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THE ROLE OF CERTIFYING AND DISBURSING OFFICERS IN GOVERNMENT CONTRACTS*

by Major James F. Nagle, Jr.**

Studies of federal government procurement often focus on the contracting officer and his or her duties and responsibilities. Of considerable practical importance though often ignored are the officials who actually pay a contractor's invoices. These officials are the certifying officer, who confirms that money is in fact owed by the government, and the disbursing officer, who issues the check. In the military services, the same person often performs the duties of both positions.

After providing historical background information, Major Nagle explains the relationship of the disbursing and certifying officers with the contracting officer, prior to contract award, during contract performance, and following completion of performance. The problem of liability for erroneous payments is discussed, together with methods for the responsible officer to obtain relief from liability.

Major Nagle observes that liability is very rarely imposed. He argues that, with the current immense volume of automated government transactions, it makes no practical sense to subject disbursing officers

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*The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency. This article is based upon a thesis submitted by the author in partial satisfaction of the requirements for the LL.M. degree at George Washington University, Washington, D.C., during academic year 1980–81.

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to the risk of liability. He suggests further that the certifying officer function is obsolete and should be abolished.

I. INTRODUCTION

Money alone sets the world in motion.[1]

This quotation is as appropriate today as when it was first written, over **2,000** years ago. It is especially applicable to government contracts. Efforts are constantly made to purchase goods and services at a reasonable price which also provides sufficient profit incentive to unleash the contractor's creative and technological energy.

Given such a maxim and its relevance to Government contracts, it might be assumed that those officials who control the money of the various departments and agencies would have exceptional prominence, awesome authority, and overwhelming responsibility and liability in the procurement process. Such is not exactly the case.

These individuals who control the purse strings are called certifying officers and disbursing officers. While more detailed definitions will be developed and explained later, suffice it to say that certifying officers are those officials who validate the fact that a certain amount is owed to a specific payee by the United States. Disbursing officers are those who, based on this certification, issue the check or otherwise render payment to the payee.[2]

All agencies and departments have certifying officers.[3] Most civilian agencies, however, do not do their own disbursing.[4] Consequently, once the certifying officer certifies a voucher, it is sent to the nearest Regional Disbursing Office of the Department of Treasury for payment.[5]

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[1]Maxim 656 of Publilius Syrus, a Latin dramatist of the 1st Century B.C.

[2]*See* J. Whelan and R. Pasley, Federal Government Contracts, Cases and Materials 136 **(1975).**

[3]Dep't of Treasury, Federal Financial Transactions — Agency Fiscal Responsibilities to Treasury for Payments **17** (June **1980)** (hereinafter cited as Federal Financial Transactions). *But see* text above notes 63 through 75, *infra.*

[4]Joint Financial Management Improvement Program, Financial Management Functions in the Federal Government 2–16 **(1974)** (hereinafter cited as Financial Management).

[5]The details of this system are discussed in the text above notes 247–249, *infra. See also* Treasury Department Circular No. 680 (2d Rev. Jan. 9, 1974).

The Department of Defense, Postal Service, United States marshals, and certain other governmental entities do their own disbursing.[6] In these departments, the certifying and disbursing functions are often combined or vested in one person, usually called the disbursing officer or finance officer.[7] Such disbursing officers must render detailed monthly accounts of those transactions to the Treasury Department and must follow Treasury regulations and utilize Treasury forms to provide some uniformity to Government-wide financial management and accounting.[8]

Some general observations are appropriate at this point to introduce and explain the nature and function of these officials. Despite their essential role in the procurement process, these officers have labored in relative obscurity.

While much has been written about the procurement role of the contracting officer[9] or the auditor,[10] for example, precious little has been written regarding certifying and disbursing officers.[11] More attention has been paid recently to these officials because of technological advances.[12] Stated bluntly, the advent of the computer and the explosive growth of the federal bureaucracy since World War II have over-

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[6] *See note 4, supra. See also* Pub. L. No. **86–31,** Act of May **26, 1959, 73** Stat. **60** (Government Printing Office); Pub. L. No. **85–340,** Act of March **15, 1958, 72** Stat. **34** (Post Office).

[7] *See* note **2,** *supra.*

[8] *See* text between notes **242** and **243,** *infra.*

[9] *See, e.g.,* Chisman & Hanes, *The Contracting Officer: His Authority to Act and His Duty to Act Independently,* **70** Dick. L. Rev. **333 (1966).**

[10] *See, e.g.,* Howell, *The Role of the Government Auditor in Defense Subcontracting,* **53** Ky. L. J. **141 (1964).**

[11] The small amount of scholarly attention paid to these officers has usually taken the form of sections in articles dealing with the role of the Comptroller General, *e.g.,* Cibinic & Lasken, *The Role of the Comptroller General in Government Contracts,* **38** Geo. Wash. L. Rev. **349** (1970).

There have been two exceptions. One is an unpublished student paper, Itnyre, The Function of the Certifying Officer in the Federal Government, and the Similar Function of the Military Disbursing Officer **(1968).** Mr. Itnyre was a student at the George Washington University School of Law when he submitted this paper.

Much more important is a study released by the Joint Financial Management Improvement Program in June 1980, entitled Assuring Accurate and Legal Payments — the Roles of Certifying Officers in the Federal Government [hereinafter cited as JFMIP Study]. The study group was comprised of officials from various Government agencies who studied the role of certifying officers in financial management in general (not limited to contracts) from a managerial and accounting viewpoint. This study and similar reports will be discussed in more detail below.

[12] *See, e.g.,* JFMIP Study, *id.;* Ms. Comp. Gen. **B–101081,** New Methods Needed for Checking Payments Made by Computers (7 Nov. **1977)** [hereinafter cited as New Methods].

whelmed the traditional concepts of the roles these officials must play. These traditional concepts and the likely changes in the roles they represent will be discussed below.

Despite their relative obscurity in the general literature, the certifying and disbursing officers have awesome authority. They are not agents or subordinates of the contracting officer. On the contrary, they are specifically made independent of him in order to form a system of "checks and balances" to avoid improper or illegal payments.[13] They have the authority to decide unilaterally that a payment is improper, and to refuse to certify or disburse payment. Unless they can be persuaded by agency officials to alter their decisions, the contractor is forced to litigate in order to receive his payment.[14]

Of special importance in this regard is the fact that certifying and disbursing officers have a statutory right to call upon the Comptroller General for an advance decision on such questionable payments.[15] Such a procedure has had a tremendous impact on Government contracting. It has served as a conduit by which the Comptroller General has been able to exercise extraordinary influence quite early in the procurement process.[16] Thus, certifying and disbursing officers play pivotal roles in the contracting process not only because of their own inherent authority but because they serve as the vehicle for Comptroller General input (for better or worse) into an agency's procurement decisions.

Coupled with this broad authority is an equally extensive responsibility. These officials are held to an extremely high standard of care[17] and may be held pecuniarily liable for their imperfect performance. It is this Siamese-twin concept of near perfection and personal liability which has been called into question recently.[18] The advent of the com-

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[13] Navy Contract Law § 12.1 (2nd Ed. 1959). *But* see section IV of this article, *infra*.

[14] One method around this obstacle is to have the payment certified or disbursed by a higher level official. Certifying or disbursing officers are usually only one rung on a certifying or disbursing ladder. Their records and accounts are often reviewed at higher levels (field office, to regional office or Army division, to Army corps). If the local certifying or disbursing officer refuses action on a particular invoice, the matter can be "escalated" to the nest senior level for another decision.

[15] 31 U.S.C. § § 74 and 82d (1976).

[16] *See* Note, *The Comptroller General of the United States; The Broad Power to Settle and Adjust All Claims and Accounts*, 70 Harv. L. Rev. 350, 352 (1956). This matter of advance decisions will be discussed at subsection XI.B.3.c, below.

[17] *See* text at notes 553–576, *infra*.

[18] *See* note 12, *supra*. *See also* Morgan, *The General Accounting Office: One Hope for Congress to Regain Parity of Power with the President*, 51 N.C. L. Rev. 1279, 1308 (1973).

puter and the spectacular growth of the federal government, both in dollars and geographical inputs, have mandated changes in the traditional manner of evaluating the conduct, and using the services of certifying and disbursing officers. The future status of these officials is an important aspect of this article.

One last generalization is necessary regarding these officials. It is said that one should "pity the man who must serve two masters." Certifying and disbursing officers have the hapless distinction of serving three masters. First, they are employees of a particular agency or department. They are, therefore, subject to all the administrative pressures such an agency can bring to bear. Such pressures may be negative (disciplinary action, lower performance ratings) or positive (promotion, awards) and can be stern reminders not to disregard the agency's wishes and orders. Second, they are intimately involved with the Treasury Department. They utilize Treasury forms, follow Treasury regulations, and comply with Treasury directives.[19] Third, their actions and accounts will be reviewed by the General Accounting Office (GAO), which has the authority to disapprove and disallow their actions and render them pecuniarily liable. It is not unusual, therefore, for such officials to be put in the unfortunate predicament of following agency directives to pay a contractor and then be held personally liable because the Comptroller General later ruled the payment illegal.[20]

With these general comments serving as a preface, attention will now be focused on the over 14,000 certifying and 850 disbursing officers who are responsible each year for federal payments amounting to about one trillion dollars.[21]

The duties and responsibilities of each certifying or disbursing officer will vary somewhat depending on the internal policies of the agency for which he or she works. Not all agencies can be analyzed without producing an interminably long tome, and consequently only a few representative agencies will be studied.

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[19] *See* Treasury Fiscal Requirements Manual for Guidance of Departments and Agencies, Vol. 1, § **4–2000** [hereinafter cited as TFRM]. ***See*** text at notes **243–249,** ***infra.***

[20] The ultimate example of this occurred in the case decided at **7** Comp. **Gen. 414 (1928).** The attorney general had authorized a contract payment to a contractor who had made a mistake in his bid. The disbursing officer made the payment. This payment was subsequently disallowed by the GAO. That agency ruled that the disbursing officer should have requested an advance decision, because only the Comptroller General's opinions are final and conclusive in such matters.

[21] JFMIP Study, note **11,** *supra*, **27.**

For agencies which do their own disbursing, only the Departments of the Army and the Navy will be studied. Thus unless otherwise noted, the term "disbursing officer" will refer to officials of those departments and not to the disbursing officers of the Treasury Department.

Because of the recent Joint Financial Management Improvement Program study,[22] a broad picture can be drawn of certifying officers that is generally accurate for all federal agencies. When analysis of particulars is needed, however, the Environmental Protection Agency, the Veteran's Administration, and the Department of Agriculture will be used as examples.

By comparing and contrasting the various systems for certification and disbursement, a greater understanding of the entire process may be achieved.

II. THE NATURE AND FUNCTION OF CERTIFYING AND DISBURSING OFFICERS

In order to understand fully the role of these officials, it is necessary to discern who they are, how they are appointed, and within what procedural framework they work.

There is a certain irony in attempting to define certifying and disbursing officers. Both have been the subject of numerous statutes — disbursing officers since 1823[23] and certifying officers since 1941.[24] Yet in none of these statutes is there a definition of what these highly regulated officials are. While the titles themselves seem sufficiently clear to render further elaboration unnecessary, actually there is much that must be explained.

One fundamental similarity does exist, however. Both certifying and disbursing officers are "accountable officers" and will be frequently labeled as such throughout this article.

The word "accountable" is a term of art in government financial management. Accountability for disbursing officers may be defined as "the obligation imposed by law or lawful order or regulation on an officer or other person for keeping accurate record of property or funds. The person having this obligation may or may not have actual posses-

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[22] JFMIP Study, note 11, *supra*.
[23] Act of January 31, 1823, 3 Stat. 723.
[24] Act of December 29, 1941, 55 Stat 875.

sion of the property or funds but does have pecuniary liability for funds."[25] As will be seen, this definition must be modified somewhat for certlfying officers.

Not all fiscal agents of the government are accountable officers. There are five types of fiscal officers: collecting officers such as customs collectors or Internal Revenue Service agents; disbursing officers; certifying officers; fiscal agents, normally employees of Federal Reserve Banks; and cashiers who are agents of disbursing officers. Only the first three are designated "accountable officers."[26]

A, *DISBURSING OFFICERS*

The Army defines "accountable disbursing officer" as "any commissioned officer who is entrusted with the duty to disburse, receive and account for public moneys in his or her own name."[27] The word "accountable" is necessary to avoid confusion since many individuals who are officers in one sense (commissioned, warrant, or noncommissioned) will perform disbursing duties; yet they are not accountable in their own name for the moneys entrusted to them.[28] They are simply agents of the disbursing officer, who must account for their activities on his monthly reports to the Treasury Department.[29]

Both the Army and Navy definitions require the disbursing officer to disburse public moneys, and .that definitional requirement is stated in many of the statutes dealing with the subject. "Disbursement," however, means more than simply dispensing. Its more complete meaning in government financial management is:

> a voucher-supported transaction which decreases the accountability of the disbursing officer and charges an appropriation or deposit fund account.[30]

There are various types of disbursing officers in the government.

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[25] U.S. Army Institute of Administration, Special Text No. 14–189, Financial Management 65 (Sept. 1976).

[26] Federal Financial Transactions, *supra* note 3, at 13.

[27] Army Regulation 37–103, Financial Administration: Finance and Accounting for Installation Disbursing Operations, para. 1–3b (4 June 1978) (hereinafter cited as AR 37–103). The Navy has a similar definition but permits civilian employees to be so appointed. Navy Comptroller Manual para. 041003–2. Any civilian disbursing officer in the Army must be designated on an exception-to-policy basis.

[28] *See* the discussion of cashiers and agents in the text between notes 38 and 39, *infra.*

[29] *See* text at notes 223 and 226, *infra.*

[30] AR 37–103, note 27, supra, para. 6–1.

