends on the cost of testing, the cost of disposal and the likelihood that the waste will fail the TCLP. For whole building waste streams, where there is a substantial volume of debris and the hazardous disposal costs could be enormous, the waste stream should be tested. However, where the volume is low, as is often the case from renovation or abatement work, the decision to TCLP test should be made based on calculations from the *TCLP Cost Equation*.[71] Testing will be economically beneficial provided:

$$T\$ + (p\ HW) * (HW\$) * (W) < (HW\$) * (W)$$

WHERE
- T$ = THE COST OF THE TCLP TEST
- p HW = THE PROBABILITY THE WASTE WILL BE CHARACTERIZE AS HAZARDOUS
- HW$ = THE COST PER POUND FOR DISPOSING HAZARDOUS WASTE
- W = THE TOTAL WEIGHT OF THE GENERATED DEBRIS[72]

As an example, the EPA's office of solid waste estimates the average cost of a TCLP test to be $175, HUD estimates the average cost of hazardous waste disposal to be $1.18 per LB and an EPA study estimates the average probability of abatement debris being hazardous as 50%.[73] Thus, if W is the total number of pounds of waste expected in the waste stream, then a substitution of the vari-

65. *Id.*
66. *Id.*
67. 40 C.F.R. § 261.24.
68. *See* USAEHA, *supra* note 44, at 2.
69. *See id.* (citing several military studies of lead migration).
70. 40 C.F.R. § 261.24; *see also Hazardous Waste Management System: Identification and Listing of Hazardous Waste; Toxicity Characteristics Revisions,* 55 Fed. Reg. 11798 (1990).
71. *See cf.* EPA, *supra* note 21, at 12 (equation derived from discussion).
72. *See id.*
73. *See id.* at 11.

ables will yield the threshold weight where testing would be cost effective.[74] By substituting, we end up with the resulting equation.

$$(\$175) + (0.5)(\$1.18/lb)(W) < (\$1.18/lb)(W)^{75}$$

Solving the equation, we find that TCLP testing will save money where the weight of the waste in question exceeds 297 lbs.[76] Beneath this weight, it will be cheaper to treat and dispose of the waste as hazardous without expending testing costs.[77]

2. *The TCLP Protocol* The initial and perhaps most critical element in a protocol designed to evaluate the physical and chemical properties of a solid waste is the sampling plan. The C.F.R. requires that all samples for TCLP testing be collected by using an appropriate sampling plan.[78] 'Appropriate sampling', in the context of building demolition and renovation, can be achieved by clearly identifying and collecting a representative sample from the waste stream.[79]

a. *Identifying the Waste Stream* The characterization of debris could be won or lost in the identification of the waste stream.[80] A waste stream can be defined as all structures and components that will comprise the waste over the course of a demolition or renovation project.[81] Although individual components such as doors or trim may be hazardous, it is the characterization of the waste stream as a whole that determines whether the debris can be land disposed.[82] Since high concentrations of painted surfaces and other lead sources may jeopardize characterization, some degree of policing may be necessary.[83]

First, the targeted plants and facilities should be inspected for lead piping. Lead piping is inherently hazardous and its high lead concentration alone may

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74. *See id.*

75. *See* EPA, *supra* note 21, at 12 (equation derived from discussion).

76. The mathematical equation is solved by equaling both sides of the formula:

175 + .59 W = 1.18 W
148.3 +1/2 W = W
296.6 + W = 2W
296.6 lbs = W

77. *See id.;* In the event less than 100 kg of hazardous waste is generated in a calendar month, then the generator would be conditionally exempt from the RCRA land disposal restrictions. 40 C.F.R. § 261.5.

78. 40 C.F.R. § 261.6.

79. *See Debris that Continues to Exhibit Toxicity Characteristic due to Fabrication of Metals*, 57 Fed. Reg. 990 (1992) (giving an example of a representative sample as including all waste stream components).

80. *See id.*

81. *See id.; see also* USAEHA, *supra* note 44, at 4.

82. *Id.*

83. *See* 40 C.F.R. § 261.24.

be responsible for the entire plant or facility being characterized as hazardous.[84] If lead piping is found, it should be removed and submitted for recycling.[85] Although other metals are less harmful, it would also be cost effective to recycle and/or sell these components for scrap.[86] It is important to note that recycled scrap metal is exempted from subtitle C regulation.[87]

Second, for reasons that will be demonstrated under the subheading *Waste Types and Typical Characterizations,* it will not be necessary to remove doors and painted components during whole factory demolition.[88] However, if a positive TCLP result occurs for a particular plant, then these components could be removed in the hopes that re-testing would result in a lower leachable lead concentrations.[89]

Third, when dealing with TCLP hot spots, it is important to note that the regulations do not restrict the partitioning of the waste stream.[90] Although dilution is expressly prohibited, division of the waste stream could be helpful in reducing the volume of hazardous debris.[91] For example, if one of three buildings in a demolition project has a disproportionately high TCLP result, then that building could be separated from the population and treated as a separate waste stream.[92] However, if a waste stream is hazardous, additional debris can not be added to reduce the lead concentration.[93] Conversely, if a waste stream is non-hazardous, adding small volumes of hazardous components would be precluded.[94]

b. *The Representative Sample* The goal of a sampling plan is to collect a representative sample from the waste stream that is both qualitative and quantitatively accurate.[95] From a qualitative perspective, the method for collecting

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84. *See Land Disposal Restrictions for Newly Listed and Hazardous Debris*, 57 Fed. Reg. 37236 (1992); *see also Debris Continues to Exhibit Toxicity Characteristics Due to Fabrication of Metals,* 57 Fed. Reg. 990.

85. *See Land Disposal Restrictions for Newly Listed and Hazardous Debris*, 57 Fed. Reg. 37236; *see also Debris Continues to Exhibit Toxicity Characteristics Due to Fabrication of Metals,* 57 Fed. Reg. 990.

86. *See Land Disposal Restrictions for Newly Listed and Hazardous Debris*, 57 Fed. Reg. 37236; *see also Debris Continues to Exhibit Toxicity Characteristics Due to Fabrication of Metals,* 57 Fed. Reg. 990.

87. *See Land Disposal Restrictions for Newly Listed and Hazardous Debris*, 57 Fed. Reg. 37236; *see also Debris Continues to Exhibit Toxicity Characteristics Due to Fabrication of Metals,* 57 Fed. Reg. 990.

88. *See* USAEHA, *supra* note 44, at G-2.

89. *See id;. see also* 40 C.F.R. § 261.24.

90. 40 C.F.R. § 268.3.

91. *See id.*

92. *See id.*

93. *Id.*

94. *Id.*

95. *See Debris that Continues to Exhibit Toxicity Characteristics Due to Fabrication of Metals,* 57 Fed. Reg. 990.

the waste must be a reflection of the debris being disposed.[96] From a quantitative standpoint, the number of samples must be large enough to ensure that a statistical analysis of the results will yield a confidence level greater than 80%.[97] A failure to collect a substantial number of samples from the correct components could yield a false characterization that may lead to RCRA liability.[98]

i. *Collection of Subsamples* The first step in the sampling plan is to collect subsamples that accurately represent the targeted plant or facility.[99] This could be done by taking samples from all components of the structure intended for the waste stream.[100] Building components, such as glass, screen and wiring, that are difficult to sample and comprise a very small percentage of the overall structure need not be included.[101]

The best methodology for collecting subsamples is to use a 1 inch drill bit or hammer drill to take core sample from each building component.[102] Paper plates, paper sheets or sample bags should be held beneath the drill until at least 100 grams of sample is collected.[103] To prevent cross-contamination, the paper sheets or plastic bags used in collection should not be reused.[104]

The origin and number of the subsamples should represent an accurate cross-section of the building.[105] For example, a good sampling plan will gather 20-30 subsamples from all external walls, wood, trim, sheet rock, ceiling, flooring and metal components.[106] The total number of subsamples necessary depends on the size of the plant or facility.[107] Statistical evaluations should be used to determine the number necessary to generate an 80% confidence level.[108]

Field duplicates, equaling 5% of the number of actual samples (at a minimum one), should be obtained to check the sampling practice.[109] The duplication should be obtained by simultaneously filling two sample containers during the

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96. *Id.*

97. 40 C.F.R. § 260.11; *see e.g.* EPA, *Test Methods for Evaluating Solid Waste* (1986) [hereinafter '*SW-846*'].

98. 40 C.F.R. § 260.11; *see e.g.* EPA, *Test Methods for Evaluating Solid Waste* (1986); *see also* 42 U.S.C. § 6928.

99. *See* 40 C.F.R. § 261.6.

100. *Debris that Continues to Exhibit Toxicity Characteristics Due to Fabrication of Metals,* 57 Fed. Reg. 990.

101. *See* USAEHA, *supra* note 44, at B-4 (Receiving EPA approval for a sampling plan excluding these materials).

102. *Id.* at 5.

103. *Id.; see also* 40 C.F.R. § 261.

104. *See id.*

105. *See Debris that Continues to Exhibit Toxicity Characteristic due to Fabrication of Metals,* 57 Fed. Reg. 990.

106. *See id.; see also* USAEHA, *supra* note 44, at C-1.

107. 40 C.F.R. § 260.11; *see also e.g.* EPA, SW-846.

108. *Id.*

109. *Id.; see also* USAEHA, *supra* note 44, at E-2.

sample process (i.e., for each subsample within a sample building, two adjacent cores should be obtained and placed into two separate containers).[110]

ii. *Compiling a Representative Sample* The second step of the sampling plan is to assemble the representative samples by taking ratios of the components as they exist in the targeted structure and measuring out subsamples in accordance with those ratios until 110 grams of material is weighed.[111] This is the representative samples and it should be homogenized prior to analysis to ensure an even distribution of the materials.[112]

The ratios of components are calculated by determining the total volume of each component in the building and then comparing that volume to the volumes of other sampled components.[113] However, within a component category, subsamples of all components should be contributed to the representative sample.[114]

The volumes of components are calculated by reasonable approximation.[115] For example, if there is a wall with two windows, the volume of the wall should first be calculated as a component solid and then the volume of the two windows should be subtracted out.[116] This will yield an approximate volume of the wall that is to be used for establishing the ratio.[117]

iii. *The Number of Representative Samples.* In the third step, the number of representative samples necessary for waste stream characterization is determined by statistical analysis.[118] The table below reflects, through statistical calculation, the total number of buildings in a demolition project that must be tested.[119]

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110. 40 C.F.R. § 260.11; *see also e.g.* EPA, SW-846; *see also* USAEHA, *LBP Characterization Study at* E-2.

111. *See* 40 C.F.R. § 251; *see also* 57 Fed. Reg. 990.

112. *See* USAEHA, *supra* note at 44, at B-8.

113. *Id.* at 6; In the Army Protocol, the EPA approved of a volume ratio to assembling representative samples. *See* USAEHA, *supra* note 44, at 5. Since mass ratio assemblage, which takes portions of the subsamples based on density, resulted in several hazardous characterizations and subsequent retesting by volume ratio assemblage found the representative samples to be non-hazardous, the volume ratio technique is recommended.

114. *Id.; see also Debris that Continues to Exhibit Toxicity Characteristic due to Fabrication of Metals*, 57 Fed. Reg. 990.

115. *See* USAEHA, *supra* note 44, at B-5.

116. *Id.*

117. *Id.*

118. *See* 40 C.F.R. § 260.11; *see also* EPA, SW-846 at nine-3.

119. These numbers are designed to meet or exceed the statistical requirements set by the EPA. Both the power and the confidence intervals (CI's) were set at or above 90 percent and 80 percent, respectively, and the precision was established as 20 percent. The coefficient of variance (CV) is assumed to be 35 percent. The actual CV will vary from case to case and should be determined when the analytical results are available. Complete statistical evaluation of the analytical data will involve a calculation of the actual CV and potentially include data transformations and/or adjustments to the other statistical

No. of Total Buildings	*No. of Buildings To Sample*[120]
1-9	All
11-15	10
16-20	13
21-30	16
31-40	21
41-100	26
100 >	32

c. *TCLP Extraction* In the fourth step, the TCLP extract is prepared. In general, the TCLP requires that the representative sample undergo a particle size reduction, if necessary, to 0.375 inches.[121] This is achieved by crushing, cutting or grinding the waste.[122]

Next, the representative sample and the extraction fluid are mixed into a vial and placed in a rotary agitation device for approximately 18 hours.[123] During rotary agitation, leachable lead is released into the fluid.[124] The sample fluid mixture is then filtered and the fluid, now the extract, is submitted for analysis.[125]

d. *Analysis of the Extract* Finally, the extract must be analyzed to determine how much lead has leached during the TCLP.[126] If the concentration of lead is greater or equal to 5 mg/l, then the debris from the targeted structure will be characterized as hazardous.[127] Since false positives occasionally occur, components should be removed and the buildings retested.[128]

There are two procedures that could be used to analyze the extract, EPA Methodology 6010A, Inductively Coupled Plasma (ICP) - Atomic Absorption Spectroscopy or EPA Method 7421, the Atomic Absorption Furnace Technique for lead.[129] Although either will satisfy the EPA requirements, the ICP procedure is recommended due to its lower cost.[130]

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parameters. *See* USAEHA, *supra* note 44, at B-5. The equation for these calculations could be found in appendix B.

120. *See* USAEHA, *supra* note 44, at B-5.

121. 40 C.F.R. § 261.7; Samples collected by drilling techniques will not require particle size reduction.

122. *Id.*

123. *Id.*

124. *See id.*

125. *Id.*

126. 40 C.F.R. § 261.3.

127. 40 C.F.R. § 261.34.

128. In the USAEHA Study, false positives occasionally occurred but often retested as non-hazardous. Interview with Tom Ronian, environmental scientist with the *USAEHA* (Jan. 11, 1994).

129. 40 C.F.R. § 261.

130. *See* USAEHA, *supra* note 44, at B-8.

e. *Statistical Analysis of the Results* As may have become apparent, a discussion of waste sampling often leads to a discussion of statistics. Statistical analysis of the results is necessary to assure accurate characterization.[131] The TCLP results from each structure in the demolition / renovation project must be compiled and the variability among the structures and the overall normality of the lead distribution assessed.[132] If the analytical results do not indicate a normal distribution (i.e., the arithmetic mean is less than the variance), then the raw data from the TCLP results should be transformed.[133]

There are two abnormal types of distributions, a Poisson distribution (mean is approximately equal to S2) or a negative binomial distribution (mean is less than S2).[134] For each of these distributions, the data, along with the regulatory threshold, must be transformed in order to calculate an 80% Confidence Interval.[135] In the former circumstance, normality can be achieved by transforming the data according to the *square root transformation.*[136] In the later circumstance, normality may be realized through the use of the *arcsine transformation.*[137] If either transformation is required, all subsequent statistical evaluations must be performed on the transformed scale.[138]

C. WASTE TYPES AND TYPICAL CHARACTERIZATION

Although it is difficult to make generalizations, due to the variability of facts and circumstances, two studies indicate that the destruction or renovation of manufacturing plants and facilities is expected to generate little to no hazardous debris. The studies that indicate this conclusion are (1) The USAEHA Army Report (2) EPA HUD Demo Study.

1. *The USAEHA Army Report* The Army study was performed to assess the waste characterization of debris that is contaminated with lead base paint.[139] Since the Army intended to undertake a mass demolition of unused W.W.II barracks, many of which contained several layers of paint from the peak lead years, a characterization study was initiated.[140]

The study involved TCLP testing of 205 barracks and included waste streams from whole building demolition debris, renovation debris, components and con-

131. 40 C.F.R. § 261; *see also* EPA, SW-846 at nine-6.
132. 40 C.F.R. § 261; *see also* EPA, SW-846 at nine-6.
133. 40 C.F.R. § 261; *see also* EPA, SW-846 at nine-6.
134. *See* EPA, SW0846 at nine-10.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *See* USAEHA, *supra* note 44, at 1.
140. *Id.*

taminated media.[141] With respect to each, the Army reached the following conclusions:

(i). *Whole Building Demolition Debris* - Non-Hazardous

Whole building debris generally included all wood, brick, cement, plasters, drywall, ceiling, tile, etc., that was generated in the destruction of the structure. Prior to demolition, the Army removed all recyclable metals and such was not included in the representative sample. However, the Army included heavily painted components such as trim and doors in the waste stream.[142]

(ii). *Partial Demolition / Renovation Debris* - Sometimes Hazardous

Partial demolition/Renovation debris generally included a mixture of components (painted and non-painted) such as those found in whole building demolition but on a lesser scale. Although generally non-hazardous, the Army found that this debris occasionally tested as hazardous. Thus, the Army recommended that painted components such as doors, trim and window frames be segregated out and disposed of separately as hazardous waste.[143]

(iii). *Components* - Generally Hazardous

Components removed for remodeling, abatement or maintenance, such as varnished or painted baseboards, window frames, doors, trim etc., were generally found to be hazardous. This was primarily due to the high ratio of paint to the overall mass of the waste.[144]

(iv). *Contaminated Media / Items* - Hazardous

Contaminated Media / Items encompass all materials that have become contaminated with dust or paint chip residues. These materials include paint chips, scraping, solvents, filters, sludges, plastic tarps and soil.[145] In addition, the Army found that blast grit and caustic pastes (corrosivity characteristic) could also be characterized as hazardous, depending on the amount and type of lead base paint identified in the waste.[146]

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141. *Id.*
142. *Id.* at G-2.
143. *Id.*
144. *See* USAEHA, *supra* note 44 at 1.
145. *Id.*
146. *Id.* at G-3.

