

**U.S. and Them:
Citizenship Issues in Department of Defense Civilian Employment Overseas**

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“These laws have been with us for centuries; how can you doubt them?”¹

I. Introduction to United States Employment Systems

Hypothetically Speaking

Federal employment systems must evolve to remain relevant,² yet a virtually inevitable consequence of evolution is complexity. When the U.S. Secretary of Defense noted that, “We have complaints from managers that they have to manage over several different personnel systems,”³ he had identified one such complexity. Indeed, over the past half-century, Department of Defense (DOD) personnel systems overseas have developed their own intricate challenges. These challenges often involve citizenship issues.

A significant part of the DOD civilian workforce is employed in Europe.⁴ Within Europe, the majority is employed in Germany. Focusing on the U.S. Army in Germany, this article examines the sources, impact, and occasionally incongruous consequences of citizenship on DOD employment of civilians overseas. In doing so, this article makes periodic reference to the following hypothetical which illustrates some common, recurring issues that invariably vex even seasoned labor and employment law practitioners abroad:

Mr. G. S. Wannabe is a U.S. citizen who has been living in Germany for years with no affiliation to the U.S. forces stationed there. One day, he applies for a local, appropriated fund (APF) job with the U.S. Army. The Army civilian personnel advisory center rejects his application because he is ordinarily resident⁵ and, in their words, cannot be paid in dollars. They also reject his later applications for APF positions under Euro-paid, local national (LN) conditions, so he files a national origin discrimination complaint against them. The Army eventually hires him into a nonappropriated fund (NAF) job under LN conditions. In this position, Mr. Wannabe meets a German citizen who also works for the Army, but as an APF (LN) employee. They marry and she acquires U.S. citizenship. At her citizenship party, Ms. Wannabe learns that the Classification Act⁶ now forces her out of her job. She is terminated and tries to file a discrimination complaint, but the agency tells her she cannot. She then sues in German labor court, prevails, and the Army settles her case. Meanwhile, Mr. Wannabe faces a reduction in force (RIF). When he isn't placed into a vacant, APF (LN) job in his field, he tries to add a reprisal allegation to his pending discrimination complaint, but the agency informs him that he cannot file one. He, too, sues in German labor court, challenging the propriety of the separation procedures, and is reinstated even though he had qualified for no jobs at the time of his separation.

How can any of this happen? The Classification Act is cited routinely as the culprit in denying such employment, but does it really do any of this and, if so, how? To be certain, not all of the hypothetical's circumstances appear in a single case, and this

¹ KAFKA (Paramount Pictures 1991). Bureaucratic deference to tradition facilitates stability but risks stagnation. Some laws and rules central to this text have originated over a half-century ago.

² See H.R. 1836, 108th Cong. (2003). The Civil Service and National Security Personnel Improvement Act and National Security Personnel System Act, intended to replace the Classification Act System. *Id.* “Embracing change” in all areas has become somewhat of a Mantra throughout much of the Army.

³ Tanya N. Ballard, *Rumsfeld: Defense Needs Personnel Reform to Manage Better*, GOVEXEC.com, June 4, 2003, at <http://govexec.com/dailyfed/0603/060403t1.htm> (quoting Secretary Rumsfeld in a hearing before the Senate Governmental Affairs Committee regarding reforms to the General Schedule system) (on file with author).

⁴ In 1988, for example, before the reunification of Germany, the U.S. Army in Europe employed over 65,500 U.S. and foreign civilian employees. PUBLIC AFFAIRS OFFICE, HQ, U.S. ARMY EUROPE AND 7th ARMY, U.S. ARMY EUROPE & 7th ARMY—CONTINUITY, CHANGE, GROWTH 9 (1994). In 2005, prior to another anticipated major reduction, this number stands at just under 30,000. See, e.g., U.S. Army, Europe, *Global Rebasing and Restructuring IPR #4* (powerpoint presentation, 9 December 2004) (on file with author) [hereinafter *Global Rebasing and Restructuring*].

⁵ Ordinarily resident status is gained primarily through residence or employment in a nation hosting U.S. Forces but without status of forces affiliation. See discussion *infra* pt. III.

⁶ 5 U.S.C. §§ 5101-5115, 5331-5338 (2000). See also 8 U.S.C. § 1430b(1)(B) (providing for U.S. citizenship without a continuous residence requirement in certain cases.). Many variations of acquired U.S. citizenship after LN appointment exist, typically involving marriage to Soldiers. The hypothetical example is theoretical.

article is by no means intended as a comprehensive discourse on all aspects of these scenarios, but effectively answering these basic questions can affect the outcome of recurring employment eligibility determinations, discrimination complaints, removals, and RIF actions. Before answering these questions, however, it would be helpful to refresh military practitioners' understanding of how the civil service and foreign national employment systems operate—particularly their limitations under statutory employment, classification, and pay systems.

What Makes a Civil Servant?

Federal employment law stretches back to the creation of the Departments of State, Treasury, and War in 1789.⁷ The escalating complexity of Government functions, and the need for similar federal jobs to have standardized performance requirements and pay, led to a continuum of legislative changes. The Civil Service Reform Act of 1978 (CSRA),⁸ inter alia, replaced an archaic Civil Service Commission with the Office of Personnel Management (OPM)⁹ to oversee federal human resources. Congress, the President, and the OPM are the principal authorities behind today's civil service.

Metaphorically, perhaps, it should not take an "Act of Congress" to make a civil servant, but in reality, many statutes and rules affect civil service operations. All aspiring civil servants must meet three initial requirements for eligibility.¹⁰ A citizenship requirement is not among them, but it rapidly enters the maze of laws, treaties, agreements, executive orders, and regulations that restrict access to many federal jobs. Citizenship issues in federal employment are as much matters of fiscal law, as they are of international, administrative, immigration, or employment law. Congressional acts establish the basic systems of federal employment and govern the classification and pay of their respective employees.¹¹ Separate statutes are required to annually fund those systems.¹² Congress gave the President authority to regulate executive branch employees, and delegated broad rule-making power, subject to his direction, to the OPM,¹³ which exercises its authority primarily in the Code of Federal Regulations (C.F.R.).¹⁴ Among its duties, the OPM establishes government-wide classification standards placing civil service positions in classes and setting pay grades with fixed rates.¹⁵

How Federal Jobs Are Structured

The Federal Civil Service basically consists of three statutory employment systems or services that provide for the different types of positions it requires: the competitive service, the excepted service, and the senior executive service (SES).¹⁶ These services are supported by statutory pay and classification systems for the types of duties performed in each position. Once classified, the positions are filled with employees under statutory and other hiring authorities (Table 1 provides a simplified overview of this structure).

⁷ U.S. Office of Personnel Management-Strategic Compensation Policy Center, *Evolution of White Collar Pay*, at <http://www.opm.gov/strategiccomp/HTML> (last visited Jan. 12, 2005) [hereinafter OPM, *Evolution of White Collar Pay*].

⁸ Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended at scattered sections of 5 U.S.C.).

⁹ For more information about the OPM, visit their website at <http://www.opm.gov/>, which outlines the OPM's mission to build a high quality and diverse Federal workforce.

¹⁰ See, e.g., 5 U.S.C. § 2105(a) (listing the requirements that prospective employees must be appointed by one of several designated federal officials; engaged in a federal function; and be subject to the supervision of one of several designated federal officials).

¹¹ U.S. CONST. art. II, § 2. Resulting federal employment systems promote equal pay for substantially equal work, and comparability of federal pay with private sector rates. 5 U.S.C. §§ 5301, 5341.

¹² See Treasury and General Gov't Appropriations Act of 2002, Pub. L. No. 107-67 § 605, 115 Stat. 514.

¹³ 5 U.S.C. § 5115. Congress, however, retains significant authority over the terms and conditions of federal employment. See 5 U.S.C. pt. III.

¹⁴ *Id.* See generally 5 C.F.R. pts. 1- 1199 (2004).

¹⁵ See, e.g., 5 U.S.C. chs. 51, 53.

¹⁶ *Id.* §§ 2102, 2102(a), 2103.

Civilian Employment System	Competitive Service	Excepted Service	Senior Executive service (SES)
Classification Systems	General Schedule (GS) Federal Wage System (FWS)	GS FWS	SES
Common Pay Systems/ Schedules	GS, Wage Grade (WG), Wage Leader (WL), Wage Supervisor (WS)	GS, WG, WL, WS	SES (pay band)
Common Appointment Authorities	COMPETITIVE: Career & Career Conditional	Schedules A, B, C	Limited Term SES Limited Emergency SES
	NON-COMPETITIVE: Career & Career Conditional Career and Career Conditional (but authorized by statute or court order)	Time Limited, Veteran's Readjustment Act, etc.	Career SES Non-career SES Scientific & Professional Term, Temporary

Table 1

*Dozens of different appointment authorities are used to hire civil servants.¹⁷

The major differences between the three services lie in their appointment processes and employment protections.¹⁸ Over 80 percent of civil service employees are in competitive service positions.¹⁹ This includes all positions with appointments subject to the examination, selection, and placement rules of Title 5 U.S.C. Chapter 33.²⁰ An employee's competitive status also can affect how positions are filled.²¹ The excepted service aptly consists of positions excepted from the competitive service by statute, the President, or OPM,²² including positions in the legislative, executive, and judicial branches for which competitive examination is not feasible. The excepted service has three appointment categories: Schedules A, B, and C.²³ Over 19 percent of civil service employees are in the excepted service. The remaining less than one half of one percent of them are in top-level, SES positions.²⁴

Competitive and excepted service employees furnish both white- and blue-collar work.²⁵ The Classification Act of 1923²⁶ identified five position groups essential to the federal workforce (at the headquarters-level) and established pay scales for each.²⁷ Its successor, the Classification Act of 1949,²⁸ established the General Schedule (GS) system (essentially white-collar positions),

¹⁷ See, e.g., U.S. OFFICE OF SECRETARY OF DEFENSE, *MANAGER'S GUIDE TO APPOINTING AUTHORITIES* (Oct. 2000) (on file with author).

¹⁸ See U.S. Army Personnel Management and Information Support System, *The Federal Civil Service*, available at http://www.afpc.randolph.af.mil/permissions/civilian/c_641.htm (last visited Jan. 12, 2005).

¹⁹ 2000 FEDERAL PERSONNEL GUIDE 18 (KEY COMMUNICATIONS GROUP, INC. 2000) [hereinafter 2000 FEDERAL PERSONNEL GUIDE]. See also ADMINISTRATIVE & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 210, *LAW OF FEDERAL EMPLOYMENT* 2-1 (Sept. 2000).

²⁰ 5 U.S.C. § 2102(a)(1).

²¹ U.S. Dep't of Defense Civilian Personnel Management Service, *Virtual Interactive Personnel—Competitive Service*, at http://www.cpms.osd.mil/vip/per_data/6411.htm (last updated Jan. 12, 1999) (observing that competitive service positions are in the excepted service while filled by some individuals appointed under excepted authorities).

²² 5 C.F.R. § 213.101 (2004).

²³ *Id.* § 6.2 (providing that schedules A and B include non-confidential, non-policy determining jobs. Schedule C comprises confidential, or policy-determining jobs subject to political patronage.)

²⁴ 2000 FEDERAL PERSONNEL GUIDE, *supra* note 19, at 18.

²⁵ U.S. Army Personnel Management and Information Support System, *Pay Setting Information, Employee Benefits Information & Advice*, at <http://cpol.army.mil/library/permissions/2413.html> (last modified Jan. 27, 2005).

²⁶ Classification Act of 1923, Pub. L. No. 67-516, 42 Stat. 1488 (repealed 1949) (establishing the following groups: professional and scientific; sub-professional; clerical, administrative, and fiscal; custodial; and Bureau of Engraving, clerical-mechanical jobs).

²⁷ See OPM, *Evolution of White Collar Pay*, *supra* note 7.

²⁸ Classification Act of 1949, Pub. L. No. 81-429, 63 Stat. 954 (1949) (repealed 1966). See *infra* note 30.

which included the first three groups.²⁹ Its classification rules are found at Title 5 of the U.S. Code.³⁰ Indeed, Chapter 51 and subchapter III of Chapter 53 are commonly referred to as the Classification Act or GS system.³¹ The present GS system's classification rules³² apply to all federal civilian employees unless they are expressly excepted from its application.³³ Classification systems thus fix varying types of positions against uniform standards.³⁴ Each system's employees must have their pay set in accordance with that system's laws³⁵ and funded by statutory appropriations. Surveys of non-federal employers determine GS pay,³⁶ which is set in U.S. dollars.³⁷ These pay provisions also apply to GS employees stationed overseas.³⁸

As federal work has diversified, new classification systems continued to evolve. The Federal Wage System (FWS), established in 1972, was designed to make federal blue-collar pay comparable to prevailing private sector rates for trade, craft and laboring employees in local wage areas.³⁹ Differences between the GS and FWS include occupational and geographic coverage, pay ranges,⁴⁰ and pay adjustment cycles.⁴¹ Wage System employees also obtain competitive and excepted service appointments,⁴² and are subject to separate rules.⁴³ The GS system, however, does not apply to them.⁴⁴ The type of work performed by GS and FWS employees is still sometimes very similar.⁴⁵ Thus, GS employees may seek reclassification of their positions as FWS, and vice versa,⁴⁶ with the OPM deciding any appeals.⁴⁷ The SES system was created by the CSRA of 1978, replacing over sixty

²⁹ OPM, *Evolution of White Collar Pay*, *supra* note 7.

³⁰ See notes to 29 U.S.C. § 172 (2000) (noting that the Classification Act of 1949 was repealed by Pub. L. 89-554, Sept. 6, 1966, Sec. 8(a), 80 Stat. 632 and that "Section 5102 of Title 5 contains the applicability provisions of the 1949 Act . . .").

³¹ U.S. Army Personnel Management and Information Support System, *Pay Systems, Employee Benefits Information & Advice* (last modified Feb. 2, 2001) ("(GS) system, sometimes called the Classification Act system, is . . . prescribed by Chapters 51 and 53, Title 5, U.S. Code. The positions . . . are classified in accordance with . . . Chapter 51.") (on file with author).

³² U.S. Dep't of Defense Civilian Personnel Management Service, *Virtual Interactive Personnel--General Schedule Classification System*, at http://www.cpms.osd.mil/vip/per_data/31b.htm (last modified Nov. 30, 1998) (providing that the GS system comprises five work categories—professional, administrative, technical, clerical, and other—spanning twenty-two broad occupational groups.). The twenty-two groups are under a revision study. See U.S. ARMY COMBINED ARMS CENTER AND FORT LEAVENWORTH, THE ARMY TRAINING AND LEADER DEVELOPMENT REPORT PHASE IV (CIVILIAN STUDY) 11 (24 Feb. 2003).

³³ 5 U.S.C. § 5102(b) (2000).

³⁴ See, e.g., CLASSIFICATION PROGRAMS DIVISION, U.S. OFFICE OF PERSONNEL MANAGEMENT, TS-107, THE CLASSIFIER'S HANDBOOK 5 (1991), available at <http://www.opm.gov/fedclass/clashnbk.pdf> (last visited Jan. 12, 2005) (noting that classification recognizes levels of position difficulty and responsibility).

³⁵ U.S. Army Personnel Management and Information Support System, *Pay Setting Information, Employee Benefits Information & Advice*, at <http://cpol.army.mil/library/permis/2413.html> (last modified Jan. 27, 2005) (noting that when pay is set "the pay policies which apply to the pay system covering that position are used").

³⁶ E.g., surveys of state and local government are used for comparison. The system spans pay grades GS-01 to GS-15, each with ten step levels attainable through time in grade, award, or superior qualifications appointment. See generally 5 U.S.C. §§ 5333, 5336.

³⁷ *Id.* § 5303.

³⁸ U.S. DEP'T OF DEFENSE, REG. 7000.14-R, DEPARTMENT OF DEFENSE FINANCIAL MANAGEMENT REGULATION vol. 8, ch. 7, para. 070101 (Feb. 2001) [hereinafter DOD REG. 7000.14-R].

³⁹ Government Employees Prevailing Rate Systems Act, Pub. L. No. 92-392, 86 Stat. 564 (1972) (codified at 5 U.S.C. §§ 5341-49). Federal Wage System employees are also known as wage grade or prevailing rate workers.

⁴⁰ The FWS has three classes of hourly rate employees: (1) WG (worker); (2) WL (leader), and (3) WS (supervisor). Each class includes multiple grade and step-levels. 5 C.F.R. § 532.203 (2004).

⁴¹ U.S. Office of Personnel Management—Office of Compensation Administration, *Facts about the Federal Wage System*, at <http://www.opm.gov/oca/wage/fwsfact.asp> (last visited Jan. 12, 2005).

⁴² See generally U.S. OFFICE OF PERSONNEL MANAGEMENT, THE GUIDE TO PROCESSING PERSONNEL ACTIONS ch. 4, available at <http://www.opm.gov/feddata/gppa/Gppa04.pdf> (last visited Jan. 12, 2005) (addressing, for example, completion of U.S. Office of Personnel Management, SF 50-B, Notification of Personnel Action blocks 8 and 34 (July 1991)).

⁴³ See 5 U.S.C. § 5342(b)(1) (2000).

⁴⁴ 5 U.S.C. § 5102(c)(7); 5 U.S.C. ch. 53, subch. IV.

⁴⁵ For example, in the guidance on GS 0856 Electronics Technicians, OPM observed that classifying close cases between FWS and GS positions "requires consideration of management requirements and intent . . . [and inter alia] time spent on trades and crafts functions as against Classification Act types of work." U.S. Office of Personnel Management—Office of Merit Systems Oversight & Effectiveness, *Digest of Significant Classification Decisions and Opinions, No. 05-04*, at 3 (Sept. 1984), available at <http://www.opm.gov/classapp/digests/articles.asp#b> (last updated August 2003).

⁴⁶ See 5 C.F.R. § 532.705 (2004).

⁴⁷ 5 U.S.C. § 5103.

separate executive personnel authorities. It emphasizes broad governmental perspective and executive skills in its members⁴⁸ and is classified distinctly, with its own pay system.⁴⁹

Other Federal employment systems, schedules, and authorities outside the civil service have distinct classification and pay systems.⁵⁰ Pertinent to this discussion, as well, are NAF⁵¹ and DOD foreign national employment systems. Funding sources affect the classification of these employees.⁵² Indeed, NAF employees are excepted from the Classification Act system as “employees whose pay is not wholly from appropriated funds. . . .”⁵³ Their multi-grade pay systems⁵⁴ are, nevertheless, structured along GS and FWS lines.⁵⁵ Further excepted from the Classification Act system are “aliens or noncitizens of the United States who occupy positions outside the United States.”⁵⁶ The legal authorities examined below govern the classification and pay of these non-citizens.

How They Are Funded

Federal pay for each employment category must derive from either APF or NAF sources, in strict compliance with the statutes and regulations for those funds. Federal APF employees (e.g., GS, FWS, and SES) are paid from Treasury funds—U.S. taxpayer dollars. Specific statutory authority must exist to lawfully expend these funds.⁵⁷ Thus, paying federal employees requires appropriate statutory pay systems, which, in turn, require annual statutory funding (e.g., Treasury and General Government Appropriations Acts). In contrast, NAF employees are paid with funds derived principally from their own sales and services.⁵⁸ These funds are not commingled with Treasury APF even if used for the same programs.⁵⁹

The Army’s civilian workforce structure is determined by a continuous assessment of its needs, annually justified to the DOD, the Office of Management and Budget, and Congress.⁶⁰ Before 1985, Congress set the number of APF civilians that DOD could employ at each fiscal year end.⁶¹ Hastily firing and rehiring employees every year created obvious inefficiencies,⁶² and Civilian Employment Level Plans emerged. Supervisors now estimate civilian pay requirements under an annual Planning,

⁴⁸ U.S. Office of Personnel Management, *History of SES*, at <http://www.opm.gov/ses/history.html> (last visited January 11, 2005). The consolidation also included former GS grades 16 through 18.

⁴⁹ See generally 5 U.S.C. §§ 3132, 5108, 5381.

⁵⁰ E.g., the Foreign Service Schedule (22 U.S.C. ch 52), Dep’t of Medicine and Surgery, Veterans Administration (38 U.S.C. ch 73), Executive Schedule (5 U.S.C. ch 53), pay fixing authority for experts and consultants (5 U.S.C. § 3109), Postal Service Schedule, and others at 5 U.S.C. § 5102(c).

⁵¹ See 5 U.S.C. § 2105(c). Non-appropriated fund employees work primarily in base exchanges, clubs, commissaries, and similar instrumentalities of the armed forces.

⁵² See *id.*

⁵³ *Id.* § 5102(c)(14). In fact, NAF employees are not treated as federal employees for the purposes of most laws administered by OPM. *Id.* § 2105(c).

