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Government Contracts: Procurement Regulations Take on Force of Law Notes and

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GOVERNMENT CONTRACTS: PROCUREMENT REGULATIONS TAKE ON FORCE OF LAW

Today the government contractor must cope with an astonishing and almost intolerable imbroglio of regulations, directives, and administrative practices, subject to constant growth and change. Moreover, within the past twenty-five years approximately 5,000 court decisions, Board of Contract Appeals rulings, and Comptroller General opinions have been issued which have modified this relatively new and specialized field of law. As this body of law continues to grow its problems multiply and become increasingly difficult to untangle.

Presently some of the contractor's worst problems stem from an ambiguous but inveterate formulation, that "a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision."[1] Recent cases have reiterated this proposition, even overriding inconsistent state legislation.[2] While it is possible that the courts have initiated a liberal trend toward giving federal regulations the force and effect of law, this is extremely doubtful. It is more probable that this vague concept (*i.e.*, a regulation has the "force and effect of law") has been freely used, and the courts have employed no precise test to determine when the concept should be used. Some courts have failed to foresee the possible detriment that this principle will impose upon the government contractor and government agents, absent a more meaningful definition.

G. L. Christian & Associates v. United States[3] is a recent decision in which the "force of law" concept was utilized to demonstrate the binding and overriding power of a federal regulation. In this case the Department of Army awarded a housing project contract under the Capehart Act. Pursuant to the terms of this contract the contractor began construction. Five months after the contractor commenced this project, the contracting officer for the government notified the contractor that the contract was being "terminated for the convenience of the government." Since the original contract did not contain a "Termination for Convenience" clause, the contractor brought an action against the govern-

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[1] Maryland Casualty Co. v. United States, 251 U.S. 342, 349 (1919).

[2] Paul v. United States, 83 Sup. Ct. 426 (1963); Public Util. Comm'n of California v. United States, 355 U.S. 534 (1958).

[3] 312 F.2d 418 (1963).

ment on the ground that termination was a breach of contract. He claimed not only damages for the cost of performance prior to the termination but also damages for his anticipated profit.

The Court of Claims reversed the Commissioner's opinion.[4] It first pointed out that Armed Services Procurement Regulation[5] Section 8.703 requires that the standard "Termination for Convenience of the Government" clause "shall" be inserted in this type of fixed-price construction contract. The contract in *Christian* did not contain this clause. But the court reasoned that since the "Armed Services Procurement Regulations were issued under statutory authority, those regulations, including 8.703 had the force and effect of law," therefore "there was a legal requirement that the plaintiff's contract contain the standard termination clause and the contract must be read as if it did."[6] Thus, the contractor could not recover for anticipated profits. He was limited to actual damages as provided in the "Termination" clause incorporated by the court into his contract.

Rehearing Denied

More important and more provocative than the initial decision of the *Christian* case is the rehearing opinion issued by the Court of Claims in July, 1963.[7] At this time the court took the opportunity, in a more illustrative manner, to reaffirm its prior holding that the "Termination for Convenience" clause is "automatically" included in armed services procurement contracts. The rehearing opinion sets out a more accurate statement of the law and defines more explicitly the court's basic rationale. At the same time, the lengthy opinion rejects additional arguments forcefully presented by the contractor's attorney.

The court first reiterates its basic proposition that "the Armed Services Procurement Regulations (ASPR) required, as a matter of law, the inclusion in the plaintiff's housing contract of the standard-form military article providing for the termination of construction contracts for the convenience of the Government."[8] The court is implying that any regulations which are issued pursuant

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[4] Commissioner's Opinion, G. L. Christian & Associates v. United States, Ct. Cl.56-59, Dec. 22, 1961. The Commissioner found that termination by the Government was in breach of contract, and awarded common-law damages.

[5] 32 C.F.R. §§ 1.100-30.5 (1961).

[6] G. L. Christian & Associates v. United States, 312 F.2d 418, 424 (1963).