2. *The EPA HUD Demo Study* The EPA HUD Demo study was initiated to determine typical characterizations of hazardous lead base paint debris and provide guidance for persons conducting lead paint abatement.[147] The source of the EPA's data was borrowed and analyzed from the HUD Demolition project.[148] The HUD Demolition project was initiated to test and abate all lead hazards existing in Public and Indian Family Housing.[149] Since the HUD Demo began prior to the adoption of the TCLP test, the majority of the data generated under this study was based on the EP-tox test.[150]

In compiling the data from the HUD Demo project, the EPA found that they had insufficient testing information for solid debris and plastic sheets.[151] However, the following three items were identified as generally non-hazardous:

- Filtered wash water
- Disposable work clothes and respiratory filters
- Rugs and carpets[152]

In addition, the EPA identified the following categories as hazardous in at least 50 % of the tested cases:

- Paint chips
- High Efficiency Particle Air (HEPA) vacuum debris, dust from air filters, paint dust
- Sludge from stripping
- Unfiltered liquid waste such as wash water from general clean-up or from decontaminating surfaces after solvents have been used; unfiltered liquid waste from exterior lasting.
- Rags, sponges, mops, HEPA filters, air monitoring cartridges, scrapers and other materials used for testing, abatement and clean-up.[153]

3. *Relationship to Manufacturing Plants and Facilities* It is unlikely that either of these studies will adequately constitute 'generator knowledge' under the proposed definition.[154] The Army report provides the strongest argument because the waste stream, consisting of brick, cement, wood, plaster, sheet rock, tile, ceiling, etc., is similar to the anticipated waste stream generated from the destruction or renovation of manufacturing plants and facilities.[155] However, due to the differences between W.W.II barracks and manufacturing plants, such as size, style and building materials, the generated debris may differ in compo-

147. *See* EPA, *supra* note 21, at 2.
148. *Id.* at 6.
149. *Id.*
150. *Id.*
151. *Id.* at 10.
152. EPA, *supra* note 21, at 11.
153. *Id.*
154. *Demonstrating Acceptable Knowledge of One's Own Waste,* 55 Fed. Reg. 48111.
155. *See* USAEHA, *supra* note 44, at G-2.

nent ratio and waste type.[156] The EPA HUD Demo study will not constitute 'generator knowledge' because it failed to reach conclusions on debris other than filtered wash water, work clothes, respiratory filters, rugs and carpets.[157] Since the entire study was based on EP-tox data, which is now an invalid method for determining toxicity, any inferences will not reflect knowledge under current standards.[158]

However, these studies are helpful in predicting the likely characterization of manufacturing plant and facility debris. The W.W.II Army barracks presented the worst case scenario for being characterized as hazardous.[159] The buildings were painted during the war years, a time when the lead in paint was at its highest level.[160] Periodically there after, the Army applied additional layers of paint.[161] Since these buildings are relatively small, measuring 65 X 27 X 25, it seems logical to assume the ratio of painted surfaces to unpainted debris would be substantially high.[162] Despite leaving LBP concentrated components such as doors and trim on the building, the whole building debris was generally found to be non-hazardous.[163]

By analogy, the same is expected to be true for the demolition of entire manufacturing plants and facilities.[164] Since manufacturing plants and facilities are larger than W.W.II. barracks, the LBP debris in the plant waste stream will likely be less concentrated then that found in the Army study.[165] Furthermore, for manufacturing plants and facilities that were built after W.W.II, the type of paint on the debris surfaces will contain lower lead concentrations.[166] Thus, since the manufacturing plants and facilities pose less of a LBP risk than the W.W.II barracks, which already have been characterized as non-hazardous, then the whole demolition of manufacturing plants and facilities will also likely be found to be non-hazardous.[167]

Therefore, small scale debris generated from the partial demolition or renovation of manufacturing plants and facilities will be the only anticipated waste

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156. *Id.*

157. *See* EPA, *supra* note 21, at 10.

158. 40 C.F.R. § 261.24; *see also* 55 Fed. Reg. 11798.

159. *See* USAEHA, *Waste Characterizations Study* at 8.

160. *See Lead Base Paint: Interim Guidelines for Hazardous Identification And Abatement in Public and Indian Housing*, 55 Fed. Reg. 14561 (1990).

161. *See* USAEHA, *supra* note 44, at 8.

162. *Id.* at B-5.

163. *Id.* at G-2.

164. *See cf. id.*

165. *Id.*

166. *See Lead Base Paint: Interim Guidelines for Hazardous Identification And Abatement in Public and Indian Housing*, 55 Fed. Reg. 14561.

167. *See* 40 C.F.R. § 261.24; *see also Lead Base Paint: Interim Guidelines for Hazardous Identification And Abatement in Public and Indian Housing*, 55 Fed. Reg. 14561; USAEHA, *supra* note 44, at G-2.

stream that may be characterized as hazardous.[168] Hazardous small scale debris will originate from two distinct sources; painted components and abatement wastes.[169] Since many of the manufacturing plants and facilities in question came into existence after W.W.II, painted components are expected to test hazardous less frequently than those in the Army study.[170] Abatement waste streams will generate hazardous debris such as plastic tarps, paint chips, HEPA filters, clothing, etc.[171]

IV) EXTRACTION TECHNOLOGIES FOR LARGE SCALE HAZARDOUS DEBRIS AND IMMOBILIZATION FOR SMALL SCALE DEBRIS.

Hazardous debris must be treated prior to land disposal.[172] Under current regulations, there is a capacity variance which allows for land disposal of hazardous debris where treatment capacity could not be located by a good faith effort.[173] The requirement for receiving a variance is met by filing a statement demonstrating a good faith effort with the EPA regional director.[174] The capacity variance expires on May 8th of 1994 and no other variances are legislatively authorized.[175]

Hazardous debris contaminated with lead originally could only be treated by stabilization.[176] However, the EPA recognized the need for flexibility and has since provided several Best Demonstrated Alternative Treatment Standards (BDAT).[177]

A. TREATMENT AND DISPOSAL OPTIONS

Debris is defined as any material that is intended for discard, solid and greater or equal to 60 mm in size.[178] When mixed with other materials such as soil, the mixture will be classified by the majority waste type.[179]

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168. *Id.*

169. *See* USAEHA, *supra* note 44, at G-2.

170. *See Lead Base Paint: Interim Guidelines for Hazardous Identification And Abatement in Public and Indian Housing*, 55 Fed. Reg. 14561.

171. *See* EPA, *supra* note 21, at 2.

172. 42 U.S.C. § 6924 (e), (g); *see also* 40 C.F.R. § 268.45.

173. *Case by Case Variance and Renewal Notice*, 58 Fed. Reg. 28506.

174. *Id.*

175. 42 U.S.C. § 6924(h).

176. *Land Disposal Restrictions for Third Third Scheduled*, 55 Fed. Reg. 22567 (1990).

177. *Land Disposal Restrictions for Newly Listed Wastes and Hazardous Debris*, 57 Fed. Reg. 37194 (1992).

178. *Id.* at 37222; A recent change in the land disposal restrictions is the allowance of containment buildings to be used to store and treat debris. 55 Fed. Reg.. 37211. Previously the use of such buildings was viewed as land disposal in violation of section § 3004(k) of RCRA. The design and operating standards in containment buildings could be found in subpart DD of 40 C.F.R. §§ 268, 265. The maximum amount of time for debris storage is 90 days. 40 C.F.R. § 265.

179. *Land Disposal Restrictions for Newly Listed Wastes and Hazardous Debris*, 57 Fed. Reg. 37224 (1992).

When debris has been characterized as hazardous, federal regulations require that it receive waste specific treatment prior to the land disposal.[180] This means if there are multiple hazardous constituents or characteristics in the waste, then it must be treated for each contaminant and characteristic.[181] If there is a mixture of materials in the debris, the waste stream must be treated for each debris type.[182]

There are two categories of treatment technologies suitable for LBP debris; Extraction and Immobilization.[183] The choice of treatment determines how the debris will be disposed.[184] If an extraction technology is used, the treated debris could be disposed of in a subtitle D facility (solid waste).[185] However, if an immobilization technology is used, the debris must be disposed of in a subtitle C facility (hazardous waste).[186]

The goal of extraction technologies is to remove the contaminants from the surface of the debris.[187] Since glass, metal, plastics and rubber are non-porous, only their surface layers need to be cleaned.[188] Porous materials on the other hand, such as brick, cloth, paper, pavement, rock and wood, must have 0.6 cm of their surface layer removed.[189] Removal of the contaminants could be achieved through the use of chemical, thermal or physical extraction.[190] However, chemical extraction can not be used for treating a waste stream that contains porous debris greater than 1.2 cm in size.[191] Also, thermal extraction by way of its high temperature recovery systems, provides logistical problems for larger debris sizes. Thus, physical extraction is the reasonable choice in this category for treating LBP debris because it provides no such logistical problems and could be used to treat all debris types. The five sub categories of physical extraction technologies are as follows:

- Abrasive blasting - Steel shot or plastic beads are propelled against the debris surface until the contaminants are removed.
- Scarification, Grinding and Plaining - Utilizing striking piston heads, saws or rotating grinding wheels to remove the surface of debris.

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180. 40 C.F.R. § 268.45.

181. *Id.*

182. *Id.*

183. *Land Disposal Restrictions for Newly Listed Wastes and Hazardous Debris,* 57 Fed. Reg. 37226; Destruction Technologies can not be used for treating debris contaminated with metals.

184. *Id.* at 37239.

185. *Id.*

186. *Id.*

187. *Id. at* 37229.

188. *Land Disposal Restrictions for Newly Listed Wastes and Hazardous Debris,* 57 Fed. Reg. 37230.

189. *Id.*

190. *Id.*

191. *Id.*

- Spalling - Drilling or chipping holes at appropriate contaminated locations and depths.
- Vibratory Finishing - Scrubbing media and flushing fluid remove contaminants.
- High Pressure Steam or Water Sprays - Sufficient temperature, pressure, time, agitation, surfactants and detergents cause contaminates to be stripped from the debris.[192]

The goal of Immobilization Technologies is to encase the hazardous debris with materials which prevent the possible migration of hazardous constituents.[193] Like Physical extraction, Immobilization technology can be used for all debris types.[194] However, if the debris contains hazardous constituents that require other treatment, then immobilization could only be used as the last technology in the treatment train.[195] The three sub categories of Immobilization technologies are as follows:

- Macro encapsulation - Contaminated portions of the debris are painted with Plastics and Resins to reduce surface exposure.
- Macro encapsulation - Stabilizing the debris by encasing it either Portland cement or lime/pozzolans.
- Sealing - The application of an appropriate material which adheres tightly to the debris surface.[196]

B. TREATMENT SELECTION FOR ANTICIPATED DEBRIS

Since treatment by either extraction or immobilization will satisfy the federal regulations, the choice of technology for treating LBP debris should be made by comparing the sum of the treatment and disposal cost for each. For extraction (E), the total cost will equal the treatment cost plus the sum of the subtitle D disposal cost per/lb (SW) times the total weight of debris (W)(i.e. Cost = E + (SW)(W)). For immobilization (I), the total cost would be derived in the same manner except the waste must be disposed of in a subtitle C facility (HW). (i.e. Cost = I + (HW)(W)). Since immobilization treatment is generally cheaper than physical treatment, the total weight of the debris is the key variable guiding decisions.[197]

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192. *Id.* at 37226.

193. *Land Disposal Restrictions for Newly Listed Wastes and Hazardous Debris,* 57 Fed. Reg. 37226.

194. *Id.* at 37234.

195. 40 C.F.R. § 268.45.

196. *Land Disposal Restrictions for Newly Listed Wastes and Hazardous Debris,* 57 Fed. Reg. 37226.

197. Interview with Veronique Hauschild, environmental scientist, USAEHA (Jan. 21, 1994) ("*We found cement encapsulation to be the most cost effective way of disposing of small scale debris*").

As previously discussed, renovation projects are anticipated to generate the majority of the hazardous waste encountered.[198] Since the weight of this waste stream, which will consist of fragments from wood, brick, sheet rock, etc., is expected to be relatively low, immobilization, primarily in the form of cement encapsulation is recommended.[199] In addition, this technology should be used for all contaminated media / items, such as paint chips, HEPA cartridges and air filters, irrespective of volume.[200]

Although whole building demolition is rarely expected to result in a hazardous waste characterization, such a waste stream would likely generate large bulky painted components.[201] Since the weight of these components will be high, it may be cheaper to physically extract the paint from the components surfaces and dispose of the treated debris as solid waste.[202] It is important to note that all blast grit removed from these components must be disposed of as hazardous waste.[203]

V) CONCLUSIONS

The destruction and demolition of manufacturing plants and facilities is not expected to generate hazardous debris.[204] However, partial demolition and renovation may generate small scale hazardous debris.[205]

Small scale debris should be treated by immobilization technology.[206] Large scale debris should be treated by extraction technology.[207]

The cost of waste characterization and disposal could be reduced by: constructing a comprehensive characterization database;[208] avoiding the use and reliance on screening technologies for characterization purposes;[209] recycling metal components;[210] calculating when the TCLP is cost effective;[211] segregat-

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198. *See e.g.* USAEHA, *supra* note 44, at G-2.

199. Interview with Veronique Hauschild, environmental scientist, USAEHA (Jan. 21, 1994) (*"We found cement encapsulation to be the most cost effective way of disposing of small scale debris"*).

200. *Id.*

201. *See* USAEHA, *supra* note 44, at G-2.

202. *See Land Disposal Restrictions for Newly Listed Wastes and Hazardous Debris*, 57 Fed. Reg. 37229.

203. *Id.* at 37239.

204. *See* USAEHA, *supra* note 44, at G-2.

205. *Id.*

206. *Ocean Dumping: Designation of a Site Located Offshore of Port O'Connor, TX,* 55 Fed. Reg. 37234 (1990); *see also* Interview with Veronique Hauschild, environmental scientists, USAEHA (Jan. 21, 1994).

207. *Id.; see also* 55 Fed. Reg. 37224.

208. 40 C.F.R. § 268.

209. *See* EPA, *supra* note 21, at 2.

210. *See Land Disposal Restrictions for Newly Listed Wastes and Hazardous Debris*, 57 Fed. Reg. 37236; *see also Land Disposal Restrictions for Newly Listed Wastes and Contaminated Debris*, 57 Fed. Reg. 990 (1992).

211. *See* EPA, *supra* note 21, at 12.

ing out LBP components from potentially hazardous waste streams;[212] analyzing the TCLP by using the ICP (method 6010A);[213] and effectively selecting the most cost efficient treatment option.[214]

212. *See* 40 C.F.R. § 268.3.
213. *See* USAEHA, *supra* note 44, at B-8.
214. *Id.* at 37279.

What Hard Work Giveth the Nursing Home Taketh Away: Asset Preservation Under Medicaid

DAVID J. ZUMPANO†

I. INTRODUCTION

We work our entire lives to provide for ourselves and our family's daily needs. We pay Social Security Tax and many of us purchase disability insurance and workers compensation insurance to ensure that if we become unable to work, our individual and family needs will be provided for. Fortunately, most of us will live-out our working lives without suffering a serious debilitating condition. However, as we become elderly[1] our ability to work is significantly reduced and, in many instances, lost. In order to provide for ourselves in later years, most of us establish various forms of savings and anticipate receiving Social Security from our lifetime of contributions. We expect that our savings and Social Security will be sufficient to sustain us when we are no longer able to work.