⁵⁴ These include pay band, child care, NAF FWS, and other systems. See U.S. DEP’T OF ARMY, REG. 215-3, MORALE, WELFARE, AND RECREATION, NONAPPROPRIATED FUNDS PERSONNEL POLICY ch. 3 (26 Aug. 2002) [hereinafter AR 215-3]. See also U.S. DEP’T OF DEFENSE, MANUAL 1400.25-M, DEPARTMENT OF DEFENSE CIVILIAN PERSONNEL MANUAL para. SC1405.1.2 (Dec. 1996) [hereinafter DOD MAN. 1400.25-M].

⁵⁵ Employees in NAF FWS positions, for example, may submit classification appeals to the OPM after agency final decision. AR 215-3, *supra* note 54, para. 3-38a.

⁵⁶ 5 U.S.C. § 5102(c)(11).

⁵⁷ The U.S. Constitution provides: “No Money shall be drawn from the Treasury but in Consequence of an Appropriation made by Law.” U.S. CONST. art. I, § 9. An “appropriation” is simply “an act of the Congress that permits Federal agencies to incur obligations and to make payments out of the Treasury for specified purposes.” DOD REG. 7000.14-R, *supra* note 38, vol. 2A, ch. 1, para. 010107B5. The “Purpose Statute” provides that “[a]ppropriations shall be applied only to the objects for which . . . made” 31 U.S.C. § 1301(a). It does not require that each expenditure be specified in an appropriations act, but only that each be reasonably necessary or material to the accomplishment of a specified or authorized function. *Id.* An unauthorized expenditure of Treasury funds can constitute a crime punishable by a fine or imprisonment or both. 31 U.S.C. §§ 1341, 1350.

⁵⁸ See U.S. DEP’T OF ARMY, REG. 215-1, MORALE, WELFARE, AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES para. 3-1c (25 Oct. 1998) [hereinafter AR 215-1].

⁵⁹ *Id.* para. 3-1a.

⁶⁰ The Army is a military department of DOD, an executive branch agency. 5 U.S.C. §§ 101, 102, 105.

⁶¹ ARMY COMMAND, LEADERSHIP, AND MANAGEMENT: THEORY AND PRACTICE 20-3 (Charles S. Rousek ed., U.S. Army War College, 17th ed., 1992-93).

⁶² *Id.* at 20-3, 20-4.

Programming and Budgeting System,⁶³ based on an analysis of projected work, with staffing based on an accepted workload requirements determination process.⁶⁴ Congress then decides how best to fund these staffing needs.⁶⁵

How They Are Governed

Complexity aside, federal employment, classification, and pay systems have evolved to afford agency management great flexibility in accomplishing its varied missions. A hierarchy of rules from the Constitution to command publications provides a cumbersome, but critical, operational framework for federal employment. Agencies determine the nature of the work and the numbers and types of employees they require.⁶⁶ Generally, the management of any business enjoys wide latitude in making business decisions.⁶⁷ This latitude is often reflected in internal rules and regulations. Federal agency regulations are key to workforce administration, especially where superior legal authority is often vague.⁶⁸ The authority for federal agencies to promulgate regulations is statutory.⁶⁹

II. Introduction to Local National Employment Systems

A Quick Word on Nationals

The Immigration and Nationality Act clearly defines non-citizen nationals at birth,⁷⁰ but tests for distinguishing them later in life vary depending on purpose. Nationals may include citizens and certain non-citizens.⁷¹ An emerging consensus of circuit court decisions now focuses on application for citizenship, not merely residence, as a determinative factor.⁷² Nationals also may be dual citizens.⁷³ For many employment purposes, the DOD characterizes nationals according to their citizenship. For instance, within the DOD, a “foreign national employee” is “[a] non-U.S. citizen employed by the U.S. Forces outside the United States, its territories and possessions.”⁷⁴ Indeed, not all countries distinguish between citizens and nationals. In the German language, for example, being a “citizen” is typically synonymous with being a “national.”⁷⁵ German employment law makes no distinction and, while English and French languages control the Status of Forces Agreement with Germany,⁷⁶ German is equally authoritative for implementing agreements.

⁶³ *Id.* at 20-4.

⁶⁴ U.S. DEP’T OF ARMY, REG. 570-5, MANPOWER AND EQUIPMENT CONTROL, MANPOWER STAFFING STANDARDS SYSTEM para. 1-21 (30 June 1989).

⁶⁵ 5 U.S.C. § 3101 (2000).

⁶⁶ *Id.* § 301. *See also* 5 C.F.R. § 351.201(a)(1) (2004).

⁶⁷ *E.g.*, “[A]n employer has the right to . . . assign work, to change an employee's duties, to refuse to assign a particular job, and to discharge---for good reason, bad reason, or no reason at all, absent intentional . . . discrimination.” *Walker v. AT&T Phone Ctr., Inc.*, 995 F.2d 846, 849-50 (8th Cir. 1993).

⁶⁸ *See Collins v. Weinberger*, 707 F.2d 1518, 1521-1522 (D.C. Cir. 1983).

⁶⁹ 5 U.S.C. §§ 301, 302. Electronically updated agency regulations change rapidly, but provide a chronological record that must be preserved to defend agency determinations under any particular version.

⁷⁰ 8 U.S.C. § 1408 (including, for example, persons born in an outlying U.S. possession on or after the date of formal acquisition of such possession, persons born outside the United States and its outlying possessions of parents both of whom are U.S. nationals, but not citizens, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person, and others as specified therein).

⁷¹ A “U.S. national” is either “a citizen of the United States, or a person who, though not a citizen of the United States, owes permanent allegiance to the United States.” *Id.* § 1101a (22).

⁷² *See Shittu v. Elwood*, 204 F. Supp. 2d 876, 879 (E.D. Penn. 2002).

⁷³ *Gaudio v. Dulles*, 110 F. Supp. 706, 708 (D. D.C. 1953) (observing that “double allegiance has been an issue of concern to the United States Congress . . .”).

⁷⁴ U.S. DEP’T OF DEFENSE, MANUAL 1416.8-M, DEPARTMENT OF DEFENSE MANUAL FOR FOREIGN NATIONAL COMPENSATION para. DL1.1.4 (Jan. 1990) [hereinafter DOD MAN. 1416.8-M].

⁷⁵ *See CASSELL’S GERMAN-ENGLISH ENGLISH-GERMAN DICTIONARY* 909, 1222 (McMillan Pub. Co., 8th ed. 1985); *see also LANGENSCHIEDT’S NEW COLLEGE GERMAN DICTIONARY, GERMAN-ENGLISH* 501 (Heinz Messinger ed., Langenscheidt KG, 1973); *LANGENSCHIEDT’S NEW COLLEGE GERMAN DICTIONARY, ENGLISH-GERMAN* 116, 416 (Heinz Messinger ed., Langenscheidt KG, 1978). The German language Status of Forces Agreement uses “*Staatsangehoerige(r)*,” which translates identically as “national” and “citizen.” Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846 (employing the term *Staatsangehoerige*, for example, art. 1 para. 1(b)) [hereinafter SOFA].

⁷⁶ SOFA, *supra* note 75, at execution para., after art XX.

Can Non-U.S. Citizens Be “Federal Employees?”

United States law on federal employment precludes government agencies from hiring certain non-citizens stateside;⁷⁷ however, the government grants some agencies exemptions and allows hiring of non-citizens overseas in specific instances.

Beginning in 1939, annual appropriations laws precluded using APF to pay non-U.S. citizen federal employees in the continental United States, unless they met one of several exceptions.⁷⁸ This preclusion is reflected in annual Treasury and General Government Appropriations Acts.⁷⁹ Certain agencies are exempted from the stateside preclusion, including the DOD,⁸⁰ as evinced in annual DOD Appropriations Acts.⁸¹ The stateside preclusion does not prevent the hiring of non-U.S. citizens overseas. Indeed, statutory authority exists for such employment of foreign nationals.⁸²

Nevertheless, other restrictions exist. Agencies may employ citizens and non-citizens overseas,⁸³ but only citizens may receive competitive service appointments. In fact, Executive Order (EO) 11935 specifically bans the employment of non-U.S. citizens or nationals in competitive service positions, worldwide.⁸⁴ The EO, reflected in the C.F.R.,⁸⁵ allows the OPM to specify exceptions⁸⁶ but their only exception is for “appointment in rare cases under [5 C.F.R.] Sec. 316.601.”⁸⁷ These positions do not confer competitive status⁸⁸ and aliens may fill them in the absence of qualified citizens.⁸⁹ In the end, their excepted service nature complies with the EO’s ban.⁹⁰ The Classification Act extends to non-citizens hired stateside, so they may receive excepted appointments to GS positions within the United States.⁹¹ Appointments under GS conditions, even in the excepted service, are not possible for non-U.S. citizens overseas.⁹²

The EO ban does not distinguish GS from FWS competitive service positions. Although the Classification Act does not apply to the FWS,⁹³ its employees also face citizenship restrictions.⁹⁴ They, too, have competitive and excepted service status⁹⁵

⁷⁷ 8 U.S.C. § 1324(a) (2000) (stating that it is unlawful for a person or entity to employ an unauthorized alien). See also U.S. Office of Personnel Management, *Federal Employment of Non-Citizens, Detailed Policy Information with Citations*, at <http://www.opm.gov/employ/html/Citizen.htm> (last modified Oct. 25, 1999) [hereinafter *Employment of Non-Citizens*] (noting that “In 1996, Public Law 104-208 added a statement that ‘the term ‘entity’ includes an entity in any branch of the Federal Government.’”). A citizenship requirement is not national origin discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (unless there is evidence that it is a pretext to disguise a policy of discrimination or a policy with the purpose or effect of such discrimination). *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 95 (1973).

⁷⁸ See *Employment of Non-Citizens*, *supra* note 77.

⁷⁹ The Appropriations Act provides, in pertinent part, that “no part of any appropriation . . . shall be used to pay . . . any officer or employee of the Government . . . in the continental United States unless such person: (1) is a citizen . . . [listing related categories]” Treasury and General Gov’t Appropriations Act of 2002, Pub. L. No. 107-67 § 605, 115 Stat. 514, 545-6.

⁸⁰ 10 U.S.C. § 1584 (providing: “Laws prohibiting the employment of, or payment of pay or expenses to, a person who is not a citizen of the United States do not apply to personnel of the Department of Defense.”) This basic authority allows, but does not set or fund, payment of DOD’s LN workforce.

⁸¹ Dept of Defense Appropriations Act of 2003, H.R. 5010, 108th Cong. (2003) (providing that FY “provisions of law prohibiting the payment . . . or employment of, any person not a citizen of the United States shall not apply to personnel of the Department of Defense . . .”).

⁸² 22 U.S.C. § 3968(b) (providing that for overseas functions “any agency . . . may administer employment programs for its employees who are foreign nationals.”).

⁸³ 5 C.F.R. § 8 (2004).

⁸⁴ Exec. Order No. 11,935, 41 Fed. Reg. 37,301 (Sept. 3, 1976), *as amended*.

⁸⁵ 5 C.F.R. § 7.3 (mandating: “No person shall be admitted to competitive examination [or] . . . shall be given any appointment in the competitive service unless . . . a citizen or national of the United States.”). Overseas the Classification Act excepts non U.S. citizens from its coverage. 5 U.S.C. § 5102(c)(11).

⁸⁶ *Employment of Non-Citizens*, *supra* note 77 (noting that “OPM may, as an exception to this rule . . . authorize the appointment of aliens to positions in the competitive service when necessary to promote the efficiency of the service in specific cases or for temporary appointments.”).

⁸⁷ 5 C.F.R. § 338.101.

⁸⁸ *Id.* § 316.601.

⁸⁹ *Id.* § 213.3102(bb).

⁹⁰ If agencies find no qualified citizens for a competitive service vacancy, and meet all the requirements of specific authorization, appropriations ban, and immigration rules, they may hire a non-citizen under a special Schedule A excepted appointment. The position then is withdrawn from the competitive service while filled by the non-citizen. *Employment of Non-Citizens*, *supra* note 77. The employee is ineligible for other federal jobs and may not be promoted or reassigned to competitive service positions, except again where no qualified citizens are available, under a Schedule A appointment. 5 C.F.R. § 316.601.

⁹¹ 5 U.S.C. §§ 5102(b), 5102(c)(11) (2000).

⁹² *Id.* § 5102(c)(11).

⁹³ *Id.* § 5102(c)(7).

and are subject to applicable rules. Further, by statute, the OPM must set schedules and rates for U.S. citizen, FWS employees outside the United States, but it has no such authority for non-U.S. citizens outside the United States.⁹⁶

How Local Nationals Are Hired

As with other employment systems, the basic authority to hire and pay foreign nationals is statutory.⁹⁷ The Foreign Service Act of 1980⁹⁸ provides this authority and allows agencies to establish LN classification systems.⁹⁹ Section 408 of the Act provides basic pay setting authority for DOD's LN employees (whose salaries are funded by annual DOD Appropriations Acts).¹⁰⁰ The Secretary of State, though authorized by statute, has left the promulgation of foreign national compensation plans to the agencies.¹⁰¹ The DOD has further delegated the authority to establish the terms of employment for foreign nationals to its military components, including the U.S. European Command.¹⁰² Department of Defense guidance, however, still governs the development of these compensation programs.¹⁰³

Just as non-U.S. citizens cannot be hired as GS employees overseas, their employment under the Foreign Service Act is seemingly restricted. The Foreign Service Act provides specific authority to employ U.S. citizens under APF (U.S.), Foreign Service schedules,¹⁰⁴ but provides the DOD no specific authority for U.S. citizens to be appointed or paid with APF as foreign nationals.¹⁰⁵

While the DOD may appoint non-U.S. citizens, and by delegation, the Army may hire LNs overseas, they typically do so under treaties and agreements endorsed by the State Department with DOD or higher-level input¹⁰⁶ and agency regulations providing implementing guidance.¹⁰⁷ Thus, the Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany¹⁰⁸ (the Supplementary Agreement) implements the North Atlantic Treaty Organization's Status of Forces Agreement

⁹⁴ *Id.* § 5342(c) (providing: "Each prevailing rate employee employed within any of the several States or the District of Columbia shall be a United States citizen or a bona fide resident . . . unless the Secretary of Labor certifies that no United States citizen or bona fide resident . . . is available. . . .").

⁹⁵ See *supra* note 42 and accompanying text.

⁹⁶ 5 U.S.C. § 5343(a)(5). The DOD is OPM's lead agency for establishing these schedules for all agencies using FWS. 5 C.F.R. §§ 532.255, 532.257 (2004).

⁹⁷ 22 U.S.C. § 3968(b); 10 U.S.C. § 1584. See *supra* notes 81- 82 and accompanying text.

⁹⁸ 22 U.S.C. §§ 3901- 4226. The Foreign Service Act of 1980 is classified principally to 22 U.S.C. ch. 52.

⁹⁹ *Id.* § 3968(a)(1). Though this provision addresses State Dep't personnel, section 3968(b) expands this authority to other U.S. agencies operating overseas. See *id.* § 3968(b).

¹⁰⁰ DOD MAN. 1400.25-M, *supra* note 54, para. SC1231.5.1. See also DOD REG. 7000.14-R, *supra* note 38, vol. 8, ch. 7, para. 070102A; DOD MAN. 1416.8-M, *supra* note 74, para. C1.2.1 (providing that under § 408, "The Secretary shall establish compensation (including position classification) plans for foreign national employees . . ."). Foreign Service, U.S. citizen employees have classification/pay authority distinct from the Classification Act. See 5 U.S.C. § 5102(c)(2).

¹⁰¹ 22 U.S.C. § 3968(c).

¹⁰² U.S. DEP'T OF ARMY, REG. 690-300, EMPLOYMENT CH. 301 OVERSEAS EMPLOYMENT para. 3-4a (15 Oct. 1979), available at <http://www.usapa.army.mil/cpol/ar690-300/chapter301/chapter301.html> [hereinafter AR 690-300, CH. 301] (the *Federal Personnel Manual* was sunset in 1993 and DOD INSTR. 1400.10 was cancelled by DOD MAN. 1400.25-M, para. SC1231). See also U.S. DEP'T OF DEFENSE, DIR. 1400.6, DOD CIVILIAN EMPLOYEES IN OVERSEAS AREAS (15 Feb. 1980) (certified current 1 Dec. 2003). Combatant commands have authority "to establish salaries, wages, fringe benefits, related compensation items, and other terms of employment for foreign national employees . . .". DOD MAN. 1400.25-M, *supra* note 54, para. SC1231.5.2.

¹⁰³ See DOD MAN. 1400.25-M, *supra* note 54, para. SC1251.3.

¹⁰⁴ 22 U.S.C. § 3963.

¹⁰⁵ 5 U.S.C. § 5102(b). See 22 U.S.C. § 3941(a) ("Only citizens of the United States may be appointed to the Service, other than for service abroad . . . as a foreign national employee."). See also 22 U.S.C. 3903(6) (describing foreign national employees in the Foreign Service as "foreign nationals appointed under section 3942 of this title . . .").

¹⁰⁶ DOD MAN. 1400.25-M, *supra* note 54, paras. SC 1231.3.1-1231.3.2. (explaining that "a treaty or other formal agreement . . . usually addresses the subject of employment of foreign nationals . . ." and that the State Dep't, with DOD technical advice and guidance, negotiates basic arrangements with host governments).

¹⁰⁷ DOD REG. 7000.14-R, *supra* note 38, vol. 8, ch. 7, para. 070102B. See generally U.S. EUROPEAN COMMAND, DIR. 30-6, ADMINISTRATION OF CIVILIAN EMPLOYEES IN THE U.S. EUROPEAN COMMAND (USEUCOM) AREA OF RESPONSIBILITY (AOR) (6 July 1999); U.S. DEP'T OF DEFENSE, DIR. 5120.39, DEPARTMENT OF DEFENSE WAGE FIXING AUTHORITY APPROPRIATED FUND COMPENSATION (24 Apr. 1980).

(NATO SOFA).¹⁰⁹ Article IX of the SOFA mandates that local labor conditions shall be those of host nation law and Article 56 of the Supplementary Agreement specifically applies German labor law to LN employment by NATO forces stationed in Germany.¹¹⁰ Local agency regulations reflect this law.¹¹¹

How the Local National Workforce Is Structured

All U.S. forces components must use the same grade and step structure for LN employment systems within a country.¹¹² In Germany, the occupying powers originally employed resident workers “without any labor agreement and subject to merely discretionary application of German labor law . . . [T]he actual administration of these local employees was largely left to German public agencies.”¹¹³ Eventually all sending States,¹¹⁴ except the Netherlands, employed local labor under a special Allied Collective Tariff Agreement.¹¹⁵ The Federal Republic of Germany concluded this Agreement with the German trade unions for the Allies.¹¹⁶ The resulting system implemented Article 56 of the Supplementary Agreement (and related provisions in its Protocol of Signature), founded in Article IX, paragraph 4, of the SOFA.¹¹⁷ The Collective Tariff Agreement for the Employees of the Sending States Forces in the Federal Republic of Germany, of 16 December 1966 (CTA II),¹¹⁸ governs wage and salary schedules and other employment conditions for most LN (APF and NAF) employees in Germany.¹¹⁹

United States citizen family members of U.S. Government employees abroad may be appointed against positions identified in manpower guidance as LN,¹²⁰ thus restricting jobs otherwise available to German citizens.¹²¹ These family member appointments, however, are made under GS employment conditions.¹²² This is consistent with the Classification Act’s

¹⁰⁸ Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany, August 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351, as amended 24 U.S.T. 2355, T.I.A.S. No. 7759 (the Treaty of Paris, July 26, 1961, governs NATO Supreme Headquarters Allied Powers, Europe personnel and those at subordinate NATO headquarters [hereinafter Supplementary Agreement]).

¹⁰⁹ See SOFA, *supra* note 75.

¹¹⁰ *Id.* art. IX, para. 4 (prescribing that local labor “conditions of employment and work . . . shall be those laid down by the legislation of the receiving State.”) See also Supplementary Agreement, *supra* note 108, art. 56, para. 1(a) (prescribing further that “German labor law . . . as applicable to civilian employees working with the German Armed Forces . . . shall apply to employment of civilian labor with a force or a civilian component . . .”).

¹¹¹ See, e.g., DOD MAN. 1400.25, *supra* note 54, para. SC 1231.4.5.1. This is not, however, considered German public service employment of the LN workforce. See *infra* notes 152, 155.

¹¹² DOD MAN. 1416.8-M, *supra* note 74, para. C2.1. Grade structures for GS and FWS serve as models, if compatible with prevailing host nation practices. *Id.* para. C2.2. If not, DOD components should consider “[p]revailing practices in the private non-U.S. Forces sector, and/or . . . the in-country government (public) sector.” *Id.* para. C2.3.1. Note that the manual’s pay fixing provisions only apply to direct hire systems though its total compensation comparability provisions apply in all cases. *Id.* at foreword.