[7] G. L. Christian & Associates v. United States, 320 F.2d 345 (Ct. Cl. 1963) (*rehearing denied*). Since this article was completed, the Supreme Court denied certiorari. 32 U.S.L. Week 3220 (U.S. Dec. 16, 1963).

[8] *Id.* at 347.

to general statutory authority are as binding on private parties as if Congress had enacted legislation to the same effect. Since ASPR has statutory authority,[9] it has "the force and effect of federal law."

The court rejects the contention of the contractor that the the particular section of ASPR (Section 8.703) requiring termination clauses was promulgated without statutory authority and thus "is bereft of the force of law."[10] The basis for the contractor's argument is that the Armed Services Procurement Act, which is the principal statutory authority for ASPR, "did not expressly refer to termination of military contracts."[11] The court answers that general legislation such as the Armed Services Procurement Act, which in broad terms empowers a government agency to make contracts, "covers all phases of that process—from the solicitation of bids or proposals, to the making of the contract, through its administration and performance, to its completion or termination."[12] Unless prohibited by Congress the government agency has authority to contract and procure by all reasonable methods. To prove that no conflict exists between ASPR's termination regulation and the Armed Services Procurement Act, the court is quick to point out that this Act "does not in any way prohibit or limit, expressly or by implication, the use of clauses providing for termination of a contract for the convenience of the Government."[13]

Assuming that Section VIII of ASPR has statutory authority, the court sees no reason why a regulation which has the "force of law" cannot require that an article be incorporated into a contract. For authority the court relies heavily on *Paul v. United States*,[14] in which "the Supreme Court has made it plain that validly issued military procurement regulations have the full force and effect of federal law."[15] In the *Paul* case the court stated that federal regulations which require competitive bidding in government procurement contracts have the "force of law." When there is a "collision between the federal policy of negotiated prices [*i.e.*, competitive pricing] and the state policy of regulated prices,"[16] the latter must give way. In *Paul* the court held basically that a

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9 Armed Services Procurement Act of 1947, 10 U.S.C. 2301-2314 (1958). In the initial decision, 312 F.2d at 424, n.8, and the rehearing opinion, 320 F.2d at 349, the court indicates that the Armed Services Procurement Act, *supra*, is the principal source of legislative authority for ASPR.

10 G. L. Christian & Associates v. United States, 320 F.2d 345, 347 (1963).

11 *Ibid.*

12 *Id.* at 348.

13 *Id.* at 349.

14 83 Sup. Ct. 426 (1963).

15 G. L. Christian & Associates v. United States, 320 F.2d 345, 347 (1963).

16 Paul v. United States, 83 Sup. Ct. 426 (1963).

regulation issued under specific statutory authority is binding upon the state.[17] Where such a regulation exists, it is immaterial whether a state law directly interferes with a vital government function. But, as will be seen, the court in *Christian* extends the power of administrative regulations beyond the decision in the *Paul* case and ignores a fundamental distinction between the two cases.

In *Christian*, as a general rationale for permitting a regulation to incorporate a provision into a contract, the court indicates that "it was important . . . and it is important . . . that procurement policies set by higher authority not be avoided or evaded (deliberately or negligently) by lesser officials, or by a concert of contractor and contracting officer. To accept plaintiff's plea that a regulation is powerless to incorporate a provision into a new contract would be to hobble the very policies which the appointed rulemakers consider significant enough to call for a mandatory regulation."[18] Just as Congressional statutes govern government contracts because of the need to guard legislative policy against encroachment by the executive branch, "there is a comparable need to protect the significant policies of superior administrators from sapping by subordinates."[19]

The court's reasoning is noteworthy. Basic to our system of government is that laws passed by Congress must be enforced. Passing a law would be futile if subordinate executive officials could sap it of its vitality. As the court states, there is a "comparable need" to protect administrative regulations from emasculation.[20] True as this may be, it is questionable that the court needed to go as far as it did to protect ASPR from becoming ineffective. The court could have decided the case without making such a sweeping alteration of government contract law. Even if some