Treasury Department disbursing officers are located at 11 disbursing centers and regional offices located throughout the United States and the Philippine Islands. These centers are directed by regional disbursing officers. They report to the Chief Disbursing Officer who heads the Division of Disbursement in Washington, D.C.[31] The Treasury Department also utilizes assistant disbursing officers who disburoe for a single agency and are employees of that agency. They are responsible, however, to the Treasury's Chief Disbursing Officer and operate under regulations issued by the Division of Disbursement. These assistant disbursing officers are used principally in the U.S. Coast Guard[32] and the Department of the Interior.[33]

United States Disbursing Officers are employees of the Department of State but derive their disbursing authority by direct delegation from the Chief Disbursing Officer. They function at foreign service posts throughout the world and disburse not only for the State Department but for other federal agencies operating in foreign countries.[34]

The remaining disbursing officers are those which disburse for the agencies excepted from Executive Order No. 6166 such as the Department of Defense.[35]

These disbursing officers are appointed by authority of the head of the agency. This authority has been delegated to the commanding officers of variously sized units and installations.[36] Officers so appointed will normally be part of the Service's finance corps, although the Navy also utilizes supply officers for disbursing functions. A disbursing officer may range in rank from second lieutenant or ensign to full colonel or Navy captain.[37]

Disbursing officers serve on the staff of the installation, ship, or organization commander. It is important to remember that disbursing is not their sole function. They normally serve simultaneously as the or-

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[31] Financial Management, *supra* note **4,** at **2–16; 7** General Accounting Office Manual for Guidance of Federal Agencies para. **21.3** (hereinafter cited as GAO Manual).

[32] The Coast Guard is a unique organization in that it is an agency of the Transportation Department but has special ties with the Defense Department. **14** U.S.C. 1, **3, 4 (1976).**

[33] 7 GAO Manual para. **21.5;** Financial Management, *supru* note **4,** at **2–16.**

[34] 7 GAO para. **21.6;** Financial Management, *supra* note **4,** at **2–16; see 22** Comp. Gen. **48** (1942).

[35] *See* text between notes **63** and **65,** *infra.*

[36] AR **37–103,** note **27,** *supra,* para. **2–20;** Navy Comptroller Manual para. **041501–1.**

[37] JFMIP Study, note **11,** *supra,* at **28.**

ganization's finance and accounting officers.[38] In such capacity they are responsible for accounting functions and budget guidance in addition to management of their subordinate personnel. Often these officers are themselves commanders of finance units with all the attendant duties such a position entails.

Because of these other time-consuming obligations, disbursing officers depend on a variety of subordinates for aid. These agents are called deputies, cashiers, and paying agents.

Deputies are appointed pursuant to 31 U.S.C. 103a,[39] which authorizes disbursing officers to appoint deputies with the approval of the head of their department. These deputies may perform all duties required of disbursing officers and are subject to the same liabilities and penalties. Both the Army and the Navy require a specific and formal designation (tantamount to a power of attorney) to be prepared by the disbursing officer and sent to the departmental finance center for a p proval prior to the appointment.[40]

Cashiers are found in all federal agencies. In those agencies for which the Treasury disburses, cashiers are employees of their individual agencies but are designated by the Chief Disbursing Officer on the request of the agency. They maintain an imprest fund composed of money advanced to them by the local or agency disbursing officer for the purpose of making relatively small disbursements.[41]

For those agencies which do their own disbursing, the cashiers are appointed by the disbursing officer or his immediate commander.[42] Cashiers are not accountable officers. Their funds are advanced to

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[38] This may lead to confusion because the courts, boards or regulations sometimes say "finance officer," "finance and accounting officer," or "fiscal officer." To be more precise, they should say "disbursing officer." (The Comptroller General is very careful to use the correct phrase.) This causes difficulty for two reasons. First, the finance and accounting officer and the disbursing officer are not always the same person. Second, even if they are, the finance and accounting officer will have other tasks besides disbursing. Therefore, in this article, unless otherwise noted, decisions or regulations using the term "finance officer" or similar terms will be cited only if they, in fact, refer to the disbursing officer.

[39] Act of July **3, 1926,** C. **775, 44** Stat. 888, as amended.

[40] AR **37–103,** note **27,** *supra,* para. **2–32;** Navy Comptroller Manual para. **041510–3.** ***See also*** **9** Comp. Gen. **267 (1930).**

[41] Federal Financial Transactions, *supra* note **3,** at **19; 7 GAO** Manual, note **31,** *supra,* para. **21.7.** There are various types of cashiers (Class A, B, or D), a discussion of which is not relevant to this article. ***See*** section VII.B of the text, *infra,* for a discussion of cashiers and their relation to government contracts.

[42] AR **37–103,** note **27,** *supra,* para. **2–52;** Navy Comptroller Manual para. **041511–4.**

them by disbursing officers who must account and be accountable to the Treasury for every transaction. Cashiers are not authorized to sign checks but may only make cash payments.

Paying agents are individuals specifically appointed to make designated payments from funds temporarily advanced to them. Unlike deputies and cashiers, they are not full time subordinates of the disbursing officers. They are normally appointed by designated commanders for making cash payroll payments or currency conversions. They therefore have little connection with Government contracts.[43]

The disbursing officer will have a disbursing station symbol number designated by the Treasury Department. This symbol number must appear on all checks, vouchers, official papers, and correspondence pertaining to that officer's disbursement of public moneys. The absence of the symbol on a check is sufficient reason for refusing payment thereon, despite its validity otherwise.[44]

Once constituted, the disbursing office will be comprised of several different branches or units. These units will normally be responsible for such functions as maintenance of pay accounts, preparation and verification of public vouchers, and the actual disbursing of funds. Usually before a voucher may be paid, it must first be reviewed and verified in one of these units.[45] Consequently, it is these units (called either the public voucher unit or the commercial accounts section of the examination branch) which ultimately will perform the "certifying officer" functions.

The military departments have extremely detailed regulations governing the step-by-step procedures of the disbursing office. This, plus the fact that these departments have a quite formalized structure of finance schools, training, and courses, results in a highly structured process.[46] This is in stark contrast with the certifying officer system.

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[43] AR **37–103,** note **27, supra,** chapter **15;** Navy Comptroller Manual para. **041514.**

[44] AR **37–103,** note **27,** *supra,* para. **2–5, 2–7;** Navy Comptroller Manual para. **041400.** The disbursing officer and deputy must decide which of their given names or initials they will use. They will then execute Form TUS **5583** (Signature Card) and Form TFS **3023** (Specimen Signatures). The signature card must be certified by an officer whose signature is recorded with the Treasury. These forms will then be sent to the Treasury for filing.

[45] *Compare* Navy Comptroller Manual para. **041200** ***with*** AR **37–101,** Organization and Functions of Finance and Accounting Officer, chapter **4** (Interim Change **101, 31** Jan. **1980**).

[46] Much of this framework is not ordinarily relevant to Government contracts and will not be discussed here. If further information is needed, AR **37–103,** note **27,** ***supra.*** and the Navy Comptroller Manual may be consulted.

B. CERTIFYING OFFICERS

The concept of the certifying officer was first officially recognized by Executive Order No. 6166, dated June 10, 1933. Section Four of the Order, in establishing the Division of Disbursement in the Treasury, stated that this Division should disburse moneys "only upon the certification of persons by law duly authorized to incur obligations upon behalf of the United States.'' The Order, therefore, roughly defined certifying officers as officials able to obligate the Government.

Such a definition would mean that every contracting officer and every person who hired a new employee or required one to work overtime would be a certifying officer. Such an expansive definition has never been adopted. None of the numerous statutes dealing with certifying officers, however, have attempted formally to define the position. Indeed, a precise definition is exceedingly rare in any Government regulation or manual. Despite this dearth of specificity, the following appears to be an appropriate definition:

> **A** person authorized to attest to the correctness and justness of the account for services rendered or supplies furnished as set forth in vouchers to be submitted for payment.[47]

It should be noted that this definition is in large part the antithesis of the one seemingly envisaged by Executive Order No. 6166. That Order spoke of certification by persons authorized to obligate the government. Presidentday certifying officers have nothing directly to do with obligation of funds. Care should be taken to avoid confusion between certification of vouchers for payment, and certification of availability of funds. Before obligating the government, the contracting officer or other person with obligation authority is required to obtain from the chief of accounting at the responsible finance office, certification that the funds to be obligated are in fact available for obligation.[48]

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[47] U.S. Army Institute of Administration, Special Text 14–189, Financial Management 73 (1976).

[48] Dep't of Defense Directive No. 7200.1, Administrative Control of Appropriations, at para. N (Nov. 15, 1978). Para. N, "Obligations Incurred by Authorized Personnel," states as follows:

> No officer or employee of the Department of Defense shall involve the U.S. Government in a contract or otherwise obligate the U.S. Government for the payment of money for any purpose unless given written authority. This should not be construed as requiring that each officer or employee who is directed to perform a service or function such as performing local travel or procuring goods

Within Department of the Army, such certification is effected on a purchase request and commitment form.[49] Though important, this type of certification is technically not a function of the certifying officer *per* se.

By the time a voucher is presented to the certifying officer for payment, the contract has already been signed, and the services rendered or the goods delivered in whole or in part. Thus, with the essential exception of certification of availability of funds mentioned above, the government was obligated days, weeks, or months before the certifying officer entered the payment process.

Despite this relative lack of control over the obligation process, the certifying officer is an accountable officer. He is accountable, however, only for the amount of any illegal, improper, or incorrect *payment* which resulted from any erroneous certification by him, or for any *payment* prohibited by law or which did not represent a legal obligation under the appropriation or fund involved.[50] Consequently, any mistakes or malfeasance which occurred earlier in the process do not taint the certifying officer. His accountability rests on whether he can discover these mistakes prior to payment. Unlike the disbursing officer, the certifying officer has no public funds in his possession for which to account. Therefore he is not required to submit monthly reports of his accounts.[51]

Obviously this does not mean that he is insulated from scrutiny. The vouchers he certifies will be reviewed by the Treasury Disbursing Officer[s*] and audited by the General Accounting Office. Additionally, each month the accounting section of the organization will submit a Standard Form **224,** Statement of Transactions, to the Treasury.[53]

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or services reimbursable from an imprest fund, be specifically authorized in writing to obligate funds. In these cases, the person who directs the service or function to be performed is the individual who must have the written delegation of authority, and have the fund availability or a certification that funds are available. Certification shall be obtained from the allottee or the person responsible for administering the allotment under a delegation of authority.

Id.

[s*] Army Reg. No. **37–108,** General Accounting and Reporting for Finance and Accounting Offices, at para. **3–73, 3–74 (15** Nov. **1975);** Dep't of Army Form No. **3953,** Purchase Request and Commitment (1 June **1973).**

[50] 31 U.S.C. 82c **(1976).**

[51] *See* **31** U.S.C. **496. 497. 498** (1976).

[52] Treasury Department Circular NO. 680 (2d Rev., Jan. **9, 1974).**

[53] An example is Dep't of Agriculture, Title **7,** Accounting & Administrative Regulation, Section **3,** Disbursements, para. **214** (July 10, **1979).** To avoid confusion with **Army**

This form will list the month's disbursements and deposits, and will therefore further bring the certifying officer's actions under scrutiny.

In the civilian agencies, certifying officers are designated by the agency head who normally has delegated this designation authority.[54] Relatively little guidance is given as to criteria for selection. General guidelines as to integrity and abilities are cited,[55] and sometimes preference is expressed for supervisory accounting personnel,[56] but normally the standards are vague. Specific training, schooling, or background is rarely required. Once appointed, formal training in certifying officer functions, other than on-the-job experience, is uncommon.[57]

Once selected, the all-important rite of initiation is the preparation of the SF 210, Signature Card for Certlfying Officers.[58] This form is sent to the appropriate disbursing office for filing. All schedules of vouchers certified by the officer will be checked against this card.[59] If more than one disbursing office will be used, an SF 210 must be sent to each office. Any limitations on the certifying officer's authority (normally as to amounts or types of voucher) should be specified on the SF 210.[60] Also, if the individual is authorized to certify letters of credit, a separate SF 210 must be completed.[61]

As stated earlier, in the military services, the certifying and disbursing authority and responsibility are often vested in one individual—the disbursing officer (usually termed the finance officer, or finance and accounting officer).[62] However, the certifying and disbursing functions are not always combined; the certlfying officer sometimes is a different individual in the financial chain.

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regulations, this regulation and section will hereinafter be referred to as 7 Ag. Reg. *See also* TFRM, note 19, *supra*, § 2–3145.10; Financial Management, *supra* note 4, at 2–17.

[54] In the Environmental Protection Agency, for example, the authority is delegated to the Chief, Fiscal Policies and Procedures Branch. Environmental Protection Agency Voucher Examination Manual 1974, chap. 1, para. 5a [hereinafter EPA Manual]. *See, e.g.*, Veteran's Administration Manual MP–4, Part I, para. 1.01b (C62, April 4, 1977).

[55] *E.g.*, 7 Ag. Reg., *supra* note 53, section 3, para. 75.

[56] *E.g.*, EPA Manual, *supra* note 54, chapter 1, para. 5a.

[57] JFMIP Study, note 11, *supra*, 31–32. The Study concluded that more training and official direction were available for certlfying officers in predominately manual systems than in predominately automated systems.

[58] *See* the appendix to this article for a copy of SF 210, which is self-explanatory.

[59] Treasury Circular No. 680 (2d Rev., Jan. 9, 1974).

[60] *See e.g.*, EPA Manual, *supra* note 54, chapter 1, para. 5b.

[61] Letters of credit are discussed in the text at notes 369–374, *infra*.

[62] *See* AR 37–103, note 27, *supra*, para. 1–3. *But see* note 38, *supra*.

The Army, for example, authorizes commanders to designate commissioned or warrant officers and civilian employees to certify vouchers. Those selected must furnish the finance and accounting officer with a DD Form **577,** Signature Card. Since the individual will be certifying vouchers to be paid within the Department of Defense by the Department's own disbursing officers, it is not necessary to use the Treasury form, SF **210.** This DD Form **577** serves the same purpose as the SF **210** in that it is used to verify the signature on vouchers submitted for payment.[63]

Although these individuals are called "certifying officers," their status is unclear.

Executive Order No. 6166 established the Division of Disbursement to handle disbursements for the entire government. On May **29, 1934,** however, Executive Order No. 6728 exempted the War and Navy Departments from the provisions of Executive Order No. 6166. Because, as the Comptroller General recognized, Executive Order No. **6166** created a new class of accountable officer—the certifying officer—,[64] the effect of the later order was to eliminate such a class of accountable officers in the War and Navy Departments.