Increasingly, elderly Americans are discovering all too late that their lifetime of savings and Social Security benefits are insufficient to meet their needs in the event they require long-term health care. The cost of long-term care is exorbitant and the number of elderly Americans requiring such care is growing rapidly. It is hard to imagine any American that has not had to confront this issue on a personal level for someone close to them. In many instances, the elderly, who require long-term care, are stripped of their lifetime of savings and their autonomy. If we have any respect for the elderly or if we hope to curb their need for long-term care, we must make great efforts to preserve their financial independence and autonomy.

Part of preserving the elderly's autonomy is to ensure they do not become impoverished. Not having the financial means to provide for ones self takes away the ability to be independent. If the elderly become dependent on others, their choices become limited and they are forced to accept a life determined by others. What most people look forward to as being the "twilight" of life can

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1. Throughout this article, individuals age 65 and older are referred to as "the elderly".

instead be a time of helplessness and despair. We must, therefore, address the cost of long-term care and how the elderly will pay for it if they fall ill.

In most, if not all, instances when the elderly cannot afford the cost of long-term care, the burden falls upon the government. Medicaid is the federal government's long-term care insurance for Americans and is often referred to as an "entitlement." The growing number of elderly on Medicaid and the massive costs to provide for them is beginning to cause lawmakers to rethink who should be entitled to Medicaid. The qualification rules under Medicaid are complex. Because of this, many healthy elderly individuals dispose of their assets and savings to ensure that they qualify for Medicaid, if and when they should require long-term care.

There is an urgent need to address the cost of long-term care and how the elderly can pay for it without becoming impoverished or losing their autonomy. We must also take a hard look at Medicaid to determine its usefulness and effectiveness in dealing with this growing problem. With the federal tax base shrinking and the cost to provide for the elderly exploding, alternatives must be explored to ensure the elderly have other viable options available to them. If we fail to address these issues soon, we are headed for disaster.

This article will provide background information in the form of statistical data in reference to the elderly in America, the cost of nursing home care, and government spending on Medicaid and Medicare. It will also discuss the importance of preserving the autonomy of the elderly and provide a detailed review of the criteria one must meet to qualify for Medicaid including income and asset resource allowances, transfer rules for assets and the related penalty periods, the available exceptions to the Medicaid qualification rules, and the spousal options of last resort. Lastly, Part V will review other estate preservation options.

II. THE COST OF GETTING OLD

America is aging. The number of Americans aged 65 or older has more than tripled in the last ninety years to 12.5% of today's population.[2] The significant increase is due primarily to our longer life expectancies. While an average American's life span at the turn of the century was 47, today's elderly can expect to live to be more than 80.[3] In fact, the fastest growing segment of today's population is composed of those aged 85 or more[4] and the number of

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2. *See Symposium: Legal Issues Relating To The Elderly*, 42 HASTINGS L.J. 683, 688 & 720 (1991), [hereinafter *Symposium*]; *See also* Christopher Farrell et al., *The Economics of Aging*, BUS. WK., Sept 12, 1994, at 60. [hereinafter *Economics*]; Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818, 1820, (1992), [hereinafter *Preserving Dignity*].

3. *See Symposium, supra* note 2, at 689. *See also Economics*, note 2, at 60.

4. *See Symposium, supra* note 2, at 690. *See also Economics*, note 2, at 60.

elderly is expected to nearly double in the next 35 years to an estimated 76 million with 13.3 million representing those over age 85.[5] Currently, one in five elderly over age 85 reside in nursing homes.[6]

Aging in and of itself presents many physical, emotional and social concerns to the elderly. The potential of financial hardship during old age and the elderly's ability to remain autonomous become issues of grave concern to them. The elderly's autonomy is jeopardized if they lack the required physical, emotional, social and/or financial means to remain independent.

The inability of the elderly to remain autonomous has lead to an increasing need for nursing home care.[7] The number of elderly needing long-term care is expected to reach 13.8 million by 2030, up from 7.1 million in 1990, and those requiring nursing home care is expected to increase to 5.3 million from 1.5 million over the same period.[8] The Federal Agency for Health Policy and additional research estimates that half of all elderly men and a third of all elderly women will spend time in a nursing home.[9] Almost half will stay longer than a year, and of those, two-thirds will deplete their entire savings to pay for the care received.[10]

The average yearly cost of nursing home care is between $30,000 and $60,000.[11] The high cost of care forces the elderly to consider how they would pay for care should the need arise. An increasing number of middle-income elderly are concerned with the possibility of being impoverished by future medical care needs. Therefore, they are depleting their assets in order to ensure they are eligible for Medicaid if and when the time comes they require nursing home care.[12] As a result, "Medicaid planning" for better or worse, has lead to a growing debate over whether the qualifications for Medicaid should be drastically changed to prevent such planning. While Medicaid qualifications were severely restricted by the Omnibus Budget Reconciliation Act (OBRA) of 1993, signed into law by President Clinton August 10, 1993,[13] some argue the changes did not go far enough.

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5. *See Economics, supra* note 2, at 60. *See also* Melinda Beck, *The Grey Nineties* NEWSWEEK, Oct. 4, 1993, at 65; *Preserving Dignity, supra* note 2, at 1847.

6. *See* Douglas R. Stanton, *The Case for Nursing Home Insurance: Financial Planners Should Consider Long-Term Care Insurance for Their Wealthy, Elderly Clients With Assets to Protect*, 33 TRUSTS & ESTATES 2 at 7.

7. *See* further discussion of this topic *supra,* note *25.*

8. *See Economics, supra* note 2 at 60.

9. *See id.; See also Preserving Dignity, supra,* note 2 at 1820; Marshall B. Kapp, *Options for Long-Term Care Financing: A Look to the Future*, 42 HASTINGS L.J. 719, 721 (1992), [hereinafter *Options*].

10. *See Stanton, supra,* note 6 at 2.

11. *See* Christine Dugas, Newsday's Fiscal Fitness, *Keeping Your Money Out Of The Home: Nursing Homes Aren't Your Only Option For Long-Term Care*, NEWSDAY, June 12, 1994, at A88.

12. *Id.*

13. *See* discussion of OBRA '93 in Part IV of this article *infra.*

The cost of Medicaid is becoming more burdensome. The Congressional Budget Office estimates that health care costs for the "elderly, poor, and disabled will account for 18.5% of all government spending in 1994 and 24.1% by 1999."[14] In addition, Medicaid and Medicare is expected to double over the next 10 years.[15] Medicaid and Medicare spending may rise from the current level of 3.8% to 11% of the national income over the next 30 years and their budgets would account for more than half of all current federal taxes collected.[16] In the short term, increases in Medicaid and Medicare will account for half of the growth in federal spending.[17] State spending for Medicaid increased 22% in 1991 and 33% in 1992 and it represents the fastest-growing component of state budgets.[18]

Although the number of elderly are growing and the costs to care for those in need of care is increasing, we cannot blind ourselves to the essential need to preserve the elderly's autonomy. The preservation of the social and economic viability of the elderly will ensure them a more productive life and perhaps enable them to remain physically and mentally fit, ultimately resulting in curbing the costs of care.

III. PRESERVING THE AUTONOMY OF THE ELDERLY

Autonomy is innate at any age, but for the elderly it is critical for their survival. Psychologist have found that many conditions previously considered to be caused by old age are actually caused by a breakdown in environmental conditions which, if corrected, could alleviate the condition altogether.[19] As Professor Rein notes throughout his article, we must proceed with great caution when appointing guardians and conservators for the elderly, especially when it results in the elderly's loss of control over their assets.[20] We must also ensure that our personal desires and feelings do not over power those of the truly competent elderly.[21] The following example illustrates this point.

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14. *See Elderly Care: The Impact of Seniors on Medicaid*, HEALTH LINE, Sept. 29, 1994.

15. *See id.*

16. *See* Robert J. Samuelson, *Unspeakable Runaway Spending*, THE WASHINGTON POST, August 3, 1994, at A17.

17. *See Medicare, Medicaid Curbs Needed To Address Deficit, Schalala Says*, 20 BNA PENSION & BENEFITS REP. 10 at 558 (March 8, 1993).

18. Adam Clymer, *Health Debates Splinters After Initial Consensus*, THE NEW YORK TIMES, April 13, 1994 at B8.

19. *See* Preserving Dignity *supra* note 2 at 1837.

20. *See id.*

21. Note in *Preserving Dignity*, *supra* note 2, at 1828 citing Cummings v. Sanford, 388 S.E.2d 729 (Ga. Ct. App. 1989), wherein the court appointed the daughter of a 65 year old woman, her guardian after finding the mother lacked the capacity to manage her own money. The only evidence presented showed the mother maintained three homes, took lavish vacations with her other children and could not account for how she expended a few thousand dollars although she had plenty more. Note also *Preserving Dignity*, *supra* note 2, at 1836 citing The Conservatorship of Earl B., No 79,197 Prob (San Mateo County Cal., Jan 1985), wherein Earl B. was "belligerent" and spent most of his assets on the

An elderly couple in their eighties resided together in their countryside home which they shared for more than 60 years.[22] The wife became feeble with age and the children, all of whom lived out of town, became concerned she might fall and hurt herself. They considered placing her in a nursing home but due to her insistence, decided to let her remain in her countryside home and hired nurse aids to assist her during the day. A couple of months later, while cooking, the mother fell and broke her hip, and during her recuperation, she died from causes indirectly related to the surgery. Although her death distressed the family, they found comfort in knowing she remained autonomous and maintained her quality of life until she died.

The death of the wife, however, had a grave effect on the husband. He became depressed and began to turn within himself. The family provided much love and support, but little by little, for fear of him hurting himself and in an attempt to help him, they dispossessed him of his daily chores. For most of his 87 years, the father had utilized his wood stove to heat his home, plowed his driveway, and mowed his lawn. The family removed the wood burning stove and had the lawn and driveway maintained by hired hands. Unknowingly to the family, the father's autonomy was slowly taken away. He turned further and further into himself and within a year, he was placed in a nursing home unable to recognize his children when they visited. He died less than a year later.

If given the choice, most would choose a death with circumstances similar to the wife's than to the husband's. She insisted on staying home regardless of her feebleness and died as a result. However, she was able to maintain her autonomy and enjoy her full quality of life and the ability to make her own decisions up to her death. The husband was not as fortunate. The family was not to blame. Most likely, the wife's death was the principal cause of him turning inward, but perhaps if he had been allowed to remain autonomous, the process of turning inward could have been slowed. Even if the chores which he was accustomed to doing caused him harm, continuing to do them would have preserved his autonomy and would perhaps enabled him to prevent living his last years in oblivion and in a nursing home.

The above scenario illustrates that a fine line exists between preserving and destroying the elderly's autonomy. The elderly's autonomy is seriously threatened when institutionalization and/or financial impoverishment is at issue.[23] Autonomy for the elderly is directly connected to their physical and mental well being. Despite a nursing homes "presumably therapeutic" environ-

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lawsuit" petitioned the court to become Earl's conservator. The court appointed her as such within a year, Earl's mental, physical, and emotional condition had significantly deteriorated. A study on Earl B. cited by Professor Rein raised the question whether the courts decision was correct or whether the decision hastened Earl's condition.

22. This example is taken from the writers personal experience and is being used to illustrate the foregoing point.

23. *See Preserving Dignity*, *supra* note 2, at 1838.

ment, the elderly physically and psychologically deteriorate upon entering a nursing home.[24] The primary cause of this deterioration is due to the elderly's loss of autonomy caused by their loss of control of their surroundings, assets, and the strict regiment and institutional atmosphere of nursing homes.[25]

If cost concerns are eliminated, 87.5% of the elderly would prefer home care over nursing home care.[26] While the elderly view nursing homes as a place to die rather than get better, they still impoverish themselves and enter nursing homes because they want to preserve their lifetime of savings, to provide security for their spouse and/or an inheritance to their children.[27] It is unfortunate that the elderly must give up their autonomy in order to preserve it, that is, give up their financial independence in order to insure that it is not taken from them. How the elderly divest themselves in their pursuit to ensure they qualify for Medicaid, if nursing home care is required, has become as important as how well they care for themselves to ensure their autonomy is preserved.

IV. QUALIFYING FOR MEDICAID

A. INCOME AND ASSET RESOURCE ALLOWANCES

Medicaid was established under Title XIX of the Social Security Act of 1965 and is detailed at 42 U.S.C. §§ 1396-1396s. The corresponding regulations are set forth at 42 CFR § 430 et seq. (as amended). Medicaid is funded by both state and federal monies, and states are given authority to proscribe laws and regulations to administer the program.[28] Some states also require financial participation at the local level.[29]

Federal law provides that any individual receiving assistance under the Supplemental Security Income (SSI) program or Aid to Dependent Children are eligible to receive Medicaid.[30] However, a vast majority of applicants must qualify under the eligibility standards promulgated by each state as provided by federally established guidelines.[31] Each state may establish income and asset limitations which cannot be exceeded unless the applicant can show that they require more than the amounts allowed.[32] The limits usually differ depending upon whether the Medicaid applicant is applying for in-home care or nursing

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24. *See id.* at 1858.
25. *See id*. at 1859.
26. *See id.* at 1860.
27. *See id.* at 1861.
28. *See* 42 U.S.C. § 1396a(a)(10)(1993).
29. For example, in New York, the State requires each of its counties to fund a portion of the Medicaid costs within the county.
30. *See* 42 U.S.C. § 1396a(a)(10)(1993).
31. *See* 42 U.S.C. § 1396a(a)(10) - (17)(1993).
32. If you can show a legitimate need for the excess, your application must be approved. *See* 42 U.S.C. § 1396p(c)(2)(D) and note further discussion of topic at section IV(d) *infra*.

home benefits. Assets or income of the Medicaid applicant, in excess of the stipulated amounts, must be "spent down" to the mandated amounts in order for the applicant to qualify.[33]

In an attempt to avoid total impoverishment of a Medicaid applicant's spouse, the federal guidelines were modified in 1988 to mandate states to provide higher income and asset resource allowance limits if the Medicaid applicant had a spouse who was not institutionalized.[34] Income and asset limits are adjusted annually to reflect increases in the "cost of living"[35] and certain assets are generally exempt from being counted when calculating the available assets of the applicant. These exemptions include an applicant's home, household goods and furnishings, an automobile, a luxury account[36], a prepaid burial account[37] (up to $1500), and personal belongings (i.e. jewelry & clothing)[38]. Also, assets such as IRA's, pensions, and annuities are generally counted as " income streams" rather than available resources.[39]

Other income producing assets valued in excess of asset resource limits may also be exempted if it is shown that the income generated from the asset does not yield the community spouse an income greater than the monthly income allowance.[40] However, if the income producing asset is liquidated, the amount liquidated in excess of the community spouse's asset allowance may be included as income in the month liquidated. The Community spouse would then have to "spend down" the excess to avoid disqualification. Conversely, if the income producing asset is not liquidated, and the community spouse pre-

33. *See Options, supra* note 9, at 725.

34. *See* 42 U.S.C. § 1396r-5(d), (f) (1993). The non-institutionalized spouse is referred to as the "community spouse."

35. *See* 42 U.S.C. § 1396r-5(g) (1993).

36. The luxury account is a minimum amount retained for the Medicaid recipient for personal needs which may arise. The maximum amount to be retained in such an account is determined by each state and in most states is less then $3,000.

37. Typically this account is set up to pay for funeral expenses which cannot be paid in advance. Caskets, burial plots, costs for death notice, and engraving head stones may be paid in advance but must be reasonable.

38. See 42 U.S.C. § 1382b (1993). There is no limit on the value of an applicant's home with regard to the exemption allowed. However, 42 U.S.C. § 1396p(a) (1993) provides that if the applicant is not reasonably expected to return home, after notice and a fair hearing, the state can impose a lien on the hone for all Medicaid benefits paid on behalf of the applicant.

39. For example: If the applicant or his spouse owns an annuity with a present value of $75,000 but annuitized payments were $750 a month, the $750 would be treated as an "income stream" and included toward the monthly income allowance rather than including the $75,000 toward the asset resource allowance. The annuity must, however, make economic sense (i.e. payout period commensurate with the life expectancy of the annuitant). See State Medicaid Manual Release published by Department of Health, Health Care Financing Administration, § 3258.9 at 3-3-109.12 (Nov 1994).