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17 In *Paul* the court demonstrates that section III of ASPR requires in "unambiguous terms" that "procurement shall be made on a competitive basis . . . ." This requirement became effective pursuant to the passage of the Armed Services Procurement Act of 1947, and was strengthened by a subsequent amendment to the Act in 1962. "If there had been a desire to make federal procurement policy bow to state price-fixing in face of the contrary policy expressed in the Regulation, [ASPR section III] we can only believe that the objectives of the Act [Armed Services Procurement Act] would have been differently stated." Paul v. United States, *supra* at 436. Thus, the court clearly infers that the 1947 Act as amended is the specific statutory authority for ASPR section III.

18 G. L. Christian & Associates v. United States, 320 F.2d 345, 351 (1963).

19 *Ibid.*

20 It is interesting to note that the "sapping" in *Christian* was by an administrative "subordinate" who held the position of Assistant Secretary of Defense (Properties & Installations). Generally a contractor would feel secure if such a high ranking official approved the contract. Upon rehearing the court dismissed this issue and indicated there was a lack of "proof that this Assistant Secretary was empowered to approve alterations in articles mandatorily required by ASPR." 320 F.2d at 353.

change was desirable, the court should not have utilized a concept which is bound to introduce further uncertaintly in an already confused area of law. This article will critically review the doctrine established by the *Christian* case.

Possible Extension of Christian

Government contracts can be extremely complex documents. The Dixon-Yates contract, for example, reads like a corporate trust indenture.[21] These contracts are already complicated, and it is unnecessary and undesirable to make them more so. But the *Christian* case creates a new caveat for the contractor, compounding his burdens. Under *Christian*, when a section of ASPR indicates that a clause "shall" be inserted in the contract, this clause is automatically incorporated into the contract. This occurs despite the fact that it was the contracting officer who failed to include the clause.

If *Christian* is followed, what will be its effect? From a practical point of view, the effect of holding that contractual provisions embodied in a regulation are binding on a private contractor, whether included in his contract or not, will be chaotic. If a government contract automatically incorporates provisions of which neither the contracting officer nor the contractor is aware, not subsequently consented to by the contractor, and not the result of a mutual mistake, the contractor can never be certain of his rights and obligations. He is potentially subject to all requirements of ASPR. He may even find himself bound by supplemental regulations from the subordinate military agency with which he is contracting. He will have the intolerable task of maintaining an accurate awareness of the pertinent provisions and their frequent changes in such regulations. At no point will the contractor be certain whether a provision of the regulation is applicable to his contract. For example, ASPR's controversial section on Patents[22] requires that every contract shall include the formal Patent Rights (License) clause if the contract has "experimental, developmental, or research work" as one of its purposes.[23] What if the contracting officer determines that a contract is not experimental, etc., and fails to include this clause, but subsequently the Department of Defense finds that the contracting officer was wrong? When a dispute arises over patent rights, will the government now

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21 Pasley, *The Interpretation of Government Contracts: A Plea for Better Understanding*, 25 Fordham L. Rev. 211 (1956).

22 32 C.F.R. §§ 9.100-9.111 (1962).

23 *Id.* at § 9-107.2.

be able to argue under *Christian* that such a clause has the force and effect of law, and despite the subordinate's failure to include it, the clause is automatically incorporated into the contract? If this reasoning prevails, the government contract will become meaningless, for in reality the contract will be found someplace in the voluminous ASPR.