This same exemption was preserved in the Certlfying Officers Act of 1941,[65] which statutorily enacted and delineated the status of certifying officers as accountable officers.

It is impossible to reconcile with the two executive orders and the **1941** act a statute which was enacted in **1947.** The statute was entitled "An Act to Relieve the Disbursing and Certifying Officers of the War and Navy Departments from Accountability."[66] It was designed to relieve these inexperienced officers from personal liability for losses that occurred during World War 11. In that regard, it was similar to other acts normally passed after wars. This Act differed, however, in that it specifically referred to certlfying officers. The legislative history indicates that Congress specifically was aware of these certlfying officers and their distinct and separate duties. What is more surprising is that

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[63] AR **37–103,** note **27,** *supra,* para. **2–57;** AR **210–10,** Installation Administration, para. **4–4b** (C1, 15 April **1978).** ***See also*** Air Force Manual (AFM) **177–101,** para. **20152 (27** Feb. **1975).**

[64] Comp. Gen. Dec. **A–58695, 15** Comp. Gen. **362 (1935).**

[65] Enacted Dec. 19, 1941, C. **641, § 4, 55** Stat. **876,** codified at **31** U.S.C. 82e **(1976).** *But see* Comp. Gen. Dec. **B–27405, 22** Comp. Gen. **48 (1942);** Comp. Gen. Dec. B–62557, **26** Comp. Gen. 578 **(1947).**

[66] Act of July **26, 1947,** Pub. L. No. **80–248, 61** Stat. **493.**

the bill was recommended for approval by the Bureau of the Budget and the Comptroller General.[67]

This **1947** act raises two questions: What certifying officers were intended to be covered by the act's provisions? What was the nature and extent of the accountability from which the officers were relieved?

The first question is relatively easy to answer. Although the executive orders and statute did not require a certifying officer system to be established in the War and Navy Departments, they did not prohibit it either. Consequently there was nothing to prevent the Secretaries of those departments, upon seeing the benefits of such a system, from administratively appointing such officers.

The second question, as to accountability, is more difficult to answer. Even if such certifying officers were administratively created, it would not require a statute to relieve them of accountability because no statute had imposed accountability. Any administrative sanctions imposed upon these officers could have been eliminated by Secretarial fiat.

Because this statute applied only to a specific period in the past, it was not codified.

In 1976 and 1977[68] the General Accounting Office suggested to the Department of Defense (DOD) that it would be better served if legislation were enacted formally establishing the certifying officer concept for DOD. (No mention was made of the **1947** statute.) The Department of Defense agreed[69] and proposed a bill "to authorize officers and employees to certify vouchers for payment from appropriations and funds and for other purposes" as part of its legislative package for the 96th Congress.[70] As of this date, the legislation has not become law.

The **1947** statute, therefore, appears to be an ignored aberration. Currently, certifying officers in the DOD are not created or made ac-

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[67] 1947 U.S. Code Cong. and Adm. News. 1478. *See also* Comp. Gen. Dec. B–107004, 32 Comp. Gen. 130, 131 (1952).

[68] Letters dated Nov. 17, 1976 and Jan. 17, 1977 from the General Accounting Office to the Deputy Assistant Secretary of Defense for Management Systems.

[69] The Army and Navy also agreed but the Air Force did not. Memorandum dated 6 Sep. 1978 to the General Counsel, Department of Defense, from the Navy Legislative Affairs Office.

[70] *See* Mayer, *Today and* ***Tomorrow*** *in Navy* ***Financial*** *Management* Systems, Navy Supply Newsletter at 5 (December 1978). The author discusses the subject legislation and states it is long overdue essentially because the disbursing offiier has been shouldering all the pecuniary liability.

countable under authority of any statute. They are administratively created to aid the disbursing officers.

The Joint Financial Management Improvement Program study revealed that certifying officers' grades range from GS–4 to GS–16.[71] (As noted earlier, in the military services, commissioned or warrant officers can also be certifying officers.) Their civil service classifications were typically voucher examiner, administrative officer, digital computer system personnel or account auditor.[72]

More importantly, the study showed that, as with the disbursing officer, the duties of a certifying officer were only one set of responsibilities the individuals had. Their formal positions ranged from voucher examiner to GS–16 center director. Interestingly enough, some civilian certifying officers doubled as chiefs of disbursing sections or division. The net effect of combining these multiple responsibilities was also documented by the Study. The question was asked, "how much time do you spend per day on certification?" The answers in large automated systems ranged from 15 minutes to one-half hour.[74]

Consequently these officers must rely heavily on their own subordinates, the integrity and procedural safeguards of the accounting and financial system as a whole, and the contracting officers, inspectors, or receivers of equipment. These last three individuals are often called approving officials because the certifying officers will certify on the basis of the approving officials' prior approval. Legal responsibility for the validity of the information, however, rests with the certifying officer, not the approving official.[75]

This, then, is what these certifying and disbursing officers are today—but it was not always this way.

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[71] Civilian general schedule (GS) pay grades and military grades or ranks are not entirely analogous, and precise comparison of particular levels between the two systems is not possible. However, the position of a GS-4 federal civilian employee is roughly comparable with the position of a junior enlisted servicemember, perhaps private first class (E-3) or specialist 4 (E-4) in Army terminology. A GS-16, in contrast, is very senior and may be compared with a colonel (0–6) or brigadier general (0–7). The relative importance of particular military and civilian grades may vary in different organizations.

[72] *See* JFMIP Study, note 11, *supra*, at 28 for a complete listing.

[73] *Id.*, at 28.

[74] *Id.*, at 30.

[75] Federal Financial Transactions, *supra* note 3, at 20.

III. HISTORY

A. THE INITIAL DEVELOPMENT

The historical development of the roles of certifying and disbursing officers is worth reviewing for two reasons. First, the system in use today is a direct result of what may only be described as two hundred years of the "trial and error" method of financial management. Second, today's system is virtually the exact opposite of what the Founding Fathers wanted.

Apparently, when the new Constitutional government began in 1789, Congress intended that accounts of the departments would be examined and settled by the Treasury Department auditor and comptroller before payment would actually be made. In other words, a "pre-audit" system was envisaged.[76]

The first Secretary of the Treasury, Alexander Hamilton, realized, however, that such a system could not be used to pay all the distant and overseas obligations of a growing nation. Contractors especially would be at a disadvantage. Often they could not perform without advance payment and, considering the snail's pace of late eighteenth century communications, could not wait the additional time required for payment to be sanctioned after Treasury audit.[77]

Therefore, almost immediately, Hamilton initiated the practice of advancing money to employees for salary or official duties, to military commanders, and even to government contractors directly.[78] Hamilton was severely criticized by Congress for this because, under the practice, only post-audit control was possible over expenditures. This was clearly not what Congress had envisaged when the Treasury Department was established in 1789 with no provisions for appointment of disbursing clerks or for advances of funds.[79]

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[76] Mosher, The GAO: The Quest for Accountability in American Government 30 (1979). Two landmark works which deal with the history of certifying and disbursing officers (and which have been relied on heavily in the preparation of this section) are Mansfield, The Comptroller General (1939), and Powell, Control of Federal Expenditures: A Documentary History, 1775–1894 (1939).

[77] Cibinic & Lasken, *supra* note 11, at 353.

[78] *See* Mansfield, *supra* note 76, at 36–37, especially wherein Hamilton himself is quoted that it was common to make advances on account to the contractors, long before the supplies were furnished.

[79] Act of September 2, 1789, 1 Stat. 65, 66. ***See*** *also* Naylor, Federal Accounting 282 (1944).

This does not mean that Congress itself did not bow to the financial realities. As early as 1790, Congress, in effect, designated the President as a disbursing officer when it authorized him to receive an advance of money for disbursement to persons serving in foreign countries and to account later for such expenditures.[80]

Two years later, in 1792, Congress created additional disbursing officers, by establishing positions for paymasters who would reside near troop headquarters and make disbursements for pay, subsistence and forage.[81]

Despite these enactments, most advances were made to disbursing agents who were not statutorily recognized. Congress, therefore, acted in 1809 to exert more control over the process. The Act of March 3, 1809,[82] provided that, except for Army paymasters, Navy pursers, military agents, the purveyor of public supplies, and other officers already authorized by law,[83] no other permanent agents would be appointed either *to make contracts, to purchase supplies,* or to disburse money in any manner for the Army or Navy, except those that were subsequently appointed by the President with the advice and consent of the Senate.[84]

The statute shows two interesting facets of the status of those early disbursing officer positions. First, disbursing officers were often also contracting officers and therefore exercised virtually total control over the procurement process at their local outposts and forts. Second, they were deemed to be of such importance that future appointments would be the result of joint executive-legislative action at a high level.

Two other sections of this act were designed to insure the safekeeping of the public money. Disbursing agents would henceforth be bonded and would make monthly reports of their accounts[85] to the Comptroller of the Treasury, who would audit and settle their accounts.[86]

This 1809 statute effectively destroyed the original pre-audit system of settling accounts. By 1816, President Madison informed Congress

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[80] Act of July 1, 1790, 1 Stat. 128. *See* Naylor, *supra* note 79, at 283.
[81] Act of May 8, 1792, 1 Stat. 279, 280.
[82] 2 Stat. 335, 536.
[83] For an example of such officers, *see* the Act of August 4, 1790, 1 Stat. 138. 140. dealing with Commissioners.
[84] Act of March 3, 1809, § 3, 2 Stat. at 536.
[85] *Id.*, § 4.
[86] *Id.*, § 2.

that this pre-audit concept "was substantially abandoned. The form, indeed, was preserved, but the vital principle was extinguished."[87]

Despite this pronouncement, the Treasury Department's authority was significantly enhanced a year later. By the Act of March 3, 1817,[88] all claims and demands involving the United States as a debtor or creditor would be settled and adjusted in the Treasury Department. This statute would be interpreted for 150 years to mean that disbursing officers could only pay claims of which there was no doubt or dispute over amount or government liability.[89] Any doubtful claims would be forwarded to the Treasury for resolution. The practical effect, therefore, was to resurrect the pre-audit system at least for dubious payments, and concurrently to decrease the inherent authority of disbursing officers. This would be the first of three attempts (intentional or not) to revive aspects of the pre-audit system,

Congress, in 1820, decided to erect one more safeguard to insure fidelity on the part of disbursing officers. The Act of May 15, 1820,[90] put enforcement "teeth" into the concept of accountability. If the disbursing officer failed to render his accounts or to pay over any required money, a United States marshal was authorized to levy on the person and property of the officer and collect by distress sale. If the sale was not sufficient to satisfy the debt, the disbursing officer was to be imprisoned "until discharged by due course of law."[91] Two avenues of relief were provided. First, the Treasury can delay the proceedings if the public interest would not be harmed.[92] Second, the aggrieved person can file a complaint in the district court. He can then secure an

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[87] Annals of Cong., 14th Cong., 2d Sess. 24 (1816).

[88] 3 Stat. 366 as amended, codified at 31 U.S.C. 71 (1976).

[89] *See* note 492, *infra*. Sometimes claims are made against the government which present no doubtful questions of law or fact, but which are based upon irregular *or* unauthorized procurements. For example, through ignorance on the part of government officials and contractor personnel involved, an otherwise proper and lawful purchase of goods *or* services may be effected without the involvement of a contracting officer. Some procurement offies have paid such claims, called no-doubt claims, on a theory of quasi-contract. *See* P.D. Park. *Settlement of Claims Arising from Irregular Procurements*. 80 Mil. L. Rev. 220 (spring 1978).

[90] 3 Stat. 592 as amended. codified at 31 U.S.C. 506 (1976).

The sections discussed in the text are now codified at 31 U.S.C. 506–520 (1976), except that now the appeal would be to the Court of Appeals and not a circuit court, 31 U.S.C. § 519 (1976). The Act of January 25, 1828, 4 Stat. 246 prohibited paying any salary to such officers until the debt was paid. *See* notes 545–546 *infra* and accompanying text.

[91] 31 U.S.C. 508 (1976). The provision concerning imprisonment for debt is now considered obsolete and unenforceable. *See* note 543, *infra*.

[92] 31 U.S.C. 517 (1976).

injunction against the marshal's actions if he presented a sufficient bond.[93] He can also appeal the district court's ruling to a higher court.[94]

Three years later, Congress became aware of lax practices or outright defalcations in the disbursing system which required correction, The Act of January **31,** 1823,[95] which first used the term "disbursing officer," outlawed advance payments except to disbursing officers if needed for the faithful and prompt discharge of their duties and the fulfillment of public engagements. The practice of advancing money to contractors was thereby terminated.

The **1823** statute lessened somewhat the reporting requirement. The time for rendering accounts was increased from monthly to quarterly, but vouchers must henceforth be attached. The officer's word would no longer suffice. If an officer violated the Act, the Secretary of the Department would report it to the President, who was *required to dismiss* the officer, unless the latter subsequently accounted for any shortages.[96]

As one author noted, the **1823** statute marked the final legislative step evincing congressional acknowledgement of the desirability of the disbursing officer system. After **1823,** all legislation would be concerned with improving and safeguarding the system.[97]

B. THE REFINING OF THE SYSTEM AND THE RISE OF PERSONAL LIABILITY

Then, as now, disbursing officers served many functions. They were Indian agents, postmasters, collectors of customs, and general fiscal agents. Their positions were obtained more by political patronage than abilities.[98] Congress had already tried to insure care and fidelity by statutes requiring periodic accounts and personal civil liability, enforced by distress sale. It even had specifically allowed expenses for employment of clerks, purchase of fireproof chests or vaults, or other measures necessary for the safekeeping of the public money.[99] Starting in the 1840's, Congress imposed criminal sanctions.