40. For example: if a states monthly income allowance for the community spouse is $1800 and the community spouse's monthly income from Social Security and other income streams is $800, a $100,000 C.D. earning 12% ($1000/monthly) may be excluded since the C.D.'s income is required to ensure that the community spouse's monthly income does not fall below the minimum allowance amount.

deceases the institutionalized spouse, the state may have a right to recover against the deceased spouse's estate.[41]

B. TRANSFER RULES

A Medicaid applicant must meet the income and resource limits set forth above to qualify for Medicaid. As a result, many elderly transfer or dispose of assets to ensure they qualify for Medicaid. However, if the transfers made by the elderly individual are not done properly, the disposed assets will be included when determining his or her Medicaid eligibility. In addition, at least one state has attempted to apply the fraudulent conveyance argument under debtor/creditor law to Medicaid planning type asset transfers.[42]

Generally, any asset (1) transferred by the Medicaid applicant or spouse to a third party (2) for less than its fair market value[43] (3) within 36 months[44] of the submission of the Medicaid application is considered an asset owned by the applicant at the time of the application.[45] Assets the Medicaid applicant is entitled to, but refuses to accept[46], are deemed an uncompensated transfer and are also considered an asset of the applicant.[47] If the transfer consisted of a payment "from" a trust which is beyond the reach of Medicaid, a 60 month look-back period is applied instead of a 36 month look back period.[48] Although the extended lookback period applies to all trusts, transfers from revocable trusts can, if properly done, be subject to the shorter look-back period.[49]

Much debate exists among elder law attorneys on the interpretation of the lookback provision. Many interpret the statute to include transfers "to" a trust as requiring a 60 month lookback period while many others read the provision literally and argue that such transfers are not included under the provision and

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41. *See* discussion of a States right to recovery against the Estates of the Medicaid recipient or his/her spouse, *infra* note 82.

42. *See* Cynthia L. Barrett, *President's Column: Debtor/Creditor Law and Medicaid Recovery*, 7 NAELA QUARTERLY 1, at 2 (1994). *But see* Michael Gilfix, *Fraudulent Conveyances: Alien to The World Of Public Entitlement*, 7 NAELA QUARTERLY 2, at 1 (1994); Frances M. Pantaleo and Robert M. Freedman, *In Defense of Medicaid Planning: Federal Law Prohibits States From Applying Debtor-Creditor Laws To Transfer Assets*, 7 NAELA QUARTERLY 4, at 15 (1994).

43. Also referred to as an "uncompensated transfer".

44. The number of months is commonly referred to as the "Lookback Period" See 42 U.S.C. § 1396p(c)(B)(i) (1993).

45. *See* 42 U.S.C. § 1396p(c) (1993).

46. Examples include a waiver or refusal to accept inheritance, pension income, tort settlements or failure to take legal action to enforce court ordered payments not being made. See State Medicaid Manual, *supra* note 39, at § 3257 at 3-3-109.

47. *See* 42 U.S.C. § 1396p(e) (1) (1993).

48. *See* 42 U.S.C. § 1396p (c)(B)(i) (1993). A trust is beyond the reach of Medicaid if it consists of assets disposed of by the Medicaid applicant that are not subject to re-inclusion under the asset transfer rules.

49. If an Applicant transfers assets from a revocable trust to himself/herself and then retransfers the assets to the intended recipient, a 36 rather than 60 month lookback period will apply since the transfer to the third party was made by the Applicant and not the trust.

are subject to the 36 month lookback period.[50] In support of the latter argument, the financial burden on Medicaid would be less if transfers "to" a trust were only subject to the 36 month waiting period. Transfers to retained income trusts[51] provide the Medicaid applicant with additional income which is included as a resource when applying for Medicaid. The additional income results in a reduction in the amount of Medicaid benefits required for the applicant. Applying a 60 month lookback period on transfers made "to" a trust, penalized applicants who retain income and encourages outright transfers which places the income earned on the transferred asset outside the reach of Medicaid. The Health Care Financing Administration (HCFA), the agency responsible for enforcing Medicaid laws, is itself unclear as to the proper interpretation of the statute.[52]

When planning for Medicaid eligibility, it is important to understand the distinction between the lookback period and the lookback date. As discussed, the lookback period is 36 or 60 months depending upon the type of transfer made by the applicant. The lookback date, however, is the specific day the lookback period begins. This date is 36 (or 60) months before the date an individual is institutionalized *and* applies for Medicaid.[53] Therefore, the date an institutionalized individual applies for Medicaid becomes critical because it is from that date that the lookback period is calculated and which the transfer rules will apply.[54]

C. THE PENALTY PERIOD

If a Medicaid applicant improperly "spends down" excess resources or makes transfers of property to a third party for less than its fair market value during the lookback period, (s)he may be ineligible for Medicaid. The period in which an applicant is ineligible is commonly referred to as the "penalty period". The penalty period is calculated by dividing the total uncompensated transfers within the lookback period by the average monthly cost of a private pay individual of a nursing facility within the state (or local community if distinguished

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50. *See* Ellice Fatoullah, *"Income Only" Trusts and Trusts for the Disabled*, 7 NAELA QUARTERLY 3, at 15 (1994). *See also* Clifton B. Krouse Jr., *Self Settled Trusts Following the Omnibus Budget Reconciliation Act of 1993*, 7 NAELA QUARTERLY 2, at 11-12 (1994), wherein the author interprets a 36 month lookback period for transfers to income only trusts.

51. Retained Income Trusts are commonly referred to as "income only" trusts which provide the beneficiary only the income from the trust with no rights to any of the trust principal.

52. *See* Fatoullah *Supra*, note 50, at 15.

53. *See* 42 U.S.C. § 1396p(c)(1)(B) (1993).

54. When planning, assume the individual is institutionalized for some period of time prior to application for Medicaid or that the individual does not enter an institution until the penalty period for uncompensated transfers has expired (concept discussed at length in next section). In the second instance, the lookback date is 36 (or 60) months before the date the individual applies for Medicaid *or* the date which the individual disposes of his/her assets for less than fair market value, whichever is *later*. See 42 U.S.C. § 1396p (c)(1)(B)(ii)(I) (1993).

by the state).[55] Once calculated, the result is the number of months in which the applicant is ineligible for Medicaid benefits.

The penalty period begins on the first day of the month during or after which assets were transferred for less than fair market value *and* which does not occur during any other periods of ineligibility.[56] The first part of the penalty period calculation is simple; it begins on the first day of the month in which the uncompensated transfer occurred.[57] The second part of the provision was added by OBRA '93 and is meant to ensure the penalty periods on succeeding transfers tack on to each other rather than overlap.[58] The Omnibus Reconciliation Act of 1993 also expanded the application of the penalty period to non-institutionalized individuals and removed the limitation on the number of months of ineligibility.[59]

To avoid the unnecessary assessment of a longer penalty period, the Medicaid applicant must ensure (s)he "spends down" excess resources properly and that all uncompensated transfers are well thought out. Excess resources spent on incidentals, medical expenses, food, maintenance of other assets held by the applicant or community spouse, or for the applicant's or community spouse's entertainment or pleasure will not result in any penalty period.[60] When planning to make a transfer of assets for less than fair market value, the Medicaid applicant must be cognizant of the transfer rules, the length of the lookback period and the calculation of any penalty period which may result. The interrelationship between these rules becomes more important as the amount of uncompensated transfers increase.

If an individual makes large amounts of uncompensated transfers (i.e. those which would result in a penalty period greater than the lookback period), (s)he should ensure (s)he retains sufficient assets to pay for his/her institutionalization

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55. *See* 42 U.S.C. § 1396p(c)(1)(E) (1993).

56. *See* 42 U.S.C. § 1396p(c)(1)(D) (1993).

57. However some Elder law practitioners interpret the phrase "or after which" within the provision to mean the month *prior* to the first month of an uncompensated transfer, thus giving an additional month or credit towards the penalty period. *See* Gregory Wilcox, *Transfer of Assets Puzzles After OBRA '93*, 7 NAELA QUARTERLY 6 (1994).

58. For example: Pre-OBRA '93, if a transfer in January of year 1 caused a penalty period of 5 months and a transfer in February of Year 1 caused a penalty period of 4 months, the applicant would be eligible in June of Year 1 because the penalty period for each transfer ran simultaneously. Post OBRA '93 the penalty periods for each transfer run concurrently. Therefore under the current law, the applicant will not be eligible until October of Year 1 (5 months penalty for the January transfer and 4 months penalty for February transfer).

59. Prior to OBRA '93, the penalty period did not apply to non-institutionalized individuals and the penalty period could not exceed 30 months (the lookback period prior to OBRA '93).

60. Popular techniques to spend down include using excess resources to make improvements to the applicant or community spouse's home which is not subject to the resource allowance limits, prepaying for funeral costs, dining out, vacationing, traveling and other leisure activities for the applicant (prior to application) or community spouse. Care should be taken, however, not to use the excess to purchase assets which are subject to the allowance limits.

or remain outside an institution, during the lookback period. Such planning ensures a maximum penalty period equal to the lookback period rather than the unlimited period set out in the statute.

To illustrate the foregoing point: An individual anticipates entering a nursing home and transfers $250,000 to his/her children.[61] Assuming the average private monthly nursing home costs $5000 in the applicant's region, the penalty period on the transfer is 50 months (250,000/5,000). If the individual enters a nursing home within 36 months of the transfer (the lookback period since the transfer was not "from" a trust) and applies for Medicaid, (s)he will be deemed ineligible for 50 months from the date of the transfer. However, if the applicant waits 36 months before entering a home (or enters sooner and privately pays for the home until 36 months have elapsed) and then applies for Medicaid, (s)he will be eligible upon his/her application. Since there will not have been any uncompensated transfers within the applicant's lookback period (36 months from institutionalization *and* application), no penalty period will apply.

As illustrated, understanding the interrelationship between the transfer rules and the penalty period can result in substantial estate preservation for large estates, but it can also be applied to preserve smaller estates. More than half of any estate can be preserved if planning begins prior to institutionalization. In fact, the further in advance to institutionalization planning begins, the greater the amount of the estate that can be preserved. Assuming the average private monthly cost of nursing home care equals the actual cost of care, an individual can transfer one half of his/her estate on the date (s)he is institutionalized and the half (s)he retains will be available to pay the cost of care during the penalty period.[62] This is commonly referred to as the "rule of halves".

Elder law attorneys must, however, be extremely careful when advising clients on transferring assets to qualify for Medicaid. As previously discussed, transferring a substantial portion of estate assets outright impoverishes the elderly and may strip them of their autonomy and quality of life. Transferring assets to a retained income trust with no provision for principal distributions until the death of the grantor can help preserve the client's autonomy and quality of life. Under such a plan, the issue of whether a 60 month lookback period applies to transfers "to" income only trusts becomes more relevant and the potential benefits to Medicaid and the elderly becomes evident.

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61. This example does not consider the potential gift tax ramifications of large transfers, which are also considered when engaging in Medicaid planning.

62. For example, if an individual transfers $50,000 of his/her $100,000 estate the day (s)he is institutionalized *and* applies for Medicaid, a 10 month penalty period will be assessed. However, the $50,000 retained by the individual can be used to pay for his/her care during the 10 month penalty period and (s)he will be eligible for Medicaid in Month 11, the same month his/her money will run out.

D. EXCEPTIONS TO QUALIFICATION RULES

As evidenced, the clash between the elderly's need for autonomy and the government's need to control the cost of Medicaid is a never ending battle. Congress, however, has recognized certain circumstances where the specific need of an applicant or his/her dependents outweigh the government cost concerns. The principal exception to the transfer rules regards transfers by the Medicaid applicant to his/her spouse. To avoid spousal impoverishment, a Medicaid applicant may transfer any asset to his/her spouse or to an individual for the sole benefit of his/her spouse without incurring any penalty period.[63] Such transfers, however, will be subject to the spousal allowance limits[64]. Any reconveyance by the community to a third party is subject to the transfer rules which may create a penalty period to the institutionalized spouse.[65]

A Medicaid applicant may also transfer his/her home without being subjected to the transfer rules or penalty period, if it is transferred (1) to his/her spouse, (2) to a child who is under age 21, blind or disabled, (3) to a sibling who has an equitable interest in the home *and* resided there with the Medicaid applicant for a period of at least one year prior to the applicant's institutionalization, or (4) to a child who resided with the applicant for a period of a least 2 years prior to his/her institutionalization *and* said child provided care to the applicant which enabled the applicant to remain home rather than be institutionalized.[66]

There are also trusts to which a Medicaid applicant may transfer assets without incurring any penalty period. Trusts exempted under the Medicaid statute include those funded for the benefit of a blind or disabled child or an individual under age 65 who is disabled[67]. Other exempt trusts include those for the benefit of a disabled individual, created by his/her parents, grandparents, legal guardian, or a court which provides for reimbursement to Medicaid upon the death of the individual for amounts Medicaid paid on his/her behalf.[68] Supplemental Needs Trusts may also be established by non-related individuals and nonprofit associations.[69] Using exempt trusts in Medicaid planning can be

63. *See* 42 U.S.C. § 1396p(c)(2) (1993).

64. *See supra,* note 34.

65. *See* 42 U.S.C. § 1396p(c) (1993) and discussion of Transfer Rules, *supra.*

66. *See* 42 U.S.C. § 1396p(c)(2)(A) (1993).

67. *See* 42 U.S.C. § 1396p(c)(2)(B)(iii) - (iv) (1993). Under said provision, disabled is defined 42 U.S.C. § 1382c(a)(3) as unable to earn a living by reason of any medically determinable physical or mental impairment which can be expected to result in death or expected to last for a period of not less than 12 consecutive months.

68. *See* 42 U.S.C. § 1396p(d)(4) (1993). These trusts are commonly referred to as "supplemental needs trusts" (SNT) and can be used by a Medicaid applicant to provide benefits to his/her children or grandchildren not otherwise provided by Medicaid. These trusts are also becoming very popular with disabled individuals who receive modest settlements or lawsuit verdicts. The SNT allows the award to be available to provide additional benefits not provided by Medicaid without jeopardizing Medicaid eligibility.

69. *See* 42 U.S.C. § 1396p(d)(4)(B) - (C) (1993).

complicated. While the rules set out in the statute are quite specific, their application can be confusing.[70]

In addition to the specific exemptions discussed, Congress recognized that other circumstances may exist which it could not foresee, but which would warrant an exception to the transfer rules. As a result, Congress provided that the Medicaid transfer rules will not apply to a Medicaid applicant who can show (s)he intended to transfer the assets for full value, transferred the assets for a purpose other than to qualify for Medicaid or has received back those assists transferred for less than full value.[71] If the applicant intended to receive full value of the asset, but was unable to, Medicaid may have recourse against the transferee if fraud, undue influence or some similar tactic was used.

A strong argument can be made that transfers of exempt property are not subject to the transfer rules. Since the property is exempt from Medicaid qualifications, a transfer of such property would not be done to qualify for Medicaid. Other transfers done for a purpose other than to qualify for Medicaid may include transfers incident to a divorce, estate planning,[72] or a valid business reason. A Medicaid applicant will also be exempt from the transfer rules if (s)he can show that application of the transfer rules would cause "undue hardship".[73] The criteria establishing an undue hardship are promulgated by the individual states, but must conform to those set by the secretary for Public Health and Welfare.[74] The undue hardship exemption also applies to transfers made in trust.[75]

E. SPOUSAL OPTIONS OF LAST RESORT

If all estate preservation options have been considered, but the community spouse wants to retain more assets than allowed by the spousal impoverishment

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70. *See* Wilcox, *supra*, note 57 at 8-9, wherein he notes the distinctions between the § 1396p(c)(2)(B)(iii) - (iv) and the § 1396p(d)(4) exempt trusts.

71. *See* 42 U.S.C. § 1396p(c)(2)(C)(ii) (1993).

72. Common estate planning transfers include those made under Internal Revenue Code § 2503(b), which allows a donor to transfer $10,000 per donee, per year without incurring any gift tax. Case law had suggested that for the exemption to apply, the donor must show a history of such transfers prior to institutionalization or reasonable knowledge of impending institutionalization. *See* Matter of Klapper, N.Y.L.J. 26 (August 9, 1994). The Judge who decided Klapper, however, expanded his decision in Matter of Beller, N.Y.L. J. 23 (August 31, 1994) and Matter of Goldberg, N.Y.L.J. 24 (August 31, 1994) and stated that guardians of incompetent individuals can perform "Medicaid Planning" without a prior pattern of gifts. Further, the Court noted that the guardian could transfer the incompetent's assets to those whom the incompetent intended them to go (determined via totten trusts, joint account, testamentary disposition, etc.), as long as sufficient assets were retained for a pre-paid burial account, the incompetent's luxury account, and to pay for the incompetent's care during any ineligibility period assessed by Medicaid. The Courts reasoning was that incompetent individuals should have the same opportunity as competent persons to preserve assets.