The *Christian* decision has already spurred vehement opposition.[24] Besides the array of arguments set out in the rehearing, another argument is that, even though Section 8.703 of ASPR requires that a standard "Termination Clause" be included in fixed-price contracts, it has not been the Comptroller General's custom to enforce such a clause against the contractor unless it has been specifically included in the contract,[25] or a specific provision in the statute makes the regulation directly applicable to the contract.[26] Absent either of these conditions, the Comptroller General has held that a regulation which requires the insertion of a provision in a contract "is mandatory only on the contracting officials, and in no way can be interpreted to bind a private contractor directly."[27]

Composition of ASPR

ASPR runs the gamut of requirements for government procurement. It can best be described as the "how-to-do-it" bible of the contracting officer. In its own context, the contents of ASPR are "policies and procedures relating to the procurement of supplies and services . . . designed to achieve maximum uniformity throughout the Department of Defense."[28] The first sections of ASPR were drafted to implement the 1947 Armed Services Procurement Act. They prescribe the manner in which the contracting officer is to procure goods by formal advertising; and "when" and "how" contracts are to be formed through negotiation; the special methods to be used when the contracting officer is obtaining con-

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24 See 51 Geo. L.J. 842, 850 (1963).

25 Dorris Motor Car Co. v. United States, 60 Ct. Cl. 68 (1924), *aff'd*, 271 U.S. 96 (1926); United States v. Speed, 75 U.S. 77 (1868).

26 De Laval Steam Turbine Co. v. United States, 284 U.S. 61 (1931); Russell Motor Car Co. v. United States, 261 U.S. 514 (1923).

27 51 Geo. L.J. 842, 847 (1963). In the following cases the Comptroller General, in an analysis of regulations required by the Davis-Bacon and Walsh-Healey Acts, seemingly has ruled that mandatory conditions prescribed by these acts do not bind the contractor unless specifically included in the contract: 20 Comp. Gen. 890 (1941); 20 Comp. Gen. 931 (1941); 40 Comp. Gen. 565 (1961); Comp. Gen. Dec. B-138242 (Jan. 2, 1959); Comp. Gen. Dec. B-144901 (April 10, 1961); Comp. Gen. Dec. B-150173 (Jan. 11, 1963).

28 32 C.F.R. § 1-104.

tracts for construction or research and development. Since May 1948 when ASPR went into effect, thirteen sections have been added to the original four. They cover a highly diverse field of subjects, from "Foreign Purchases" (section VI) to "Federal, State, and Local Taxes" (section XI). In addition to the present seventeen sections, ASPR provides that the Army, Navy, Air Force, and the Defense Supply Agency may implement the regulation by departmental procedures, directives, and administrative practices which are not inconsistent with, nor repetitive of, the regulations. These three branches of the armed services have their respective sub-commands, *e.g.*, procuring Bureaus and Offices, which may issue operating instructions that in turn implement the implementations. For example, the important Navy Bureau of Supplies and Accounts Manual, Volume VI (Purchasing), prescribes detailed procurement practices for the use of its field purchasing officers; and thus is valuable as an operational guide.[29] The result of this successive implementation policy has produced a maze of complex regulations which are often confusing and sometimes contradictory. The contractor "is faced with a vast source of procurement law and policy which is in constant change because it is subject to so many influences."[30]

MANDATORY DIRECTIVES OF ASPR

Since *Christian* requires that an ASPR section has the "force and effect of law," it is proper to ask: To whom are the mandatory contractual provisions of this regulation directed? In other words, does an objective perusal of ASPR viewed in its entirety demand an imposition of its requirements on both contracting officers and those who seek to enter into transactions with the government? Official procurement textbooks published by the Army, Navy and Air Force Departments[31] seemingly do not demand an automatic incorporation of every mandatory ASPR clause into a private contract with the government. These departmental manuals provide that the "Boilerplate," or the "General and Additional General Provisions" of government procurement contracts "consist of standard clauses designed to fit the majority of fixed-priced contracts, including those contract clauses required by statute."[32] What is significant is that each Armed Service textbook expressly

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[29] NAVY CONTRACT LAW § 12.10 (2d ed. 1959).

[30] Alvis, *Background and Current Government Contracting Trends*, in GOVERNMENT CONTRACTS & PROCUREMENT 9 (1962).

[31] D.A. PAM. 270153, PROCUREMENT LAW (1961); NAVY CONTRACT LAW (2d ed. 1959); AFM 110-9, PROCUREMENT LAW (1960).