¹¹³ Memorandum, Special Assistant for NATO Legal Affairs, OSJA, HQ, U.S. Air Forces in Europe (unaddressed), subject: Indirect Hiring of U.S. Nationals Ordinarily Resident in the Federal Republic of Germany (FRG) (Aug. 2, 1977) [hereinafter HQ, USAFE, OSJA Memorandum, 2 Aug. 1977] (on file with author).

¹¹⁴ SOFA, *supra* note 75, art. I, paras. 1(d), 1(e) (providing that a “sending State” is “the Contracting Party to which the force belongs.” A “receiving State” is the “Party in the territory of which the force or civilian component is located . . .”).

¹¹⁵ HQ, USAFE, OSJA Memorandum, 2 Aug. 1977, *supra* note 113.

¹¹⁶ *Id.*

¹¹⁷ *Id.* See also *infra* note 149.

¹¹⁸ See U.S. ARMY EUROPE, PAM. 690-60, TARIFF AGREEMENTS THAT APPLY TO PERSONS EMPLOYED BY THE U.S. FORCES IN GERMANY (ENGLISH TRANSLATION) (1 Apr. 1996) [hereinafter USAREUR PAM. 690-60] (German version, U.S. ARMY IN EUROPE, PAM. 690-60-G/U.S. AIR FORCE EUROPE, PAM. 36-720-G, TARIFFVERTRÄGE FÜR DIE ARBEITNEHMER BEI DEN US-STREITKRÄFTEN IN DEUTSCHLAND (8 Mar. 2004)).

¹¹⁹ *Id.* art. 63 (including, for example, Salary Tariff C setting LN monthly pay rates based on a 38.5-hour workweek. Pay grades range from C-1 through 10, with 4 through 7 with intermediate “a” grades (*i.e.*, C-4a)).

¹²⁰ See 22 U.S.C. § 3951(a) (2000). See generally U.S. DEP’T OF DEFENSE, INSTR. 1400.23, EMPLOYMENT OF FAMILY MEMBERS OF ACTIVE DUTY MILITARY MEMBERS AND CIVILIAN EMPLOYEES STATIONED IN FOREIGN AREAS (12 May 1989) [hereinafter DOD INSTR. 1400.23].

¹²¹ Political tensions could arise if non-family member U.S. citizens filled these APF jobs. “[I]n many cases DoD personnel could not afford to have their families accompany them abroad . . . [T]he State Department states ‘that as a matter of practice . . . Germany willingly acquiesces in the United States Forces . . . employing its dependents for jobs designated under NATO SOFA for foreign national occupancy.[’]” U.S. Dep’t of Justice Opinion, 2 OLC (1978), quoted in Draft Memorandum, Chief, Labor and Employment Law Office, Office of the Judge Advocate General, U.S. Army, to General Counsel, U.S. Dep’t of Defense, subject: Request for Opinion of the Attorney General (21 Mar. 1990) [hereinafter OTJAG Request for Attorney General Opinion, 1990] (indicating possible German Government non-acquiescence “if the U.S. attempted to place anyone other than dependents in them”) (on file with author).

¹²² Excepted Service; Consolidated Listing of Schedules A, B, and C, Notice, 67 Fed. Reg. 60,798 (Sept. 26, 2002) (codified at 5 C.F.R. § 213.3106(b)(6)) (providing Schedule A applicability for overseas DOD positions “when filled by dependents of military or civilian employees of the U.S. Government

applicability to U.S. citizens.¹²³ The OPM General Counsel has confirmed that “there is no exception in 5 U.S.C. 5102 that would permit payment of local national pay rates to U.S. citizens paid from appropriated funds.”¹²⁴ Similarly, the Army defines LN employees as non-U.S. citizens.¹²⁵ (Hence Mr. Wannabe’s application for APF (LN) employment was rejected properly.)

The Army also may place non-U.S. citizen family members¹²⁶ into positions customarily filled by foreign nationals overseas, absent host nation restrictions, but must employ them under LN conditions.¹²⁷ They are given Schedule A appointments, but are paid in accordance with LN schedules established pursuant to the Foreign Service Act. This complies with the EO ban on non-U.S. citizen competitive service appointments,¹²⁸ and with the exception of non-U.S. citizens from the GS system when outside the United States.¹²⁹ Agency regulations may further limit employment opportunities based on citizenship¹³⁰ (e.g., by granting LN hiring preferences in certain circumstances).¹³¹ At Major Army Command (MACOM)-level, for example, the Headquarters, U.S. Army, Europe and 7th Army (USAREUR) promulgated both USAREUR and Army in Europe regulations (AER)¹³² that include guidance on this area.¹³³

III. Affects of Citizenship on DOD Employment Overseas

The SOFA and Its Two Categories

Thus far, citizenship matters in overseas employment seem straightforward, but to more fully understand the affects of citizenship on DOD employment overseas, practitioners must understand how the SOFA and DOD-utilized employment systems interact. Normally, when U.S. Forces are stationed abroad a treaty or SOFA is executed that provides for categories of civilian employment.¹³⁴ In 1983, the Court of Appeals for the D.C. Circuit observed that sending State civilian employees under the SOFA with Germany are either: (1) members of the civilian component, or (2) local labor (i.e., LN employees).¹³⁵

residing in the area”). See also 5 C.F.R. § 6.2 (2004); U.S. ARMY EUROPE, SUPP. 1 TO U.S. DEP’T OF ARMY, REG. 690-300.301, OVERSEAS EMPLOYMENT para. 7-2d (15 June 1999) [hereinafter USAREUR SUPP. TO AR 690-300.301].

¹²³ See discussion *supra* pt. II.

¹²⁴ Applicability of 5 U.S.C. § 5102 to Specific Positions and Employees in DOD, Op. General Council, Office of Personnel Management (28 Nov. 1986) (on file with author).

¹²⁵ AR 690-300, CH. 301, *supra* note 102, para. 1-1d(9) (defining an LN employee as “A non-U.S. citizen employee who is a national of the host country or is ordinarily resident there or is otherwise employed under the same conditions as host country employees.”).

¹²⁶ Non-U.S. citizen family members are defined as “[f]amily members of any nationality, including permanent alien residents, who have not acquired U.S. citizenship.” *Id.* para. 1-1d(11).

¹²⁷ DOD INSTR. 1400.23, *supra* note 120, para. 4-7. See also U.S. ARMY IN EUROPE, REG. 690-70, CIVILIAN PERSONNEL RECRUITMENT AND STAFFING FOR LOCAL NATIONAL EMPLOYEES IN GERMANY para. 7b (23 Apr. 2003) [hereinafter AER 690-70]; 5 C.F.R. 8.3 (2004) (providing that non U.S. citizens “may be recruited overseas and appointed to overseas positions without regard to the Civil Service Act”).

¹²⁸ See discussion *supra* pt. II (regarding excepted service appointments for rare cases).

¹²⁹ AR 690-300, CH. 301, *supra* note 102, para. 7-4 (“[N]on-U.S. citizen family members (if permitted by treaty) will be under Schedule A . . . appointments under 5 CFR 213.3106(b)(6). [They] . . . are excluded by 5 USC 5102(c)(II) from . . . pay and employment conditions accorded to U.S. citizen family members hired under the same appointment authority, unless . . . in summer/student . . . programs.”). See also U.S. Office of Personnel Management, Basic Federal Personnel Manual ch. 301, para. 3-1 (Last OPM Update: Inst. 312, Jan. 31, 1984) (obsolete) (providing that non-citizen appointed outside the United States “may be recruited overseas and appointed to overseas positions without regard to competitive requirements in accordance with the authority provided in civil service rule VIII, section 8.3. These appointments are, in general, made in the same manner as Schedule A excepted appointments”) (on file with author).

¹³⁰ Supplementary Agreement, *supra* note 108, art. 3, para. 4 (allowing for administrative implementation by the parties); see also *Collins v. Weinberger*, 707 F.2d 1518, 1522 (D.C. Cir. 1983) (observing, essentially, that MACOM regulations promulgated after bilateral negotiations and representing a compromise between two legal systems, while obviously not treaties, are accorded judicial deference if consistent and within the scope of the treaty).

¹³¹ See U.S. DEP’T OF DEFENSE, INSTR. 1404.12, EMPLOYMENT OF SPOUSES OF ACTIVE DUTY MILITARY MEMBERS STATIONED WORLDWIDE para. 6.2.5 (12 Jan. 1989); DOD INSTR. 1400.23, *supra* note 120, para. 6.8. See, e.g., AER 690-70, *supra* note 127, para. 7 (Regarding recruitment of LN applicants for APF and NAF positions “recruitment may be limited to LN employees and applicants when the commander determines that it is essential for mission effectiveness . . .”).

¹³² U.S. Army Europe regulations, when updated, are published as U.S. Army in Europe, Regulations.

¹³³ See, e.g., AER 690-70, *supra* note 127.

¹³⁴ See DOD MAN. 1400.25-M, *supra* note 54, para. SC1231.3.

¹³⁵ No other categories of civilian employment are identified in the SOFA and Supplementary Agreement:

These agreements distinguish three categories of employees of a “sending state” . . . First, there are military personnel. . . . Second, there is a “civilian component” consisting of civilian personnel accompanying and employed by the sending state’s force who are

The civilian component is exempt from many host nation taxes and obligations, and receives other logistical privileges.¹³⁶ Its members are subject to sending State employment conditions¹³⁷ and its constituency is restricted. The SOFA with Germany essentially defines the civilian component as the following:

[T]he civilian personnel accompanying [and]...who are in the employ of an armed service of [a]...Contracting Party, and who are not stateless persons, nor nationals of any State which is not a party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the State in which the force is located.¹³⁸

Thus, a sending State can employ those who cannot be members of the civilian component only as local labor—tautologically, the only other specifically authorized SOFA employment category not conferring civilian component status¹³⁹—and local labor is subject to local employment law.¹⁴⁰

Local labor conditions differ from the civilian component's in currency, pay, procedural protections, sick leave, social insurance, retirement, taxes, vacation, working hours and so on.¹⁴¹ But what if the German Government was considered to be the employer of our LN workforce—could U.S. citizens who met local employment and immigration rules escape the Classification Act's restrictions and be employed in the U.S. Forces' APF (LN) workforce? This premise has surfaced in forums ranging from the U.S. Equal Employment Opportunity Commission (EEOC) to the German Supreme Labor Court.

Direct and Indirect Hire Systems

The DOD officially provides for two systems of foreign national employment overseas: direct and indirect hire systems.¹⁴² The host nation is the legal employer of U.S. Forces foreign nationals in indirect hire systems, but grants daily operational control to the Forces.¹⁴³ These employees often are host nation civil servants working for the Forces. Their hiring rules, not merely their conditions of employment, are governed by host nation law. For direct hire systems, however, the U.S. Forces are the employer.¹⁴⁴ The Army defines both systems similarly to the DOD, noting that direct hire employees are paid directly in U.S. APF,¹⁴⁵ not through an indirect reimbursement agreement.¹⁴⁶ The system that is used depends upon social, political, and

neither "stateless persons nor nationals of any state which is not a party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the state in which the force is located." . . . [T]hird, there are local nationals

Collins, 707 F.2d at 1519.

¹³⁶ See generally SOFA, *supra* note 75; Supplementary Agreement, *supra* note 108. See also U.S. ARMY EUROPE, REG. 600-700, IDENTIFICATION CARDS AND INDIVIDUAL LOGISTIC SUPPORT (17 July 2002).

¹³⁷ SOFA, *supra* note 75, art. I, para. 1(b), art. IX, para. 4.

¹³⁸ *Id.* art. I, para. 1(b).

¹³⁹ *Id.* art. IX, para. 4.

¹⁴⁰ Supplementary Agreement, *supra* note 108, art. 56, para. 1(a).

¹⁴¹ USAREUR PAM. 690-60, *supra* note 118.

¹⁴² DOD MAN. 1400.25-M, *supra* note 54, para. SC 1231.4.2 (providing for "those where the employees are hired directly by the U.S. Forces as employees of the U.S. Government (direct hire); and those where the personnel are employees of the host government and are assigned to work with the U.S. Forces on a reimbursable [sic] cost or other financial basis (indirect hire)."). But see JAMES R. DIKEMAN, THE STRUCTURE OF OVERSEAS FOR DOD CIVIL SERVANTS IN EUROPE INCLUDING PAY AND ALLOWANCES para. I C (2005), available at <http://www.usis.it/ussso/files/labor/outline2005.pdf> (identifying U.S. Forces local national employment systems as follows: in Italy, a direct hire system exists; in the United Kingdom, both a direct and an indirect hire system exist; in Spain, an indirect hire system is used; in Greece, an indirect hire system is used but the Greek Ministry of Defense employs contracted employees rather than civil servants, however, U.S. Forces in Iceland employ "a unique system that has elements of both the direct hire and indirect hire system.") [hereinafter Dikeman].

¹⁴³ DOD MAN. 1400.25-M, *supra* note 54, para. SC1231.4.2.2.

¹⁴⁴ *Id.* para. SC1231.4.2.1.

¹⁴⁵ AR 690-300, CH. 301, *supra* note 102, para. 1-1d(2) (defining "direct-hire" as "[a]n employee hired directly by the U.S. Government and paid directly for personal services from appropriated funds.").

¹⁴⁶ *Id.* para. 1-1d(7) (defining "indirect-hire" as "[a] non-U.S. citizen employee hired in a foreign area under the terms of an agreement between the host country and the United States.").

economic factors,¹⁴⁷ and indirect hire systems naturally increase host nation obligations (e.g., social service, pension, and placement expenses).¹⁴⁸

Written indications of whether direct hire, indirect hire, or both systems apply in Germany are scant. Manpower documents occasionally refer to indirect hire employment in Germany. This possibly emanates from the origins of sending State employment there,¹⁴⁹ further complicated by the unique, occupational cost—LN salary situation of the enclave in Berlin.¹⁵⁰ This enclave no longer exists and it is well established, though not as well accepted,¹⁵¹ that LN employees in Germany are not indirect hire employees. As early as 1957, the German Supreme Labor Court held that “the authorities of the forces are the employer,” a fact reflected in the Supplementary Agreement.¹⁵² The Supplementary Agreement allows U.S. Forces to determine the number of jobs they require and their classification, as well as control of employee engagement, placement, training, transfer, dismissal and

¹⁴⁷ DOD MAN. 1400.25-M, *supra* note 54, para. SC1231.4.2.1.1 to SC1231.4.2.1.4 (including the following factors: host nation objections; the number of potential employees and its affect on the local economy; whether treaty or agreements grant U.S. Forces authority to employ foreign nationals following local law and customs; and whether the host nation is able or willing to meet the obligations of an indirect hire system.

¹⁴⁸ Dutch Forces were able to use an indirect hire system in Germany, but not U.S. Forces, due to costs:

German public employees were made available to the Netherlands forces in Germany upon Dutch reimbursement of their salaries. . . . [T]his workforce numbers 200. [They] . . . are not subject to the special CTA . . . but remained under the regular “Bundesangestellten-Tarifvertrag” . . . for white collar workers and the “Mantel Tarif Vertrag” . . . for blue collar workers. There would be no objection, of course, if the FRG would be willing to convert some 80,000 local employees of the U.S. Forces to public service employees. . . . Obviously . . . they are not going to do the same for such a tremendous number”

HQ, USAFE, OSJA Memorandum, 2 Aug. 1977, *supra* note 113.

¹⁴⁹ West Germany’s status changed significantly after 1955:

In 1955, West Germany’s status as occupied territory was dissolved and membership in NATO was conferred upon the Federal Republic. Article 1 of the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954 . . . also incorporated the Convention on Relations Between the Three Powers and the Federal Republic of Germany, May 26, 1952 . . . (effective May 5, 1955), and in Schedule 1 amended *inter alia*, its Article 8 to provide that the temporary status-of-forces arrangement would endure only “until the entry into force of new arrangements . . . based on” NATO SOFA, “supplemented by such provisions as are necessary in view of the special conditions existing in regard to the forces stationed in the Federal Republic.” The Senate ratified the Protocol. . . . authorizing negotiation by the Executive Branch and its concurrence in the Supplementary Agreement [citations and footnotes omitted].

Holmes v. Laird, 459 F.2d 1211, 1214 n.15 (1972), *cert. denied*, 409 U.S. 869 (1972).

[After] the Bonn Conventions and . . . attainment of sovereignty by the FRG on 5 May 1955, an organized system of employment and administration of local nationals and residents was established pursuant to Article 44 of the Forces Convention (FC). The German legal writers, Pretsch, Schalkhaeuser and Rechenberg, all officials of the Federal Ministry of Finance, in their commentary, November 1955, entitled . . . The Law applying to the Employees of the Armed Forces (Foreign Powers) . . . unequivocally hold that the forces are to be considered the employer Just as the occupying powers were the true employers before 5 May 1945, they retain this status thereafter although the FRG agreed in Article 44, FC, as a left-over from occupation times, to discharge certain employer’s functions. In concluding the CTA, the FRG acted on behalf and as the agent of the sending States forces. As far as the likewise accepted duty to represent the forces before German Courts is concerned, it must be observed that this applies not only to labor disputes but also to lawsuits for or against the forces as recipients of goods, services and facilities This was done . . . since the sending States could not be sued in German courts due to their sovereign immunity.

HQ, USAFE, OSJA Memorandum, 2 Aug. 1977, *supra* note 113.

¹⁵⁰ The Berlin Tariff Agreement employees were neither direct nor true indirect hire employees, but rather:

[A]ll employees hired under the provisions of the Berlin Tariff Agreement were paid directly by the German Government in deutsche marks . . . neither appropriated nor non-appropriated funds of the United States were utilized to pay their salaries or to reimburse the German government . . . employees hired as local nationals were not considered U.S. Government employees since the German government paid those salaries directly as a mandatory occupation cost recognized under principles of international law until October 3, 1990. On that date, the occupation of Berlin came to an end. Since October 3, 1990, the German government had continued to pay the salaries of the local national employees in fulfillment of its obligations undertaken pursuant to international agreements.

Ashburn v. West, 1994 EEOPUB LEXIS 1055 (Aug. 25, 1994).

¹⁵¹ The number of Army LN direct hires has relatively recently been reported to total 8,411. U.S. Dep’t of Army, The Army Training and Leader Development Panel Civilian Study and The Strategic Army Workforce, *Outbrief and Discussion* (Powerpoint presentation, 2003), available at <http://www.odcsm.hqusareur.army.mil/rmmp/CP26/ATLDP.ppt#1>. Provided U.S. Army foreign national employment in Germany is properly viewed as a direct hire system, however, Germany alone has half as many direct hires, affecting pension, RIF, and other costs. See, e.g., *Global Rebasng and Restructuring*, *supra* note 4.

¹⁵² HQ, USAFE, OSJA Memorandum, 2 Aug. 1977, *supra* note 113, at 2 (citing BAGE 5, 130 (136-37)). See also Supplementary Agreement, *supra* note 108, art. 56, para. 1(f) (providing: “Employment of civilian labor with a force or a civilian component shall not be deemed employment with the German Public Service.”); U.S. ARMY EUROPE, REG. 690-60, EMPLOYMENT OF LOCAL NATIONAL PERSONNEL IN GERMANY para. 5 (29 Sept. 1987) [hereinafter USAREUR REG. 690-60].

resignation.¹⁵³ Agency regulations implement this authority.¹⁵⁴ German LN employees have no German civil service placement rights.¹⁵⁵ Moreover, for indirect hire systems, bilateral subsidiary agreements typically identify the legal employer (and even the employing agency¹⁵⁶) of a local labor force.¹⁵⁷ Such agreements, identifying indirect hire host nation agencies, exist with the United Kingdom, Netherlands, and Greece, for example, but not with Germany.¹⁵⁸ Rather, the CTA II controls many LN employment matters in Germany, with a DOD system of APF (LN) payrolls that is characteristic of direct hire systems,¹⁵⁹ and DOD Appropriations Acts fund various “necessary and authorized” expenses¹⁶⁰ including the salaries of U.S. and LN employees.¹⁶¹

The Consequences of Acquiring U.S. Citizenship

It seems that even after decades of operation, a direct hire system can yield a confusing result when APF (LN) employees obtain U.S. citizenship. These APF employees, as U.S. citizens, ordinarily could become subject to the Classification Act and that Act does not permit classification and payment of U.S. citizens as LNs in APF positions.¹⁶² Employees hired under other than LN conditions, however, are considered members of the civilian component.¹⁶³ Therein lies the catch. Former German citizens, especially those who have lived and worked in Germany for years, are now citizens of their new country, but are often ordinarily resident in the old country. Further, dual citizens are still considered to be German nationals.¹⁶⁴ Both are excluded from civilian component membership and thus cannot be converted to U.S. employment conditions.¹⁶⁵

¹⁵³ Supplementary Agreement, *supra* note 108, art. 56, paras. 6, 7a.