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[93] 31 U.S.C. **518 (1976).**
[94] U.S.C. **519 (1976).**
[95] 3 Stat. **723** (1823), as amended, codified at **31** U.S.C§ **529 (1976).**
[96] Act of Jan. **31, 1823,** § **3, 3** Stat. **723.**
[97] Naylor, *supra* note **79** at **287.**
[98] *See* Mansfield, *supra* note **76** at **124.**
[99] Act of July **4,** 1840, **5** Stat. **389,** codified at **31** U.S.C§ **545 (1976).**

In 1841, Congress made it a crime for a disbursing officer to convert, use, or loan for his personal benefit the money entrusted to him. Such action would constitute embezzlement, and a failure to turn over the public money on order of higher authority would be *prima facie* evidence of such conversion. The penalty was a fine of the amount embezzled and imprisonment from six months to five years.[100] Apparently, by 1853 a particular method of fraud had come to Congress' attention. In that year, it enacted a statute that prohibited a disbursing officer from paying an individual less than the entitled sum, yet demanding that the individual receipt for the greater amount. This, too, was termed embezzlement. The penalty was a fine of an amount double the sum withheld and a mandatory two years in prison.[101]

Congress was not the only branch of government imposing stern requirements on disbursing officers. Beginning in 1845, the Supreme Court initiated a long line of cases which held disbursing officers to the highest responsibility.

The case of *United States v. Prescott*,[102] decided in 1845, involved a fiscal officer in Chicago who had executed a bond that he would safeguard the public money. A portion of this money was stolen from him. The Court ruled that he and his surety were liable because of the bond and principles of public policy.

> Public policy requires that every depository of the public money should be held to a strict accountability . . . Any relaxation of this condition would open the door to fraud which might be practiced with impunity.[103]

The Supreme Court relied upon its *Prescott* decision in several later nineteenth-century cases, solidifying this strict accountability standard for decades to come.[104] The Court would fashion two exceptions to the rule: Relief from accountability could be granted if a loss was due to an act of God, or to an act of the public enemy, occasioned without fault or negligence of the official.[105] These exceptions were very narrowly con-

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[100] Act of August 13, 1841, 5 Stat. 439. *See also* Act of August 6, 1846, 9 Stat. 59.
[101] Act of March 3, 1853, 10 Stat. 238, now codified at 18 U.S.C. 652 (1976).
[102] 44 U.S. 658, 3 How. 578 (1845).
[103] 44 U.S. at 670–671, 3 How. at 588–589.
[104] *E.g.*, United States v. Morgan, 52 U.S. 161, 11 How. 153 (1850); United States v. Dashiel, 71 U.S. (4 Wall.) 182 (1866); Boyden *et al.* v. United States 80 U.S. (13 Wall.) 17 (1871).
[105] United States v. Thomas, 82 U.S. (15 Wall.) 337 (1872). *See also* 18 Comp. Gen. 639 (1939).

strued.[106] The clearest example of the rigidity of this system is seen in *Smythe v. United States.*[107] Smythe was the superintendent of the New Orleans Mint. He had responsibility for $25,000 in Treasury notes which were totally destroyed by fire, except for $1182 which was recovered in a charred condition. Mr. Justice Harlan, speaking for the Court, ruled that a fire was not a defense to the officer's high responsibility. Smythe was therefore accountable for the entire $25,000.

It must be remembered that these cases dealt only with physical losses. The Supreme Court did not and has not imposed such a strict standard of accountability concerning erroneous or illegal payments.

Congress, by 1853, was apparently convinced that sufficient safeguards were in effect to justify the permanent imposition of the system throughout the government. The Act of March 3, 1853,[108] provided for one disbursing clerk each for the War, Navy, and Post Office Departments and not more than three each for the Treasury and Interior Departments. Subsequent legislative enactments would authorize such clerks for the State[109] and Labor[110] Departments. These appointments were in addition to the numerous paymasters, postmasters, pursers and other similar officials who already performed disbursing duties.

A unique method of compensation was devised for disbursing officers in 1858. Those disbursing for the construction of public buildings were compensated by a percentage of the amount they disbursed, at the rate of one quarter of one percent.[111] By today's standards, this would be an egregious example of a conflict of interest.[112] It must be

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[106] *Compare* United States v. Thomas, supra note 96, *with* United States v. Keehler, 76 U.S. (9 Wall.) 83 (1869). In Keehler, the court ruled that the mere threat of overpowering confederate force did not justify a postmaster in turning over his funds.

[107] 188 U.S. 156 (1902). The case also provides an excellent history of the law in this area, and a summary of the liability cases mentioned in notes 102 through 106, *supra.*

[108] 10 Stat. 189, 211. For some reason the Act is still codified, with much of the original language, at 31 U.S.C. 492–1 (1976). By this statute the disbursing "clerks" are still required to superintend the department's building when directed. Although the statute refers to them as disbursing "clerks," they were, in fact, the disbursing officers for their agencies.

[109] Act of March 3, 1855, 10 Stat. 669.

[110] Act of March 4, 1913, 37 Stat. 736. See *also* 30 Op. Atty. Gen. 129, March 14, 1913 authorizing the Labor Department to use temporarily the Disbursing Clerk of the Commerce Department.

[111] Act of June 12, 1858, 11 Stat. 319, 327. See *also* Act of July 28, 1866, 14 Stat. 341; Bartlett v. United States, 39 Ct. C1. 338, *aff'd 197* U.S. 230 (1904).

[112] *E.g.*, 5 CFR § 735.204 (1981).

remembered, however, that in 1858, except for criminal misconduct, disbursing officers were not yet responsible for insuring the legality or propriety of their payments.

The system then was firmly in place when the Civil War erupted. The war served as a crucible in which to judge the system's merits. By any fair assessment, the system performed admirably. By one estimate, the War Department during the war disbursed $1,100,000,000, with defalcations and losses of all kinds amounting to less than one-tenth of one percent of that amount.[113]

The war, however, did highlight one aspect of being a disbursing officer—it was an inherently dangerous job. Disbursing officers were priority targets for enemy soldiers because they traveled with huge sums of money to pay troops. Money was lost to Quantrell's Raiders during the infamous raid at Lawrence, Kansas.[114] Two different paymasters were pulled off trains and robbed by Mosby's partisans.[115] Other money was stolen by ordinary soldiers, both North[116] and South.[117] The high risk associated with the job was not limited to wartime. The money-laden disbursing officer proved an easy prey for stagecoach robbers.[118]

These tales are not recounted for their melodramatic content, but rather to provide a backdrop for the next important event in the system's development. By virtue of occurrences such as these, Congress became aware of the dangerous plight of the hapless disbursing officer and decided that some avenue of relief was needed.

The Act of May 9, 1866,[119] expanded the jurisdiction of the Court of Claims to allow suits by disbursing officers for relief from liability for losses by capture or otherwise in line of duty. Henceforward, whenev-

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[113] Article, *History of the Finance Corps*, Army Finance Journal at 5 (June 1961).

[114] Christian Case, 7 Ct. Cl. 431 (1871).

William C. Quantrell, or Quantrill, was a Confederate irregular or guerilla leader during the Civil War. His best known exploit was a raid on the town of Lawrence, Kansas, on August 21, 1863, which resulted in extensive loss of life and destruction of property.

[115] Ruggles v. United States, 2 Ct. Cl. 520 (1866); Moore v. United States, 2 Ct. Cl. 522 (1866).

John Singleton Mosby (1833–1916) was an attorney, and a colonel in the Confederate army. During the years 1863 through 1865, he led an irregular cavalry force, the Partisan Rangers, which carried out raids in northern Virginia against occupying Union forces.

[116] Glenn's Case, 4 Ct. Cl. 501 (1868); Hubbell v. United States, 2 Ct. Cl. 527 (1866).

[117] Beckwith v. United States, 2 Ct. Cl. 526 (1866).

[118] Wood v. United States, 25 Ct. Cl. 98 (1889).

[119] 14 Stat. 44, now codified at 28 U.S.C. 1496, 2512 (1976).

er the court ascertained that the loss occurred without the officer's fault or negligence, it was empowered to issue a decree directing the accounting officers of the Treasury to allow the officer the necessary amount in the settlement of his account.

The act is unique for two reasons. First, as the Court of Claims itself recognized, it gave that court equity jurisdiction in such matters.[120] Second, as the Supreme Court pointed out, the act authorized the Court of Claims to recognize a defense against a claim which the government could judicially establish only in some other court.[121]

The Court of Claims viewed the purpose of the 1866 Act as to relieve innocent disbursing officers from "the rigors of law and the consequent judgment of courts of law."[122] Because of this 1866 mandate to the Court of Claims, two different judicial standards of disbursing officer responsibility developed. The Supreme Court had already applied the strict liability standard, which continued to be followed by that Court and other courts.[123] The Court of Claims, on the other hand, imposed a reasonable-man standard.[124] As the court stated:

> To require that disbursing officers shall be gifted with prescience, or endowed with power to use superhuman efforts, so as always to avoid or prevent loss, would be to exact from mortals the exalted excellencies of superior beings. From the latter class, disbursing officers are rarely, if ever, appointed.[125]

The court would use its equity powers liberally,[126] as shown in *Jones v. United States.*[127] In *Jones,* the court ruled that payments made by a disbursing officer in good faith, even though excessive, may be authorized. The court, however, limited this to emergency situations.

The year 1866, however, also saw a significant increase in the responsibility of disbursing officers. The Act of June 14, 1866,[128] re-

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[120] Boggs v. United States, 44 Ct. C1. 367, 383–384 (1909).
[121] United States v. Clark, 96 U.S. 37 (1877).
[122] Boggs, supra note 120, at 383.
[123] *See* notes 104–107, supra, and accompanying text. ***See*** *also* United States v. Freeman, 25 F. Cas. No. 15,163 (C.C. Mass. 1845).
[124] Martin v. United States, 37 Ct. C1. 527 (1902).
[125] Glenn's Case, *supra* note 116.
[126] *See* Stevens v. United States, 41 Ct. C1. 344 (1906), and cases cited therein.
[127] 41 Ct. C1. 493 (1906).
[128] 14 Stat. 64, as amended, codified at 31 U.S.C. 492 (1976).

quired disbursing officers to use public money only as necessary for payments which they were required by law to make. Prior to this, disbursing officers were only held accountable for physical loss, deficiencies, or criminal misconduct. Henceforth, they had not only to safeguard the public money while it was in their possession, they had also to insure that the payee was legally entitled to receive it.[129]

This tremendous broadening of the disbursing officers' responsibility was not unfair considering the circumstances. Three separate facts must be remembered. First, the contracting process was relatively simple at the time. The myriad of statutes, regulations, and directives in force today had not been developed.[130] Second, as shown earlier, these disbursing officers were often the contracting officers who incurred the obligations. Third, they were often also the receivers of any supplies ordered (Navy pursers for example). Thus, they often exercised virtually total control over the procurement process at outposts and field offices.

Although this change was not necessarily an unfair imposition, it was nonetheless a change. Consequently, when reviewing United States *v. Prescott*,[131] discussed above, and its progeny, which imposed virtually strict liability on disbursing officers, it must be remembered that those cases dealt only with physical losses, not the additional responsibilities imposed in 1866.

The Act of June 14, 1866, is important for two other reasons. Its requirement for lawful payments would initiate the practice of requesting advance decisions from the Comptroller of the Treasury. Additionally, it would necessitate creation of the position of certlfying officer.

After 1866, disbursing officers developed the practice of going to the Comptroller of the Treasury prior to making a doubtful payment in order to request an advance opinion.[132] (The practice received an important impetus in 1868 when the Comptroller's certification of such payments became conclusive.[133]) This procedure was totally unofficial and the Comptroller's advance opinion was not binding on anyone.

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[129] Act of June 14, 1866, sec. 1, 14 Stat. 64.

[130] The present day system is actually an improvement over the system that developed between 1900 and World War 11. See Navy Contract Law § 1.3 (2nd Ed. 1959).

[131] 44 U.S. 658, 3 How. 578 (1845).

[132] *See* Machinery and Allied Products Institution, The Government Contractor and the General Accounting Offiie 21 (1966).

[133] Act of March 30, 1868, 15 Stat. 54.

The practice was statutorily recognized in 1894 in the Dockery Act,[134] one of the most important acts dealing with financial management in our history. Section 4 of the Act allowed disbursing officers or heads of departments to apply to the Comptroller for advance decisions which would govern the later examination of the Comptroller.[135]

Some writers[136] have quite correctly pointed out that the language of the statute says that the advance decision "shall govern" the Comptroller. It is not made binding on any disbursing officer or department head. Despite this language, the Attorney General ruled in 1897[137] that such advance decisions were final and conclusive on the Executive branch. Furthermore, he withdrew from rendering opinions in questionable payments, saying that the Dockery Act made such rulings the sole province of the Comptroller.[138]

These advance decisions were intended to provide relief to disbursing officers by giving them an authoritative opinion as to the propriety and legality of proposed payments. Quickly, however, this avenue of relief became a two-edged sword. The Comptroller General decided that seeking such an advance opinion was the only safeguard for a disbursing officer. Failure to seek such an opinion became *prima facie* evidence of negligence or lack of due care. Reliance upon the advice of the Attorney General,[139] the agency general counsel,[140] or one's commanding officer[141] was an unworthy substitute. As a result, the threat of personal liability coupled with the virtually mandatory nature of the advance decision system combined to force disbursing officers to involve the Comptroller in the process as soon as possible.

The advance decision concept also, in effect, changed the jurisdiction of the disbursing officer. Remember that the Act of March 3, 1817, had been interpreted to mean that all doubtful claims and demands must be settled and adjusted in the Treasury Department.[142] Under that stat-

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[134] Act of July 31, 1894, ch. 174, 28 Stat. 162.

[135] *Id.*, § 4, at 205.

[136] *E.g.* Cibinic and Lasken, *supra*, note 11; Baum, *The Comptroller General and Arbitration: The Last* Word, 35 F.B.A.J. 228 n.19 (1976).

[137] 21 Op. Atty. Gen. 530 (May 6, 1897); 22 Op. Atty. Gen. 581, (Sept. 13, 1899). See also Cnited States *ex rel.* Brookfield Construction Co. v. Stewart, 234 F.Supp. 94 (D.D.C.), *aff'd* 339 F.2d 753 (5th Cir. 1964).

[138] 21 Op. Atty. Gen. 178 (May 22, 1895); 21 Op. Atty. Gen. 188 (June 8, 1895); opinions cited in note 137, *supra*.

[139] *See* note 20, *supra*.