[32] NAVY CONTRACT LAW § 12.11 (2d ed. 1959).

indicates that ASPR's "Termination for Convenience" clause is "additional," and not required by statute.[33] Both the Army and Navy textbooks have identical sections which read: "Since no statute makes the termination regulations in ASPR Section VIII apply to contracts which do not expressly incorporate them by reference or otherwise, the basic rights of the government and the contractor upon termination must be found in the terms of the contract itself. The whole termination system established by ASPR Section VIII depends on the use in contracts of termination clauses provided in it or similar clauses."[34] When the court was confronted with this authority in the rehearing arguments, it concluded that these textbooks simply mean that "since no statute . . . [which] specifically covers the field of termination, requires the inclusion of a termination-for-convenience article, and prescribes termination procedures—the ASPR termination procedures must find their basis in a contractual termination article, which can be incorporated in the contract 'by reference or otherwise.' "[35] While the court believes that the textbooks are correct in finding no "specific" statutory authority for incorporation of a termination clause, it points out that the Act may provide "general" authority which would allow such a clause to be incorporated. Since previous decisions have unquestionably established that a validly issued military procurement regulation has the "force and effect of law," section 8.703 of ASPR requires that a termination article be "included in plaintiff's contract and therefore it was incorporated 'by reference or otherwise.' "[36] The conclusion to be drawn from the court's reasoning is that the textbook authors have merely failed to acknowledge this "general" authority which gives impetus to Section VIII of ASPR, or the court took this opportunity to "re-write" the Army-Navy-Air Force textbooks on government contracts and procurement to fit its own theory.

It is not a novel concept that a termination statute can require a clause to be "read into" a contract,[37] making the right to cancel one of the terms of the contract.[38] But it is novel to allow a regulation to incorporate a termination clause into a contract.

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33 D.A. PAM. 27-153, PROCUREMENT LAW, p. 407 (1961); NAVY CONTRACT LAW § 5 (2d ed. 1959); AFM 110-9, PROCUREMENT LAW, chap. 9 (1960).

34 D.A. PAM. 27-153, PROCUREMENT LAW, p. 407 (1961); NAVY CONTRACT LAW § 5.29 (2d ed. 1959).

35 G. L. Christian & Associates v. United States, 320 F.2d 345, 349, 350 (1963).

36 *Id.* at 350.

37 De Laval Steam Turbine Co. v. United States, 284 U.S. 61 (1931); Russell Motor Car Co. v. United States, 261 U.S. 514 (1923).

38 College Point Boat Corp. v. United States, 267 U.S. 12 (1924); Russell Motor Car Co. v. United States, 261 U.S. 514 (1923).

Yet the court fails to see "why this should be so when . . . mere regulations can supersede state laws which would otherwise control; giving the regulation the status of law equates them fully to federal legislation."[39] The court cites Executive Order No. 9001 (implementing the First War Powers Act) as a "well-known" example of such incorporation. But an executive order is not an ASPR-type regulation, and no examples were cited where a pre-existing regulation with only "general" authority was read into a contract. Regulations with "specific" statutory authority receive the impetus of law because they are aligned to the statute. For example, the Armed Services Procurement Act states there must be formal advertising in government procurement.[40] Pursuant to this "specific" demand a regulation (ASPR section II) was compiled to implement the legislation. In comparison, the Defense Department has implied authority as a governmental agency to promulgate regulations at all echelons. This authority is "general." The regulations issued under general authority may be of great significance, *e.g.*, ASPR's Termination for Convenience clause, or minor significance, *e.g.*, a requirement as to the weight and texture of the paper used in writing government contracts. *Christian* stands for the proposition that "general" statutory authority is sufficient to give all regulations within ASPR the "force and effect of law."