¹⁵⁴ See, e.g., USAREUR REG. 690-60, *supra* note 152, para. 5a (providing: “LN employees . . . will be recruited, appointed, and serviced by civilian personnel offices . . . according to USAREUR Regulation 690-1.”).

¹⁵⁵ The results of RIF actions and consequent compensation or “annulment contracts” with the U.S. Forces attest to this status. The U.S. Air Force, Europe, Headquarters Legal Office noted:

[T]hat work for the forces shall not constitute employment in the German public service . . . is illustrated, e.g., by the lack of credit for service performed with the sending State’s forces . . . by an individual who is later taken over into the German public service . . . The Federal Republic is so concerned that there should be no notion that the national or resident personnel working for the forces could be considered to be in the German public service that it bought off the pressure . . . by the German Trade Unions, by conclusion of the special “Tariff Agreement for the Social Security of the Employees of the Stationing Forces in the territory of the Federal Republic of Germany” of 31 August 1971 granting these workers separately in case of layoff or dismissal . . . benefits of a type . . . available to them only if they were in the public service.

HQ, USAFE, OSJA Memorandum, 2 Aug. 1977, *supra* note 113. See generally U.S. ARMY EUROPE, REG. 690-84, REDUCTION IN FORCE—LOCAL NATIONAL EMPLOYEES IN GERMANY ENGLISH TRANSLATION OF USAREUR-REGULATION 690-84(G) (5 May 2000).

¹⁵⁶ HQ, USAFE, OSJA Memorandum, 2 Aug. 1977, *supra* note 113.

¹⁵⁷ DOD MAN. 1400.25-M, *supra* note 54, para. SC 1231.4.3.1.2.

¹⁵⁸ HQ, USAFE, OSJA Memorandum, 2 Aug. 1977, *supra* note 113 (opining further that Sending States in Germany “have insisted on . . . sovereign prerogatives, such as irreversible dismissal of local employees on security grounds . . . which would lapse if the Federal Republic would be made the legal employer.”). See also Dikeman, *supra* note 152, para I C (identifying, for example, systems used in Italy, Spain, and Iceland).

¹⁵⁹ See U.S. ARMY EUROPE, REG. 690-72/ U.S. AIR FORCES IN EUROPE, REG. 40-4, LOCAL NATIONAL PAYROLL PROCEDURES IN GERMANY sec. II (1 Sept 1994) [hereinafter USAREUR REG. 690-72].)

¹⁶⁰ See Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8005, 116 Stat. 1519, 1537 (2002) (explaining that Operation and Maintenance funds are available for expenses, not otherwise provided for, necessary for the operation of the Army).

¹⁶¹ Subordinate overseas commands receive a Funding Authorization Document for salaries based on work years, with no distinction between U.S. and LN civilian employees. Payment is made in U.S. dollars from the DOD Finance and Accounting Service to the *Aufsichts und Dienstleistung Direktion, Verteidigungslasten-Verwaltung*, which processes LN payrolls. United States APF are used. See USAREUR REG. 690-72, *supra* note 159, sec. IV (outlining NAF (LN) payroll procedures). The USAREUR Commander, as designated coordinator for LN personnel matters, and the German Federal Minister of Finance have agreed on pay procedures for LNs. *Id.* sec. I, para. 1. “[A]ppropriate agencies of the US Forces . . . furnish to the [now *Verteidigungs-lastenverwaltung* or Administration of Defense Costs (ADC)] the necessary pay supporting documents, pay authorizations, and required funds. The ODC will compute, document, and disburse all monetary entitlements . . .” USAREUR REG. 690-72, *supra* note 159, sec. I, para. 4. The role of the ADC is more ministerial. They deduct taxes, social insurance and other required charges. USAREUR REG. 690-72, *supra* note 159, sec. I, para. 4c.

¹⁶² 5 U.S.C. § 5102(c)(11) (2000). See also *supra* note 124 and accompanying text. See also *supra* note 124 and accompanying text. See, e.g. U.S. OFFICE OF PERSONNEL MANAGEMENT, BASIC FEDERAL PERSONNEL MANUAL ch. 301, para. 3-2 (Last OPM Update: Inst. 312, Jan. 31, 1984) (obsolete) (providing: “Employees appointed under section 8.3 of rule VIII who acquire citizenship during their overseas service may continue to serve under excepted appointment in the position occupied when citizenship is acquired”) (on file with author).

¹⁶³ SOFA, *supra* note 75, art. IX, para. 4 (regarding local labor, it provides that “Such civilian workers employed by a force or civilian component shall not be regarded for any purpose as being members of that force or civilian component.”).

¹⁶⁴ Rich Wales, *Dual Citizenship FAQ: Dual Nationality and United States Law*, at <http://www.richw.org/dualcit/#Overview> (last revised Jan. 29, 2005) (noting that “Each country will usually consider the person as if he were a citizen of that country alone.”) (on file with author). Also, a dual citizen is still a U.S. citizen and the Classification Act applies to U.S. citizens. See discussion *supra* pt. I. Cf. *Kriegel v. Petri*, 2000 U.S. Dist. LEXIS 14265, 2 (S.D. N.Y., 2000) (observing regarding a choice of forums, “Plaintiff, although the holder of dual citizenship, is an American citizen . . .”). Loss of U.S. citizenship is

But, for indirect hire systems the host nation government is the employer.¹⁶⁶ Though the Classification Act normally would apply to a U.S. citizen in a position wholly funded with appropriated funds, it obviously does not apply to the employment systems of other nations.¹⁶⁷ Thus, new U.S. citizens who do not qualify for the civilian component may remain classified and paid as local labor under indirect hire systems.¹⁶⁸

The fate of Title 22 authorized APF (LN) employees who acquire U.S. citizenship in direct hire systems but do not qualify for civilian component membership is, somewhat nebulous. The Army regulation addressing this situation, for Title 5 oriented non-citizen appointments under Rule VIII, mandates in its paragraph on direct hire systems, but mandates in its paragraph on indirect hire systems that, for LN employees who acquire U.S. citizenship, remaining under LN employment conditions is only possible where the host nation is the true legal employer.¹⁶⁹ The lack of clear authority for continued classification and payment of these U.S. citizens could be interpreted as requiring the cessation of such employment where the host nation is not the true legal employer (e.g., direct hire systems). New U.S. citizens in Germany's direct hire foreign national employment system, of course, could secure APF (U.S.) jobs in other NATO countries (assuming they qualify), although this could entail reappointment, relocation, loss of benefits, and family separation. They also remain eligible for NAF employment under LN conditions (NAF employees under other than LN conditions are in the civilian component). In other NATO countries this may not be an option.¹⁷⁰ If such placement options are not available, authority for their continued employment becomes vague. Once employees are hired under LN conditions, however, local employment law governs their employment including the propriety of its termination.¹⁷¹

possible on acquisition of another. 8 U.S.C. § 1481(a) (listing expatriating acts). *But see* *Vance v. Terrazas*, 444 U.S. 252, 261 (1980) (noting that the act alone is not enough; an expatriating act, and an intent to relinquish citizenship, must both be proved by a preponderance of the evidence to establish loss of U.S. citizenship. *Id.* at 266-70. *See also* AR 690-300, CH. 301, *supra* note 102, para.1-1d.

¹⁶⁵ SOFA, *supra* note 75, art. I, para. 1(b). *See* USAREUR SUPP. TO AR 690-300.301, *supra* note 122, para. 3-2a(4) (noting that "U.S. citizens who are also citizens of another country . . . other than Italy may apply for employment based only on their U.S. citizenship."). But, for dual citizens, "apply" does not automatically mean "qualify." *See supra* note 164.

¹⁶⁶ *See* discussion *supra* pt. II, *Direct and Indirect Hire Systems*.

¹⁶⁷ *Id.* *See also* 5 U.S.C. § 5102(c)(14).

¹⁶⁸ Memorandum, Deputy Asst. Secretary of Defense, Manpower, Reserve Affairs, & Logistics, to Asst. General Counsel, Manpower, Health and Public Affairs, subject: Local Employment of U.S. Citizens in Foreign Areas (25 May 1976) (on file with author) (noting: "In indirect hire countries, this apparent conflict poses no problem because employees in the category of local labor are not employees of the U.S. Government Thus they can be hired and paid under . . . conditions established for local national personnel.").

¹⁶⁹ Acquired U.S. citizenship situations were significant enough to merit specific address in an Army Regulation provision dealing with Rule VIII appointments:

b. Direct hire employees. An employee appointed under civil service rule VIII, section 8.3 [non-U.S. citizen recruited overseas], {nay [sic] continue to be employed in the excepted service and in the position occupied when U.S. citizenship is acquired. If qualified as a member of the civilian component, the employee becomes subject to U.S. salary schedules and conditions of employment. In these cases, make a pay system change on the day immediately following the elate [sic] on which the employee provides proof of U. S. citizenship.

c. Indirect hire employees. An indirect hire employee who is a national of, or ordinarily resilient [sic] in, the host country will normally hot [sic] qualify for membership in the civilian component when acquiring U.S. citizenship. The employee continues to be subject to host country labor law and may be retained on the rolls with no change in status, pay, or benefits. *Retention of the employee in this status is permissible only in those countries where the host country government is the true legal employer . . . and when consistent with the . . . SOFA [emphasis added].*

AR 690-300, CH. 301, *supra* note 102, para. 3-2. *See* 5 C.F.R. § 8.3 (2004) (allowing overseas appointment without regard to the Civil Service Act). Rule VIII § 8.3 was used as authority for Third Country Citizen employment in Germany. *See also supra* note 129 and accompanying text. *See infra* note 237 and accompanying text. It is not used as appointment authority for the foreign national workforce in Germany. They are hired pursuant to the Foreign Service Act. *See* discussion *supra* pt. II.

¹⁷⁰ Employment of U.S. citizens under NAF foreign national systems seems inconsistent with Foreign Service Act and DOD definitions of foreign nationals as "non-U.S. citizens." *See supra* notes 74, 105 and accompanying text. These are definitions, of course, not exclusionary provisions. It is the Classification Act that does not permit U.S. citizen employment under APF (LN) conditions. NAF systems, however, are not covered by the Classification Act, 5 U.S.C. § 5102(c)(14), and neither German law nor the NAF foreign national system in Germany preclude U.S. citizen employment in NAF (LN) positions. This result may differ in other NATO countries, thus, their laws and restrictions must be examined independently. *See, e.g.,* USAREUR REG. 690-60, *supra* note 152, para. 4e (noting: "LN employment of US citizens in GE, excluding Berlin, is limited to nonappropriated fund positions [the affect of SOFA, arts. I and IX]."). *See also infra* note 228 and accompanying text; note 230 and accompanying text.

¹⁷¹ SOFA, *supra* note 75, art. IX, para.4 (providing: "The conditions of employment . . . and conditions for the protection of workers, shall be those laid down by the legislation of the receiving State."). *See also* Supplementary Agreement, *supra* note 108, art. 56, para. 1(a) (providing: "German labor law . . . shall apply to employment of civilian labor with a force or a civilian component except as otherwise provided . . ."). Local nationals may be removed by "ordinary" or "extraordinary" notice, for disciplinary infractions and unacceptable performance. U.S. ARMY EUROPE, REG. 690-64, LOCAL NATIONAL EMPLOYEE CONDUCT, DISCIPLINE, COMPLAINTS, GRIEVANCES, AND LABOR DISPUTES para. 11b (18 Sept. 1984) [hereinafter USAREUR REG. 690-64]. National security reasons are a separate basis. The requirements are specific. *Id.* para. 11).

German employment law does not view the acquisition of U.S. citizenship as a ground for disqualification, and terminations based on this factor could translate into costly settlements in their labor courts.¹⁷²

A one-person RIF would be no better a solution than a termination for disqualification.¹⁷³ A host nation labor attorney can best assess prospects for the success of such an action before a German labor court, but LN RIF actions, in general, have a lackluster success record.¹⁷⁴ Even absent exacerbated “old European”¹⁷⁵ political tensions, the success of such an action is uncertain.¹⁷⁶ (Hence, should Ms. Wannabe be required to leave her job under these circumstances, she might achieve a handsome settlement in German labor court.)

Thus, the SOFA and the German Supplementary Agreement apply German labor law to employees hired under LN conditions. The SOFA, of course, is a multilateral treaty, ratified by the U.S. Senate and the President,¹⁷⁷ and a treaty, like a statute, is the supreme law of the land.¹⁷⁸ This presents a quandary. No specific authority exists to classify or pay U.S. citizens as APF foreign nationals, but no lawful authority exists by operation of German law to remove them on this basis. “It has been a maxim of statutory construction . . . [that] ‘an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . .’”¹⁷⁹ This is especially so for general statutes applied extraterritorially.¹⁸⁰ But, the Classification Act is difficult to reconcile with the treaty in this regard. The authority to pay APF salary-based settlements seems similarly questionable, and while taking such actions to German courts could result in judgment fund solutions,¹⁸¹ this, too, seems counterproductive.

What Can Be Done About It?

The issue then, is how to best enforce both statute and treaties. From an employer’s standpoint, there is no public policy interest in discouraging U.S. citizenship applications or in losing these employees simply because they have acquired their

¹⁷² Improperly separated LN employees may retain employment or receive indemnity pay on appeal:

If the [German] court decides that the notice is not justified and, therefore, does not terminate the employment contract, the employer must either continue the employment or request the court to cancel the employment contract and rule that the employer pay an indemnity . . . US Forces should . . . request that the court dissolve the employment relationship and establish . . . suitable indemnity pay if . . . termination is not justified. If the employee was given an extraordinary notice, only the employee can request dissolution of the employment relationship . . .

USAREUR REG. 690-64, *supra* note 171, para. 35a.

¹⁷³ The German Law on the Protection from Termination of Employment or Kündigungsschutzgesetz, is the basis for MACOM, LN RIF policies. U.S. ARMY EUROPE, REG. 690-84, CIVILIAN PERSONNEL, REDUCTION IN FORCE-LOCAL NATIONAL EMPLOYEES IN GERMANY ENGLISH TRANSLATION OF USAREUR REGULATION 690-84 (G) para. 7 (20 Nov. 2003).

¹⁷⁴ For example, LN RIF actions in the Stuttgart area after the U.S. VII Corps’ departure in the 1990s were widely problematic, resulting in costly settlements. This comment is based on the author’s professional experiences as an Attorney-Advisor with the Office of the Judge Advocate, HQ, U.S. Army Europe & Seventh Army, and at various other U.S. Army legal offices in Germany from December, 1983 through present [hereinafter Professional Experiences].

¹⁷⁵ See BBC News World Ed., *Outrage at ‘old Europe’ remarks* (Jan. 23, 2003), at <http://news.bbc.co.uk/2/hi/europe/2687403.stm> (referencing Defense Secretary Rumsfeld’s then poorly received remarks at a 22 Jan. 2003 press brief: “‘You’re thinking of Europe as Germany and France. I don’t,’ he said. ‘I think that’s old Europe.’”).

¹⁷⁶ Again, both funding and work exist. The U.S. Forces would have continued the employment but for the employee’s acquisition of U.S. citizenship. The OPM permits agencies with § 408 programs to include special RIF plans, but this is only to give effect to local laws and practices consistent with public interest. 5 C.F.R. § 351.201(d) (2004).

¹⁷⁷ See *Aaskov v. Aldridge*, 695 F. Supp. 595, 596 (D.C. Dist. 1984) (“NATO SOFA, a multilateral treaty . . . is designed ‘to define the status of [forces of one party] while in the territory of another Party’”); *Collins v. Weinberger*, 707 F.2d 1518, 1522 n.25 (D.C. Cir. 1983) (explaining: “No one disputes that NATO/SOFA, as an Article II treaty, and the Supplementary Agreement, as an executive agreement, are both treaties within the meaning of Section 106,” referring to Pub. L. 92-129, § 106, 85 Stat. 355 (Sept. 28, 1971) at note following 5 USC § 7201 (2000)).

¹⁷⁸ U.S. CONST. art. VI, cl. 2.

¹⁷⁹ *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (citing *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804)). See also *Rossi v. Brown*, 467 F. Supp. 960, 964 n.3 (1979) (quoting Restatement (Second) Foreign Relations Law of the United States § 145 (1965): “An act of Congress enacted after an international agreement . . . inconsistent with the agreement, supersedes it as domestic law . . . [i]f the purpose of Congress to supersede the agreement is clearly expressed.”).

¹⁸⁰ *Rossi*, 456 U.S. at 32.

¹⁸¹ 31 U.S.C. § 1304 (2000). See also DEP’T OF TREASURY, MANUAL I TFM 6-3100, TREASURY FINANCIAL MANUAL pt. 6, ch. 3100 (Sept. 28, 2000), available at <http://www.fms.treas.gov/judgefund/regulations.html>.

employer's citizenship. But where would authority be found to allow their conversion to APF (U.S.) employment conditions or to continue their APF (LN) employment in these recurring cases?¹⁸²

One solution to this problem would entail amendment of the SOFA to allow or require LN employees who acquire U.S. citizenship to become members of the civilian component.¹⁸³ This presents several challenges. The continued LN employment of a new U.S. citizen is not a problem under German law, but a compelled conversion to employment under U.S. conditions might detrimentally impact upon long-term LN employment benefits such as German social security benefits. Further, all countries with similar SOFA provisions and direct hire systems could require a similar re-negotiation to allow for the employment of host nation nationals, or persons ordinarily resident in the host nation, in the civilian component of a sending State, under those circumstances. Such an effort is not only unrealistic, but might also could jeopardize existing sending State advantages on other issues. Seeking case-by-case waivers from the receiving State is another option, but it is irregular and uncertain. Moreover, German authorities likely have no policy interest in increasing the U.S. civilian component while, correspondingly, decreasing the number of persons who would otherwise pay German revenues. (In fact as discussed later in this article, they are beginning to believe that APF (U.S.) employment may be possible without SOFA privileges.).

In the end, a practice of removing LN employees from the rolls simply because they become U.S. citizens seems legally "absurd."¹⁸⁴ Far better solutions are locally under examination to identify and effect proper authority for classification and payment of these employees. The Classification Act does not specifically require the removal of U.S. citizens from APF positions under other systems in which they have been lawfully hired. Since the expenditure of taxpayer dollars is at issue, however, specific authority for their continued employment still must be identified.¹⁸⁵ This is not as easy as it might seem, and a multitude of interests must be balanced. Possible reappointment of these new "family members" under other authority requires consideration of any SOFA implications, the impact on various benefits and entitlements, liability, and other issues. The Foreign Service Act does not provide specific authority to pay U.S. Citizens in APF (LN) positions,¹⁸⁶ but it does provide authority to pay persons properly hired under local compensation plans.¹⁸⁷ The issue of authority to pay U.S. citizens as APF (LN) under these circumstances may not be resolved with finality absent authoritative clarification,¹⁸⁸ but analogous authority exists regarding various aspects of foreign national compensation plans. For example, the U.S. Comptroller General has held that the Foreign Service Act, at "22 U.S.C. 889 does not require compensation plans for aliens to be limited by the laws and regulations applicable to civil service employees."¹⁸⁹ If the proposed practice is based upon prevailing compensation practices for corresponding types of positions in the locality it may be adopted, in spite of civil service employment or fiscal law, but only to the extent it is "consistent with the public interest."¹⁹⁰

If U.S. citizen, LN employees continue in their APF (LN) jobs in direct hire systems, however, this creates an appearance of inconsistency. Such an appearance already has generated confusion in several Army EEO complaint investigations, as exemplified by an investigating agency's comments:

¹⁸² Nearly 16,000 foreign nationals are presently employed by the Army alone, in the European theater. See, e.g., *Global Rebasing and Restructuring*, *supra* note 4. In the two years, prior to August 2004, there have been at least six acquired citizenship situations in Germany and foreign law attorneys have noted more. Professional Experiences, *supra* note 174. Unreported citizenship acquisitions likely number even higher. Combined with other direct hire systems, the scenario is more extensive. Especially since the opening of borders within the European Union, the citizenship of LN employees in Germany varies—some are eager to acquire U.S. citizenship.

¹⁸³ *Holmes v. Laird*, 459 F.2d 1211, 1222 (1972), *cert. denied*, 409 U.S. 869 (1972) (stating that changes to the SOFA must be made through diplomacy rather than courts: "the corrective machinery specified in the treaty itself is nonjudicial [notes omitted].").

¹⁸⁴ See *Environmental Defense Fund, Inc., v. EPA*, 82 F.3d 451, 466 (D.C. Cir. 1996); *State of Ohio v. EPA*, 997 F.2d 1520, 1535 (D.C. Cir. 1993); *Public Citizen v. Young*, 831 F.2d 1108 (D.C. Cir. 1987) (holding that "the literal meaning of a statute need not be followed where the precise terms lead to absurd or futile results . . .").

¹⁸⁵ See *supra* note 57 and accompanying text.

¹⁸⁶ See *supra* note 105 and accompanying text.

¹⁸⁷ 22 U.S.C. § 3968 (2000).