73. *See* 42 U.S.C. § 1396p(c)(2)(D) (1993).

74. *See id.*

75. *See* 42 U.S.C. § 1396p(d)(5) (1993).

allowances, (s)he may elect to divorce the institutionalized spouse or refuse to contribute toward his/her care. Divorce, because of its religious, social and psychological impact on the elderly, is rarely used. Most elderly equate such a scenario as an "abandonment", even if done solely for financial reasons. Additionally, divorce may effect a community spouse's right to pension and/or social security benefits received on behalf of the institutionalized spouse, and subject the community spouse's entire estate to Medicaid's reach if (s)he should fall ill and require nursing home care.[76] The divorcing spouse would also most likely be subject to any equitable distribution rules under state law and if the institutionalized spouse is incompetent, his/her rights may be protected by a court appointed representative.

An outright refusal to contribute to an institutionalized spouse's care also presents some concerns. While Medicaid cannot be denied to an applicant who, but for a spousal refusal, qualifies for Medicaid, states can implement methods to recover from the community spouse for Medicaid benefits paid.[77] New York, for example, provides that spousal refusals must be in writing for the Medicaid applicant to receive benefits.[78] In addition, New York's Department of Social Services has authority to commence a proceeding against the community spouse to compel support.[79] New York goes so far as to allow its Department of Social Services to "elect" against the estate of a deceased spouse of Medicaid recipient, for any interest (s)he may have under the law.[80] New York also allows recovery of Medicaid benefits paid for an institutionalized spouse from the estate of a deceased community spouse.[81] Federal law does not provide for such recovery but does require recovery against the"estate" of the Medicaid recipient.[82]

The Omnibus Reconciliation Act of 1993 grants each state the authority to define "estate" for purposes of recovery of Medicaid benefits paid. Estate, may include real and personal property or assets which the Medicaid recipient had a legal interest in at the time of death including: joint tenancies, life estates, living trusts, or other similar arrangements.[83] If a state were to enact such a liberal

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76. As a single person, the community spouse is subject to Medicaid income and asset limitations which are drastically less than (s)he receives as a community spouse.

77. *See* Medicaid Catastrophic Coverage Act (MCCA) of 1988.

78. *See* New York Social Services Law § 366 (McKinneys, 1995).

79. *See id.*

80. *See id.* In New York a decedent cannot disinherit his/her spouse. If the surviving spouse is not provided for in the will of the deceased spouse, the surviving spouse is entitled to "elect" to receive the greater of 1/3 of the estate or $50,000. Other states may refer to such provisions as "dower rights".

81. The state's right of recovery is based on a theory of implied contract but, is limited to assets of the community spouse which were "available" resources (i.e. those which exceed the spousal allowance limits). *See* Matter of State of Craig, 592 N.Y.S. 2d 164 (App. Div., 4th Dept. 1992), *aff'd* 624 N.E. 2d 1003, 604 N.Y.S. 2d 908 (N.Y. 1993).

82. *See* 42 U.S.C. § 1396p(b)(1) (1993), but note exceptions thereto.

83. *See* 42 U.S.C. § 1396p(b)(4) (1993).

definition of "estate" it would, arguably, be able to dispossess joint tenants or remaindermen of interest in property shared with a Medicaid recipient.[84] It is obvious that the current trend is to expand Medicaid laws to allow recovery for benefits paid from all available sources. Therefore, any attempt to use an option of last resort must be carefully reviewed and all the potential consequences weighed.

V. OTHER ESTATE PRESERVATION OPTIONS

While Medicaid is a principal source in providing care for the elderly facing institutionalization, other sources are available which if utilized properly can provide additional benefits to the elderly in their attempt to preserve assets. Medicare, like Medicaid is a government provided health insurance program for those age 65 or older and the disabled.[85] Medicare consists of two parts; Part A, which insures the costs of hospitals, skilled nursing facilities, home health care and hospice care[86] and Part B, which covers physician's charges, outpatient care, ambulance, and medical equipment services.[87] Medicare benefits can subsidize the cost of care during any ineligibility period under Medicaid.

Home health care benefits under Medicare cover the costs of skilled nursing visits and certified home health aids for up to 35 hours per week. The insured must require skilled nursing services for less than five days a week (but at least once every 60 days) or therapy services of less than 8 hours a day.[88] Medicare also covers the first 100 days of care received in a nursing home if the insured was hospitalized for at least three days within the 30 day prior to admission to the nursing home and (s)he requires daily skilled nursing services (7 days a week or 5 days of therapy services).[89] The unlimited duration of Medicare home care benefits and/or more than three months of nursing home benefits received, act simultaneously as a credit toward any penalty period assessed to a Medicaid applicant.

In addition to Medicare, other sources of aid to the elderly included Veteran Administration benefits and private nursing home insurance. In some instances, Veteran Administration benefits pay the cost of the first six months of care in a nursing home for qualified veterans.[90] The Veteran Administration may also

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84. For example if a Medicaid recipient transferred his/her home to his/her children but reserved a life estate, the home would be subject to Medicaid's right of recovery. A legal question arises, however, whether the deceased Medicaid applicant has any "legal title" at death to assets which said title is defeated by death.

85. *See* 42 U.S.C. § 426 (1988).

86. *See* 42 U.S.C. § 1395(d) - 13959(i) (1993).

87. *See* 42 U.S.C. § 1395(j) - 1395(w) (1993).

88. *See* 42 U.S.C. § 1395(d) (1988). *See also* 42 C.F.R. 401.40 (1995).

89. *See* 42 U.S.C. § 1395d(a)(2) (1988). *See also* 42 C.F.R. 409.30 - 409.31 (1995).

90. The Veterans Administration provides various benefits to veterans depending whether they are of active status, the availability of nursing home beds within VA facilities and the recommendation of

provide monthly benefits to the spouse of the institutionalized veterans. Private nursing home insurance, on the other hand, may be purchased by anyone willing to pay for it. The cost of $150 per day coverage for up to three years for a 65 year old is approximately $1,355 per year.[91] The actual cost of the insurance, however, will depend upon the health of the applicant, the options purchased, and the age when the policy is first obtained.[92]

Residents of a limited number of states have a special form of nursing home insurance available to them under the Partnership For Long-Term Care, sponsored in part by the Robert Wood Johnson Foundation.[93] Under the Partnership, an individual purchases a policy which provides minimum benefits for three years of coverage in a nursing home. Policy premiums are standardized and upon completion of the benefit period, the applicant is eligible under the state Medicaid system regardless of the amount of assets (s)he owns.[94] The Partnership was established in an effort to provide the elderly an alternative to impoverishment when facing the possibility of institutionalization.

For individuals with significant estates, the best Medicaid planning may be avoiding Medicaid planning. If an individual's assets generate sufficient income to pay for his/her care upon institutionalization, a simple solution is to place the assets into a revocable trust. A revocable trust provides a vehicle for asset management in the event of an individuals' incapacity and enables him/her to avoid probate in states that require it. Revocable trusts also enable an elderly individual to retain control of all of his/her assets until (s)he is unable or chooses to relinquish it.[95] Most importantly, the trust can be as flexible or as rigid as the grantor decides and can provide a myriad of scenarios for trust management in the event of his/her incompetency.

VA physicians, to name a few. Veterans should contact their regional Veterans Administration office to determine what, if any, benefits (s)he may be entitled.

91. *See* Dugas, *supra*, note 11, at A88.

92. The multiplicity of options available when purchasing nursing home insurance are vast and outside the scope of this paper. Options such as the length of the waiting period, built-in inflation protection, non-forfeiture provisions, home care coverage and medi-gap coverage (which covers the deductibles on Medicare or other health insurance benefits) are the more significant options to consider. *See* Jerry L. Soltermann, *Medicaid Alternatives*, 1 THE ELDER LAW JOURNAL 281, 284 (1993) [hereinafter *Medicaid Alternatives*].

93. *See* Gary Enos, *States Try to Ease Burden of Long-Term Care: The Question is, Will it Save the Public Some Money?* PTS PROMT, April 12, 1993, City & State, at 3. *See* also Dugas, *supra,* note 11, at A88. OBRA '93 prohiited States from implementing these programs after May 14, 1993. *See* 42 U.S.C. § 1396p(b)(1)(C)(i) - (ii). California, New York, Connecticut, and Indiana were among the states that initiated these programs before the OBRA '93 prohibition.

94. *See id.*

95. The use of a Power of Attorney or Joint Accounts can also prevent the need for probate. Such techniques, however, do not protect the elderly individual's assets from abuse by the appointed attorney in fact or from the creditors of a joint account holder (i.e. account in the name of the elderly individual and his/her child will subject the account to the creditors of the child).

VI. CONCLUSION

The number of elderly Americans is growing rapidly, the cost of care for the elderly is skyrocketing, the frustration of taxpayers is mounting, and the elderly's fear of impoverishment is materializing. Some argue Medicaid was meant to provide care to the "less fortunate", and consider Medicaid planning an abuse while others contend Medicaid is a right and must be made available to everyone. Regardless of how an individual views Medicaid qualification and benefits, the "government" by its policies or the "greed of the health care system providers" are often laid to blame for the "crisis" in long-term health care for the elderly. It is time to stop philosophizing and pointing fingers and time to recognize the problem and address it before it is thrust upon us with impending magnitude. The government's role should be to act as a partner to help us achieve our goals, not to be the sole provider of our needs.

The elderly's ability to remain autonomous and free from the threat of impoverishment is as important an element of the solution to the problem as is the need to control cost and provide sufficient care. Hopefully, everyone agrees that the elderly are not to blame for the problem and that they deserve our respect and concern as we attempt to resolve this issue. The preservation of the elderly's autonomy and their ability to preserve the dignity should be at the forefront of any proposed solution. As suggested by Professor Rein, such a goal may in fact result in a reduction of long-term benefits required, resulting in a reduced need for nursing home care.[96] For the same reason, we should also seek to preserve the financial independence of the elderly.

To avoid impoverishment of the elderly, we must provides avenues for the elderly to preserve assets. The Partnership for Long-Term Care was a good start. The annual cost of premiums for significantly less than the cost of one months stay in a nursing home.[97] Few of us argue the need to obtain insurance to protect our homes, automobiles and other personal assets. Why then should we hesitate in purchasing nursing home insurance to protect our financial security and lifetime of savings. Arrangements under the Partnership guarantee the preservation of the Medicaid applicant's assets and subsidized the cost of care by requiring the income on the retained assets to be used for the support of the applicant. With 87.5% of elderly preferring home care to nursing home care,[98] great effort must be made to increase its availability. Perhaps the Partnership program should be expanded to include home-care benefits in addition to nursing home benefits.

Allowing individuals to establish income only trusts without being subjected to a penalty period may eliminate some Medicaid planning and enable assets

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96. *See Preserving Dignity, supra*, note 2.
97. *See* Enos *supra*, note 93, at 3. *See also* Dugas *supra*, note 11, at A88.
98. *See Preserving Dignity, supra*, note 2 at 1860.

which otherwise may have been transferred to generate income and subsidize the cost of care. Such a proposal would also help to preserve the elderly's financial autonomy. Perhaps using the income from such a trust to purchase some form of long-term care insurance could also be implemented.

Any attempt to have the government finance universal long-term care for all Americans is unrealistic and insurmountable.[99] The government, however, through tax incentives[100] can be the impetus to encourage individuals to seek alternate means of payment for long-term care.

Assisted living arrangements should also be encouraged. Many elderly do not require full time nursing care, but rather only require assistance with some daily chores. Private investors could stand to profit if assisted living residences are created wherein the elderly can have his/her own apartment with a nurse or aid available 24 hours at the push of a button if required. Providing volunteers and/or visitors to the elderly can also assist in preserving the elderly's autonomy. The cost of assisted living housing should be far less than the costs of nursing home care which would serve to preserve the elderly's estate and their autonomy and relieve the system of having to pay for nursing home care for those individuals who otherwise do not require it.

The responsibility of addressing the problem of long-term care belongs to everyone. If not addressed, the young will be strapped with paying for runaway costs of care for the ever-growing number of elderly; the middle age will become elderly and seek benefits which may or may not be available; and the elderly may face death with despair rather than dignity. The Medicaid qualification rules are becoming ever more complicated. The Medicaid system is expensive and burdened with costs of government bureaucracy. The ultimate solution lies with us, with the government acting only as a partner to assist us in achieving our goals, not to mandate its solutions nor bear the burden of the costs.

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99. *See Medicaid Alternatives, supra* note 92 at 286.

100. Such incentives could include deductibility of the costs of nursing home insurance, tax-free withdrawals from untaxed sources (i.e. IRA's, pensions, etc.) to pay for nursing home insurance or long-term health care costs, tax credits to private investors who finance long-term care facilities (i.e. similar to the low income housing and historic tax credits under the Internal Revenue Code) or charitable type deductions for payments made to a national fund for health care.

In Defense of Congressional Term Limits*

MARK P. PETRACCA†

I. INTRODUCTION

Countless public opinion polls show that the overwhelming majority of Americans want to limit congressional terms. Not surprisingly therefore, a promise to vote on the so-called "Citizens Legislature Act," which would limit congressional terms by constitutional amendment, was a key component of the Republican Party's 1994 "Contract With America."

Whether a constitutional amendment to limit congressional terms will emerge from the frenzy of the 104th Congress remains to be seen. I doubt it, especially since many Republican leaders of the House and Senate started backing away from their "intense commitment" to term limits once it was apparent that they had control of Congress for the first time in 40 years. Nevertheless, even if a constitutional amendment to limit congressional terms is not forthcoming from the 1st session of the 104th Congress, the public demand for term limits isn't likely to wane anytime soon.

I endorse a constitutional amendment to limit congressional terms for two basic reasons. First, such an amendment will reestablish the principle of rotation as an essential institutional feature of the national government. Second, term limitation is an appropriate and efficacious antidote to the professionalization of legislative politics in America, particularly the professionalization of the United States Congress.

The principle upon which term limitation rests—namely, rotation in office—has been long identified as an essential institutional feature of republican government. Over the centuries a great many distinguished and varied political theorists have advocated the rotative principle as a key defining characteristic of representative democracy. Moreover, America has extensive experience with the formal and voluntary practice of rotation in office; an experience going back some 350 years.

Throughout the historical development of democratic theory and the institutional design of republican government, three main advantages have been attributed to the principle of rotation in office. Rotation provides a check on the potential abuse of public power; increases the opportunity citizens have for ser-

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vice in public office, and enhances the over-all quality of political representation. These advantages were well understood and appreciated by America's constitutional framers, even though they decided for prudential, among other reasons not to include a requirement for legislative rotation in the new constitution.

Not every constitutional amendment to limit congressional terms, currently on the table for discussion, will accomplish these ends. In my view, a wise term limitation amendment must have three features. It should: (1) Limit the number of terms which can be served by members of both chambers to below the current mean length of service; (2) Provide explicitly for rotation in office by specifying the period which must be spent in "private station" by a term-limited legislator prior to running for office in the same chamber again; and (3) Include language which implements whatever term limit is imposed in stages across the nation's 435 congressional districts. These features, all discussed below, are virtually absent from the current array of resolutions before the 104th Congress to limit congressional terms by constitutional amendment.

II. POPULAR SUPPORT FOR TERM LIMITATION

Term limitation is undoubtedly the 20th century's most popular institutional reform as evidenced by both opinion polls and election results. National poll after national poll show that regardless of party, race, ethnicity, income, gender, or geographical location the vast majority of Americans support term limits for federal and state legislators.

However, we might be rightly suspicious of what citizens tell pollsters. Moreover, we all know that opinion is not necessarily determinative of behavior. The real evidence of public support for term limits comes in the form of election results. Since 1990 twenty-one states have passed initiatives to limit terms for federal legislators, including California, Florida, Massachusetts, Michigan, Ohio, and Washington. One additional state—Utah—has adopted term limits for federal legislators by the passage of state legislation.[1] An initiative to limit congressional terms will appear on the ballot this November in Mississippi. Moreover, twenty states now also limit terms for state legislators and countless municipalities, including Los Angeles, San Francisco, Washington, D.C., and New York City, have adopted term limits for local elected officials.