Does an objective reading of ASPR as a "whole" lend credence to the *Christian* approach? It is reasonable to suppose that Congress intended the voluminous demands of ASPR to have the "force of law"? In general "the ASPR was established with the idea of being a concise statement of principles to guide Contracting Officers in exercising the powers and judgment granted to them by the Armed Services Procurement Act."[41] More specifically, and pertinent to the *Christian* case, "the main function of ASPR Section VIII is to explain the termination clauses and to furnish guidance and direction to the contracting officer and his representatives in taking action under the termination clause."[42] ASPR itself indicates that: "Each contracting officer is responsible for perfoming or having performed all administrative actions necessary for effective contracting."[43] The inference can be drawn that ASPR was not written for the contractor. Instead, it was

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[39] G. L. Christian & Associates v. United States, 320 F.2d 345, 350 (1963).

[40] 10 U.S.C. § 2304 (1958).

[41] Alvis, *Background and Current Government Contracting Trends*, in GOVERNMENT CONTRACTS & PROCUREMENT 8 (1962).

[42] D.A. PAM. 27-153, PROCUREMENT LAW, p. 407 (1961); NAVY CONTRACT LAW § 5.29 (2d ed. 1959).

[43] 32 C.F.R. § 3-801.2.

written as a general directive for the contracting officers. Despite the fact that numerous sections of ASPR refer specifically to the contractor, it would seem that it is not the contractor's task but the contracting officer's duty to determine which of the numerous clauses in ASPR are applicable to a contract. The contractor has certain obligations during the procurement proceedings. But the government executes the contract, and "the cardinal rule is that the contract means exactly what it says. There are no hidden meanings, no 'traps for the unwary,' no deliberate ambiguities."[44] Under general contract principles, the contractor should be able to determine his rights and obligations by looking to the contract. This fundamental concept is especially important when dealing with fixed-price contracts; here the court has held that the United States is governed by the same rules as are private individuals.[45] Under the common law concept of contractual agreements, when parties enter into a written contract, they manifest their intent that this writing is a complete statement of their agreement and "no evidence, oral or written, of prior understandings or negotiations, are admissible to contradict or vary the written contract."[46] The traditional method of determining the rights and obligations under a contract is to look at the contract. The court's reasoning in *Christian* not only demonstrates a complete departure from this basic common law principle, but also is contrary to the prevailing law involving government contracts.[47]

Force of Law Concept

In its initial determination of the controversy in the *Christian* case the court alluded to two basic notions regarding public policy: (1) there has been a "deeply ingrained strand of public procurement policy" disallowing the recovery of anticipated profits by a contractor,[48] and (2) "the Defense Department and the Congress would be loath to sanction a large contract which did not provide for power to terminate . . . ."[49] The court concluded that it "should not be slow to find the standard termination article incorporated, as a matter of law, into plaintiff's contract."[50] Undoubtedly the court was disturbed by the facts in this case.

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44 Pasley, *The Interpretation of Government Contracts: A Plea for Better Understanding*, 25 Fordham L. Rev. 211, 216 (1956).

45 United States v. A. Bentley & Sons Co., 293 Fed. 229 (1923).

46 Simpson, Law of Contracts § 63 (1954). See also Boffinger v. Tuyes, 120 U.S. 198 (1887); Gilbert v. Moline Plow Co., 119 U.S. 491 (1886).

47 See 51 Geo. L.J. 842, 847, 848 (1963).

48 G. L. Christian & Associates v. United States, 312 F.2d 418, 426 (1963).

49 *Ibid.*

50 *Ibid.*

The contractor was suing the government for more than five million dollars in anticipated profits, after having completed less than three per cent of the construction called for under its Capehart Contract. Perhaps the court could have permitted termination without "specific" statutory authority and without a provision in the contract on the ground that public interest so required.[51] Instead, it chose to bestow on ASPR the "force and effect of law" on the ground that it was issued pursuant to "general" statutory authority.