[140] 55 Comp. Gen. 297 (1975).

[141] 7 Decisions of Comptroller of Treasury 268, 271 (Dec. 10, 1900). *But* see note 158, *infra*.

[142] *See* 4 Decisions of Comptroller of Treasury 332 (Dec. 17, 1897). See note 492, *infra*.

ute, once the disbursing officer determined that a voucher represented a doubtful claim or amount, the matter had then to be submitted to the Treasury for resolution. The advance decision concept, however, allowed the disbursing officer to retain jurisdiction over such payments, but allowed him or her to transfer temporarily such matters to the Treasury. Normally, the advance decision would be rendered and the matter returned, except in those cases where the matter was deemed dubious enough to require retention and resolution by the claims personnel of the Treasury.

The advance decision process and its mandatory nature as declared by the Comptroller General represent the second attempt to revive a facsimile of the pre-audit system.

C. THE DECLINE OF PERSONAL LIABILITY.

It is not known when certifying officers first appeared in the disbursing system. Certainly as the individual disbursing officer's duties become more widespread and diverse, other officials would have to report to him that goods had been delivered or that employees had worked a full month. The 1866 imposition of the requirement that disbursing officers insure lawful payment certainly aided in the development of such an infrastructure. By 1890, the Court of Claims noted that vouchers were certified before they were sent to Washington for payment.[143]

By **1912,** this infrastructure had become so large that Congressional attention was required. The agencies had large staffs to prepare and examine vouchers before they were sent to the disbursing officers. Nevertheless, the disbursing officers continued to use their own subordinate clerks to re-examine the vouchers before payment. To eliminate this duplication of effort, Congress passed a law which required examination by the administrative heads of divisions and bureaus in the executive branch and not by the disbursing officers. Such officers would only determine whether the vouchers represented legal claims against the United States.[144] The Congressman who introduced the law, Mr. Johnson of South Carolina, said this meant that the disbursing officer was not like the Auditor or Comptroller of the Treasury, with authority to examine facts and inquire into the expediency and propriety of the claim.[145]

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[143] Bartlett v. United States, 25 Ct. C1. 389, 392 (1890).
[144] 37 Stat. 375 (1912); codified at 31 U.S.C. 82 (1976).
[145] *See* Itnyre, *supra* note 11, at 3.

This 1912 statute all but made official the concept of a certifying officer. For the next twenty years there would be numerous admonitions by the newly created Comptroller General and many legislative proposals to formalize the certifying officer concept and separate disbursing from the individual agencies. None would be successful until June 10, 1933.

Franklin Roosevelt, on his 98th day as President, surprised Congress by issuing Executive Order No. 6166 which transferred the disbursing function of all agencies to the Treasury Department and its then created Division of Disbursement. This division would disburse moneys only upon the certification of persons who were legally authorized to incur obligations upon behalf of the United States. These officials would be accountable for improper certification, not the disbursing officers.[146]

The Comptroller General ruled that the order created a new class of accountable officer but did not reduce the liability of disbursing officers.[147] The numbers of the new class of accountable officer were severely reduced the following year when Executive Order No. 6728, dated May 29, 1934, exempted the War, Navy, and Post Office Departments, along with various minor activities, from the provision for centralized disbursement.

Executive Order No. 6166, although weakened by Executive Order No. 6728, represented the third and most successful attempt to revive a facsimile of the pre-audit system. By 1933, however, sheer numbers and volume of transactions had destroyed the possibility of a pre-audit system as envisaged by the Founding Fathers.

Executive Order No. 6166 did leave unanswered questions nevertheless. As the Comptroller General stressed in his 1940 annual report, it was necessary to define clearly the duties and responsibilities of certifying and disbursing officers; "to provide the closest possible relationship between liability and fault" by placing accountability on the certifying officers for an improper certification, and not on the disbursing officer who acted on this false certification; to have certifying officers bonded so that "adequate protection may be provided for the United

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[146] It is interesting to note that this aspect of the executive order which made such a drastic change in federal financial management was not viewed as so important at the time. Time Magazine, in its June 19, 1933 issue discussing the Executive Order, did not mention the Division of Disbursement but did mention that the order abolished the National Screw Thread Commission.

[147] *See* note **64,** *supra.*

States in the event of improper certification;' and to permit the Comptroller General to relieve certifying and disbursing officers from liability if no fault or negligence were involved. This last item was suggested because it would reduce the workload of Congress and minimize the likelihood of relief in other than clearly meritorious cases. (Private relief bills in Congress were a primary source of relief to disbursing officers.)[148]

Congress immediately adopted these proposals and incorporated them into the Certifying Officers Act of 1941.[149]

The Act stated that disbursing officers would disburse moneys only upon, and in strict accordance with, vouchers duly certified by the head of the agency or by his duly designated agent. The disbursing officer was required to make such examination of vouchers as may be necessary to ascertain that they were (1) in proper form; (2) duly certified and approved; and (3) correctly computed on the basis of the facts certified. This last requirement was shifted, one year later, into the area of responsibility of the certifying officer.[150]

Obviously, this reduced substantially the potential liability of the Treasury Department disbursing officers. (The Act specifically exempted the War and Navy departments but did not mention the Post Office Department, which also was exempt from the Executive Order.) Henceforth, they were required to insure only that the voucher was certified and regular "on its face." As the "face" of the voucher changed over the years from printed page to computer magnetic tape, their potential liability decreased even more. The officers were still subject to the high standard of care for safeguarding public funds in their possession, but the days of the money chest crammed with cash were gone. Now the disbursing officer's funds consisted mostly of funds credited in his account, with only a relatively small amount of cash on hand.

The certifying officer now became the bearer of the brunt of potential liability. Under the Act, he was responsible for the existence and correctness of the facts represented on the voucher or its supporting papers and for the legality of the payment. He was required to be bonded and to make good to the United States the amount of any ille-

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[148] *See* Ms. Comp. Gen. B–128067, June 8, 1956, wherein the Comptroller General discusses his 1940 annual report.

[149] 55 Stat. 875 (1941); codified at 31 U.S.C. 82b–82e (1976).

[150] Act of April 28, 1942, 56 Stat. 244, codified at 31 U.S.C. 82*f* (1976).

gal, improper, or incorrect payment resulting from any false, inaccurate, or misleading certification made by him as well as for any illegal payment. This liability could be enforced in the same manner and to the same extent as for disbursing officers.[151] Certifying officers were, however, authorized to request advance decisions from the Comptroller General.[152]

The Comptroller General was allowed to relieve the certifying officer if (1) the certification was based on official records and the certifying officer did not know and by reasonable diligence and inquiry could not have ascertained the true facts, *or* (2) the obligation was incurred in good faith; the payment was not contrary to any statute; and the United States had received value for such payment.[153] These rather expansive exceptions resulted in a marked decrease in the potential liability for the certifying officer and also on the Treasury Disbursing Officers.

The Act did not reduce the liability for military disbursing officers. They were exempted from its provisions.[154] Congress, however, authorized relief for such officers for physical losses or deficiencies of moneys, vouchers, checks, and securities. If the Secretary of the department determined that the loss or deficiency occurred in the officer's line of duty and without his fault or negligence, this determination was to be conclusive on the General Accounting Office (GAO). The statute specified that no relief under the Act was to be granted for any illegal or erroneous payment.[155] In 1947, Congress granted similar protection to civilian agency disbursing and other accountable officers.[156]

After this, disbursing and certifying officers became virtually the sole province of Congress and the GAO. The courts' last major appearance in this area brought nearly fatal results to the concept of personal liability.

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[151] 31 U.S.C. 82d (1976). For discussion, see notes 90–94, *supra,* and accompanying text.

[152] 31 U.S.C. 82d (1976).

[153] 31 U.S.C. 82c (1976).

[154] 31 U.S.C. 82e (1976).

[155] Act of Dec. 13, 1944, 58 Stat. 800, codified at 31 U.S.C. 95a (1976). A similar act existed for the Navy, Act of July 11, 1919, 41 Stat. 132. The two were merged by the Act of Aug. 11, 1955, 69 Stat. 687, into 31 U.S.C. 95a. See text at notes 615–624, *infra,* concerning relief from liability for erroneous payments.

[156] Act of Aug. 1, 1947, 61 Stat. 720, codified at 31 U.S.C. 82a–1 (1976).

The 1932 case of *United States* v. *Heller*[157] arose in the district court of Maryland. It was a test case brought by the Attorney General at the urging of the Comptroller General against a military disbursing officer who purchased caskets in France for the reburial of American soldiers. The government urged that the contract was illegal and the officer must reimburse the government.

The court disagreed and held that a disbursing officer making an a p parently lawful payment in good faith, on express orders of a superior, is not liable, notwithstanding the fact that the payments might be unauthorized. This case was not appealed or overruled. Left standing, it creates a gaping hole in any threat of imposition of liability on military disbursing officers.[158] It is essentially an application of the reasonable-man standard that the Court of Claims had developed in granting rlief.

The court relied heavily on the earlier case of *United States* v. *Warfield*,[159] and quoted

> I have not found a reported case in which an innocent disbursing officer has been held liable under such circumstances. It hardly seems that the financial operations of the government could go on if at the peril of refunding the money every subordinate was required to exercise his own judgment as to whether an apparently legal claim which his superior directed him to pay was to be paid or not.[160]

Considering such language, it is not surprising that the Comptroller General was content not to bring such issues to court again.

D. *THE DELUGE AND SOME SOLUTIONS*

The practice of reviewing and checking such certifications and disbursements had become a crushing burden. Often carloads of documents were backlogged in the Washington freight yards awaiting examination [161]

The Department of Agriculture designed a plan to eliminate such backlogs. A statistical plan was instituted which would cut down on the examination and certification of vouchers. Only a representative

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[157] 1 F. Supp. 1 (D.C. Md. 1932).
[158] It also essentially obliterated 7 Dec. of Comp. Treas. 268, 271 (Dec. 10, 1900).
[159] 170 F. Rep. 43, 45 (4th Cir. 1909). See Morgan, *supra* note 18, at 1302–1303.
[160] *Id.*
[161] *See* **Mosher,** *supra* note 76, at 77.

sampling would be examined to insure compliance with law and regulations. The Comptroller General negated such a practice in 1963 because it violated the spirit and intent of the 1941 Act. He did, however, leave the door open for Congress to authorize such a practice in the interest of economy and efficiency.[162]

Congress immediately took the hint. In 1964, it passed Public Law 88–521,[163] which authorized agency heads, in the interest of economy, to use adequate and effective statistical sampling procedures in the examination of documents. No certifying or disbursing officers acting in good faith would be liable for payment made on vouchers not subject to specific examination. Those officials, however, were not relieved of their responsibility to pursue collection action once an erroneous payment was discovered. The maximum amount for vouchers to be eligible for such sampling was $100, but that has since been raised to $500.00.[164]

Finally, in 1972, Congress eliminated the bonding requirement for certifying and disbursing officers.[165] The bonding process was too expensive, far exceeding the value of claims. Henceforth, the government would be a self-insurer in such matters.[166] This act was vitally important for two reasons. First, it virtually eliminated any chance for the Government to recoup from its officials any loss due to an erroneous payment. It is not at all uncommon for a certifying or disbursing officer in an average month to authorize payments of over one thousand times his annual salary. Without a bond, any meaningful reimbursement from such officials would be nil. Second, the bond had always been a prime basis on which courts, especially, based personal liability.[167] Now that this requirement is gone, although personal liability as a matter of law still remains, it is substantially weakened.

N. RELATIONSHIP WITH THE CONTRACTING OFFICER

Considering that certifying and disbursing officers are responsible

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[162] 43 Comp. Gen. 36 (1963).

[163] Act of August 30, 1964, 78 Stat. 700, codified at 31 U.S.C. 82b–1 (1976).

[164] Pub. L. No. 93–604, Act of Jan. 2, 1975, 88 Stat. 1959; 3 GAO Manual para. 45.1. *See* GAO Manual, note 31, *supra*, section 45, for a complete discussion of the statistical sampling system.

[165] Act of June 6, 1972, 86 Stat. 213.

[166] *See* S. Rep. No. 92–790, 92d Cong., 2d Sess., 1972 U.S. Code Cong. & Admin. News 2364.

[167] *See* text above notes 102, 103, *supra*.

for insuring the legality and propriety of contract payments, knowledge of the procurement process would presumably be a prime prerequisite for their appointment. As has been seen, however, procurement knowledge is not normally a criterion for selection. When specific criteria are listed, they normally center upon accounting experience.[168] The Army, for example, recognizing "that it is necessary for finance and accounting personnel to have some knowledge of procurement," attempts to summarize the procurement process in one chapter in its finance regulation dealing with commercial accounts.[169] Such a synopsis is obviously of little value for the certifying or disbursing officer in his or her daily job. These officers, therefore, must rely heavily on the knowledge, judgment, and integrity of the contracting officer and his or her personnel.

The need for such reliance coupled with the requirement to be independent has produced a unique relationship with the contracting officer. The symbiotic relationship may be described as (1) independent, with some exceptions, and (2) mutually supportive.

A. *INDEPENDENCE*

The certifying or disbursing officer is intended to be independent of the contracting officer. The fact that a contracting officer has approved a payment does not relieve the accountable officer from this duty of determining that the payment is legal and proper.[170] If a contracting officer has made a decision concerning which the certifying or disbursing officer has doubts, the accountable officer has the right to apply to the Comptroller General for an advance decision on the legality of payment.[171] The certifying or disbursing officer must be assured of the le-

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[168] *See* text above notes 55–57, *supra*.

[169] Army Reg. No. 37–107, Financial Administration: Finance Accounting for Installations: Processing and Payment of Commercial Accounts, chapter 2, Procurement Background (change 18, 27 Nov. 1974). *See also* AR 37–103, *supra* note 27, para. 3–2.

[170] An example may be found in Comp. Gen. Dec. A–13215, 7 Comp. Gen. 797 (1928). However, the requirement for strict accountability concerning contract claims seems to have been changed by the Contract Disputes Act of 1978, Pub. L. No. 95–563, 92 Stat. 2383, codified at 41 U.S.C. 601–613. *See* discussion in text above notes 499–500, *infra*. *See also* note 522, *infra*, regarding decisions which are solely the province of the contracting officer.