¹⁸⁸ For example, by OPM, Federal Courts, or through congressional action.

¹⁸⁹ To the Secretary of Navy, B 173210, 1971 U.S. Comp. Gen. LEXIS 68, *1 (Aug. 24, 1971). The cited statute section has been replaced by 22 U.S.C. § 3968a(1).

¹⁹⁰ Decision of the Comptroller General, B-199054, 1980 U.S. Comp. Gen. LEXIS 2110, *1-2 (Dec. 16, 1980). Though there are limits to how far the statute will allow for recognition of prevailing practices, it seems at least arguable that this authority could be used to allow for the continued compensation of lawfully hired LN employees who acquire U.S. citizenship. Prior to adopting a local employment practice it should be substantially followed by local employers, determined by the agency head to be consistent with public interest, and coordinated with other agencies in the area to ensure uniformity in application. Decision of the Comptroller General, B-145804, 1961 U.S. Comp. Gen. LEXIS 2110, *7 (May 26, 1961).

[Army Regulation] 690-300, Chapter 301.3-2c, permits a non-US citizen employee who acquires US citizenship, if a national or ordinarily resident in the country of employment to remain employed as a Local National under host nation employment conditions.... There is no known legal basis for discriminating in this fashion in favor of the ordinary resident who acquires American citizenship, as opposed to the American who becomes ordinarily resident simply by virtue of length of sojourn.¹⁹¹

The above-cited regulation provision, of course, specifically provides for continued APF (LN) employment in *indirect* hire systems.¹⁹² It provides that direct hire, APF (LN) employment should extend only for one day after providing proof of acquiring U.S. citizenship. These LN employees must then convert to U.S. conditions—if they qualify for the civilian component.¹⁹³ The Army regulation’s “day-after clause” promotes rapid conversion, rather than offering a loophole for delay. Of course, LN employees are not always of German nationality. To understand why others are excluded, military practitioners must examine the concept of “ordinarily resident” status.

What Is “Ordinarily Resident” Status?

Military lawyers have observed that the phrase “not ordinarily resident” is “by far the thorniest area in determining status under the SOFA.”¹⁹⁴ The term “ordinary residence” has various definitions, most commonly in the context of jurisdiction or tax liability. Under the SOFA, personnel who are ordinarily resident in the receiving State, regardless of their citizenship, cannot be members of a civilian component of a sending State.¹⁹⁵ Neither the SOFA, nor the Supplementary Agreement, defines ordinary residence in a SOFA context, and the negotiating histories offer no clues to assist in the term’s implementation.¹⁹⁶ The definition of ordinary residence, for purposes of U.S. Forces civilian employment in Germany, is found in MACOM publications:¹⁹⁷

A person with ordinarily resident status is a U.S. citizen to whom one of the following applies: (1) The person obtained a work permit during current residency in the host country (2) The person resided in the host country for the time shown below without status as a member of the U.S. Forces or civilian component as defined by the NATO Status of Forces Agreement: (a) In Germany: 1 year. . . .¹⁹⁸

Historically, USAREUR derived the work permit rule and the one-year rule from legal commentaries.¹⁹⁹ The U.S. Air Forces in Europe and the U.S. Naval Forces, Europe, have similar basic rules.²⁰⁰ “Ordinary residence,” in the SOFA context, “is not

¹⁹¹ U.S. Army Civilian Appellate Review Agency, Europe, *Analysis of Issue of Employability of Ordinarily Resident Americans in Appropriated Fund Positions* 6, 7 (undated) (submitted in EEO Complaint of Chester J. Cole, received by agency, Oct. 7, 1987) (on file with author).

¹⁹² AR 690-300, CH. 301, *supra* note 102, para. 3-2. *See supra* note 169 (quoting the provision).

¹⁹³ *Id.* *See also* discussion *supra* pt. II (supporting continued APF (LN) employment is possible *only* where the host government is the legal employer.).

¹⁹⁴ Captain David S. Gordon, *Individual Status and Individual Rights Under the NATO Status of Forces Agreement and the Supplementary Agreement with Germany*, 100 MIL. L. REV. 49, 80 (1983).

¹⁹⁵ SOFA, *supra* note 75, art. I, para. 1(b).

¹⁹⁶ Gordon, *supra* note 194, at 81.

¹⁹⁷ Because the SOFA does not define ordinarily resident status, and agencies are obliged to implement the SOFA, an agency’s definition of that term, as consented to by the host nation, also enjoys deference from judicial and quasi-judicial U.S. forums. *See* Supplementary Agreement, *supra* note 108, art. 3, para. 4, (allowing for administrative implementation by the parties). *See also* Collins v. Weinberger, 707 F.2d 1518, 1521-1522 (D.C. Cir. 1983) (noting that MACOM regulations promulgated after bilateral negotiations and accommodations envisioned by the SOFA and Supplementary Agreement, and representing a compromise between two legal systems, while obviously not treaties, are accorded judicial deference if consistent and within the scope of the treaty); Sumitomo Shoji Am. v. Avagliano, 457 U.S. 176, 184-85 (1982); Daneshpayeh v. Dep’t of Air Force, 57 M.S.P.R. 672 (1993), *aff’d*, 17 F.3d 1444 (Fed. Cir. 1994). The Commander, U.S. European Command, gave the Commander, U.S. Army, Europe, responsibility for coordination of LN employment matters in Germany, Belgium, Luxembourg and the Netherlands. U.S. EUROPEAN COMMAND, DIR. 30-6, ADMINISTRATION OF CIVILIAN EMPLOYEES IN THE U.S. EUROPEAN COMMAND (USEUCOM) AREA OF RESPONSIBILITY (AOR) para. 9b(1) (6 July 1999).

¹⁹⁸ USAREUR SUPP. TO AR 690-300.301, *supra* note 122, para. 5-1.1a. *See also* U.S. ARMY EUROPE, REG. 600-700, IDENTIFICATION CARDS AND INDIVIDUAL LOGISTIC SUPPORT glossary, sec. II (17 July 2002). Examples of ordinary residents include U.S. citizen family members whose sponsors are reassigned but who remain in Germany or obtain work permits or both or former U.S. employees who likewise remain or obtain work permits or both. Other nations use different gauges. *See, e.g.*, TRI-SERVICE REGULATIONS FOR ITALY, U.S. ARMY EUROPE, REG. 550-32/U.S. NAVAL FORCES EUROPE, INSTR. 5840-2D/U.S. AIR FORCES IN EUROPE, INSTR. 36-101, REGULATIONS ON PERSONAL PROPERTY, RATIONED GOODS, MOTOR VEHICLES AND DRIVERS’ LICENSES, CIVILIAN COMPONENT STATUS, AND ACCESS TO FACILITIES BY ITALIAN LABOR INSPECTORS (18 Apr. 2001).

¹⁹⁹ Draft Memorandum, Foreign Law Branch, Office of the Judge Advocate, U.S. Army, Europe and 7th Army to Labor Law Attorney, Grafenwoehr Law Center, subject: USAREUR SJA Interpretation of “Ordinarily Resident” clause of SOFA (4 May 1998) (on file with author).

²⁰⁰ Memorandum of Chief Nonappropriated Fund Division, Civilian Personnel Directorate, U.S. Army, Europe and 7th Army, to Chief International Law Division, Office of the Judge Advocate, Headquarters, U.S. Army, Europe and 7th Army, subject: Employability Determination (24 May 2000) (on file with author) (explaining:

equivalent to the legal concept of residence or domicile . . . in either common or civil law jurisdictions.”²⁰¹ Indeed, “Prior to 1974, ‘ordinarily resident’ determinations were . . . based on the indicia of intent commonly found in American legal practice.”²⁰² Consequently, the criteria for ordinarily resident status determinations have always been more of a factual than a legal issue, taking into account all the facts surrounding a person’s presence in the receiving State, with particular emphasis on the place of recruitment.²⁰³ The resulting latitude in agency discretion developed new dimensions after the Equal Employment Opportunity Act of 1972 extended the right to file civil actions on discrimination complaints to many Federal employees.²⁰⁴ The USAREUR rule was implemented to avoid subjective and unfair ordinarily resident status determinations.²⁰⁵ It was not intended to exclusively define ordinary residence, but to serve as guidance for initial applicant evaluations.²⁰⁶ Commanders, however, still may request reviews of this status (when gained by residence, not by work permit) to determine an applicant’s APF employability.²⁰⁷ These discretionary reviews take into account individual circumstances (e.g., the nature of one’s travel and its origins).²⁰⁸ Further, under the USAREUR rule, ordinarily resident status gained in Germany can be lost under certain conditions upon leaving the country.²⁰⁹

German authorities have tacitly, though never formally, agreed to the USAREUR definition of ordinary residence.²¹⁰ Initially, the German government seems to have voiced no concern over these determinations.²¹¹ At least from 1974, however, the German Ministry of Finance has expressed an interest (joined later by their Foreign Office and Ministry of Labor) in applying

The USAFE Supplement 1 to FPM chapter 301 [expired, but used as guidance, takes] . . . into account: whether the person has (1) purchased a residence or entered into a long term lease; (2) been employed on the local economy or obtained a work permit on the economy; (3) obtained a resident visa; (4) paid local taxes; or (5) been in Germany for over a year without AF affiliation.)

See also U.S. NAVAL FORCES, EUROPE, INSTR. 12301.3B, INELIGIBILITY OF ‘ORDINARILY RESIDENT’ INDIVIDUALS FOR U.S. CIVILIAN COMPONENT EMPLOYMENT IN NATO HOST NATIONS (2 Sept. 1998).

²⁰¹ See Gordon, *supra* note 194, at 81.

²⁰² *Id.* at 80.

²⁰³ SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 93 (1971).

²⁰⁴ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e-16 2000) (amending and adding various sections to Title VII).

²⁰⁵ Memorandum, Chief of Staff, Headquarters, U.S. Army, Europe and 7th Army, to subordinate commanders, subject: “Ordinarily Resident” Determinations (14 Apr. 1983) [hereinafter Memorandum of USAERUR Chief of Staff, 14 April 1983] (on file with author). See also Gordon, *supra* note 194, at 81 (stating that the rule was adopted to avoid judgments “which could be construed as discriminatory or showing favoritism”).

²⁰⁶ Gordon, *supra* note 194, at 81 (citing 1st Indorsement, AEAJA-IA, subject: Concept of the “Ordinarily Resident” Provision (Paragraph 16, Article I, NATO SOFA) (2 Mar. 1981)).

²⁰⁷ USAREUR SUPP. TO AR 690-300.301, *supra* note 122, para. 5-1.1d. The MACOM Civilian Personnel Directorate conducts the reviews. *Id.* For NAF employment, a separate regulation is used. U.S. ARMY IN EUROPE, REG. 215-3, MORALE, WELFARE, AND RECREATION, NONAPPROPRIATED-FUND PERSONNEL POLICY AND PROCEDURES (29 Jan. 2004) [hereinafter AER 215-3].

²⁰⁸ Circumstances that might warrant flexibility include “cases where individuals have crossed the bridge into becoming ‘ordinarily resident’ between the dates of application, referral and selection for employment.” Memorandum, USAERUR Chief of Staff, 14 April 1983, *supra* note 205. Also:

Although presence in Germany without status for more than one year without substantial interruption, when combined with employment on the local economy would probably give rise to a finding of “ordinarily resident” in almost all instances, a one year or more presence as a student, without a local job, or a one year presence . . . traveling on business or vacation from a point of origin located outside the host country, or a one year presence without a local job combined with evidence that the applicant has tried repeatedly for civilian component jobs, could, in the absence of evidence to the contrary, form the basis for a finding that the applicant is not ordinarily resident in Germany.

Id. See also USAREUR SUPP. TO AR 690-300.301, *supra* note 122, para. 5-1.1c.

²⁰⁹ Presently, continuous U.S. residence for a year or more is required, tying the concept in to other DOD employment policy considerations. *Id.* para. 5-1.1a. A former USAREUR REG. 690-333, allowed a “substantial period” of stateside residence to purge ordinarily resident status. Factors examined included, for example, German house sale or lease cancellation and creation of a new domicile, shipment of household goods, and any employment outside Germany. Information Paper, U.S. Army, Europe, Office of the Judge Advocate, subject: Ordinarily Resident General Information para. 7 (1996) (on file with author) (explaining the process envisioned in U.S. ARMY EUROPE, REG. 690-333, RECRUITMENT AND SELECTION FOR TEMPORARY AND TERM APPOINTMENT OUTSIDE THE REGISTER (version ca. 1991)).

²¹⁰ See Information Paper, U.S. Army, Europe, Office of the Judge Advocate, subject: Ordinarily Resident General Information paras. 2, 3 (1996) (on file with author) (contending that aware of the USAREUR rule: “The German government has, by abstention, given credence to the USAREUR definition of ordinarily resident . . .” but noting “It could be an issue for discussion in any negotiations pertaining to the SOFA.”).

²¹¹ Draft Memorandum, Foreign Law Branch, Office of the Judge Advocate, U.S. Army, Europe and 7th Army to Labor Law Attorney, Grafenwoehr Law Center, subject: USAREUR SJA Interpretation of “Ordinarily Resident” clause of SOFA (4 May 1998) (on file with author) (explaining that “[i]n the seventies and early eighties . . . sending State Forces could decide independently on their internal matters without much control by the German authorities.”).

German law to define ordinary residence.²¹² Thus, the receiving State's interest in controlling SOFA status clearly extends beyond its own nationals.²¹³ After all, the core issues of revenue and sovereignty would evoke the interest of any nation.

The German standard for ordinary residence is generally based on their legal requirement to obtain a residence permit after 90 days in the country.²¹⁴ While German employment law is silent on the term, the German General Revenue Code, for example, provides that ordinary residence can be acquired in a much shorter period than under the USAREUR rule.²¹⁵ This period is normally six months but, depending upon other factors, can be as brief as a single day, and does not exceed one year, in Germany.²¹⁶ An example of the factors considered in German ordinary residence determinations is evident in the distinct but analogous reviews of U.S. Forces' contractor employees seeking technical expert status under Article 73 of the Supplementary Agreement. If accorded technical expert status, they are "considered to be, and treated as, members of the civilian component."²¹⁷ Tightening control on SOFA status,²¹⁸ German authorities, through negotiations specifically limited to these non-Federal employees, have listed nine residence, income, employment, and social-related factors that when evaluated along with the "totality of circumstances," determine whether an applicant's main "focus of vital interests" has shifted from the United States to Germany.²¹⁹ If so, this type of applicant for SOFA status is considered to be ordinarily resident in Germany.

The German judiciary has not ignored U.S. Forces civilian employee SOFA status, either. In 1984, the German Supreme Labor Court held that while the sending States determined which persons accompanied their forces as civilian employees, the SOFA status of those employees was subject to review by the receiving State.²²⁰ German authorities, nevertheless, continue to tacitly abide by the USAREUR standards in reviewing these SOFA status determinations.

Given the interests at stake, and the determination of the German government to exercise greater influence in defining ordinary residence, any formal, bilateral consistency on the definition of ordinary residence for federal employment purposes remains illusive. Within the European Union, it is likely that a common definition of ordinary residence eventually will emerge

²¹² See, e.g., Letter from German Ministry of Finance, to Director of Civilian Personnel Division, HQ USAREUR and 7th Army 4 (Mar. 26, 1974) (raising no objection to the U.S. Forces hiring discharged soldiers who were not ordinarily resident under German law) (on file with author).

²¹³ But see LAZAREFF, *supra* note 203, 93. Lazareff argues that:

the criterion of residence is not of particular interest to the Receiving State whose main problem is to make certain that its own nationals do not enjoy privileges granted to foreign members of the civilian component. Therefore . . . the Sending State is . . . responsible for determining who . . . belongs to the civilian component.

Id.

²¹⁴ Information Paper, U.S. Army, Europe, Office of the Judge Advocate, subject: Ordinarily Resident General Information para. 2 (1996) (on file with author).

²¹⁵ The German Revenue Code provides that one who stays at a place under conditions that indicate he is not there temporarily is ordinary resident after a continuous period of residence of more than six months; with any brief interruptions not considered. If the stay is only for a visit or similar private purpose and does not exceed one year, however, the above restriction does not apply. § 9 AO (1977), BGBl. I 800.

²¹⁶ The German Federal Ministry of Finance stated that "As a rule such intent is implied when a person's stay exceeds a certain period." Letter from German Ministry of Finance to Director of Civilian Personnel Division, HQ USAREUR and 7th Army (Mar. 26, 1974) (on file with author) (proceeding to analogize the standard to the German Revenue code standard of six months).

²¹⁷ Supplementary Agreement, *supra* note 108 art. 73. See also *id.* arts. 71, 72. Contractor employees are employees of private firms under private employment contracts, not under Federal personnel statutes or under the Foreign Service Act. They are not "employees" of the U.S. Forces. 5 U.S.C. § 2105 (2000). They do not always stand in such an integral relation to the U.S. Forces so as to warrant SOFA exemptions. But see *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 218 (1992) (indicating that an intertwined employee/employer relationship can inadvertently yield some employee rights in other respects.).

²¹⁸ This apparently resulted from a longstanding bilateral disagreement. See Draft Memorandum, Foreign Law Branch, Office of the Judge Advocate, U.S. Army, Europe and 7th Army, to Labor Law Attorney, Grafenwoehr Law Center, subject: USAREUR SJA Interpretation of "Ordinarily Resident" clause of SOFA (4 May 1998) (on file with author) (explaining "USAREUR continued to make unilateral determinations. . . . In a letter dated 19 July 1982, the FMOF [Federal Ministry of Finance] indicated that it had serious doubts whether the USAREUR position . . . for granting Article 73 status was in line with Article 73 . . .").

²¹⁹ Exchange of Notes between the United States and Germany on Article 73 of the Supplementary Agreement to the NATO SOFA para. 2f (Mar. 27, 1998) available at <http://www.per.hqsareur.army.mil/cpd/docper/exchange73.htm> (last visited 23 June 2005) (including factors, such as the duration of the stay, and performance of work, in Germany while not affiliated with the Forces. The Exchange of Notes explains at para. 2c that one who remains in Germany without SOFA status "may within a period of 90 days . . . solely on the basis of the fact . . . become ordinarily resident.").

²²⁰ BAGE 46, 107 (124-26) (examining whether employees of the American Express Internat'l Banking Corp. military banking facilities in Germany qualified for civilian component benefits and exemptions, irrespective of any sending State designation as members of the civilian component). In November 1985, the German Federal Social Court had ruled that SOFA status was subject to final review by German courts. Draft Memorandum, Foreign Law Branch, Office of the Judge Advocate, U.S. Army, Europe and 7th Army, to Labor Law Attorney, Grafenwoehr Law Center, subject: USAREUR SJA Interpretation of "Ordinarily Resident" clause of SOFA (4 May 1998) (noting that "As a result [of these decisions], USAREUR became more restrictive in granting exceptions to the 'ordinarily resident' rule and OJA gradually interpreted the internal rule more restrictively.") (on file with author).

and also will impact this situation. For the present time, however, the twelve-month standard is used to implement the treaty in this regard.

What Is It Not?

Soldiers, civilian employees, and their family members cannot become ordinarily resident by the length of their residence as long as they have SOFA status.²²¹ The German Supreme Labor Court has interpreted Article 7 of the Supplementary Agreement as precluding family members of a member of the force or civilian component from establishing ordinary residence under Article I of the SOFA and under German law.²²² They are not required to obtain a work permit under any circumstances, even for employment on the economy. Because of their SOFA status, both U.S. citizen and non-citizen family members are exempt from certain German labor requirements, such as residence and work permits,²²³ but this does not mean they cannot or do not get these permits. Though not ordinarily resident under German law, they may be treated as such by agency regulations.²²⁴

SOFA Interaction with the Classification Act

This article will now summarize and apply previously discussed information to U.S. Forces hiring determinations in Germany. Ordinarily resident U.S. citizens are still U.S. citizens. In APF positions ordinarily resident U.S. citizens are subject to the Classification Act (or other specifically excepted U.S. systems) and cannot be hired as LN employees. If they are hired by the U.S. Forces under employment conditions other than those of LN employment they would be considered members of the civilian component, but the SOFA precludes this.²²⁵ Self-funded NAF positions are not subject to the Classification Act,²²⁶ and the Army may fill them under either U.S. or LN conditions.²²⁷ Normally, U.S. citizens are hired into NAF (U.S.) positions, but no U.S.

²²¹ The SOFA, makes no distinction between U.S. and non-U.S. citizens in this regard. SOFA, *supra* note 75, art. I, para. 1(b) Also, "In applying international agreements ...concerning residence . . . insofar as they relate to . . . extension of residence permits or to gainful occupation, periods of time spent in the Federal territory by any person as a member . . . of a civilian component . . . shall be disregarded." Supplementary Agreement, *supra* note 108, art. 7.

²²² BAGE 35, 370 (374-77).