Unfortunately, the *Christian* decision leaves the government contractor (also the government lawyer) without a workable test by which he can determine which regulations have the "force and effect law." At best the contractor has such guide-lines as the *Paul* case[52] which employed the "force of law" concept in a rather surprising generalization. But, more important, the court in *Christian* failed to see that "regulations are not all birds of a feather. The genus contains several species and numerous varieties. The several species differ in origin, function, and performance."[53] Though the Supreme Court "has never provided a full-bodied discussion of it,"[54] most authorities recognize two dominant species which are classified as "interpretative" and "legislative" regulations (rules).[55] Space does not allow a thorough analysis of this distinction, but we shall illustrate some of the distinctions that the court might have made in lieu of the ambiguous generalization that ASPR has the "force and effect of law."

Davis defines a legislative regulation as "the product of an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power by the legislative body."[56] If it is within the granted power, issued pursuant to proper procedure, and reasonable, this type of regulation is as binding upon a court as a statute. On the other hand, interpretative regulations are those "which do not rest upon a legislative grant of power (whether explicit or inexplicit) to the agency to make law."[57] The distinction between legislative and interpretative regulations is important. The court may substitute its judgment as to the con-

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51 United States v. Corliss Steam-Engine Co., 91 U.S. 321 (1875); 18 Comp. Gen. 826 (1939); 29 Comp. Gen. 36 (1949); 22 Ops. Att'y Gen. 437 (1899).

52 Paul v. United States, 83 Sup. Ct. 426 (1963).

53 Lee, *Legislative and Interpretive Regulations*, 29 GEO. L.J. 1 (1940).

54 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 5.03 (1958).

55 *Id.* at §§ 5.01-5.11; Griswold, *A Summary of the Regulations Problem*, 54 HARV L. REV. 398, 400, 411 (1941); Feller, *Addendum to the Regulation Problem*, 54 HARV L. REV. 1311, 1320 (1941).

56 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 5.03 (1958).

57 *Id.* at § 5.11.

tent of an interpretative regulation, but it will usually not substitute its judgment as to the content of a legislative regulation. Thus if the ultimate power to determine the content of the law covered by the regulation is in the court, the regulation is interpretative. But if Congress has granted law-making power to the agency, and a regulation is issued pursuant to this authority, it is legislative.[58]

This does not mean that legislative regulations have the force of law, while interpretative regulations do not. Sometimes the latter do have the force of law, *e.g.*, the Federal Tax Regulations. If interpretative regulations meet certain prerequisites they may have the force and effect of law: "(1) when the regulation embodies a construction made contemporaneously with the enactment of the statute, (2) when the regulation is of long standing, and (3) when the statute has been re-enacted with the regulation outstanding."[59] As indicated in *Skidmore v. Swift & Co.*,[60] these are the factors which give the regulations "power to persuade, if lacking power to control." These are the highly crystalized circumstances which determine the degree of authoritative weight that a court will give an interpretative regulation. Basically, however, the interpretative type of administrative regulation will "interpret the statute to guide that administrative agency in the performance of its duties until directed otherwise by decision of the courts."[61]

What is the law-making grant of power behind ASPR? Both *Paul* and *Christian* indicate that the Armed Services Procurement Act of 1947 is the principle source of statutory authority.[62] This Act, however, does not mention ASPR. Sections II and III of ASPR coincide with the Act, but there is no specific provision in this Act which provides an express delegation of power to the Department of Defense (ASPR Committee) to issue regulations which could be binding upon the courts. This does not mean that there cannot be an implied delegation of such power, though it does not seem reasonable that such implied authority would be so broad as to cover the entire ASPR. The *Christian* case, how-

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58 A clear illustration of a legislative regulation is the FCC's designation of a uniform system of accounts for telephone companies, pursuant to a provision of the Federal Communication Act that "the Commission may, in its discretion, presbribe the forms of any and all accounts . . . ." American Telephone & Telegraph v. United States, 299 U.S. 232 (1936).

59 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 5.05 (1958).

60 323 U.S. 134, 138 (1944).

61 Comptroller of Treasury v. M. E. Rockhill, Inc., 205 Md. 226, 234, 107 A.2d 93, 98 (1954).

62 See notes 9 & 17 *supra*.

ever, holds that the "general" authority stemming from the Act is sufficient as a law-making grant of power, applicable to all sections of ASPR. Yet an examination of prior cases reveals that the *Christian* doctrine is not as well founded as the court indicates.