[171] *See* Neutra and Alexander, IBCA No. 408, 1964 BCA 4485 (1964). In this case, the certifying officer requested an advance decision regarding the propriety of paying on a change order issued by the contracting officer. The Comptroller General stated that such a payment would be improper. Ms. Comp. Gen. B–150094, Apr. 3, 1963. The Interior Board of Contract Appeals sent the case back to the contracting officer, directing him either to settle the case by agreement or to render an appealable final decision. *See also*

gality of the payment and should return the voucher to the contracting officer for more documentation until he is satisfied.[172]

This independence is not absolute, however. In certain situations, such as contract claims, the decision of the contracting officer is final and conclusive and must be followed by the accountable officer.[173] Another important qualification on independence depends on whether a certifying or disbursing officer has been involved in the procurement process.

In *Lakeland Medical Associates, Ltd.*,[174] the Armed Services Board of Contract Appeals was faced with a situation in which the contractor had been billing for services that were beyond the terms of the contract. The contractor's invoices were sent directly to the Indian Health Services certifying officers who certified them for payment. When the contracting officer eventually became aware of this on a later contract, he attempted to recoup the money paid on the earlier contract. The board ruled that the government was bound because the contractor was entitled to rely on the long course of dealing between the parties under the prior contracts. Furthermore, *"because the certifying officer's function is part of the procurement function, not the finance function,"* the certifying officer's knowledge as to what the payments were for was imputed to the contracting officer.[175]

The board's stereotyping of certifying officers as part of the procurement function is unfortunate. Such a concept might have been the perception of the drafters of Executive Order No. 6166, which prescribed certification by those authorized to incur obligations.[176] However, it is clearly not the reality today. While some certifying officers (such as a GS–16 center director) might very aptly be characterized as participants in the procurement function, most such officials perform purely financial roles and are, in fact, appointed on the basis of their financial expertise.

The decision in *Lakeland Medical Associates, Ltd.*[177] places an unrealistic gloss over the entire process. In reality, certifying officers are not subordinates or agents of the contracting officer. They are the

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Pasley, *The S & E Contractors Case—Beheading the Hydra or Wreaking Devastation,* 1973 Duke L. J. 1, 25.

[172] *E.g.*, Comp. Gen. Dec. B–141167, 39 Comp. Gen. 548 (1960).

[173] *See* text at notes 494–500, *infra*.

[174] ASBCA No. 13,040, 78–1 BCA para. 22028 (1978), 20 G.C. 159 (1978).

[175] *Id.*

[176] *See* Discussion in text at beginning of subsection II.B, above note 47, *supra*.

[177] Note 174, *supra*.

connecting link between the agency's procurement division and the Treasury Department disbursing officers. It is disruptive of the entire process arbitrarily to classify all certifying officers according to one function for the purpose of imputing knowledge to the contracting officer. Such a classification should depend on the title and position of the individual certifying officer. Despite these 'difficulties with the decision, *Lakeland Medical Associates, Ltd.*[178] is still in force as a ruling.

Exactly the opposite result was reached by the Comptroller General in a case involving very similar facts.[179] A General Services Administration contract provided for payment under a specific method of computation. The contractor was actually paid on the basis of invoices using a different method. Successive contracts were concluded which involved the same disparity in payment procedures. When the contracting officer discovered the error, he attempted to recover the money paid on all the prior contracts.

The Comptroller General ruled that the government could recover on the first contract, because it unambiguously required the government's method of computation. However, recovery on the subsequent contracts was not allowed, because the contractor was entitled to rely on the government's apparent interpretation of the first contract. Regarding the frst contract, the Comptroller General stated that the interpretation, in order to be binding, must be the conscious action of a *responsible* agent. Government fiscal or finance officers ordinarily do not play a significant part in the process of negotiating and administering contracts. Therefore, the government could not be bound.[180]

The two decisions, therefore, appear to be irreconcilable. An acceptable middle ground, however, appears to have been reached. In *Universal Ultrasonics, Inc.*,[181] the contractor delivered certain property to a Veterans Administration hospital. The firm then sent an invoice to the hospital fiscal office. The invoice was paid without an official inspection of the property by an authorized qualified inspector and without acceptance of the property by the contracting officer in accordance with contractually specified procedures for inspection and acceptance. When a dispute later developed over the property's conformance with the contract specifications, the contractor argued that the payment represented acceptance.

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[178] *Id.*

[179] Ms. Comp. Gen. B–157999, March 28, 1966; 8 G.C. 225 (1966).

[180] The ruling was based on Jansen v. United States, 170 Ct. Cl. 346, 344 F.2d 363 (1965), to be discussed *infra.*

[181] VACAB No. 1014, 73–2, BCA 10095 (1973).

The Veteran's Administration Board of Contract Appeals disagreed. Although it did not fully discuss the issue, the board seemed to base its decision on the fact that the contract called for a specific type of acceptance which payment alone would not satisfy.[182] The case apparently stands for the proposition that, if the contractor is clearly put on notice of areas in which the certifying officer is impotent, the government can argue with hope of success that erroneous acts of the certifying officer may not be imputed to the contracting officer, thereby binding the government, on grounds of apparent authority.

The ability, or lack thereof, of disbursing officers to so bind the government is not questioned. In 1924, the Court of Claims recognized that a disbursing officer is an officer of very limited power whose a p proval could not create a liability against the United States where none existed before.[183] This same notion was implicit in the Court of Claims decision in 1965 in Jansen *v.* United *States.*[184] In that case the court said that payment by an Air Force disbursing officer is not binding on the government, because payment was not made by the "contracting officer or anyone else in authority at the air base."[185] Essential in such language is the notion that the disbursing officer performed a primarily ministerial function.

The Armed Services Board of Contract Appeals, in direct contravention of its view of certifying officers expressed in Lakeland *Medical Associates,* Ltd.,[186] has ruled that disbursing officers are not entitled to make a binding interpretation of contract language because they do not ordinarily play a significant role in the process of negotiating and administering contracts.[187] Their role is purely ministerial.[188]

The view that the role of the accountable officer is merely ministerial is not shared by the Comptroller General,[189] to whom such officer must account. Such a perception of accountable officers as ministerial bureaucrats appears based on the fact that, in practice, accountable officers pay virtually all the vouchers presented to them. This fact may

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[182] *Id.*
[183] Southern Pacific Co. v. United States, 59 Ct. Cl. 36 (1924).
[184] *See* note 180, *supru.*
[185] *Id.*
[186] Note 174, *supra.*
[187] A Padilla Lighterage Inc., ASBCA No. 17288, 75-2 BCA 11406 (1975). The case involved a decision of the disbursing officer to pay the contractor's monthly invoices at a current rate of exchange rather than at the contract rate. Note that the language used is virtually identical to that contained in Ms. Comp. Gen. B-157999, *supra* note 179.
[188] *Id.*
[189] *See* notes 224-227, *infra,* and accompanying text.

lead to the erroneous assumption that such payment is not discretionary with the accountable officer. This overlooks the independent duty of the accountable officer to determine the vouchers' legality. At the same time, such a notion is actually accurate regarding present day certifying and disbursing officers. Because of the voluminous number of payments to be made, examination, if made at all, is perfunctory, and the role has, in fact, been reduced to a ministerial one.

Consequently, a dichotomy exists. On the one hand, it is presumed that payment by a disbursing officer is not binding regarding the procurement functions of the agency. Conversely, a presumption appears to exist, at least in decisions of the Armed Services Board of Contract Appeals, that certification by the agency certifying officer, independent though he is, connotes the agency's (including the contracting officer's) determination that the facts and amounts stated in the contractor's invoice are correct. Absent fraud or clear notification in statutes, regulations, or the contract that certain actions are beyond the authority of a certifying officer, this certification will be binding on the government.

Considering the independence of the certlfying or disbursing officer, the relationship between that officer and the contracting officer is essentially that of two individuals who exercise absolute control over one domain, like Roman consuls with veto powers. Both must concur in an action for it to be successfully completed, but either may render a decision which would terminate a course of action.

B. MUTUAL SUPPORT BETWEEN OFFICIALS

Certifying and disbursing officers are totally dependent on the information supplied to them by the contracting officer and his or her representatives, such as inspectors. Without such data, no basis would exist for certification and payment. The contracting officer is charged with funneling copies of all vital contractual documents to these officials who certify and pay so they may aid in the successful completion of the contract.[190] Conversely, the certifying and disbursing officers apprise the contracting officer of actions taken by them in regards to payments.[191] This mutual flow of documents and information is vital to the work of each official.

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[190] AR 37–107, note 169, *supra,* para. 2–2, 2–11g, 2–14.

[191] *E.g.,* Defense Acquisition Regulation, Appendix E, §§ E–602.3, E–610.4 (hereinafter cited as DAR). The DAR may be found in Title 32, Code of Federal Regulations (1979).

V. PRIOR TO AWARD

Much happens prior to award of the contract that will have impact upon work of the certifying or disbursing officer. That officer, however, is uninvolved at that point, except for certifying the availability of funds of the type and in the amount needed to carry out a proposed purchase of goods or services.[192]

The first important step is the placing of the public money in the agency's accounts for the certifying and disbursing officers to draw on. The budgeting, appropriating, apportioning, and allocating process is a lengthy, complex ordeal.[193] It results in division of the funds in the agency's coffers among numerous projects or categories. The funds thus individualized may not be exceeded for a particular project or category of expenditure.

The agency accounting office will advise the certifying or disbursing officer how much is available for payment on a particular contract. However, it is the certifying or disbursing officer who bears the responsibility for ensuring that the payment is lawful, that it does not exceed the specified amount, and that it is not being used for a different purpose than originally intended.[194] This advice from the accounting office represents the modern equivalent of the money chest crammed with cash. At present the money for payment is merely credited in the accounts of the agency for which the certifying officer certifies, and in the account of the disbursing officer. Only a miniscule portion of the money will be physically present (in the form of coins and currency) in the agency offices. Normally it will be presented by check.[195]

The initial step involving finance personnel in the procurement process is the submission by the contracting officer of a purchase request form to the finance office. On the basis of this request, the necessary

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[192] *See* notes 48 and 49, *supra* and text thereat.

[193] *See* Chermak, *Financial Control, Congress and the Executive Branch,* 17 Mil. L. Rev. 83 (1962); Gallimore, *Legal Aspects of Funding Department of the Army Procurements,* 67 Mil. L. Rev. 85 (1975); Pace, Negotiation and Management of Defense Contracts, chapter 11 (1970); Army Reg. No. 37–20, Financial Administration, Administrative Control of Appropriated Funds (1 Aug. 1980) (hereinafter AR 37–20); Lewis, *Federal Fund and Account Structure,* 15 Fed. Acct. 23 (No. 4, 1966).

[194] *See* text at notes 547–549, *infra* for a discussion of the Anti-Deficiency Act.

[195] *See* Lewis, *Federal Fund and Account Structure,* 15 Fed. Accountant at 23, 42–43 (No. 4 1966); *seee also* AR 37–20, note 193, *supra.*

funds will be committed or reserved by the accounting branch of the finance office.[196]

After receiving notice that the funds are available, the contracting officer may then proceed to award of the contract. Before the award, however, the decision is made as to which office will be the certifying or disbursing office.[197] This decision often has a tremendous impact on the financial prospects of the contractor and will be of great concern to him.[198]

Consider the following example: An agency in Washington is planning to award a production contract to a California firm. If the certifying or disbursing office is at the agency's headquarters in Washington, then, to receive payment, the contractor must send all invoices across the country. This normally takes at least two to three days. If an invoice is processed immediately, the check then must be sent back, for a loss of another two to three days. Over the life of a contract, especially if the contractor is receiving partial or progress payments, such transcontinental delays would cost a great deal of money in lost interest on the unreceived money, interest spent on borrowed money, lost discounts from suppliers, and higher prices. To alleviate this problem, companies will often hand-carry the invoices to the proper office and hand-carry payment back. Such a practice, however, would also be highly expensive in this coast-to-coast example. Contractors, therefore, are most anxious to have the certlfying or paying office as close as possible to their plants or billing offices.

Problems such as this have been substantially reduced as a result of two interrelated developments: the use of modern telecommunications equipment,[199] and the creation of fully automated accounting and disbursing systems comprised of multiple field offices throughout the United States. Although such systems are becoming more numerous,[200] attention will be focused on only one such system, the Defense Contract Administrative Service (DCAS).

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[196] *See* AR 37–107, note 169, supra, para. 2–2a. See also notes 48 and 49, supra, and accompanying text.

[197] This must be specified in the contract. See, *e.g.*, Standard Form 26, Federal Procurement Regulations § 1–16–901–26 (hereinafter FPR); DAR, note 190, supra, § 20–706. The Federal Procurement Regulations and other agency procurement regulations may be found in Title 41, Code of Federal Regulations. See also note 191, supra.

[198] *See* Pace, Negotiation and Management of Defense Contracts 581 (1970).

[199] The electronic fund transfer system would essentially eliminate this problem. See note 650, *infra.*

[200] The Veterans Administration, for example, utilizes a central accounting and certifying center in Austin, Texas, to which data is sent from all of its 222 field stations.

An agency of the Department of Defense, DCAS administers the majority of defense contracts, especially the large production contracts. The individual military services still administer many of their own contracts, particularly those dealing solely with the individual post (on-post construction, painting, and janitorial services, for example).[201] Because DCAS, when requested, will also administer contracts for civilian agencies such as NASA or the Energy Department,[202] it must be studied because of its effect on both the certifying and disbursing officer system. As will be seen, the main difference is that DCAS, because of its responsibility for a very wide geographical area, utilizes essentially a totally automated system of administration and disbursement. Such automated systems are in sharp contrast with the administration and disbursement done by the local military commands. Such commands are not fully automated because all contracts and other supporting documents are delivered or prepared within the area.