The term limitation express, as I've called it, has barreled across the country at an especially rapid pace, most prominently in those states where citizens have the initiative power. By 1995 every state with the initiative power will likely have adopted term limits for state and federal legislators. However, more than

1. This means that 42% of all House and 44% of all Senate members are currently serving from states with term limits.

one-half of the states in the union do not give citizens the initiative power. Restrictions on the initiative power, the wisdom of uniform limits on congressional terms, and the possibility of an adverse decision from the Supreme Court on the authority of states to limit the terms of federal legislators[2] all recommend the adoption of an appropriate constitutional amendment to limit congressional terms. If term limitation was a bad idea, as so many critics allege,[3] neither election victories nor a high level of public support would persuade me to endorse it. I endorse term limitation for members of Congress on the basis of republican principles and as an antidote to the professionalization of political representation in Congress. An elaboration of each point follows.

III. HISTORICAL SUPPORT FOR THE PRINCIPLE OF ROTATION IN OFFICE

Beginning with Aristotle, the principle of rotation has been recognized as an essential institutional feature of what came to be called republican government. The rotative principle, historical antecedent of modern term limitation, is based upon the simple, but profound Aristotelian observation that democratic citizenship is possible only where there is reciprocity of "ruling and being ruled by turn." Thus, for representative democracy to flourish there must be significant rotation in office. The power of incumbency and the desire of many elected officials to pursue lifelong careers as professional legislators make significant rotation nearly impossible.

Promoted by Aristotle and Cicero, practiced in ancient Athens and Rome along with the Renaissance city-states of Florence and Venice, rotation in office was highly praised as an essential feature of republican political design by a wide array of English writers during the 17th and 18th centuries, most prominently, James Harrington, William Blackstone, William Godwin, Walter Moyle, Algernon Sidney, Henry Neville, James Burgh, John Trenchard and even John Locke among others.[4]

IV. AMERICA'S HISTORICAL EXPERIENCE

In the "new world" of 18th century America, the rotative principle appeared as a characteristic of legislative and deliberative institutions in many colonial,

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2. The Supreme Court heard a challenge to the Arkansas initiative limiting congressional terms in November, 1994, *see* U.S. Term Limits, et al. v. Ray Thorton, et al., 115 S.Ct. 39 (mem), 129 L. Ed. 935 (1994).

3. For a summary of the arguments, for and against, term limits along with a wide range of relevant citations, *see* Cato Institute, THE POLITICS AND LAW OF TERM LIMITS (Edward H. Crane and Roger Pilon, eds., 1994); Kenneth Jost, *Testing Term Limits*, 4 CQ Researcher 1009-1032 (November 18, 1994); *Limiting Congressional Terms* (Gerald Benjamin and Michael J. Malbin, eds., 1992).

4. *See* MARK P. PETRACCA, ROTATION IN OFFICE: THE HISTORY OF AN IDEA, IN LIMITING LEGISLATIVE TERMS, 19-51 (Gerald Benjamin and Michael Malbin eds., 1992); and MARK P. PETRACCA, A HISTORY OF ROTATION IN OFFICE, IN LEGISLATIVE TERM LIMITS, (Bernard Grofman, ed., 1995)[forthcoming].

revolutionary, and post-revolutionary charters, treaties, and constitutions as well as in numerous plans for the design of state and national governments. Prominent examples included the "New England Confederation of 1643," William Penn's "Frame of Government" (1682; Art. III), the Delaware "Frame of Government" (1683), the Pennsylvania Constitution of 1776, the bills of rights accompanying six of the new state constitutions adopted from 1776-1780 [Virginia, 1776, Sec. 5; Pennsylvania, 1776, Art. 19 & 11; Delaware, 1776, Art. 4; New York, 1777, Art. 11; South Carolina, 1778, Art. 9; and Massachusetts, 1780, Art. VIII] , and the Articles of Confederation (1781).[5]

It's worth noting that the right of citizens to expect officials to return to "private station" or "private life" after brief periods of officeholding appeared in the bills of rights accompanying six of the state constitutions adopted from 1776-1780. In these declarations or bills of rights, rotation in office was a right of citizenship on par with freedom of speech and the press, trial by jury, and frequent elections. The Virginia "Bill of Rights," for example, provided that members of the legislature and executive "may be restrained from oppression, by feeling and participating in the burdens of the people, they should, at fixed periods, be reduced to private station" (1776, Sec. 5).

Contrary to the persistent assertion of term limit opponents, there is nothing anti-democratic or un-American about term limitation. Indeed, throughout the historical development of democratic theory and the design of republican government, three main advantages have been attributed to the principle of rotation in office: (1) it checks the abuse of public power by frequently returning officeholders to private station; (2) it increases the opportunity for citizens to serve in public office, thereby expanding the educative function of political participation; and (3) it enhances the overall quality of political representation by creating a reciprocity of responsibility and experience among rulers and the ruled.[6] These advantages were well understood and greatly appreciated by a diverse group of American revolutionaries and constitutional framers, most prominently Thomas Paine, John Adams, Thomas Jefferson, Benjamin Franklin, Ellbridge Gerry, George Mason, Melcanton Smith, James Madison, and George Washington.

"The truth is," said a Committee of Congress in 1782, "the security intended to the general liberty in the Confederation consists in the frequent election and in the rotation of the members of Congress, by which there is a constant and effective check upon them. This is the security which the people in every state enjoy against the usurpations of their internal government and it is the true source of security in a representative republic." To repeat: "Rotation of the

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5. *See* PETRACCA, A HISTORY OF ROTATION IN OFFICE, *supra*, note 4.

6. *See* Mark P. Petracca, *Poison of Professional Politics*, Cato Institute Policy Analysis No. 151 (May 10, 1991); PETRACCA, ROTATION IN OFFICE; and PETRACCA, A HISTORY OF ROTATION IN OFFICE, *supra*, note 4.

members of Congress, [is] . . . the true source of security in a representative republic." Three members of Congress served on this committee and authored this report: Thomas Fitzsimmons of Pennsylvania, James Madison of Virginia, and Alexander Hamilton of New York. Hamilton of course would later criticize the principle of rotation in response to the Anti-Federalists who strongly objected to the absence of rotation in the proposed Constitution.[7]

V. EXPLAINING THE ABSENCE OF ROTATION IN THE CONSTITUTION

If rotation was such a popular and widely accepted political principle, why then was it omitted from the Constitution? After-all, a requirement for rotation was contained in the "Virginia Plan" submitted by Edmund Randolph along with the plans submitted by Charles Pinckney of South Carolina and William Patterson of New Jersey.

Yet, in a single vote on a single day (June 12, 1787), to which no one apparently voiced a recorded objection, the committee of the whole voted to strike the language: "incapable of re-election into 1st branch of Natl. Legisl. for [blank] years and subject to recall."[8] Much has been made of this vote by the contemporary opponents of term limits, but I dare say, it doesn't reveal very much about why the convention delegates did not include a requirement for mandatory rotation and recall in the draft of the constitution. This single reference, which occupies only three lines in Madison's voluminous notes from the convention (and even less space in the official journal and the notes from Robert Yates) does not explain why rotation was omitted from the Constitution. I maintain that in leaving out a requirement for mandatory rotation in the new constitution, delegates to the Constitutional Convention in 1787 did not reject the principle or importance of rotation in office. The record indicates that only a small number of delegates to the Constitutional Convention and subsequent state ratification conventions, such as Alexander Hamilton, Robert Livingston, and Roger Sherman, ever expressed opposition to the rotative principle.

Alexander Hamilton, of all people, who wanted the president to serve for life and the governors of every state to be appointed by the national government has become something of a poster-boy for term limit opponents. By his own admission, Hamilton was no friend of republican government; making him a rather odd champion for those who oppose term limits for supposedly democratic reasons.[9] From my historical research I have concluded that the convention dele-

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7. *See* Petracca, *Do Term Limits 'Rob Voters' of Democratic Rights? An Evaluation and Response*, 20 Western State University Law Review 547-567 (1993).

8. 1 *The Records of the Federal Constitution of 1787*, at 217 (Max Farrand, ed., 1966).

9. *See* MARK P. PETRACCA, *Restoring 'The University in Rotation': An Essay in Defense of Term Limitation*, THE POLITICS AND LAW OF TERM LIMITS, 57-82 (Edward H. Crane and Roger Pilon, eds.) Washington, D.C.: Cato Institute, 1994).

gates may have decided against the inclusion of a mandatory requirement for rotation in office for five reasons.[10]

(1) The requirement of rotation had been difficult to enforce during the fragile period of national government under the Articles of Confederation. The Framers of the Constitution were rightly wary of imposing any further requirements on the states which, if difficult to enforce, could threaten the stability and governability of the new union.

(2) Requirements for mandatory rotation may have been left out of the Constitution because they were thought of as "entering into too much detail" for such a short document.

(3) Delegates thought mandatory rotation unnecessary given short terms, the doctrine of instruction, and the other checks built into the Constitutions, such as the separation of power and federalism.

(4) With specific reference to the Senate, the Framers may have expected article I, section 3 of the Constitution to provide for a full rotation of that body every six years, precisely as proposed and strongly endorsed by James Harrington in *Oceana* (1656) and James Burgh in *Political Disquisitions* (1774/1775). During the Constitutional Convention, James Madison, James Wilson, Nathaniel Gorham, Edmund Randolph and Hugh Williamson among others, defended the longer 6-year term for members of the Senate on the grounds that one-third of the Senate would "go out" every two years; thereby balancing the need for experience with "a rotation of power" "essential to liberty." Wilson, for example, responded to delegates opposed to the long terms being proposed for Senators with this explanation: "There is a rotation; and every second year one third of the whole number will go out. Every fourth year two thirds of them are changed. In six years, the *whole body is supplied a new one.*"[11]

What was an explanation at the Convention turned into an expectation, by individuals urging ratification of the Constitution. Namely, that one third of the Senate would "go out," "retire," or "return to private station" every two years. This expectation can be found in the remarks delivered at various state ratifying conventions by George Read and John Dickinson in Delaware, James McHenry in Maryland, James Iredell and William Davie in North Carolina, Thomas M'Kean and James Wilson in Pennsylvania, and Rufus King and Fisher Ames in Massachusetts.

Indeed, no less an authority on this expectation than Alexander Hamilton explained the meaning of article I, section 3 of the Constitution to the New York Ratification Convention in precisely the same fashion: "One third of them [Senators] are to go out at the end of two years, two thirds at fours, and the

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10. Citations for this discussion can be found in PETRACCA, A HISTORY OF ROTATION IN OFFICE, *supra*, note 4.

11. 2 THE DEBATE IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 319 (Jonathan Elliot, ed., 1968).

whole at six years."[12] There can be little doubt that the often-used phrase "to go out" meant precisely that—senators would go home and return to "private station" after a brief period of service.

Indeed, the behavior of Senators elected under the Constitution for the first 36 years of the republic, from 1789-1824, confirms that the framers expectation of a biennial rotation of one-third of the Senate was taken very seriously. For the first 17 states admitted to the Union the average number of individuals serving as Senator during this 36 year period was 8.1 persons for the first seat and 7.5 persons for the second. The average length of service for Senators from these states was 4.4 years for the first seat and 4.8 years for the second.[13]

There were a few individuals who stayed in office longer than one term, however, this was by far the exception. The norm was, as Hamilton had accurately predicted at the New York's Ratification Convention, a "constant and frequent change of members" in the Senate.[14]

Finally, article I, section 3 of the Constitution was also interpreted by legal scholars and historians throughout the 19th century as creating a full rotation in the Senate every six years. To quote an authority frequently cited by the opponents of term limits, Justice Joseph Story, "The next clause" in article I, section 3 of the Constitution, "provides for a change of one third of the members every two years. Thus the whole body is gradually changed in the course of six years, always retaining a larger portion of experience, and yet incapable of combining its members together for sinister purposes."[15]

Though the Constitution clearly permits reelection of senators, there was an equally clear expectation by Constitutional Framers, ratification advocates, senators themselves, and subsequent commentators that a full rotation of the Senate would occur every six years.

(5) The fifth and final reason mandatory rotation was left out of the Constitution is a function of the widespread expectation that rotation would be practiced voluntarily. The prevalent practice of voluntary rotation in many state legislatures no doubt persuaded convention delegates that rotation in office would be the norm in the new national government, with or without a constitutional requirement. For more than 100 years the convention delegates were right.

Indeed, the Constitutional Framers were prescient when it came to predicting the extent to which the norm of voluntary rotation would be practiced by national officeholders. Throughout most of the 19th century, voluntary rotation in office was the prevailing norm and standard for behavior for national legisla-

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12. *See* Elliott, DEBATES, vol. 4, *supra,* note 11, at 318.

13. *See* PETRACCA, A HISTORY OF ROTATION IN OFFICE, *supra* note 4.

14. *See* Elliot, DEBATES, vol. 4, *supra,* note 11, at 318.

15. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 72 (New York: Harper & Bros., 1893)(1840). Further examples can be found in PETRACCA, A HISTORY OF ROTATION IN OFFICE, *supra,* note 4.

tors—even those luminaries whose aggregated service in national government was quite lengthy, such as John Calhoun, Daniel Webster, and Henry Clay.

Through the end of the 19th century it was rare for the percentage of first-term members serving in the House of Representatives to be lower than 40 to 45 percent and House members rarely served more than two terms. This stands in sharp contrast to the contemporary turnover rates in both branches of Congress.[16] Moreover, support for rotation in America was not limited to the period preceding ratification of the Constitution. It continued throughout most of the 19th century from the practices of Presidents Washington, Jefferson, and Monroe to those of Presidents Jackson and Lincoln along with a great many members of Congress.

Rotation in office came into disrepute during the end of the 19th century because of its expansion to administrative offices and association with the much reviled "spoils system." Not coincidentally, decline in support for the principle of rotation in office coincided with the institutionalization and professionalization of the House of Representatives.

America's constitutional framers did not and could not have foreseen the changes which have occurred in Congress since the late 19th century. Term limitation for members of Congress would reassert a fundamental right of citizenship and reestablish one of the primary structural features of republican government intended by America's constitutional founders.

VI. AN ANTIDOTE TO THE PROFESSIONALIZATION OF POLITICS

Surely there are reasonable and strong arguments on both sides of the term limitation debate—some philosophical and others which are amenable to empirical verification. However, there are also a number of wrong reasons for supporting term limits. Anger and revenge are poor motivations for constitutional reform. Term limitation is not the "silver bullet" to remedy all that ails the polity nor will it necessarily produce more Republican-controlled legislatures. Finally, term limitation alone will not lower the federal deficit or produce a smaller federal government. Policy-making under term limits will be different, perhaps in a profoundly beneficial way, but not necessarily in the direction of a less expansive federal government.

I endorse term limitation to reestablish one of the primary structural features of republican government, as explained above, and as an antidote to the professionalization of legislative politics in America. Whereas representative government aspires to maintain a proximity of sympathy and interests between representative and represented, professionalism creates authority, autonomy, and hierarchy, distancing the expert from the client. Though this distance may be necessary and functional for lawyers, nurses, physicians, accountants, and

16. *See* Petracca, *The Poison of Professional Politics*, *supra*, note 6.

social scientists, the qualities and characteristics associated with being a "professional" legislator run counter to the supposed goals of a representative democracy.

Professionalization encourages an independence of ambition, judgment and behavior that is squarely at odds with the inherently dependent nature of representative government. For representation to resolve this paradox representatives cannot become experts and constituents cannot be treated as clients. Yet these are precisely the new roles in which representative and represented are cast by the professionalization of legislative politics in America.[17]

The professionalization of legislative politics in America is incompatible with the essence of political representation and it is precisely this transformation which congressional term limitation would redress.

VII. ELEMENTS OF A CONSTITUTIONAL AMENDMENT TO LIMIT CONGRESSIONAL TERMS

As a general rule I endorse the idea that it is better to adopt some limit for both chambers by constitutional amendment, even if it's 12 years for both chambers, than none at all.

However, my preference is strongly for a limit less expansive than six-terms or 12-years in the House. There is little debate about the limit most appropriate for the Senate, even though a two-term limit is actually higher than the mean years of service in the Senate for any period during the past 40 years. However, a two-term limit of 12-years will still impact the average 36% of members who have served for more than two-terms over the past two decades.

When it comes to the House, a 12-year limit is longer than the mean years of service for every Congress since 1953 save two (i.e., the 92nd and 102nd). Indeed, the average mean service for the past decade in the House has been 5.5 terms or 11 years. A six-term or 12-year limit in the House might be a relatively painless way for House members to bring about term limits, but it won't do much to deprofessionalize the House. Neither may it do much to remedy the other exigencies driving the term limitation movement. The limit imposed on House members must be longer than one or two terms—even though both limits have been proposed and have considerable public support—but must be shorter than five or six terms in order to accomplish any of the laudatory goals celebrated by term limit advocates.