When the Supreme Court declared in *Paul v. United States*[63] and *Pubilc Utilities Commission v. United States*[64] that certain Army regulations "have the force of law," it referred to regulations (ASPR Sections II and III) whose basic content is expressly codified in the Armed Services Procurement Act. Probably these regulations are what Davis calls legislative.[65]

What is the status of the remaining sections of ASPR? The sections of ASPR which do not coincide with the Armed Services Procurement Act come within the definition of interpretative regulations, *i.e.*, they were not issued pursuant to a grant of law-making power. It has been suggested above that an interpretative regulation may have the force of law. But it must meet certain prerequisites. Section VIII of ASPR (Termination for Convenience) does not embody any of these aforementioned factors: it was not created "contemporaneously" with a statute;[66] and, it is not a regulation of "long standing";[67] and, it was not "outstanding" while its statutory basis was re-enacted. Thus it would seem that the *Christian* case, in holding that ASPR Section VIII has the "force and effect of law," promulgated a doctrine without foundation.

CONCLUSION

The real fallacy in *Christian* is that the court treats ASPR as an indivisible entity. It fails to realize that certain ASPR sec-

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[63] 83 Sup. Ct. 426 (1963).

[64] 355 U.S. 534 (1958).

[65] See 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 504 (1958). Davis indicates that if the regulations referred to in *Public Utilities Commission* "had been interpretative, the Court might have deemed them to lack the force of law." Even if all ASPR sections were interpretative type regulations, there is a strong argument that the section involved in *Paul* has the "force of law" because this regulation was "outstanding" when the Armed Services Procurement Act was re-enacted. See note 17 *supra*. Thus it met an important prerequisite in Davis' test. See text accompanying note 59 *supra*.

[66] The Code of Federal Regulations cites two statutes as authority for the issuance of ASPR section VIII: 5 U.S.C. § 22 (1952); 10 U.S.C. § 2202 (1958). Both of these enactments merely grant department heads the authority to make regulations for the governing of departmental activities.

[67] ASPR section VIII was first promulgated in January 1952. Though the concept within this section is not of recent origin, United States v. Speed, 75 U.S. 77 (1869), the use of section VIII in *Christian* is not indicative of an "established administrative regulation" as set forth in Commissioner v. Estate of Sternberger, 348 U.S. 187 (1955).

tions have specific statutory authority (at least by implication) and others do not. In failing to make this distinction, and by attributing the "force and effect of law" to ASPR *in toto*, the court has created two unfortunate results. It places an onerous and somewhat unjustified burden upon both the private contractor and the government lawyer. Neither can be certain as to the content of their contract. *Christian* may become a "catch-all" authority to bind the contractor to obligations that he never contemplated at the time the contract was entered into.

Moreover it seems highly probable that *Christian* will adversely affect the fundamental principles which the government employs to obtain a desirable contract. The government recognizes that profit is the basic and essential motive to any business enterprise.[68] In order to harness this motive to work toward more efficient performance, the contracting agency offers the contractor a stimulating high profit. This profit, however, will vary according to the financial risk assumed by the contractor in performing, *i.e.*, the profit is tied to the contractor's efficiency in controlling costs and meeting desired standards of performance, reliability, quality, and delivery. To successfully harness the profit motive, the government must negotiate contracts in which the contractor's risks are identifiable. Contractors will be unwilling to compete for contracts in which their risks are indeterminate.

If the contractor must risk the possibility of having any ASPR clause automatically incorporated into his contract, as *Christian* seems to permit, he will become skeptical and apprehensive about dealing with the government. This creation of an indeterminate risk for the contractor will militate against the profit motive principle which the government is so laboriously trying to solidify into a basic procurement policy.

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[68] For a complete discussion on the types of contracts used by the government to harness the profit motive, see ASPR §§ 3-401 – 3-410.2.