The contract will specifically designate the place to which invoices are to be sent.[203] If DCAS is to administer the contract for a DOD department, the designated DCAS disbursing officer may be listed. If DCAS is to administer the contract for a non-DOD department, the office which handles disbursements for that department should be listed as the paying office.[204] Once selected, the disbursing office may be changed if necessary.[205]

This selection of a paying office from a wide-spread system can lead to difficult verification problems in the future. In one recent case,[206] the GAO discovered that valid payment of $306,749 due on a contract was made by the New York DCAS office. A copy of the same contract was also sent to the Philadelphia DCAS office, except that the designated paying office had been changed from New York to Philadelphia, and the place to which payment was to be sent was also changed. Fraudulent invoices were then sent to the Philadelphia office, which paid $306,749 on the basis of these invoices. The clerk, however, sent

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[201] The listings of specific types of contracts DCAS will normally not administer are in DAR, note 191, *supra*, § 20–703.

[202] *See* DAR, note 191, *supra*, § 20–501–§ 20–506. *See also* note 260, *infra*.

[203] *E.g.*, Standard Form 26, FPR, note 197, *supra*, § 1–16.901–26. In fixed price contracts, invoices for partial or final payments will normally be sent to the certifying or disbursing office. In cost reimbursement contracts or contracts called for advance or progress payments, the invoices or requests for payment will be sent to the contracting officer for his approval.

[204] DAR, note 191, *supra*, § 20–706a.

[205] DAR, note 191, *supra*, § 20–707.

[206] Ms. Comp. Gen. B–197559, at 18–19 (Nov. 21, 1980).

the check to the legitimate vendor instead of to the place designated in the altered contract. The error was discovered when the legitimate vendor reported the receipt of the second check. It is not known how long or how often similar incidents had occurred.

As noted, all these pre-award actions, while of vital importance to certifying and disbursing officers eventually, do not require action on their part yet.[207] There is one area, however, in which disbursing officers have a specific responsibility prior to award. Certain procurements require bidders to submit bonds. If the bidder submits a United States bond or note, certified or cashier's check, bank draft, money order, or currency in lieu of such bonds, the contracting officer is required to promptly turn over such securities to the disbursing officer[208] for safekeeping until the obligation of the bond has ceased.[209] Until then, the disbursing officer exercises the same responsibility toward those instruments as he does for the public money.[210] If a negotiable instrument payable to the Treasury of the United States is submitted in lieu of a bid bond and is lost, the Treasury Department under 40 U.S.C. 725[211] may execute an indemnity agreement to protect the bidder and his bank. If the check is cashed, the United States must honor its indemnity agreement with possible liability being imposed on the disbursing officer.[212]

V. DURING CONTRACT PERFORMANCE

In order to portray clearly the activities of certifying and disbursing officers regarding contracts, we will first examine their actions in effecting payment under a fixed-price supply contract involving only one payment. This examination will highlight what specific rules or pre-

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[207] Notes 48, 49, and 196, *supra*, and text thereat.

[208] For Air Force contracts, the bond must be turned over to the accounting and finance officer. Recall that while disbursing officers are normally also finance and accounting officers, this is not always the case. In the civilian agencies, the accounts are turned over to "the finance or other officer." It is up to the individual agency to designate who the official shall be. FPR, note 197, *supru*, § 1–20.204–1; DAR, note 191, *supra*, § 10–202.

[209] United States notes, however, may alternatively be deposited in a Federal Reserve Bank.

[210] 31 U.S.C. 5 (1976). *See* AR 37–103, note 27, *supra*, para. 5–9, for the procedures to be followed.

[211] Act of July 8, 1937, C. 444, § 3b, as added by Act of August 10, 1939, C. 665, § 2, 53 Stat. 1356.

[212] *See* Impact of Current Developments on the Legal Mission of DARCOM at 4 (Apr. 1978).

scribed practices exist for certifying and disbursing officers to follow. As was noted earlier,[213] however, specific guidance is sparse. The specifics that apply to relatively simple fixed price contracts must then be extrapolated and applied to the other types of contracts and financing arrangements.

An extrapolation of the specifics and an examination of the case law leads to five general principles that certifying and disbursing officers must follow. These principles are:

1. Make sure the contract is legal. Such a statement is good general advice but is totally useless as a daily guide. Certifying and disbursing officers do not have the knowledge, time, or resources to comply with such an all-encompassing principle. They do not have the knowledge because normally neither they nor their subordinates (who do the actual examining) have the requisite expertise in procurement. They do not have the time to examine each among the myriad of documents pertaining to the numerous contracts under their jurisdiction. Finally, they often do not have certain essential items, namely copies of the actual contracts and supporting documents, to examine fully. In automated systems, only abstracts of information are sent to certifying or disbursing officers.

2. Make sure the supporting documentation is adequate to support the payment. This is also difficult to achieve for the same reasons listed above. Most payments, however, need only one or two specific supporting documents, such as a receiving report or a contracting officer's approval, in order to be made. All systems, including automated ones, provide for a joinder of these documents with the voucher prior to payment.

3. Make sure the payment is authorized by the contract. Before certain payments (such as advance or progress payments) may be made, there must be a specific contract clause authorizing such payments.

4. Make sure the payment has been approved by the proper official. Although very similar to the requirement for adequate supporting documentation, this requires something more. Often while the supporting data is adequate to support a payment, the contracting officer may need to approve the payment and specify the amount. This is especially true in certain financing arrangements.

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[213] *See* note **57** *supra* and accompanying text, and text between notes 46 and **47,** *supra.*

5. Make sure the payment is made to the right party. This sounds obvious but, as will be seen, often the certifying or disbursing officer finds numerous claimants tugging at his coat sleeves and demanding the same check. Although this problem potentially must be faced with all payments, it is especially prevalent in final payments and will be analyzed in the section on final payment.

The certifying officer and disbursing officer systems are virtually identical up to the point that the voucher is authorized for payment. After that, the differences are manifest. Consequently, both systems will be combined for analysis up to that point of divergence.

A more profound difference, however, exists between systems which are "manual" (i.e., the mechanics of the process are done individually by clerical personnel) and those which are automated totally or partially (i.e., the mechanics are performed by computer on the basis of selected input). Both methods, must, therefore, be examined.

A. MANUAL CERTIFYING AND DISBURSING OFFICER SYSTEMS

Once contract award has been made, the contracting officer must furnish the certifying or disbursing officer with a copy of the contract, purchase order, or delivery order, and any modifications thereto.[214] In the disbursing officer system these documents will normally be retained in the commercial accounts section of the examination branch. As seen earlier, it is this section which will normally perform the certifying officer function.[215] In the certifying officer system, the retaining office might be the agency's accounting office.[216]

In order for the contractor to receive payment, this examining section must have a voucher; a copy of the contract, purchase order, or delivery order; a receiving report; and a vendor's invoice.

Vouchers are usually on Standard Form 1034[217] and are prepared by the examining section after the supporting documents are examined. The contract, purchase order, or delivery order, together with any

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[214] AR 37–103, note 27, ***supra,*** para. 3–29; EPA Manual, note 54, *supra*, chap. 4, section 2, para. 2.

[215] *See* AR 37–103, note 27, ***supra,*** para. 1–21, 1–22.

[216] *E.g.*, EPA Manual, note 54, *supra*, chap. 4, section 2, para. 2.

[217] *See* appendix to this article, ***infra.*** *See* text at notes 310–316, ***infra,*** for discussion of the form to be used on small purchases.

modification, is examined to insure it complies with all laws and "applicable regulatory requirements."[218] This classification is exactly as broad as it sounds. One agency states that the voucher examiner,[219] in order to carry out his responsibilities properly, is supposed to have a current and "generally extensive" familiarity with (1) agency directives, (2) the United States Code, (3) Comptroller General decisions, (4) volume 1 of the Joint Travel Regulations, (5) the Code of Federal Regulations, and (6) the Federal Travel Regulations.[220] Such knowledge, while possibly a legitimate criterion for selecting an agency general counsel, is simply unrealistic for lower-grade examiners.[221]

Because the examining personnel are not well versed in the myriad of procurement laws and regulations and because of the volume of paperwork involved, examination of contractual documents is often perfunctory and spotty. The examiners know that, before it reaches their desks, the contract has been reviewed by the contracting officer, contracting specialists, and, normally, legal officers. The examiners will not attempt to second-guess these personnel. Consequently, their review does not normally extend to judgmental factors such as whether the contract should have been obtained by formal advertising or negotiation.[222]

However, the examiner can perform essentially a checklist test, asking, is the paying office correctly identified on the contract; are all required signatures affixed; is the contract complete and correct as to accounting data; is the vendor indebted to the Government for any money.[223]

It is vital that all necessary documents be attached to vouchers submitted for payment. The Comptroller General has ruled that, if the certifying or disbursing officer is not satisfied with the supporting documentation, he should return the voucher and documentation for

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[218] AR 37–107, note 169, *supra,* para. 1–22d.

[219] The voucher examiner actually examines the contract and all supporting documents before preparing and examining the voucher.

[220] EPA Manual, note 54, *supra,* chapter 1, para. 4b(1); *see also* VA Manual MP–4, Part 111, Voucher Auditing para. 2.06 (C3, May 16, 1979) [hereinafter VA Manual].

[221] *See* text preceding note 45 and 72, *supra.*

[222] The Comptroller General has stated that the certifying officer is not required to verify if the contracting officer was correct in deciding whether or not to advertise for bids. An explanatory statement of facts, however, signed by the contracting officer, should be attached to the voucher. Comp. Gen. Dec. B–67837, 27 Comp. Gen. 73 (1947); VA Manual, note 220, *supra,* para. 2.07C.

[223] *See* Navy Comptroller Manual para. 046050–3; EPA Manual, note 54, *supra,* chap. 4, sec. 2, para. 2.9a.

administrative correction.[224] The accountable officer must obtain the necessary documentation regardless of the fact that payment might have been approved by the agency head.[225] This responsibility cannot be waived by contract clause.[226] This is especially true regarding all types of cost reimbursement contracts. While such contracts generally vest contracting officers with broad powers in approving reimbursable items, these powers are not unlimited. They may not offset the independent responsibility of accountable officers to require evidence in support of claims for payment.[227]

Receiving reports and certificates of performance are furnished by the appropriate accountable property officer who receives the equipment, or by the contracting officer, inspector, or other authorized person.[228] The receiving report[229] serves as evidence that the goods have been received and conform to the contract specifications. If the contract calls for services, then a certificate of performance is used.[230] The receiving support may also be used as the vendor's invoice if sufficient information is included and it is clearly marked as such.

Since 1964, however, it has not been necessary for DOD disbursing officers to delay payment until receipt of such reports. The Department of Defense in that year instituted a "fast pay" procedure which authorized payment on certain small purchases and other contracts prior to notification of receipt. The procedure was designed to benefit contractors by enabling them to receive payments sooner, and to bene-

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[224] Ms. Comp. Gen. B–179916, 11 March 1974. *See also* note 222, *supra*.

[225] Comp. Gen. Dec. A–14334, 5 Comp. Gen. 1011 (1926) (Attorney General).

[226] Comp. Gen. Dec. B–21378, 21 Comp. Gen. 598 (1941). For an example of how rigidly the Comptroller General requires this responsibility to be carried out, *see* Comp. Gen. Dec. A–66824, 15 Comp. Gen. 371 (1935).

[227] Comp. Gen. Dec. B–28072, 22 Comp. Gen. 169 (1942). *See also* Comp. Gen. Dec. B–20680, 21 Comp. Gen. 341 (1941), and Comp. Gen. Dec. B–15804, 20 Comp. Gen. 664 (1941), which required original signed receipts and copies of contracts with subcontractors (if required by contract) to be attached to the voucher.

[228] AR 37–107, note 169, *supra*, para. 3–2b.

[229] DOD uses DD Form 250, Material Inspection and Receiving Report. The civilian agencies use a variety of forms such as EPA Form 2550–1a, Contract Status Notification. *See also* VA Manual, note 220, *supra*, para. 2.07b(2). *See* appendix to this article for a reproduction of DD 250.

[230] Such inspection and receiving reports, however, are frequently inaccurate. The GAO recently discovered glaring errors. For example, a contractor was paid for painting a building that was not painted; two contractors were paid for painting the same building twice at about the same time; another contractor was paid for painting 343,900 square feet of surface area on 42 buildings when the buildings involved only had 193,270 square feet, a 78 percent overpayment. Ms. Comp. Gen. B–196952, January 9, 1980.

fit the Government by permitting it to take advantage of any prompt payment discounts available under the contract.[231]

Payment under this procedure is based on the contractor's invoice, which represents that the supplies have been delivered to a post office, common carrier, or point of first receipt by the Government.[232] Three conditions must be satisfied before the fast pay procedure may be used. These conditions are listed in a special clause required in all applicable contracts.

1. Individual orders may not exceed $10,000, with two exceptions. In procurements of brand-name subsistance items for resale at commissaries, and of commercial-type medical supplies for direct shipment overseas, the procedure may be used without limitation.

2. Title to the supplies must vest in the Government upon delivery to a post office or common carrier or upon receipt by the Government if shipped by other means.

3. The supplier must agree to replace, repair, or correct supplies not received at destination, damaged in transit, or not conforming to purchase requirements.

At present, the civilian agencies have authority to implement the fast pay procedure,[233] but have not done so to any large extent. The Environmental Protection Agency is testing fast payment under a pilot program by designation of the General Accounting Office.[234]

The vendor's invoice is of critical importance in the payment process. The contract requires the vendor to send a specific number (normally four)[235] of copies of a correct invoice to the office designated.[236] If the vendor fails to send the correct number[237] or if the voucher itself is incorrect, it will be returned for correction, with a corresponding delay in payment.[238]

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[231] The details of the plan are set forth in AR 37–107, note 169, *supra*, chap. 6, sec. V.

[232] The invoice should be clearly marked "FAST PAY" and "No DD Form 250 Prepared." Defense Logistics Agency, How to AVOID DELAYS in Payment, at 8 (Apr. 1980).

[233] Ms. Comp. Gen. B–158487, April 4, 1966.

[234] Interview with Mr. Marcus Pugh, Certifying Officer of EPA, December 30, 1980.

[235] *See* Standard Form 26, FPR, note 197, *supra*, § 1–16–901–26.

[236] *E.g.* DAR, note 191, *supra*, 7–103.7, FPR, note 197, *supra*, 1–7.101.7 (Fixed Price Supply Contracts); DAR 7–302.2 (Fixed Price Research and Development Contracts); DAR 7–602.7, Clause 7 (Construction Contracts).