As to the choice between three or four terms—6 or 8 years—it's difficult to reach a final recommendation on the basis of political principle. The public strongly supports a three-term House limit and 15 of the 22 states have limited House members to three terms by initiative. If forced to choose between six

17. *Id.* (for an elaboration).

and eight years, I would select a four-term House limit to preserve the current symmetry with presidential elections.

Much of the debate about congressional term limits will center on the number of terms most appropriate as the limit on future House service. However, there are other elements which should be included in the design of a constitutional amendment.

No amendment should be sent to the states for ratification which establishes a lifetime ban on elected service in either chamber or in both chambers combined. To be truly rotative, a term limit must be specified, but so must a period within which the member is required to return to private station before he or she is again eligible to hold elected office in either chamber. A break in service should be required for both chambers half as long as the total period of service permitted by the term limit. For example, if a two-term limit is imposed for the Senate, a one-term break should be specified before that individual could run for elected office to the Senate from any state. If the limit is four terms in the House, then two terms should be the specified break.

Finally, it's also important to stage the implementation of any term limit amendment for the House. Pursuant to article I, section 3 of the Constitution members of the Senate are already divided into classes, so that at no time is the Senate absent at least two-thirds of its members with some experience in that body. This will not change under term limitation.

However, this is not the case for the House, where every member must stand for reelection every two years to continue in office. If a four-term limit on House members was approved by Congress and ratified by the states in 1996, for example, it is possible that by the year 2004 nearly every member of the House not previously defeated for reelection could leave that body at the same time. This would be an enormous mistake given the near total loss of experience and stability in that chamber.

The wisdom of James Harrington and James Burgh which led the Framers to divide the Senate into three classes for the purposes of preserving experience and institutional memory in that body should be applied to the implementation of term limits for the House. If the limit agreed upon and ratified is three terms, implementation should occur in three stages. If the limit is four terms, then implementation should occur in four stages.

Let me illustrate how this would work for a four-term limit. For the purposes of implementing such a constitutional amendment *only*, all congressional districts would be randomly divided into four classes: Groups A-D. The limit of four terms would apply to all districts in Group A immediately, giving representatives in these districts 8 years to serve if reelected every two years. Implementation of the amendment would be postponed for two years for Group B; four years for Group C; and six years for Group D. This means that for districts in Group D the term limit "clock," as it were, wouldn't start ticking until six

years after it began ticking for districts in Group A. This grouping of districts would end six years after the amendment went into effect.

A constitutional amendment to limit congressional terms should not only specify a reasonable limit consistent with the political exigencies identified by term limit proponents, but should also be rotative and implemented in stages to preserve experience in the House and Senate.

The American people have gone just about as far as they can to limit terms for members of Congress. They have organized petition drives, gathered signatures, fought off legal challenges, run campaigns, passed initiatives, and much more. Although I believe states have the authority to impose term limits on their members of Congress,[18] it would be better for the nation and Congress if there was a uniform and universal application of the rotative principle to members of Congress. Whether the "truly republican" principle of rotation in office will be restored to the design of the federal government is now up to the members of the 104th Congress.

It took more than fifteen years of intense political activity before Congress approved a constitutional amendment requiring the direct election of U.S. Senators. By comparison, the movement to limit congressional terms is only in its infancy. Thus, it would be no surprise if Democrats and Republicans in the 104th Congress, notwithstanding campaign promises made in 1994, pass on the current opportunity to pass an amendment to limit their own terms.

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18. *See* Petracca, *A New Defense of Congressional Term Limits*, 26 PS: Political Science & Politics 700-705 (December, 1993).

Congressional Term Limits: Political Perspectives and Constitutional Controversies

RODERICK SURRATT†

One of the principal "political reform" movements in recent years has been the movement to impose term limits on state and local officeholders and on members of Congress. With regard to term limits applicable to members of Congress, the political "campaign" by proponents of such term limits has included two different approaches. One approach has been an effort to get states to adopt term limits applicable to their congressional delegations. This approach has resulted in a significant degree of success; as of this writing (April 1995), some 22 states have enacted measures intended to limit the terms of their representatives in the Senate and the House of Representatives (although such state-enacted measures may well be unconstitutional). The second approach has been an effort to amend the United States Constitution to impose term limits on all members of the Senate and the House. This approach, so far, has not achieved success; as of this writing, no proposed amendment has been approved in either house of Congress.

This essay will deal with two significant aspects of the subject of congressional term limits. In Part I of this essay I will discuss the current constitutional question that is important to the outcome of the campaign for term limits — whether the state-enacted measures intended to limit the terms of members of Congress representing those states are constitutional. In Part II of this essay I will discuss some "political perspectives" concerning congressional term limits — perspectives on the question of whether it would be wise or unwise for the Constitution to be amended to impose term limits on all members of Congress.

I. CONSTITUTIONAL ISSUES IN THE COURTS

As noted above, 22 states have enacted term limits to apply to their representatives in Congress. Despite the political popularity of such term limits, there is a serious constitutional question about their validity. This constitutional question is now before the United States Supreme Court. A brief summary of the

† Associate Professor of Law, Syracuse University. This essay has been written in response to an invitation from my colleague, Professor Robin Paul Malloy, Editor-in-Chief of THE DIGEST. Professor Malloy, knowing that I am in the process of researching and writing a law review article concerning constitutional aspects of congressional term limits, invited me to submit an essay on the subject of congressional term limits, to be published along with Professor Petracca's essay. In responding to Professor Malloy's invitation, I have chosen to discuss both the specific constitutional question I have been researching, *see infra* note 1, and some general political perspectives concerning congressional term limits.

relevant lower court decisions[1] will shed some light on the issues to be decided by the Supreme Court.

The question of the constitutionality of state-enacted congressional term limits has been subjected to full judicial scrutiny in two lower court cases. In one of these cases, *Thorsted v. Gregoire*,[2] a federal district court considered the constitutionality of provisions of a term limit measure (a statute) adopted by the voters of the State of Washington in November 1992. In the second case, *U.S. Term Limits, Inc. v. Hill*,[3] the Supreme Court of Arkansas considered the constitutionality of a term limit measure (a state constitutional amendment) adopted by the voters of Arkansas in November 1992. In each case, the court held that the state-adopted measure imposing congressional term limits was unconstitutional. In effect, each court held that the only permissible method of imposing term limits on members of Congress is by an amendment to the United States Constitution.

The opponents of constitutionality in these cases have based their argument primarily on the Qualifications Clauses of Article I of the Constitution. These clauses set forth three requirements for a person to be eligible to serve in the House or the Senate: he/she must have attained a minimum age, must have been a United States citizen for a certain number of years, and must be a resident of the state from which elected.[4] In both *Thorsted* and *Hill*, the court relied on the Qualification Clauses in holding the state-adopted term limit measure unconstitutional.

In *Thorsted* the court noted that previous cases had held that Congress cannot add qualifications to the three requirements listed in the Qualifications Clause, and that "the states, like Congress, are without power" to add any new qualifi-

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1. The summary of the lower court cases which follows is based on research and writing I have done for a law review article dealing with the constitutional question of whether states have the power to enact congressional term limits, i.e., the constitutional question discussed here; my article, however, will deal with this question in much greater depth and detail than this essay.

2. 841 F. Supp. 1068 (W.D. Wash. 1994), *appeal pending sub nom.* Thorsted v. Munro, No. 94-35222 (9th Cir.).

3. 872 S.W.2d 349 (Ark. 1994), *cert. granted sub nom.* U.S. Term Limits, Inc. v. Thornton, No. 93-1456 (U.S. argued Nov. 29, 1994).

4. There are two Qualifications Clauses, one dealing with the House of Representatives and one dealing with the Senate. The clause dealing with membership in the House of Representatives provides as follows: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2. The clause dealing with membership in the Senate provides as follows: "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." U.S. CONST. art. I, § 3, cl. 3.

cations.[5] The *Thorsted* court also articulated the following rationale for these holdings:

> The cases holding that neither the states nor Congress may add to the Article I qualifications for service in Congress [i.e., the three requirements of age, citizenship, and residency] all rest on the same foundation: the constitutional right of voters in the United States to elect legislators of their choice.[6]

The court concluded that the Washington term limit measure was unconstitutional because it added a new qualification.

In *Hill* the court utilized a similar analysis with regard to the Arkansas term limit measure: "An additional qualification has been added to congressional eligibility. The list now reads age, [citizenship], residency, and [lack of] prior service."[7] No state, the court said, has the power to make this kind of change: "[T]o institute such a change, an amendment to the [United States] Constitution is required."[8]

The proponents of constitutionality in these cases have based their argument primarily, though not exclusively,[9] on the Times, Places and Manner Clause (hereinafter the "TPM Clause") of Article I of the Constitution. This clause empowers the states to "prescribe" the "Times, Places, and Manner of holding Elections for Senators and Representatives."[10] This clause has been relied upon by courts to uphold a wide variety of state election laws, including provisions dealing in great detail with such matters as political party nominating conventions, political party primary elections, and the procedures by which independent candidates may get their names included on the general election ballot. Proponents of the constitutionality of term limit measures argue, in effect, that just as states have been given wide leeway to regulate the election process with regard to these matters, they should also be able to adopt measures imposing term limits.

There is an additional strand to the constitutional argument made under the TPM Clause. This has to do with the precise wording of some term limit measures. Although some such measures literally limit terms, in others the literal

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5. 841 F. Supp. at 1076. With regard to the holding that *Congress* cannot add qualifications, the *Thorsted* court cited, and discussed at length, the Supreme Court decision in Powell v. McCormack, 395 U.S. 486 (1969).

6. 841 F. Supp. at 1077.

7. 872 S.W.2d at 357 (plurality opinion).

8. *Id.*

9. The proponents of constitutionality have also advanced an argument based on the Tenth Amendment, which reserves "to the States . . . or to the people" those powers "not delegated to the United States by the Constitution, nor prohibited by [the Constitution] to the States." U.S. CONST. amend. X. In my view, the Tenth Amendment argument is very weak, and it was soundly rejected by the lower courts. Thorsted, 841 F. Supp. at 1982-83; Hill, 872 S.W.2d at 357 (plurality opinion) (The power to establish "requirements for congressional service . . . is not a power left to the states under the Tenth Amendment.")

10. U.S. CONST. art. I, § 4, cl. 1.

language of the measure limits only "access to the ballot." Both the Washington provision in *Thorsted* and the Arkansas provision in *Hill* are such "ballot access" measures. The Arkansas provision, for example, does not say that a Senator or Representative who has served the allowed number of terms "shall not be eligible to serve" an additional term in the same office; instead, it says that a Senator or Representative who has served the allowed number of terms "shall not be eligible to have his/her name placed on the ballot" as a candidate for an additional term in the same office.[11] Since such a Senator or Representative could theoretically conduct a write-in campaign and would not be barred from serving in office if the write-in campaign turned out to be successful, proponents of constitutionality argue that such a provision is not a "qualification" at all, but is a valid regulation of the election process under the TPM Clause.[12]

Both the *Hill* court and the *Thorsted* court rejected this argument. Some brief quotations from the language of the *Thorsted* opinion will summarize that court's approach. The court noted that the purpose of the Washington statute is different from that of other state statutes that have been upheld under the TPM Clause: "The state election laws that have been upheld have been general ground rules designed to make elections 'fair and honest' and to impose 'some sort of order, rather than chaos' on the electoral process . . . ."[13] The term limit measure, "in contrast, is aimed not at achieving order and fairness in the process but at preventing a disfavored group of candidates from being elected at all."[14] The court also observed that the effect of the Washington statute would be virtually the same as a provision which literally limits terms: "Denial of ballot access ordinarily means unelectability," because write-in candidates almost never win.[15] "The intended and probable result [of the term limit measure] would be the same as if the State were to adopt non-incumbency as an absolute requirement."[16]

I believe the courts in *Thorsted* and *Hill* reached the correct result. State-enacted term limits applicable to members of Congress should be held unconsti-

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11. ARK. CONST. amend. 73, § 3, *quoted in* Hill, 872 S.W.2d at 352 (plurality opinion).

12. I have never seen any persuasive evidence that proponents of "ballot access" measures actually intend that an incumbent barred from the ballot by such a measure would have any meaningful possibility of winning election by conducting a write-in campaign. Instead, it appears that the decision to draft such measures as provisions limiting only "access to the ballot" (and not literally limiting terms of office) is an attempt to create a legal technicality which can then be relied on when the constitutional argument is made in court, i.e., the argument that the measure in question is an election regulation under the TPM Clause rather than a "qualification."

13. 841 F. Supp. at 1080, *citing* Burdick v. Takushi, 112 S. Ct. 2059, 2063 (1992).

14. 841 F. Supp. at 1081.

15. *Id.*

16. *Id.*

tutional.[17] Such term limits *do* add a qualification beyond those listed in the Constitution;[18] the opposing argument made by the proponents of constitutionality is not persuasive. We will soon know whether the United States Supreme Court agrees with these lower courts, because the Arkansas case is now before the Supreme Court; as noted above,[19] the case was argued on November 29, 1994. If the Supreme Court agrees with the conclusion of the lower courts that the Constitution bars states from enacting congressional term limits, then the "campaign" for such term limits will focus on the ongoing effort to amend the Constitution.

II. POLITICAL PERSPECTIVES ON CONGRESSIONAL TERM LIMITS

The political movement to amend the Constitution to impose term limits on members of Congress had apparently reached a high point when the current Congress convened, with new Republican majorities in both the House and the Senate and term limits included in the "Contract with America." But when four different term limit proposals were brought to a vote on the floor of the House on March 29, 1995, not one of them received the necessary two-thirds vote to achieve passage.[20] Nevertheless, the political effort to secure passage of a constitutional amendment seems certain to continue, and thus the political debate over the wisdom of term limits will continue.

The remainder of this essay will deal with the political debate — the question of whether congressional term limits are a "good idea" or not. Although I am

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17. For law review commentary generally supporting this conclusion, *see, e.g.*, Troy Andrew Eid & Jim Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 DENV. U. L. REV. 1 (1992); Joshua Levy, Note, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 GEO. L.J. 1913 (1992); Johnathan Mansfield, Note, *A Choice Approach to the Constitutionality of Term Limitation Laws*, 78 CORNELL L. REV. 966 (1993).

18. I would note that a logical or "structure of government" rationale underlying the traditional interpretation of the Qualifications Clauses was articulated in the plurality opinion in *Hill*: "Qualifications set out in the U.S. Constitution, unalterable except by amendment to that document, is a conclusion that makes eminently good sense." 872 S.W.2d at 356. Since "[f]ederal legislators speak to national issues that affect the citizens of every state," the "watchword for representation" in Congress is "uniformity." *Id.* "The uniformity in qualifications mandated in Article I provides the tenor and the fabric for representation in Congress. Piecemeal restrictions by state would fly in the face of that order." *Id.*

19. *Supra* note 3.

20. Katharine Q. Seelye, *House Turns Back Measures To Limit Terms in Congress*, N.Y. TIMES, Mar. 30, 1995, at A1. The four proposals, and the votes for and against, were the following: (1) A proposal which would have limited House members to 12 years (6 terms) and Senators to 12 years (2 terms), and would have applied retroactively to years already served, failed 135-297. (2) A proposal which would have limited House members to 6 years and Senators to 12 years failed 114-316. (3) A proposal which would have limited House members to 12 years and Senators to 12 years, and would have allowed states to impose more stringent limits, failed 164-265. (4) A proposal which would have limited House members to 12 years and Senators to 12 years failed 227-204. *Id.* Note that only the fourth proposal received even a majority of favorable votes.

somewhat inclined to the conclusion that term limits are *not* a "good idea," I do not have a *strong* opinion on the issue; in fact, I think both sides can offer plausible arguments. Consequently, I will offer some observations on both sides of the debate — arguments in favor of term limits and arguments against term limits.

A. ARGUMENTS IN FAVOR OF CONGRESSIONAL TERM LIMITS

In thinking about pro-term limit arguments, we should begin, I think, by focusing on two important facts of modern congressional politics: There is less frequent "turnover" in office today than in earlier eras in our history, and this is partly because incumbents (for a variety of reasons) have significant advantages in election campaigns.[21] Proponents of term limits, perceiving serious problems arising from the existence of too many "long-term incumbents" in Congress, make a variety of arguments in favor of term limits.[22] If I were called upon to make a case in favor of congressional term limits, there are two arguments I would advance, i.e., two arguments that appeal to me.