²²³ AER 690-70, *supra* note 127, para. 5d(5) (exempting family members from "a work permit, residence permit, and . . . a police good conduct certificate. . ."). Also, "[n]on-German citizens-with the exception of non-U.S.-citizen family members-must be in possession of a residence permit if employment is expected to last longer than 3 months." *Id.* tbl. 1. A prior regulation explained that nonresident employment rules

are established in the German Federal Law on Foreigners, 28 April 1965 German Federal Law Gazette (Bundesgesetzblatt) Nr. 19, 8 May 1965, and the pertinent implementing directive (arbeitslaubnisverordnung), published in the German Federal Gazette Nr. 17, 6 March 1971 . . . (1) Foreigners who enter GE seeking employment must possess a residence permit in the form of a visa issued before their entrance . . . This requirement does not apply to (a) Citizens of countries that are parties to the EC. (b) Dependents of members of the Sending States Forces and the civilian component . . . (3) Foreigners must obtain a work permit from the local German Labor Office before employment. Exempt from this requirement (sic) are individuals listed in 1(a) and (b) above.

U.S. ARMY EUROPE, REG. 690-70, RECRUITMENT AND STAFFING OF LOCAL NATIONAL POSITIONS para. 13 (2 Feb. 1982) (superseded by AER 690-70). Further highlighting the political interests at stake:

In 1971 USAREUR instituted a Dependent Hire Program. . . . These dependents received jobs traditionally reserved for local nationals. . . . But as German economic growth slowed, local nationals became increasingly concerned with their job security. Complaints were made to the German parliament, and complicated negotiations between the two governments ensued. . . . The FRG maintained that since USAREUR was hiring these dependents in the FRG to fill local labor requirements they were, like local nationals, subject to German law, including the German work permit requirement. USAREUR, on the other side, insisted that it had the right to hire U.S. citizens, whether in the U.S. or in the FRG, according to U.S. law and to designate anyone so hired as a member of the civilian component. The negotiations on this issue reached an impasse. The FRG, however, proved willing to drop its insistence that dependents were subject to German law in exchange for assurances that the job security of local nationals would not be jeopardized by the Dependent Hire Program.

Collins v. Weinberger, 707 F.2d 1518, 1519-20 (D.C. Cir. 1983) (footnotes omitted).

²²⁴ Regulations should ensure those with SOFA status are not improperly considered as ordinary residents. An agency's failure to comply with its regulatory requirements can be harmful error that invalidates its actions. See 5 U.S.C. § 7701(c)(2)(A) (2000); 5 C.F.R. § 1201.56 (b)(1) (2004). See, e.g., Vitarelli v. Seaton, 359 U.S. 535 (1959).

²²⁵ 5 U.S.C. § 5102 (2000). See also AR 690-300, CH 301, *supra* note 102, para. 1-1d(9); USAREUR SUPP. TO AR 690-300.301, *supra* note 122, para. 3-2a(1). Views that the SOFA trumps the Classification Act since the treaty came later are not persuasive. There is no incompatibility between them that cannot be read *pari materia*. Memorandum, Asst. General Counsel, Manpower, Health and Public Affairs, Dep't of Defense, to Deputy Asst. Sec. Def. (Civilian Personnel Policy), subject: Local Employment of U.S. Citizens in Foreign Areas (1 May 1978) (on file with author).

²²⁶ See *supra* note 53 and accompanying discussion.

²²⁷ See AER 215-3, *supra* note 207. See also USAREUR REG. 690-60, *supra* note 152. The former governs NAF (U.S.) employees and the latter governs NAF (LN) hires.

statute or regulation specifically precludes their hire under NAF (LN) conditions.²²⁸ The Army may not hire ordinarily resident U.S. citizens as NAF (U.S.) employees, though, since only employment under local labor conditions is excluded from civilian component status under the SOFA.²²⁹ Thus, the sending State cannot employ ordinarily resident U.S. citizens in anything but NAF (LN) positions, if locally permitted.²³⁰ (Hence, Mr. and Ms. Wannabe may be hired into the NAF (LN) positions in the vignette.)

The Classification Act specifically excepts non-U.S. citizens overseas from APF positions under its pay systems,²³¹ but the Army may hire non-U.S. citizens into APF (LN) positions under Foreign Service Act Authority.²³² Further, no statutes or regulations block their employment in most NAF (U.S.) or (LN) positions. If a non-U.S. citizen is hired under U.S. conditions, however, he or she would, under the SOFA, be considered a member of the civilian component. If ordinarily resident, he or she would face the same obstacle as their citizen counterparts and, at least in Germany, could only be hired into NAF (LN) jobs.²³³ (Hence, ordinarily resident U.S. citizens such as Mr. Wannabe are covered by the Classification Act precluding their APF (LN) employment, but they cannot be hired under U.S. conditions (APF or NAF) since their civilian component status is SOFA-precluded.)

The SOFA further restricts civilian component membership to U.S. and other NATO country nationals. Stateless persons, host nation citizens, and non-NATO country citizens cannot be members.²³⁴ Thus, in Germany, citizens of NATO countries (other than the U.S. or Germany) who are not ordinarily resident in Germany, generally, may be eligible not only for APF (LN) and NAF (LN) positions, but also for certain NAF (U.S.) positions. The U.S. Forces' practice, and indeed the plain language of the agreement, support that this eligibility extends to citizens of countries that are new entrants into NATO, once entry is complete. Special employment categories for "third-state nationals" and "third-country citizens (TCC)" are no longer used in Germany.²³⁵ The TCCs were non-U.S. citizens who also were not citizens or permanent residents of the host nation.²³⁶ They were paid in APF or NAF dollars, and held required skills unobtainable from U.S. or local citizens, but were term employees with no competitive status. Their employment under non-local labor conditions made them members of the civilian component.²³⁷ Classified primarily against GS and FWS standards, their pay rates were based on separate but corresponding standards.²³⁸ Because of their civilian component status, the Army could hire TCCs only if they were NATO country citizens and not citizens of, or ordinarily resident in, the host nation.²³⁹ The Army in Germany must now hire all NATO country (other than U.S.) citizens who are seeking APF jobs as LN conditions.²⁴⁰

²²⁸ See *supra* note 170. Nonappropriated fund employees are an integral part of the U.S. Forces under Part I. Para. 4, of the Protocol of Signature to the Supplementary Agreement. Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces with respect to Foreign Forces Stationed in the Federal Republic of Germany, with Protocol of Signature (Supplementary Agreement and Protocol), Aug. 3, 1959, 14 U.S.T. 531, T.I.A.S. No. 5351. United States citizen, NAF (LN) employees have no civilian component status. Their LN conditions of employment place them outside the civilian component. SOFA, *supra* note 75, art. IX, para. 4. The employment conditions used depend upon cost, expected job tenure, workforce stability, and skills needed. While NAF (LN) conditions offer less flexibility (*e.g.*, longer lead-time for outplacements and separations), their contracts can ensure they are as flexible as U.S. employees. Employment of U.S. citizens as LN may be prohibited by host nations or by agency policy.

²²⁹ SOFA, *supra* note 75, art. I, para. 1(b). See also AER 215-3, *supra* note 207, para. 4c.

²³⁰ *Collins v. Weinberger*, 707 F.2d 1518, 1519 n.7 (D.C. Cir. 1983) ("It should be noted the category of local nationals may include United States citizens ordinarily resident in the FRG.").

²³¹ 5 U.S.C. § 5102c(11) (2000).

²³² See discussion *supra* pt. II.

²³³ SOFA, *supra* note 75, arts. I, IX. See also AER 215-3, *supra* note 207, para. 4c.

²³⁴ SOFA, *supra* note 75, art. I, para 1(b). See SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 93 (1971). The working group designated to draft the SOFA failed to adopt a French proposal that civilians must be nationals of a sending State to be in its civilian component.

²³⁵ The command rescinded the governing regulation when the term appointment of the last TCC/TSN employee expired in 1990/91.

²³⁶ AR 690-300, CH. 301, *supra* note 102, para. 1-1d(14).

²³⁷ U.S. ARMY EUROPE, REG. 690-34/U.S. NAVAL FORCES EUROPE, INSTR. 12250.2, CIVILIAN PERSONNEL, ADMINISTRATION AND MANAGEMENT OF THIRD COUNTRY CITIZEN EMPLOYEES para. 1-3 (22 Mar. 1974) (cancelled) (on file with author). These employees were hired under Civil Service R. VIII. *Id.* para. 2-7.

²³⁸ *Id.* paras. 2-7, 3-1 (providing, for example, that a GS-05 was equivalent in grade to a TCC-5).

²³⁹ AR 690-300, CH. 301, *supra* note 102, para. 1-1d(1) (providing that the civilian component: "includes U.S. citizens and third-country citizens (TCC) (also referred to as third-state nationals (TSN)) . . .").

²⁴⁰ 5 U.S.C. § 5102(c)(11) (2000). See also *supra* note 112 (regarding uniformity of LN systems).

Citizenship restrictions exist for certain NAF positions, as well. The Army may not assign non-US citizens to NAF positions designated as sensitive,²⁴¹ and they must meet all immigration requirements to be eligible for any stateside NAF position.²⁴² Citizenship restrictions for NAF FWS mirror their APF counterparts,²⁴³ but EO 11935 restrictions do not apply since these are not positions with competitive service status. Army NAF (LN) employees (including third country nationals) are employed in foreign areas in accordance with specific international agreements and treaties.²⁴⁴ In the absence of a SOFA or other intermediate guidance, MACOM regulations again provide employment details.²⁴⁵ While NAF (LN) positions are the only option for U.S. Forces employment of ordinarily resident U.S. citizens in Germany, hiring preferences can make even these positions difficult to obtain.²⁴⁶

What Happens When Ordinary Residents Are Hired by the U.S. Forces?

Simply because ordinary residents cannot lawfully be members of the civilian component does not mean they are never mistakenly hired into its APF positions. Agencies must terminate ordinary resident appointments made under U.S. employment conditions since the residents are not qualified for them. The U.S. Merit Systems Protection Board (MSPB) has sustained such terminations.

The 1987 case of *Meyers v. Dep't of Army*²⁴⁷ highlighted that erroneously converted (LN to GS) ordinarily resident employees are probationary, as well, and thus have no MSPB appeal rights. In that case, Ms. Giovanna M. Meyers, an LN employee in Italy, became a naturalized U.S. citizen. Consequently, the agency reappointed her as a GS overseas limited employee but later terminated her appointment because she was ordinarily resident in Italy.²⁴⁸ She appealed both her conversion to GS conditions and her termination to the MSPB. The administrative judge dismissed the case finding that the MSPB had no jurisdiction over the agency's actions or over non-preference eligible, excepted service employees.²⁴⁹ In her petition for review, Miss Meyers argued that because she was now a U.S. citizen, the MSPB had jurisdiction. Finding this argument irrelevant, the MSPB confirmed that her excepted service, non-preference eligible status was non-jurisdictional.²⁵⁰ But even non-probationary, ordinarily resident appointees fare no better. They may never acquire statutory employee status.

The mistaken appointment of a non-probationary, ordinarily resident U.S. citizen was at issue in the 1993 MSPB case of *Daneshpayeh v. Dep't of Air Force*.²⁵¹ The agency removed Mr. David H. Daneshpayeh from a GS-07, Assistant Operations Manager position in Turkey, on grounds that his appointment was illegal under the SOFA when the agency hired him nearly three years earlier.²⁵² The administrative judge found that he was not a Title 5 employee and dismissed the case for lack of jurisdiction.²⁵³ Upon petition for review, however, the MSPB noted that an employee entitled to adverse action procedures did not lose them because of an illegal appointment unless it was made "in violation of an absolute statutory prohibition so that the appointee [was] not qualified for appointment in the civil service."²⁵⁴ The MSPB reopened his case and closely examined his employment record vis-à-vis the agency's ordinarily resident definition, then noted that ordinary residents could not become

²⁴¹ AR 215-3, *supra* note 54, para. 2-13m.

²⁴² *Id.* para. 2-13n.

²⁴³ *Id.* (providing: "Each FWS employee within . . . the United States . . . must be a US citizen or a bona fide resident . . ."). If the Labor Secretary certifies that none are available, non-citizens may be considered. *Id.*

²⁴⁴ *Id.* para. 1-8.

²⁴⁵ See, e.g., AER 215-3, *supra* note 207.

²⁴⁶ See, e.g., AER 690-70, *supra* note 127.

²⁴⁷ *Meyers v. Dep't of Army*, 35 M.S.P.R. 417, 1987 MSPB LEXIS 162 (1987).

²⁴⁸ *Id.* at *2.

²⁴⁹ *Id.*

²⁵⁰ See the Civil Service Due Process Amendments of 1990, Pub. L. No. 101-376, 104 Stat. 461 (1990) (modifying the definition of employee at 5 U.S.C. § 7511 so that now most excepted service employees have true adverse action appeal rights after two years).

²⁵¹ *Daneshpayeh v. Dep't of Air Force*, 57 M.S.P.R. 672 (MSPB 1993), *aff'd*, 17 F.3d 1444 (Fed. Cir. 1994).

²⁵² *Id.* at *1,*2.

²⁵³ *Id.* at *2.

²⁵⁴ *Id.* at *4,*5 (citing *Travaglini v. Dep't. of Educ.*, 18 M.S.P.R. 127, 137 (MSPB 1983), *aff'd as modified*, 23 M.S.P.R. 417, 419-20 (MSPB 1984); *Torres v. Dep't. of the Treasury*, 47 M.S.P.R. 421, 422 (MSPB 1991)).

civilian component members under the statute-equivalent SOFA.²⁵⁵ It further explained that because the treaty (the SOFA) did not define the term “ordinarily resident,” the MSPB was required to “afford deference to the interpretation given that term by the agency as set forth in its rules.”²⁵⁶ The MSPB, consequently, concluded Mr. Daneshpayeh was not an employee under 5 U.S.C. Sections 2105 (a) or 7511(a)(1)(A), and that it lacked jurisdiction over his removal.²⁵⁷ Thus, it is reasonable to assume that USAREUR’s definition of “ordinarily resident” would receive similar deference. The MSPB’s logic, extrapolated, also would cover other SOFA-excluded categories. But, what harm is there in retaining such improperly appointed employees?

The improper appointment of ordinarily resident U.S. citizens presents significant liability issues. The risks to erroneously hired employees exceed job loss. Arguably, they may be liable for their portion of host nation social insurance for their employment period and their agencies may remain principally liable for all social insurance contributions. In 1996, for example, the Army was compelled to settle a 1991 German Social Court case (AOK Frankfurt/Main v. FRG)²⁵⁸ involving Dr. James Lewis, an ordinarily resident U.S. citizen, who had been appointed as a Department of Army, GS employee at the agency’s Scientific Technology Center, Europe in Frankfurt/Main from 1985 until 1989. The German Social Insurance Agency (*Allgemeinen Ortskrankenkasse* or AOK) received social insurance contributions of around \$40,000 in settlement, for the period of Dr. Lewis’s employment.

[T]he judge indicated ... the Army [had] violated the stationing agreements by hiring Dr. Lewis as a civil servant under U.S. law. Not being a member of the civilian component Dr. Lewis, in the opinion of the court, [was] only an employee with a civilian component, and therefore subject to the German social security system.²⁵⁹

If AOK had pursued interest and penalties, the amount could have nearly doubled.²⁶⁰ The court’s view of a U.S. employment category “with a civilian component,” but subject to German liabilities, represents a problematic trend that will be examined later in this article.

Thus, for U.S. civilian employment purposes in Germany, USAREUR has adopted a twelve-month standard for determining ordinarily resident status.²⁶¹ Superficially, it might appear that the agency has excluded these expatriate citizens from U.S. employment, but any German law on this point likely would not condone a longer period. The U.S. standard is twice the duration of the German tax law standard and their differences have never been reconciled. While strict application of the USAREUR rule can avoid host nation litigation such as in the *Lewis* case, the manner in which the rule is applied remains a fertile ground for disparate treatment claims.

Isn’t This Discrimination?

While the SOFA excludes ordinarily resident U.S. citizens from some types of employment,²⁶² this is not prohibited discrimination. Title 5 of the U.S. Code states that: “Unless [permitted]²⁶³ by treaty, no person shall be discriminated against ...

²⁵⁵ *Id.* at *5 (noting: “The NATO/SOFA, as an Article II treaty ratified by the United States Senate, has the force and effect of a statutory enactment. U.S. Const. art. VI, cl. 2; *Collins*, F.2d at 1525 n.25 . . .”). Although the SOFA is an executive agreement, not a treaty in the constitutional sense (requiring the advice and consent of the Senate before becoming effective), under international law, such executive agreements are considered treaties and supersede prior inconsistent domestic law. *Rossi v. Brown*, 467 F. Supp. 960, 964 n.3 (D.D.C. 1979).

²⁵⁶ *Daneshpayeh*, 57 M.S.P.R. at *7 (citing *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 184-85 (1982)).

²⁵⁷ *Id.* at *19.

²⁵⁸ See Memorandum, Foreign Law Branch, Office of the Judge Advocate, U.S. Army, Europe and 7th Army, to International Labor Relations Division, Directorate of Civilian Personnel U.S. Army, Europe and 7th Army, subject: Lawsuit FRG v. AOK (Dr. Lewis) (9 Dec. 1996) (on file with author) (referring to SozG, (social insurance court) Frankfurt, F.R.G., file no. S/9Kr 2777/91 (unpubl.) (on file with Directorate of Civilian Personnel, U.S. Army, Europe and 7th Army). The basic claim totaled approximately DM 60,000 (at the 1996 official exchange rate of DM 1.5/1 USD)). The case was eventually settled. E-mail from Foreign Law Branch, Office of the Judge Advocate, U.S. Army, Europe and 7th Army, to Director of Civilian Personnel, U.S. Army, Europe and 7th Army (11 Oct. 1996) (on file with author).

²⁵⁹ E-mail from Foreign Law Branch, Office of the Judge Advocate, U.S. Army, Europe and 7th Army, to Director of Civilian Personnel, U.S. Army, Europe and 7th Army (11 Oct. 1996) (on file with author).

²⁶⁰ Memorandum, Foreign Law Branch, Office of the Judge Advocate, U.S. Army, Europe and 7th Army, to International Labor Relations Division, Directorate of Civilian Personnel U.S. Army, Europe and 7th Army, subject: Lawsuit FRG v. AOK (Dr. Lewis) (9 Dec. 1996) (on file with author).

²⁶¹ USAREUR SUPP. TO AR 690-300.301, *supra* note 122, para. 5-1.1.

²⁶² SOFA, *supra* note 75, art. I, para. 1(b).

²⁶³ The statute uses “prohibited,” but “the words ‘unless permitted by’ or ‘unless provided by’ would convey more precisely the meaning” *Weinberger v. Rossi*, 456 U.S. 25, 29 (1982) (quoting *Rossi v. Brown*, 642 F.2d 553 (1980)).

in the employment of civilian personnel at any ... installation operated by the [DOD] in any foreign country because such person is a citizen of the United States....²⁶⁴ Thus, the SOFA's employment proscription is treaty-permitted, even if it might be considered "discriminatory."²⁶⁵ The manner in which its employment proscription is implemented, however, is a separate issue, and one that has been the subject of litigation.

The requirement for nondiscriminatory implementation of such proscriptions is clear. In the 1984, EEOC case of *Chambers v. Dep't of Air Force*,²⁶⁶ a United Kingdom (UK) SOFA provision prohibited UK citizens from holding U.S. Forces positions in the United Kingdom.²⁶⁷ The U.S. Air Force rejected Ms. Shirley F. Chambers's—a UK/U.S. dual citizen—application for a U.S. Air Force civilian position, explaining that she was ineligible unless she renounced her UK citizenship.²⁶⁸ Ms. Chambers challenged the practice as national origin discrimination, but the agency rejected her EEO complaint reasoning that it did not control the matter—the United Kingdom considered her its citizen and the SOFA precluded her U.S. employment.²⁶⁹ On appeal, the EEOC concluded that the agency's rejection of her complaint was an improper finding on the merits, as the agency's reasons were merely its non-discriminatory justification for rejecting her application.²⁷⁰ The EEOC required the agency to produce a copy of the SOFA and related documents, and data on any similarly situated employees whom the agency allegedly hired without renounced UK citizenship. No further record on the case exists (perhaps indicating a settlement, withdrawal, or a further complaint cancellation), but if no evidence of disparate treatment could have been shown, the supplemented record should have established Ms. Chambers's disqualification from such employment and defeated even a prima facie case of discrimination. The confusion over SOFA citizenship restrictions, however, continued.