The first argument I would make is fairly straightforward, or at least relatively easy to explain. This argument begins with the concept that, in a representative democracy, political parties play an important role. The existence of political parties tends to make the legislative body more accountable to the voters, and the existence of parties also makes it easier for individual voters to understand the political process and to cast votes that are meaningful in terms of political ideology and broad policy questions.[23] If a political system based on representative government is working "efficiently," there should be periodic

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21. The significant advantages of incumbents have been described in a variety of ways. *See, e.g.*, Mark P. Petracca, *Restoring "The University in Rotation": An Essay in Defense of Term Limitation, in* THE POLITICS AND LAW OF TERM LIMITS 68-69 (Edward H. Crane & Roger Pilon, eds. 1994) [hereinafter POLITICS AND LAW]. One of the parties in the term limits case now before the Supreme Court asserted the existence of the following advantages: "Incumbents typically raise more funds than challengers"; they "have use of the franking privilege to distribute mass mailings"; they have "easier access to media coverage," which results in "greater name recognition and visibility, particularly given the use of televised hearings and floor speeches." In addition, "[l]ong-term incumbents enjoy seniority, which enables them to bestow favors on constituents or local interest groups at public expense." Brief for the State [of Arkansas] Petitioner, at 26, U.S. Term Limits, Inc. v. Thornton, No. 93-1456 (U.S. argued Nov. 29, 1994).

22. For a helpful collection of the major arguments, both for and against term limits, see POLITICS AND LAW, *supra* note 21, at 27-95. For a good summary of the major problems perceived by proponents of congressional term limits, see Thorsted v. Gregoire, 841 F. Supp. 1068, 1075 (W.D. Wash. 1994) ("The proponents say that long-term incumbents become indifferent to the well-being of the people, preoccupied with re-election, aligned with special interest groups, hard to dislodge because they hold a great advantage in fund-raising, and resistant to any change that would level the playing field.")

23. For very helpful insights with regard to the problems that can exist for voters when the choices on the ballot do not include competing political parties, I would recommend V. O. Key, Jr.'s classic study of Southern politics in the days of the so-called "one-party South." V. O. Key, Jr., SOUTHERN POLITICS IN STATE AND NATION (1949).

changes in terms of which political party is in power (unless, for some reason, the political opinions of the public remain static).

In terms of the United States Congress, the entire membership of the House of Representatives must stand for re-election every two years. If the political system were working in an ideal manner, there should be periodic changes in terms of which party has a majority in the House. Although this was actually happening at earlier periods in our history, it has rarely happened in the last few decades.[24] In fact, prior to the 1994 election, the Democratic Party had controlled the House for 40 years, even during several Republican presidential administrations.

One important reason for the lack of "partisan turnover" in the House is the political power of incumbency in our current political system. In general, long-term incumbents are difficult to defeat in current American politics.[25] (Even in 1994, the number of congressional incumbents who ran for re-election and suffered defeat was not large.) In other words, when an incumbent from Party A is running for re-election, Party B has less chance of winning that election than if there were no incumbent, i.e., if this were a campaign for an "open seat."[26] Term limits would result in more "open seats" more frequently. This would make it somewhat more likely that "partisan turnover" would occur in the House of Representatives. (The same would be true of the Senate, except that the impact would be less direct because only one-third of the Senators must stand for re-election in any two-year election cycle.) A greater tendency toward "partisan turnover" in Congress would be good for representative government.[27]

The second argument I would make in favor of term limits is just as important as the first, but it requires a longer and more involved explanation. If this argument had to be summed up in one sentence, that sentence would be the following: Term limits would effectively do away with "careerism" in Congress, and thereby increase the likelihood that members of Congress will make decisions on the merits of the issue involved rather than on the basis of political calculations (in other words, on the basis of something other than "what will help me get re-elected.")

In developing this argument, I begin by rejecting a position sometimes asserted by proponents of term limits. Some proponents say that if term limits were in effect, then politicians would be "closer to the people." The implication

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24. *See* Petracca, *supra* note 21, at 70.

25. *See supra* note 21.

26. This certainly appears to be true as a general proposition, but of course there are countervailing considerations in some particular election campaigns.

27. Even a strong opponent of congressional term limits has stated that he is "sympathetic to the goal" of achieving partisan turnover, because "an occasional change in the House majority party in line with national political tides would be good for politics and governance." Thomas E. Mann, *Congressional Term Limits: A Bad Idea Whose Time Should Never Come*, *in* POLITICS AND LAW, *supra* note 21, at 90.

is that politicians currently are "not close enough" to the people. It can be argued, though, that the real problem is that politicians in today's world are "too close" to the people. Members of Congress, it can be said, are "quiveringly sensitive to the folks back home,"[28] — trying very hard to please as many voters as possible and also trying very hard not to offend any major group of constituents — in large part because many members want to make a career of being in Congress. One might argue that it is not a bad thing for politicians to be so eager to do what the public wants, but in fact such an attitude by members of Congress has a deleterious effect on the political process.

One problem created by members of Congress being "too close" to the people — i.e., being extremely responsive to what the people want — is the fact that voters demand a variety of things from government, some of which conflict with each other. For example, most voters endorse the abstract goal of "cutting government spending" (which can be achieved only by eliminating or reducing government programs), but many voters will react negatively to concrete proposals to eliminate or reduce specific programs. Many voters want both a low level of taxation and a high level of government services. The degree to which the voters make "inconsistent demands" on government was summed up in a colorful fashion at the time of the 1994 election by a four-term member of the House, who was not running for re-election. In explaining some of his frustrations as a member of Congress, this Representative wrote:

> For the eight years I have served in the House (and, I am told, for a long time before that), representatives have been under strict orders [from the voters] to slash taxes, beef up benefits, trim pork and bring home the bacon. And the trouble is, most of us have delivered.[29]

In such an environment, it is extremely difficult for members of Congress to make the "hard choices" that are necessary to deal effectively with difficult problems, such as finding a workable combination of spending cuts and tax increases to bring the persistent budget deficit under control.[30]

It should also be remembered that the pressures from the public come not just from voters as individuals, but also from organized interests and groups. A member of Congress who wants to be re-elected will have a strong tendency to support the positions of such groups as much as possible, in part because she/he would not want to encounter opposition from such groups at the next election.

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28. Robin Toner, *Making Sausage: The Art of Reprocessing the Democratic Process*, N.Y. TIMES, Sept. 4, 1994, at E1.

29. Fred Grandy, *Why Not Term Limits for Constituents?*, USA TODAY, Oct. 31, 1994, at 13A. Fred Grandy was a Republican Representative from Iowa.

30. I realize that there are some (perhaps many) who espouse the view that the federal budget deficit can be "tamed" by spending cuts alone, without any tax increases. I happen to disagree with that view, but regardless of which "tools" are used to deal with the deficit — whether expenditure choices alone or some combination of expenditure and revenue choices — it is clear that "hard choices" will have to be made.

As one journalist noted in describing various aspects of the health care debate in Congress in 1994, a reality of current politics is that "the best organized interests — like the National Federation of Independent Business, which targeted small businesses in numerous Congressional districts [during the health care debate] — have become as powerful as any committee chairmen searching for a compromise."[31]

Perhaps congressional term limits would create a situation in which members of Congress are significantly less responsive to the immediate demands of individual constituents and organized interest groups. If so, members of Congress would be more likely to confront hard choices, to make politically difficult decisions — in other words, to exercise their *judgment* to reach the decisions they consider best in the long run,[32] rather than the decisions that are the least risky politically in the short run.

In the words of one prominent supporter of term limits, "the sensible reason for enacting term limits is . . . to nurture deliberation, meaning a disposition to reason about policies on their merits rather than their utility in serving the careerism of legislators."[33] In my view, this is a strong argument in favor of term limits. If the imposition of term limits would have the effect of inducing Senators and Representatives to look at the "big picture" and be free to make decisions on the basis of what is good for the country rather than what is good for re-election, then congressional term limits would be a good thing.

B. ARGUMENTS AGAINST CONGRESSIONAL TERM LIMITS

If I were called upon to make the case against congressional term limits, I would begin by making reference to "the law of unintended results." Any time

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31. Toner, *supra* note 28, at E1. *See infra* note 33.

32. In this connection, one might recall Edmund Burke's famous Speech to the Electors of Bristol (1774), in which he took the position that a representative elected by the people should be something more than a mere conduit for the opinions, wishes, or demands of the representative's constituents: "Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion." EDMUND BURKE ON GOVERNMENT, POLITICS AND SOCIETY 157 (B. W. Hill, ed. 1975).

33. GEORGE F. WILL, RESTORATION: CONGRESS, TERM LIMITS AND THE RECOVERY OF DELIBERATIVE DEMOCRACY 110 (1992). *See generally id.* at 102-47. In one of his recent syndicated columns, George Will made essentially the same point, using more colloquial language. After stating that "[t]he primary reason" for term limits is to remove "careerism" as a motive "for entering, and for making decisions while in, Congress," he offered the following example of the impact term limits might have:

> Term limits would spike the artillery of the big interest groups: They lose their ability convincingly to threaten to end a legislator's career. If, say, the American Association of Retired Persons or the National Rifle Association threatened to work to end a term-limited legislator's career, the legislator could shrug, smile sweetly and say, "Actually the Constitution does that. Perhaps you can do it a few years sooner, but you are powerless to alter my life plans fundamentally."

George F. Will, *Road to Budget Sanity Leads to Derailing Career Track*, CHICAGO SUN-TIMES, Feb. 9, 1995, at 27. *See supra* text accompanying note 31.

a change is made in an institution, whether public or private, there is a danger that some of the results of the change will be things that were not intended (and sometimes not even anticipated). Moreover, when a *big* change is made — and imposing term limits on Congress would be a big change in our political system — the chances are good that *big* unintended results will ensue.

A classic example of the application of "the law of unintended results" is presented by the "reforms" in the presidential nominating process that have taken place within the past thirty years. As recently as the late 1960's, there were relatively few presidential primaries, many delegates to both national party conventions were chosen by methods that provided the individual voters no input into the selection process, and "political bosses" still had clout in some states and some cities. After 1968, however, there was a strong movement to "reform" the presidential nominating process by "opening it up" so that ordinary people could be participants. One result of the reforms that took place is what the reformers intended. The process today is, indeed, "open"; delegates to the national conventions are now selected, not in "smoke-filled rooms" populated by "political bosses" or "insiders," but in presidential primaries or caucuses in which ordinary voters participate. But there have been other (unintended) results, too. Campaigning for the presidential nomination is now a prolonged, arduous ordeal for the candidate; the time and effort involved are so great that candidates without a current position (such as *former* governors or *former* Cabinet members) seem to have some advantage over candidates who currently hold office in Congress, in the Cabinet, or in a governorship. Candidates have to raise enormous sums of money, including large amounts long before the first caucus or primary. Since fewer "moderate" voters cast votes in presidential primaries than in general elections, right-wing activists in the Republican Party and left-wing activists in the Democratic Party appear to have more influence than their numbers would merit. In addition, it appears to be a valid conclusion that the political parties have been weakened as a result of the "reformed" process. One could certainly argue that the unintended results of reforming the presidential nominating system have been just as sweeping as the intended results, if not more so.

What would the "unintended results" be if congressional term limits were put into place? We know that one *obvious* result would be that Congress would have no really experienced leadership. (The most "lenient" of the term limit proposals voted on recently in the House would allow both Senators and Representatives to serve a maximum of 12 years.) Would Congress, which necessarily "competes" with the President for political power, be substantially weakened vis-a-vis the Presidency? Would federal bureaucrats become relatively more powerful? Would lobbyists become more powerful? Would the professional staff of Congress (the "unelected members" of Congress) become more powerful? Would the "quality" of people serving in Congress decline because it

would no longer be a "career" option (i.e., no matter how well you do your job, you're out after X years)? We don't know the answers to most of these questions, and that's a big problem.

We probably *do* know the answer to one of the questions just posed: The imposition of congressional term limits probably would weaken Congress vis-a-vis the Presidency. A Congress with no truly experienced leadership, with a lessened institutional memory,[34] with more short-time members and fewer long-term members, probably would have somewhat less "political power" in comparison to the power of the executive branch. To put it another way, congressional term limits probably would strengthen the Presidency vis-a-vis the Congress. It is difficult for me to believe that most supporters of congressional term limits *intend* to enhance the power of the President — and I don't think it would be a good result — but it probably *would* be one result of a political victory by term limit supporters.

I would articulate another reason for opposing congressional term limits, namely a healthy skepticism about the political motives of the politicians who support them. Most of the prominent politicians publicly supporting term limits have been Republicans. They were ardent in their opposition when Democrats had a majority in both houses of Congress — i.e., when supporting term limits was one way of attacking their political opponents — but their ardor seemed to cool somewhat when the 1994 elections produced Republican majorities in both houses.[35] And a true skeptic might make an observation along this line: The Speaker of the House in the 104th Congress is fond of saying that term limits will eventually pass because Americans are "sick of professional politicians,"[36] but he has never offered to resign, or declined to run for re-election, on the ground that he himself has been in Congress for more than 16 years.

One might also be somewhat skeptical about the nature of support for term limits among members of the public. It is true that the polls show that a substantial majority of Americans express support for the term limit concept, and

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34. In a thoughtful article dealing with the subject of congressional term limits, Steven R. Greenberger, *Democracy and Congressional Tenure*, 41 DEPAUL L. REV. 37 (1991), the author included the following among the results to be anticipated if term limitations are adopted: "[T]here will be a substantial loss of institutional memory. It cannot help but hamper Congress' ability to address our increasingly complex social and economic problems when the entire institution is moved down several notches on the learning curve." *Id.* at 55. And in the recent debate in the House on term limit proposals, Representative Henry Hyde of Illinois was reported to have said: "I just can't be an accessory to the dumbing down of democracy." Seelye, *supra* note 20, at A1.

35. I take note of the fact that Prof. Petracca, speaking or writing some time *before* the recent House votes on term limit proposals (*see supra* note 20 and accompanying text), clearly perceived this reality: "I doubt [that a constitutional amendment will emerge from the 104th Congress], especially since many Republican leaders . . . started backing away from their 'intense commitment' to term limits once it was apparent that they had control of Congress for the first time in 40 years." Mark P. Petracca, *In Defense Of Congressional Term Limits*, 3 THE DIGEST 75 (Combined 1994 & 1995 issue).

36. Speaker Newt Gingrich was quoted as having made this statement during the House debate on term limit proposals on March 29, 1995. Seelye, *supra* note 20, at A1.

that when term limit proposals have been on the ballot in various states, they have almost always been approved.[37] But much of the popular support for term limits does not appear to be the result of careful, thoughtful analysis; instead, supporting term limits seems often to be an uninformed, unreflective way of striking back at "big government" or cutting down to size "those professional politicians" in Washington.[38] In the recent debate in the House on term limit proposals, Representative Henry Hyde of Illinois, a prominent Republican opponent of term limits, referred to "the angry, pessimistic populism that drives this movement";[39] his phrase, I think, is on the mark.

Finally, if I were articulating reasons for opposing term limits, I would point out that amending the Constitution is serious business, and it should not be undertaken except in the most extreme circumstances. With regard to the problems in the political system perceived by proponents of term limits, at least some of them could be dealt with in less drastic ways than a constitutional amendment. For example, a big problem is the fact that incumbents in modern American politics have a significant advantage over challengers in elections, and a big part of that advantage is the fact that most incumbents are able to raise and spend more money than their challengers. Why not enact meaningful campaign finance reform measures to "level the playing field" for both challengers and incumbents? Why not consider other statutory reforms to further "level the playing field"? Such reforms, designed to deal with specific elements of the problem of "long-term incumbency," would be preferable to taking the dramatic step of amending the Constitution when we can't be confident that the advantages of the amendment would outweigh the disadvantages.

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37. *See* Petracca, *supra* note 21, at 57-58.

38. *See* Mann, *supra* note 27, at 83 ("Precious little reasoned discussion has accompanied the debates over term limits in the states. Advocates have skillfully tapped the reservoir of public distrust of politicians and stimulated visceral reactions in favor of term limits.").

39. Seelye, *supra* note 20, at A1.

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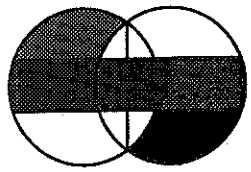

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