In a 1986 letter to the editor of the *European Stars and Stripes* newspaper, the director of the U.S. Army Civilian Appellate Review Agency (USACARA),²⁷¹ European Region—charged with investigating Army discrimination complaints—ventured that since the Classification Act does not apply to FWS employees it could not exclude

“ordinarily resident” Americans from such blue collar positions when classified under a Local National pay system. Moreover, since Local National wage scales in Germany are fixed under a cooperative agreement between the United States and the FRG . . . it seems at least persuasible that the Classification Act does not, in and of itself, prohibit the employment of “ordinarily resident” Americans from any position (white collar or Wage Grade) classified and paid under the Local National pay system.²⁷²

Perhaps an APF, FWS (LN) system was persuasible, but with Congress, not the Army. Any job under LN conditions would escape the SOFA's civilian component proscriptions, but any APF (LN) job still would fall under the Foreign Service Act's authority. Investigators do not determine an agency's workforce requirements for its management, but had FWS work been required, the notion of APF (LN) employment of U.S. citizens still lacked statutory authority. The burden of proof that this commentary suggested was equally unfounded. Once management asserted that no such employment system for U.S. citizens existed, proving that one existed and had been used discriminatorily became an aggrieved employee's burden.²⁷³ The USACARA

²⁶⁴ See 5 U.S.C. § 7201 (2000) (citing Pub. L. No. 92-129, tit. I, sec. 106, 85 Stat. 355 (Sept. 28, 1971)).

²⁶⁵ The term “treaty” is not limited to international agreements concluded by the President under Article II of the Constitution, but also includes executive agreements. *Rossi*, 456 U.S. at 31-32. This is especially true where a statute impacts on foreign policy. *Cf. B. Altman & Co. v. United States*, 224 U.S. 583 (1912).

²⁶⁶ *Chambers v. Dep't of Air Force*, EEOC No. 01832403, 84 FEOR 20535 (Apr. 5, 1984).

²⁶⁷ In the United Kingdom, this covered APF and NAF (LN) jobs (NATO countries other than Germany typically prevent U.S. citizens from being LN employees). Although the EEOC has jurisdiction over U.S. citizen (including dual citizen) applicants for Federal employment, once hired under host nation conditions the EEOC has no jurisdiction. See *Ashburn v. West*, 1994 EEOC LEXIS 1055 (Aug. 25, 1994).

²⁶⁸ *Chambers v. Dep't of Air Force*, EEOC No. 01832403, 84 FEOR 20535 at Background para. (Apr. 5, 1984).

²⁶⁹ *Id.*

²⁷⁰ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (holding that findings can result if agencies knowingly disregard their rules and employ others not in the complainant's protected class.).

²⁷¹ The USACARA examined Army EEO complaints and grievances until 1993, when the DOD Office of Complaint Investigations assumed this role. See U.S. DEP'T OF ARMY, REG 10-57, ORGANIZATION AND FUNCTIONS U.S. ARMY CIVILIAN APPELLATE REVIEW AGENCY (15 Sept. 1979) (cancelled, on file with author). See also U.S. DEP'T OF DEFENSE, MANAGEMENT REPORT DECISION NO. 974, CIVILIAN PERSONNEL ADMINISTRATION EFFICIENCIES 6 (15 Dec. 1992).

²⁷² Letter from R. H. Thornhill, Director, USACARA-Europe, to Editor, *European Stars and Stripes* newspaper (Feb. 26, 1986) (on file with author) [hereinafter *Thornhill Letter of Feb. 1986*].

²⁷³ *McDonnell-Douglas Corp.*, 411 U.S. 792 (1973); *Texas Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *U.S.P.S. v. Aikens*, 460 U.S. 711 (1983); *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993) (holding that the burden of proof remains with the plaintiff).

support for, and solicitation of, ordinarily resident cases,²⁷⁴ nevertheless, was not lost on complainants. A short time later, what seemed to be a perfect case for USACARA arose in *Cole v. Stone*.²⁷⁵

In 1987, Mr. Chester J. Cole, a U.S. citizen ordinarily resident in Germany, applied for a GS-201-5/7/9, Personnel Management Specialist, position in Frankfurt/Main. The Civilian Personnel Office rejected his application and explained that he could qualify only for LN vacancies (but failed to specify NAF (LN)).²⁷⁶ He then reapplied to be hired for the same position, but as an LN employee. When the agency rejected that application, Mr. Cole filed a formal discrimination complaint based on his American national origin and included a letter, on USACARA stationery, entitled *Analysis of Issue of Employability of Ordinarily Resident Americans in Appropriated Fund Positions*.²⁷⁷ Although the SOFA excluded all ordinary residents, not just Americans, the analysis attacked such employment denials²⁷⁸ and concluded “the USAREUR policy and practice of prohibiting employment of ordinarily resident Americans in appropriated fund positions as Local Nationals . . . [was] illegal.”²⁷⁹ The Army rejected the complaint, based on its non-discretionary application of the SOFA and the Classification Act (and thereby skipped USACARA review).²⁸⁰

Mr. Cole appealed, but the EEOC sustained the agency’s rejection. In his request to reopen the complaint, Mr. Cole argued that it was not the SOFA, but the agency’s interpretation of it that denied Americans employment.²⁸¹ As in *Chambers v. Dep’t of Air Force*, the EEOC required the agency to supplement the record, reasoning that the DOD must not discriminate in the following matter:

in employment against United States citizens on military bases located overseas unless permitted by treaty.... [A]ppellant is alleging that he is an aggrieved applicant . . . denied a position . . . on the basis of his national origin This is all that is necessary for appellant to state a claim. . . .²⁸²

It further observed that the “NATO-SOFA and its supplementary agreement are not a blanket prohibition against the employment of U.S. nationals, but merely concern working conditions of employment.”²⁸³ The remaining concerns ostensibly included whether the agency had improperly categorized him, or had impaired his ability to apply for jobs open to similarly situated citizens, and whether the agency permitted any similarly situated ordinarily resident applicants to receive APF (U.S.) or (LN) jobs in the past.²⁸⁴

²⁷⁴ Thornhill Letter of Feb. 1986, *supra* note 272 (advocating that certain complainants “might well desire to seek a review of any decision categorizing them as ‘ordinarily resident’ based solely on a one-year presence in Germany. It might be that a proper . . . application of the 14 Apr 83 USAREUR letter . . . would lead to a different decision based on the total USAREUR policy.”).

²⁷⁵ *Cole v. Stone*, EEOC No. 05891042, 89 FEOR 21252 (Aug. 23, 1989).

²⁷⁶ Letter from Chief, Recruitment & Placement Division, Frankfurt Military Cmty. Civilian Pers. Office, to Chester J. Cole, Applicant (May 13, 1987) (on file with author).

²⁷⁷ Memorandum, U.S. Army Civilian Appellate Review Agency, Europe, subject: Analysis of Issue of Employability of Ordinarily Resident Americans in Appropriated Fund Positions (undated, rec’d. Oct. 7, 1987) (on file with author) (purporting to have been drafted in response to similar issues from Italy and Germany in two other agency EEO complaints).

²⁷⁸ Frustration with the rule is detectable in the USACARA commentary:

It is our view that the more cogent principle of *reductio in absurdum*, i.e., the law should not be read in such a fashion as to render it ridiculous, must also be considered. An interpretation of the US Code, in conjunction with the NATO/SOFA, which permits the US Forces to hire as a Local National a national from virtually any country on the face of the earth who is ordinarily resident, and which concomitantly prohibits employment of a similarly situated American, is preposterous on its face.

Id. at 6.

²⁷⁹ *Id.* at 7.

²⁸⁰ U.S. Dep’t of Army, DA Form 5497-R, Disposition of Complaint of Discrimination (Dec. 1985) (filed 5 Oct. 1987; rec’d. 7 Oct. 87); U.S. Dep’t of Army, DA Form 5495-R, Chronology of Individual EEO Complaint (Dec. 1985) (on file with author) (completed by complainant 26 Jan. 1988).

²⁸¹ *Cole v. Stone*, EEOC No. 05890142, 89 FEOR 21252, at Background para. (Aug. 23, 1989).

²⁸² *Id.* at Analysis and Findings.

²⁸³ *Id.*

²⁸⁴ The USACARA editorial warned that “authority to prescribe regulations does not imply the authority to [arbitrarily] waive regulations in certain cases and enforce them in others. . . . [R]egulations must contain sufficient guidelines, applicable to all individuals similarly situated, so that an affected individual may determine his or her rights thereunder.” Thornhill Letter of Feb. 1986, *supra* note 272. See also 5 U.S.C. § 706 (2000) (providing that agency actions are subject to judicial review and will not be upheld if they are arbitrary, capricious, an abuse of discretion, or otherwise unlawful.).

The agency, relying on *Espinoza v. Farah Manufacturing Co., Inc.*,²⁸⁵ had prepared to argue that the discrimination envisioned in *Weinberger v. Rossi* was not cognizable in a Title VII context.²⁸⁶ While this reasoning certainly supported the rule's legitimacy, the agency likely would have been required to develop the record and to articulate legitimate, nondiscriminatory reasons regarding the application of its ordinarily resident rule in that case. Had Mr. Cole been unable to refute his ordinarily resident status or to demonstrate his disparate treatment from others similarly situated he, too, would have failed even to establish a prima facie case of discrimination. Mr. Cole, however, passed away and his family did not pursue the case.

More recently, in *Chung v. Rumsfeld*,²⁸⁷ a 2003 case from South Korea, the EEOC rendered a decision in an ordinary resident's discrimination complaint, albeit without a hearing. As in *Chambers v. Dep't of Air Force* and *Cole v. Stone*, the EEOC exercised jurisdiction, but based on the record before it found that the complainant, Mr. Arthur K. Chung, was ordinarily resident under the applicable SOFA and, as such, did not establish a prima facie case of discrimination.²⁸⁸ Mr. Chung failed to apply for positions for which he was qualified, and could not further demonstrate that the agency considered similarly situated employees not in his protected class for employment even though they, too, did not reside in the United States.²⁸⁹ Finally, he was unable to establish that the agency's residence requirement was not neutral or had not been even-handedly applied.²⁹⁰ Thus, where discretion exists, so, too, will EEOC jurisdiction. Nevertheless, where treaty-predicated rules are correctly and consistently applied, any resulting employment denials will not be found unlawfully discriminatory. (Hence, Mr. Wannabe may file his initial EEO complaint over his ordinarily resident disqualification, but he likely will lose.)

Ordinarily resident determinations are not vulnerable to attack solely on the basis of national origin discrimination, as the EEOC case of *Miller v. Dalton*²⁹¹ demonstrates, but that case also offers an alternative strategy for agencies. Mr. Reuben A. Miller, a U.S. citizen and legal resident of Spain, applied for a GS-188-05, Recreation Specialist job with the U.S. Navy in Spain.²⁹² Under the Agreement on Defense Cooperation between the United States and Spain, civilian component members could not be nationals of, or ordinarily resident in, Spain.²⁹³ When he was not selected, he filed an informal EEO complaint of race, gender and age discrimination. The agency settled the complaint by agreeing, inter alia, to request that the Permanent Committee of the Office of Defense Cooperation, Spanish Section, grant him civilian component status.²⁹⁴ The agency also agreed to place him in a *status quo ante*, GS-188-05 position, with back pay, contingent upon his status's approval, and to make every reasonable effort to attain the status determination through established channels.²⁹⁵ When the U.S. Section of the Permanent Committee ultimately denied the status request, he alleged that the agency breached its agreement. On appeal, however, the EEOC held that the agency made reasonable efforts and satisfied the agreement.²⁹⁶

And what of U.S. citizens, who already work under LN conditions and seek to challenge an agency's employment related decisions? Quite simply, other than as applicants for Federal employment, their relief is limited to host nation forums.²⁹⁷ United

²⁸⁵ *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 95 (1973). The agency argued:

What Mr. Cole is really complaining about...is the Army's distinction between groups of U.S. citizens ... In *Espinoza v. Farah Manufacturing Co.* ... the Supreme Court held ... "national origin" in the Civil rights Act ... was not intended to embrace United States citizenship ... [further] (T)he EEOC improperly interpreted *Weinberger v. Rossi* ... and misconstrued "discrimination" in that context as within its own purview ... The purpose of this small section in the Amendments to the Military Selective Service Act of 1967 was "to correct a situation ... where discrimination in favor of local nationals and against American dependents in employment has contributed to ... hardship for families of American enlisted men" H.R. Conf. Rep. No. 92-433, p. 31 (1971).

OTJAG Request for Attorney General Opinion. 1990, *supra* note 121.

²⁸⁶ Professional Experiences, *supra* note 174. In November, 1989, the author assumed responsibility over the Cole case, at the agency representative level, at HQ, V Corps, in Frankfurt/Main, FRG..

²⁸⁷ *Chung v. Rumsfeld*, 2003 EEOPUB LEXIS 2237 (2003).

²⁸⁸ *Id.* at *2.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Miller v. Dalton*, EEOC No. 01952955, 96 FEOR 10672 (Mar. 5, 1996), *reconsid. denied* 7 FEOR 30229 (Mar. 27, 1997).

²⁹² *Miller*, 96 FEOR 10672 at Background para.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at Analysis and Findings para.

²⁹⁷ Supplementary Agreement, *supra* note 108, art. 56, para. 1(a).

States anti-discrimination laws, of course, do not cover non-U.S. citizens overseas²⁹⁸—they have no access to the EEOC, the MSPB or the Federal Labor Relations Authority.²⁹⁹ Similarly, once U.S. citizens are employed under LN conditions, host nation law alone governs their employment.

An example of this principle is the 1994, EEOC case of *Ashburn v. West*.³⁰⁰ Since 1984, the Army employed Mr. Lloyd A. Ashburn, an ordinarily resident U.S. citizen in Berlin, as a criminal investigator/translator (LN). In 1990, Mr. Ashburn filed a formal EEO complaint after the agency removed him for refusing an order to pull guard duty.³⁰¹ The Army rejected the complaint and maintained that Mr. Ashburn's exclusive relief rested with the LN system. In his action before a German labor court, the court found that the agency violated the German Employment Protection Law, but that Mr. Ashburn was not entitled to reinstatement.³⁰² Although the Army reached a DM 12,500 settlement, Mr. Ashburn appealed his EEO complaint's rejection to the EEOC. After two remands, the agency cancelled the complaint citing lack of jurisdiction. Mr. Ashburn again appealed to the EEOC, which affirmed the agency's cancellation holding that, by treaty, his LN employment was governed by German, not U.S., law.³⁰³ Though the agency emphasized that Berlin's occupational cost salary system clearly made Mr. Ashburn a German employee, the U.S. Army concluded that host nation employment law applies to all employment under LN conditions.³⁰⁴ (Hence the Wannabe's may not file U.S. EEO complaints over terminations or placement rights while under LN employment conditions. They are excluded from U.S. EEO or MSPB channels.³⁰⁵) When sending State citizens secure foreign labor court reviews, however, the results from a U.S. law standpoint may seem more equitable than legal.

The "Third Category"

No truly landmark foreign court cases have affected U.S. Forces employment categories in Germany, but an increasing number of decisions touching on employment eligibility are, perhaps, setting the stage for change. The German court cases discussed below, are significant in this regard. As discussed, the D.C. Circuit court in *Collins v. Weinberger*, identified the civilian component and local labor (LNs) as the only two categories of sending State-hired civilian employees under the SOFA.³⁰⁶ In examining the employment status of several of these personnel, however, the German Supreme Labor Court came up with a third category.

Mr. Robert J. Still, a U.S. citizen, was married to a German citizen and had worked on the economy as a photographer in Germany since 1978.³⁰⁷ This made him ordinarily resident, yet in 1981, the U.S. Forces in Germany hired Mr. Still as a photography instructor under U.S. employment conditions. After initially extending Mr. Still's employment, the agency sent him a notice terminating his employment effective May of that year.³⁰⁸ Seeking to avail himself of greater protections under German law, he filed a complaint with the State Labor Court for Baden-Wuerttemberg, essentially arguing that as an ordinary resident the agency could not hire him under U.S. conditions, and thus he had to be treated as if under LN conditions.³⁰⁹ The state court dismissed his case for lack of jurisdiction, and he appealed. In its 1984 judgment, the German Supreme Labor Court entertained a relatively novel concept that one could be hired under U.S. conditions yet not be entitled to the privileges of the civilian

²⁹⁸ See, e.g., 42 U.S.C. § 2000e - 2000e-17 (2000). The term "employee," at § 2000e def.(f), regarding U.S. employment in a foreign country, "includes an individual who is a citizen . . ." Unlawful discriminatory refusals to refer or hire applicants are also prohibited. *Id.* § 2000e-2(a) and (b).

²⁹⁹ See 29 C.F.R. § 1614.103d (2004) (providing, "[t]his part does not apply to: . . . Aliens employed in positions, or who apply for positions, located outside the limits of the United States."). Non-U.S. citizen employees outside the United States have no MSPB rights. 5 U.S.C. § 7511(b)(9), *referencing* 5 U.S.C. § 5102(c)(11). See also 5 U.S.C. § 7103(a)(2)(i) (denying them Federal Labor Relations Authority rights, as well).

³⁰⁰ *Ashburn v. West*, 1994 EEOPUB LEXIS 1055 (Aug. 25, 1994).

³⁰¹ *Id.* at *2-4.

³⁰² *Id.* at *5.

³⁰³ *Id.* at *11-12.

³⁰⁴ *Id.* at *8-9. See also Supplementary Agreement, *supra* note 108 art. 56, para. 1(a).

³⁰⁵ See U.S. DEP'T OF ARMY, REG. 690-600, EQUAL EMPLOYMENT OPPORTUNITY DISCRIMINATION COMPLAINTS (9 Feb. 2004). The complaints process under the regulation, "does not apply to non-U.S. citizens employed by the Army outside of the United States," or U.S. citizens employed under local national conditions. *Id.* at Applicability para. .

³⁰⁶ *Collins v. Weinberger*, 707 F.2d 1518, 1519 (D.C. Cir. 1983).

³⁰⁷ BAG (unpubl.), Urteil, 30.11.1984 - 7 AZR 499/83 1, 2 (on file with author). Citations to this judgment are to a file copy of judgment.

³⁰⁸ *Id.* at 3.

³⁰⁹ See *id.* at 4.

component.³¹⁰ Irrespective of whether the agency properly hired Mr. Still, or whether he could have enjoyed civilian component status, however, Mr. Still had not been hired under local labor conditions and, thus, the court had no jurisdiction.³¹¹

A short time later in 1985, the German Supreme Labor Court examined the SOFA status of a family member employee of the British Royal Air Force in Germany (RAFG).³¹² A unit of the RAFG employed “Mrs. M” in a British Forces service dependent position.³¹³ Under the agency’s rules, dependents could be employed only when no qualified civil servants were available and their working conditions could be no better than for civil servants.³¹⁴ While they took no oath to the British Crown, they signed an obligatory declaration similar to civil servants.³¹⁵ The unit’s works council³¹⁶ sought a judgment subjecting these employees to their procedures and argued that they were local labor, not governed by British employment law. The RAFG maintained that these employees were in its civilian component under an employment relationship that required no oath and were distinguishable from local labor since they were not subject to German social security law and were paid directly by the British State, not under the CTA II.³¹⁷

The court recognized that a sending State alone decided whether to employ LNs under Article IX or other employees under Article I of the SOFA, and found that service dependents were not local labor over which it had jurisdiction.³¹⁸ But, again, the court did not recognize any critical distinction between membership in the civilian component and being a civilian employee accompanying the forces. Citing Article I, the court observed that not all civilian workers accompanying the forces were “members of the civilian component.”³¹⁹ It explained, by example, that if in the United States a stateless person became a civilian employee of the U.S. Forces and later transferred to Germany, that person was employed as an accompanying civilian, but neither enjoyed the rights of the civilian component nor became a civilian employee under Article IX, subject to German employment law.³²⁰ Without jurisdiction, it was unnecessary for the court to examine whether such an employee could be legally appointed under sending State law.³²¹

In fact, employees who are not qualified for civilian component membership are disqualified from employment under U.S. conditions in Germany. While such mistaken appointments vis-à-vis the SOFA inevitably occur, they are subject to the consequences upheld in *Daneshpayeh v. Dep’t of Air Force* and *Meyers v. Dep’t of Army*. The concept of a “third category,” nevertheless, has endured. In 2002, for example, another German Supreme Labor Court case involved a U.S. Army and Air Force Exchange Service employee at the Giessen Depot.³²² “Mr. M” was an ordinarily resident U.S. citizen who secured U.S. Forces employment in Germany in 1997, that required an “oath of American public service.”³²³ In early 1999, Mr. M was placed in a term limited LN position over the objection of the local works council. In March of that year, the agency again hired Mr. M under U.S. conditions as an Accounting Clerk and, in 2001, he became a delivery Service Manager.³²⁴

³¹⁰ *Id.* at 8. See also BAGE 46, 107 (124-26) The decision was translated, in pertinent part, in Memorandum of Special Assistant to the Judge Advocate, U.S. Army, Europe and 7th Army, to Mr. Ramish, subject: Implications of the 19 June 1984 Supreme Labor Court Decision Concerning American Express International Banking Corporation Military Banking Facilities in Germany (10 Dec. 1984) (on file with author) (presaging such arguments, the German court held that sending States determined which persons accompanied the force as civilian employees, but: “The question [of] . . . rights, exemptions and benefits . . . under the agreements is to be answered directly from . . . the Agreements, and not from a ‘grant’ of . . . status as members of the civilian component. . . .”).

³¹¹ See BAG (unpub.), Urteil, 30.11.1984 - 7 AZR 499/83 at 4-11.

³¹² BAGE 48, 81 (81-96).

³¹³ *Id.* at 82.

³¹⁴ *Id.*

³¹⁵ *Id.* at 82 (referencing RAFG Civilian Administration Instructions).

³¹⁶ Works councils are groups of elected LN employees who represent other LNs in agency employment matters. U.S. ARMY EUROPE, REG. 690-63, ELECTION OF WORKS COUNCILS AND OTHER BODIES OF EMPLOYEE REPRESENTATIVES—LOCAL NATIONAL EMPLOYEES IN GERMANY para. 5a(1) (21 Sept. 2001).

³¹⁷ BAGE 48, 81 (82-83). Lastly, the RAFG argued against plaintiff’s standing because their Civilian Administrative Instructions never had been coordinated with the works council. *Id.* at 83.

³¹⁸ *Id.* at 84-89.

³¹⁹ *Id.* at 91.

³²⁰ *Id.* at 91-92.

³²¹ *Id.* at 95-96.

³²² BAG, Urteil, 28.05.2002 – 1 ABR 35/01 (C.H. Beck AP Arbeitsrechtliche Praxis CD-ROM, Jan. 2005).

³²³ See *id.* sec. A. Oaths were administered in NAF employment as well.

³²⁴ *Id.*

The works council brought suit asserting its right of participation in his job placement.³²⁵ Arguing that he was not a member of the civilian component, the works council sought to block his further employment until the participation process had been concluded.³²⁶ The works council was correct that his employment under U.S. conditions did not alter his ordinarily resident status and that local labor (specifically NAF (LN)) employment was the only U.S. Forces employment an ordinarily resident citizen could occupy in Germany. This fact, however, as with Mr. Still, did not make him defacto local labor. Although Mr. M did not qualify for employment under U.S. conditions, the German court had no control over his appointment.³²⁷ Clearly, Mr. M was ordinarily resident and thus precluded from membership in the civilian component by the SOFA. He was not, however, employed under LN conditions that would give the court jurisdiction.³²⁸ The court observed that while the civilian component and local labor were mutually exclusive these were not the only options.³²⁹ It distinguished the civilian component as standing in a close organizational relationship to the forces, while others hired under U.S. conditions (solely a sending State's prerogative) merely stood in a force-accompanying relationship.³³⁰ Twenty-one years after the RAFG decision, the court still believed that employment under U.S. conditions did not resolve civilian component status.

As we have seen in the German Social Court case of AOK Frankfurt/Main v. FRG, the consequences of a "third category" can include pecuniary accountability for improper appointments.³³¹ Where host nation jurisdiction over employment conditions finally arises, the concept also can be troublesome in other ways. For example, a U.S. citizen, NAF (LN) employee (such as Mr. Wannabe) could file suit in a German court challenging a RIF action—arguing that he could have been placed into an appointment, apparently improper under U.S. law, which the court would only consider a "third category" employment. In 2002, this occurred in a state-level case.

Mr. James K. Infield, an ordinarily resident U.S. citizen was employed by the Army in Germany since 1984, and eventually became a NAF (LN), C5 employee, in data processing at Bad Kreuznach.³³² In the spring of 2001, base closures affected his position. He received an employment change notice in May of that year, but protested the agency's offer of continued employment in a C4 position (with retained pay) in maintenance, at the agency's Gruenstadt Depot.³³³ Mr. Infield brought an action challenging this change in working conditions in the local labor court in Kaiserslautern that was decided in the agency's favor in July of 2001, and he promptly appealed to the Labor Court for the Rhineland-Palatinate region.³³⁴ Mr. Infield sought to invalidate the change notice alleging, inter alia, that the agency offered an APF position in Wiesbaden to another employee with less protection (considering host nation social factors of age and employment longevity) that the agency should have offered to him, and that the position offered him was not properly comparable to his old job.³³⁵ He further claimed that the agency failed to meet its burden of proof and had denied him hearing rights.³³⁶ He identified a dental technician, budget specialist, and several other positions that he felt he was qualified for and that he believed had been open in his competitive area during his notice period.³³⁷

The agency responded that American fiscal laws governed the appellant,³³⁸ and that under the Classification Act, he could not be hired into an APF (LN) position and appropriated funds could not be used to fund his employment in such a position.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *See id.* sec. B II.

³²⁸ *See id.* secs. B II, B III.

³²⁹ *Id.* sec. B II 2. The German text's legal principle for the case essentially reads that a U.S. citizen who is an ordinarily resident in Germany cannot become a member of the civilian component under art. I, para. 1b of the NATO SOFA simply through placement by the stationing force. But, this does not mean that he can only be employed as local civilian labor under art. IX, para. 4. *Id.* para. preceding sec. A.

³³⁰ *Id.* sec. B II 2c.

³³¹ *See supra* note 258 and accompanying text.

³³² *See* LAG Rheinland-Pfalz, Urteil, 3 (Mar. 15, 2002) [hereinafter LAG Rheinland-Pfalz, 15 Mar. 2002] (on file with author). Citations to this Rhineland-Palatinate Labor Court of Appeals judgment are to a file copy of the judgment.

³³³ *Id.*

³³⁴ *See id.* at 5.

³³⁵ *Id.*

³³⁶ *Id.* at 4.

³³⁷ *Id.* at 6.

³³⁸ *Id.* at 4, 5. The agency argued that all its operations save one office had been closed; the Head Works Council had taken due part in this, and the local works council had duly participated in the change notice. Finally, placement efforts failed because ordinary residents were eligible only for NAF(LN) employment. *Id.* at 7-8.

Although he was not employed under U.S. conditions of employment, as a U.S. citizen, he was not excepted from the Classification Act's applicability as were non-citizens hired into such positions.³³⁹ Thus, he could only be employed with a NAF unit,³⁴⁰ and a NAF position in Gruenstadt was the only available qualifying position.³⁴¹ The German court, however, rejected that argument and noted that the appellant had broad vocational experience.³⁴² Moreover, it found that positions could not be distinguished as LN and as NAF³⁴³—the appellant was a U.S. citizen, employed as a normal civilian worker with the U.S. Forces.³⁴⁴

Something seems to have been misconstrued.³⁴⁵ The court was correct that employees under LN conditions are subject to German employment law, irrespective of their NAF (LN) or APF (LN) status. Indeed, had a NAF (LN) position been eliminated, and a suitable APF (LN) vacancy existed, a non-U.S. citizen incumbent might have qualified for it. But, as previously discussed, the Classification Act precludes employment of U.S. citizens in APF (LN) positions, and no separate authority exists for such employment. Ordinarily resident, U.S. citizens in Germany may only be hired by the U.S. Forces into NAF (LN) positions since NAF positions are not covered by the Classification Act and since employment under LN conditions is the only other category of SOFA employment outside the civilian component—unless, of course, there is a “third category” allowing for positions under U.S. employment conditions but without civilian component status.

The German court again noted that it had no authority over how the sending State filled its employment needs, but instead capitalized on its authority over LN RIF actions. The court found that the agency failed to meet its burden of proof,³⁴⁶ and reinstated Mr. Infield under his original contractual conditions.³⁴⁷ Had the agency specified the application of U.S. rules (such as NAF placement restrictions) in NAF (LN) employment contracts the results might have been different.³⁴⁸ The fact remains that his NAF position had been abolished and the agency had no position in which to place him, yet it could not terminate his employment. (Hence, whether Mr. Wannabe could prevail in his separation appeal depends upon how clearly the applicable U.S. rules are spelled out—both in court and in his employment contract.)

IV. Conclusion

Does a “Third Category” Exist?

Clearly, German tribunals increasingly display a belief that employees not qualifying for membership in the civilian component may be hired by a sending State as non-local labor, but without SOFA benefits. This concept has several flaws. It has no direct support in the SOFA, Supplementary Agreement, or implementing regulations. A SOFA serves to establish a legitimate U.S. Forces' presence in a foreign country.³⁴⁹

The SOFA does not define the civilian component as a status for especially close, force-affiliated employees. It does not distinguish between civilian component personnel who accompany a force into a receiving State and those hired in a receiving State and who accompany a force after qualifying for civilian component treatment. The SOFA, however, does identify

³³⁹ *Id.* at 7. The record cites to a non-existing provision of the Classification Act, 5 U.S.C. § 5102(b)7. The citation should be to § 5102(c) (11) (2000).

³⁴⁰ *Id.* The concepts of funding authority and SOFA preclusions apparently had been blurred.

³⁴¹ *Id.*

³⁴² *Id.* at 6.

³⁴³ A non-U.S. citizen LN employee may apply for either APF (LN) or NAF (LN) positions. From this standpoint LN conditions are similar regardless of a position's funding, but the appellant was a U.S. citizen.

³⁴⁴ LAG Rheinland-Pfalz, 15 Mar. 2002, *supra* note 332, at 6.

³⁴⁵ Outsourced host nation counsel represent the U.S. Forces in German labor courts. See USAREUR REG. 690-64, *supra* note 171, para. 28b (explaining that, in accordance with the Protocol of Signature implementing art. 56, para. 9 of the Supplementary Agreement, the Commander, USAREUR, “requested that GE agencies act in the name of the US Forces or of the civilian component in labor court proceedings arising in connection with the German Personnel Representation Law . . .”).

³⁴⁶ LAG Rheinland-Pfalz, 15 Mar. 2002, *supra* note 332, at 10.

³⁴⁷ *Id.* at 10, 11.

³⁴⁸ *Id.* at 10 (clarifying that NAF (LN) employee qualification for variously funded positions under U.S. law does not alter the applicability of SOFA-derived local labor employment conditions to these employees).

³⁴⁹ See, e.g., SOFA, *supra* note 75, art. I, para. 1.

categories of individuals who can never be in a civilian component.³⁵⁰ The SOFA also specifically provides that sending States may employ personnel under local labor conditions, and that this is not regarded as civilian component employment.³⁵¹

Personnel not qualifying for civilian component status may be employed by a sending State if they qualify for its positions in accordance with its laws, are lawfully present in the foreign country, and such employment is permitted by international agreement. While hiring determinations are beyond the jurisdiction of receiving State courts, it is not beyond their power to recognize sending State laws that preclude certain types of employment. The “third category,” however, would represent a sending State’s non-local labor workforce in a receiving State without SOFA status. There is no authority for such a U.S. employment presence abroad under international agreement.

The fact that the SOFA does not specifically preclude a “third category” does not necessarily mean one can exist with the tacit consent of the receiving State. A “third category” would supplement rather than implement the treaty, as there is no mention of this category in either the SOFA or the Supplementary Agreement.³⁵² Consequently, it would exceed the parameters of SOFA authority—certainly a cause for receiving State concern in other areas. The U.S. Forces in Germany neither have nor ostensibly need another category of employees who are not local labor but who do not enjoy civilian component status. To create one likely would require a statutory or SOFA amendment, not a unilateral receiving State judicial decision.³⁵³

A “third category” is also contrary to the interpretation, case law, and overall practice of the sending State whose authority alone determines the need for employees under appropriate employment conditions.³⁵⁴ A treaty’s restrictions on which persons may accompany and be employed by a sending State require the State’s employment systems and laws to restrict its employment eligibility accordingly. Under U.S. law, factors disqualifying applicants from the civilian component under the SOFA are as significant as disqualifying factors under the Classification Act or other applicable statutes.³⁵⁵ Thus, a foreign tribunal’s decision that is tantamount to a conversion from NAF to APF employment, or from LN to U.S. conditions, seemingly infringes on the sending State’s discretion.

This does not mean that U.S. Forces can never be liable for the improper hiring of ordinarily resident applicants, but the present focus, scope, and resolution of such liability seem to be more a political than a legal issue.³⁵⁶ The situation’s significance lies in its potential for liability and in the confusion that it generates, which can unpredictably affect U.S. employment actions. Moreover, should the “third category” not be resolved, agency liability for employment claims in foreign courts from those employees hitherto properly denied employment, including those now retired, could become an issue,³⁵⁷ and disparate treatment claims remain a factor.

As OPM guidance confirms, there is no exception to the Classification Act that would permit payment of local national pay rates to U.S. citizens paid from appropriated funds.³⁵⁸ Other appointment, classification, and payment authority must clearly be identified for such employment to transpire. Such authority should be specific. Mr. Infield’s case, for example is distinguishable from retained U.S. citizen employment under LN conditions in acquired citizenship cases. Unlike the employees in those cases, Mr. Infield would have to have been placed into a new LN position funded under different, APF fiscal constraints. Yet, as we have seen, LN employees may move from APF to NAF positions under the foreign national employment system in Germany, and Mr. Infield was lawfully hired under this local compensation plan. Arguably, applying the same logic as could support retained APF (LN) employment in an acquired citizenship scenario, he could move from one position to another and from NAF (LN) to APF (LN) positions with equal legal dexterity. The recurrent issues are those of proper U.S. fiscal and classification authority. If these issues are resolved for acquired citizenship scenarios, the arguments against placement of NAF (LN) U.S. citizen employees into APF (LN) positions become more tenuous. While this presents a far more serious impact in terms of RIF and disparate

³⁵⁰ *Id.* art. I, para 1(b).

³⁵¹ *Id.* art. IX, para. 4.

³⁵² *See supra* note 130 and accompanying text. Implementation requires that terms be consistent *and* within the scope of the treaty.

³⁵³ *Holmes v. Laird*, 459 F.2d 1211, 1222 (1972), *cert. denied*, 409 U.S. 869 (1972). Changes to the SOFA must be diplomatic rather than judicial. *See supra* note 186.

³⁵⁴ *See, e.g., supra* note 317 and accompanying text.

³⁵⁵ *See, e.g., Daneshpayeh v. Dep’t of Air Force*, 57 M.S.P.R. 672 (1993), *aff’d*, 17 F.3d 1444 (Fed. Cir. 1994); *Chung v. Rumsfeld*, 2003 EEO PUB LEXIS 2237 (Apr. 30, 2003).

³⁵⁶ The improper hiring of an ordinarily resident U.S. citizen under U.S. conditions does not imply that he could have been hired under LN conditions (paying social insurance and other taxes). Similarly, it does not imply that an LN employee should have been hired, or that the U.S. citizen would have been working on the economy instead.

³⁵⁷ *See supra* note 258 and accompanying text.

³⁵⁸ *See supra* note 124 and accompanying text.

treatment claims than the comparatively few acquired citizenship cases, one possible prospective solution could be to apply U.S. fiscal and classification constraints in the terms of all LN employment contracts. That presents its own German labor issues, and as mentioned, this article is by no means intended as a comprehensive discourse on all aspects of these scenarios.

Regardless of what might result from the proposed DOD personnel system revisions, it will be another APF system, subject to the same SOFA, fiscal, and citizenship restrictions. To be certain, it will develop its own complexities. But, it also will propagate the same ones discussed herein unless prompt agency action is consistently taken to correct or identify proper authority for questionable appointments.³⁵⁹

Answers at a Glance

Each facet of federal employment presents myriad variations, with diverse applications and consequences, governed by layers of statutes, treaties, agreements, executive orders, regulations, publications, and policies, spanning several legal disciplines—all of it constantly in flux. No discourse on any one facet is exhaustive, and to the extent simplicity in this area is achieved, the potential for error is exponential. Nonetheless, the matrix at Table 2 provides a quick-reference summary of the impact of citizenship on the major categories of DOD Federal employment in Germany discussed in this article.³⁶⁰

³⁵⁹ See discussion *supra* pt. II.

³⁶⁰ Cited authority therein is explanatory, not exhaustive. Consult text or cited authorities for greater detail.

Table 2
CITIZENSHIP & MAJOR CATEGORIES OF FEDERAL EMPLOYMENT WITH THE U.S. FORCES IN GERMANY
 The term "NATO country," as used in this chart, also applies to new NATO countries upon completion of entry into NATO.

	APF (GS) US Employment Cond.	APF (FWS) US Employment Cond.	APF (LN) LN Employment Cond.	NAF (US) US Employment Cond.	NAF (LN)* LN Employment Cond.
US citizen (not ordinarily resident)	YES 5 USC § 5102(b); Art. I, SOFA: eligible for civilian component	YES 5 USC § 5102(c)(7) excludes FWS; Art. I, SOFA: eligible for civilian component	NO 5 USC § 5102(b)	YES 5 USC § 5102(c)(14) excludes NAF; Art. I, SOFA: eligible for civilian component	YES No restrictions in statute, treaty/agreement
US citizen (ordinarily resident)	NO Art. I, SOFA: Ordinarily residents cannot be in civilian component	NO Art. I, SOFA: Ordinarily residents cannot be in civilian component	NO 5 USC § 5102(b)	NO Art. I, SOFA: Ordinarily residents cannot be in civilian component	YES Arts I, IX, SOFA: Only LN conditions not considered in civilian component
Dual citizen (US/FRG; US/non-NATO country) Dual citizen (US/anywhere) (ordinarily resident)	NO Art. I, SOFA: FRG/non-NATO nationals & ordinarily residents cannot be in civilian component	NO Art. I, SOFA: FRG/non-NATO nationals, stateless & ordinarily residents cannot be in civilian component	NO 5 USC § 5102(b)	NO Art. I, SOFA: FRG/non-NATO nationals, stateless & ordinarily residents cannot be in civilian component	YES Arts I, IX, SOFA: Only LN conditions not considered part of civilian component
Dual citizen (US/NATO country, not FRG) (not ordinarily resident)	YES 5 USC § 5102(b); Art. I, SOFA: NATO country nationals may be in civilian component	YES 5 USC § 5102(c)(7) excludes FWS; Art. I, SOFA: NATO country nationals may be in civilian component	NO 5 USC § 5102(b)	YES* 5 USC § 5102(c)(14) excludes NAF; Art. I, SOFA: NATO country nationals may be in civilian component	YES No restrictions in statute, treaty/agreement
NATO country citizen (not US or FRG) (not ordinarily resident—formerly employable as APF (TCC) under US employment conditions)	NO 5 USC § 5102(c)(11) excludes non-citizens hired overseas	NO 5 USC § 5343(a)(5) only for U.S. citizens overseas	YES Foreign Service Act FN schedule applies to non-US citizens	YES* Art. I, SOFA: NATO country nationals may be in civilian component	YES No restrictions in statute, treaty/agreement
NATO country citizen (not US) (ordinarily resident) Non-NATO country citizen (ordinarily resident or not) Stateless persons German citizen	NO 5 USC § 5102(c)(11) excludes non-citizens hired overseas; Art. I, SOFA: FRG/non-NATO nationals, stateless & ordinarily residents cannot be in civilian component	NO 5 USC § 5343(a)(5) only for U.S. citizens overseas; Art. I, SOFA: FRG/non-NATO nationals, stateless & ordinarily residents cannot be in civilian component	YES Assuming lawful status in country, Foreign Service Act FN schedule applies to non-US citizens; No restrictions in statute, treaty/agreement	NO Arts I, IX, SOFA: Only LN conditions not considered part of civilian component	YES Arts I, IX, SOFA: Only LN conditions not considered part of civilian component
LN employee acquiring US citizenship & qualifying for civilian component (i.e., not ordinarily resident, not FRG dual citizen, not non-NATO country dual citizen)	YES** 5 USC § 5102(b); Art. I, SOFA: eligible for civilian component	YES** 5 USC § 5102(c)(7) excludes FWS; Art. I, SOFA: eligible for civilian component	NO*** Generally subject to US conditions day after proof of citizenship.	YES* 5 USC § 5102(c)(14) excludes NAF; Art. I, SOFA: eligible for civilian component	YES No restrictions in statute, treaty/agreement
LN employee acquiring US citizenship, but not qualifying for civilian component (i.e., ordinarily resident, FRG dual citizen)	NO 5 USC § 5102(b); Arts I, IX, SOFA: Only LN conditions not considered part of civilian component	NO Arts I, IX, SOFA: Only LN conditions not considered part of civilian component	YES?*** Specific authority is not clear, but arguable support exists.	NO Arts I, IX, SOFA: Only LN conditions not considered part of civilian component	YES Arts I, IX, SOFA: Only LN conditions not considered part of civilian component

* Permissible absent other legal constraints. Agency policy/preferences may restrict employment. In other NATO countries U.S. citizen, LN employment is typically precluded. U.S. citizenship requirements also exist for certain NAF positions.
 ** See discussion *supra* Part II, *Direct and Indirect Hire Systems*, (Germany is a direct hire system).
 *** See generally discussion *supra* Parts II, III (Applying Classification Act and agency regulation. In some NATO countries, agreements or restrictions may affect or preclude U.S. citizen employment under LN conditions.)