[237] *See* ASBCA No. 10340, Carl B. Todd, 65–1 BCA 4823 (1965).

[238] It also extends the time for discounts. *See* text at notes 288–290, *infra*.

The required data for the invoice includes contract number, description of supplies or services, sizes, quantities, unit prices, terms of discount, date and number of invoice, and any required certification or supporting documentation.[239]

The contractor must take special care to insure the accuracy of the invoice because that document will receive particular scrutiny.[240] For example:

1. The quantity stated on the invoice will be checked against the quantity listed in the receiving report to insure that the Government is not paying for goods it has not received. Discrepancies often arise when a vendor bills for units which he did not know had been or would be rejected. Goods not accepted by the Government are considered not to have been received even though delivered by the contractor.

2. The unit prices will be compared with the prices listed in the contract. If the invoice shows a higher price, the accountable officer may pay the correct (lower) amount and furnish the vendor a copy of the adjusted invoice. Invoices may be accepted if they are submitted for less than the contract price.[241]

3. Arithmetic computations are checked for accuracy.

4. Discount terms on the invoice and procuring document are compared. If a discrepancy exists, the Government will use whichever discount is greater.

5. The date of receipt of the invoice in the correct office is also noted because this begins the computation of the discount period.

6. Items for which the United States is not liable (such as local and state taxes when the legal incidence of the tax is on the vendee) will be rejected.[242]

At this point the two systems diverge.

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[239] *See* How to **AVOID** DELAYS in Payment, note **232,** *supra,* at **29.**

[240] *See* **AR 37–107,** note **169,** *supra,* para. **5–23, 5–24.**

[241] AR **37–107,** note **169,** *supra,* para. **5–23; 7 Ag** Reg., note **53,** *supra,* section **3,** para. **88.5.**

[242] *See* Comp. Gen. Dec. **A–58702, 14** Comp. Gen. **464** (1934), wherein a disbursing officer erroneously paid the contractor for United States taxes paid by suppliers and the Comptroller General refused to grant him relief. ***See*** *also* Ms. Comp. Gen **B–151095,** May 9, **1963.**

B. DISBURSING OFFICE SYSTEM

After the examination and voucher preparation process is completed, the voucher and supporting documents are sent to the disbursing section for payment. This might be across the hall or merely to a different section of the same room.

If, however, the finance officer is not also the certifying officer, all supporting documents must be routed to the certifying officer for examination and preparation of the voucher.[243] The commercial accounts section will nonetheless review these documents before they are sent to disbursing.

On the basis of the examination by the commercial accounts section, the disbursing section will issue payment, normally by check.[244] The voucher will then be marked "Paid," with the date of payment and the symbol number of the disbursing office. A copy of the annotated voucher should be sent to the contractor with the check.[245]

Each month, the disbursing officer will prepare a statement of accountability (Standard Form 1219). This form shows summary totals of all receipts and disbursements made during the period and the status of the officer's account.[246] The original voucher must be attached to the SF 1219. These documents will be forwarded to the Treasury Department for review and will eventually be audited by the General Accounting Office.

C. CERTIFYING OFFICER SYSTEM

Once the voucher is approved for certification,[247] it will be listed on Standard Form 1166, Voucher and Schedule of Payments, which must be signed by the authorized certifying officer. The certified voucher and schedule of payments will then be sent to the designated regional disbursing office for payment. Once the voucher is received, the re-

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[243] AR 37–107, note 169, *supra*, para. 1–7; see *also* AR 210–10, note 63, *supra*, Installations — Administration, para. 4–4b (Change, 1978).

[244] *See* AR 37–107, note 169, *supra*, para. 6–41c if cash payment is made.

[245] Navy Comptroller Manual para. 046333–2; AR 37–107, note 169, supra, para. 3–8.

[246] AR 37–103, note 27, *supra*, chapter 18 gives detailed instructions on how the form is to be completed. *See also* Navy Comptroller Manual Chapter 7, Part E, section II; TRFM, note 19, *supra*, § 2–3140, *but* see TFRM, note 19, *supra*, 2–3110; AR 37–151, Financial Administration Accounting and Reporting for Operating Agency (Interim Change 104, 19 June 1980), chap. 5, sec. 11.

[247] *See* VA Manual note 220, *supra*, para. 2.10.

gional disbursing office will verify the signature by comparison with the Standard Form 210 card on file. That office will also insure that the schedule is valid on its face, and will render payment. It will retain the original schedule for the records and send the annotated copy back to the agency.[248] The regional disbursing office will prepare a monthly Statement of Accountability, Standard Form 1219, and the agency accounting office will prepare a Statement of Transactions which will eventually be used as the basis of GAO's periodic audits.[249]

D. NOTICE OF EXCEPTION

If during the audit, the General Accounting Office (GAO) discovers questionable payments, it will normally send notice of an informal inquiry, GAO Form 3010, to the accountable officer.[250] If the matter is not resolved by this method, a formal Notice of Exception is issued to the accountable officer.[251] The accountable officer must give the notice his prompt consideration and will reply on the Notice of Exception form itself, attaching any additional documents needed. The burden of proof is on the accountable officer to prove that the payment was proper. GAO is not required to prove that it was improper.[252]

If the reply is sufficient to statisfy GAO's questions, the Notice of Exception is marked "cleared" or "satisfactory." If it is not sufficient, then collection action must be initiated against the payee[253] or the accountable officer.[254] Once repayment is made, GAO must be notified so the account may be properly annotated.[255]

E. AUTOMATED CERTIFYING AND DISBURSING OFFICER SYSTEMS

There is no doubt that automation of payment processing is the wave of the future.[256] This development is mandated by the simple

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[248] TFRM, note 19, *supra*, § 4-2060.15; Treasury Department Circular No. 680 (2d rev., 9 Jan. 1974).

[249] *See* TFRM, note 19, *supra*, § 2-3145.10; 7 Ag. Reg., note 53, *supra*, section 3, para. 214; Lucas, *Financial Management in the Federal Government and a United States Treasury Perspective*, The Government Accountant 8 (summer 1979).

[250] 3 GAO Manual, note 31, *supra*, § 63.

[251] 3 GAO Manual § 61-63; AR 37-103, note 27, *supra*, chap. 11, EPA Manual note 54, *supra*, chap 1, para. 5g(2); Navy Comptroller Manual para. 047427.

[252] Comp. Gen. Dec. A-36301, 13 Comp. Gen. 311 (1934).

[253] *See* text at notes 442-468, *infra;* Navy Comptroller Manual para. 047428.

[254] *See* text at notes 577-587, *infra*.

[255] 3 GAO Manual, note 31, *supra*, § 64.

[256] *See* New Methods, *supra* note 12.

fact that manual systems cannot handle the volume of paperwork generated by the Federal Government as it approaches the 21st Century.

All federal agencies have some degree of automation. The Veterans Administration, Department of Agriculture, and DCAS are virtually totally automated. The Veterans Administration, for example, has implemented a system known as Centralized Accounting Local Management (CALM). Under this system, input from all the Administration's 222 field stations is telecommunicated to its centralized computer in Austin, Texas, where it is put on magnetic tape. When voucher and voucher schedules are prepared, only the totals of large groups of payments are shown. Individual payments are broken out on an attached magnetic tape.[257]

In such systems, the "hard copies" of the supporting documents are never seen by the certifying and disbursing officer. Indeed, such documents might be thousands of miles away in the purchasing office. The certifying and disbursing officers act on the basis of data placed in the computer by the various officers in the process. The JFMIP study cited as an example that one GS-4 records examiner was also the agency's certifying officer. Each month she certified $350,000,000 and spread out over 1.2 million individual payments. The only examination performed by the individual was comparison between the detailed listing totals and the summary listing totals. If they agreed, she certified the summary totals. No other examination was possible considering the volume of payments.[258]

The system of the Defense Contract Administration Service will be examined as representative of an automated system.[259] It is selected because it does handle both military and civilian agency contracts, and because it handles most large defense contracts.

Fundamentally, the DCAS system is the same as that used in the other DOD agencies. The similarities, however, are almost unrecognizable, because they must be implemented by vastly different

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[257] *See* New Methods, *supra* note 12, at 6.

[258] JFMIP Study, note 11, *supra,* at 31.

[259] For brief studies of other systems ***see*** JFMIP Study, note 11, *supra,* at 18–26; New Methods, note 12, *supra,* at 6–11. For a discussion of the Navy's automated system, Integrated Disbursing and Accounting (IDA), ***see*** Lynam, ***Here*** *Comes IDA,* Navy Supply Corps Newsl. 37 (Dec. 1976); Lynam and Dula, *Integrated Disbursing and Accounting: An Overview,* Navy Supply Corps Newsl. 25 (Dec. 1978).

procedures in order to adapt to **DCAS'** wide geographical jurisdiction.[260]

When a contract is designated for assignment to **DCAS,** the purchasing office will prepare pertinent parts of the contract in "machine processible form, e.g., magnetic tape, magnetic cards, punched paper tape, or punched cards." These pertinent parts will be culled to develop contract summaries ("abstracts"). This abstract will then be sent to the **DCAS** automatic data processing **(ADP)** point.[261] The various parts of these summaries will be used by the disbursing office, contract administration office, and consignees, among others, to perform their functions regarding the contract. All modifications must be abstracted and sent to the **ADP** point for ultimate transmission to the necessary offices.[262]

When the contractor has completed the material, he is required to send a **DD** Form **250** to the specified contract administrative office within twenty-four hours of shipment. If the contract specifies source acceptance, this **DD** Form **250** will serve as both the shipping and acceptance document as long as the local quality assurance representative (QAR) has signed the form. Such a procedure will expedite payment. If destination acceptance is required, payment is delayed.[263]

Once the item has been accepted either at source or destination, essential information from the **DD** Form **250** will be sent to the disbursing office.

The contractor then submits his invoices to the disbursing office. The invoice will automatically[264] be compared with the disbursing offi-

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[260] The basic guidance on DCAS procedures is contained in DOD Manual **4105.63–M,** MILSCAP, Military Standard Contract Administration Procedures (change **1, 21** May **1979)** (hereinafter cited as MILSCAP). That document, however, is extremely complicated; more understandable portrayals of the DCAS process are contained in Marko, *A Guide to DCASR Contractor Payments,* Contract Management **9** (Sep. 1980), and Fendrich, Why *MZLSCAP,* Contract Management, **12** (Sep. 1977). For other background, ***see*** *DCAS on DCAS,* Contract Management **4** (Mar. 1979), and Remick, *A Primer on Government Contracting,* 1 Nat. Contr. Mgmt. J. **110, 131–134** (No. **3, 1967).**

[261] MILSCAP, note **620,** *supra,* para. **3–2, 3–5.**

[262] Fendrich, *supra* note **260,** at **12.**

[263] *See* Marko, *supra* note **260,** at **11–12,** for a good discussion of this process. ***See*** *also* Defense Logistics Agency, *supra* note **232,** for a practical booklet outlining the steps necessary to expedite payment.

[264] Cost Type Contracts are currently processed manually. Marko, *supra* note **260,** at **12.**

cer's summary of data input as to item number, quantity, price, and other necessary information. This comparison process is now normally done automatically by the automatic payment of invoices (API) method inaugurated in 1976. If payment is not possible because of discrepancies noted, the information will be manually examined by a voucher examiner.[265]

Once payment is made, the funding activity (the original organization which signed the contract) is notified so that it may annotate its finance records. Such notifications are made throughout the life of the contract either by contract payment notice or periodic status reports of outstanding obligations.[266] Each month DCAS will send a copy of the statement of accountability (Standard Form 1219) to the appropriate departmental designees,[267] so those offices may properly administer, annotate, and control the fund appropriations that have been disbursed.

Such new systems do not develop without occasional mishaps which lead to overpayments and which plague the certifying or disbursing officer. In one instance, the contract progress payment clauses were not incorporated into the computerized data bank. Because no such clauses appeared, the computer records of past progress payments were not checked, and $765,000 had already been overpaid, and $5.2 million would eventually have been overpaid had the error not been discovered.[268]

Despite such mishaps, the systems are fulfilling their objective of maximizing the use of the computer to pay contractors. As the Defense Audit Service noted, "Using the same logic and criteria as a voucher examiner, the system was designed to accelerate the payment process by reducing manual manipulation of data and documentation."[269] The automated systems have accomplished that goal perhaps too well, as will be discussed now.

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[265] Marko, supra note 260, at 12.

[266] *Id.* at 12–13, MILSCAP, note 260, *supra*, chap. 9.

[267] MILSCAP, note 260, *supra* appendix H.

[268] Defense Audit Service, Report No. 906, Report of the Audit of Accounts Receivable, Defense Contract Administration from Service Region Los Angeles, Calif. (12 June 1978). See also Defense Audit Service Report No. 832, Report on Audit of the Automatic Payment of Invoice System at Defense Contract Administration Services Region, Boston, Massachusetts (10 Nov. 1977).

F. PROMPT PAYMENTS

Despite the rather convoluted process described above, payment is made very rapidly in accordance with policy guidelines calling for prompt payments.[270] In the Navy, for example, not counting fast payment procedures, discounts, and large defense contractor payments, payment usually occurs 40 days after receipt of the contractor's invoice.[271] Payments, in fact, have been made too promptly.

The government borrows money in the open market and must pay an interest charge. When it pays a contractor in advance of the due date, the government incurs additional expense over the amount of the payment made. A 1976 study by the Joint Financial Management Improvement Program illustrates the point.[272] A review of fifty payments made by the Forest Service revealed that 76 percent were paid an average of 11 days in advance of the payment date normally used in private industry, that is, 30 days after receipt of the goods or invoice, whichever is later. This advance payment increased interest costs by $3,500 or an additional $225,000 for each $100 million paid 11 days in advance.[273] The study concluded that the time value of money justified disbursements being made only when due and not before. To that end, it was pointed out, the letter-of-credit system had been adopted to lessen the amount of time money is outstanding before being used.[274]

Such an approach was formally adopted by the Treasury Department when it required payment to be made as close as possible to the due date specified in the invoice, contract, or other agreement. If no date has been specified, then the 30th day after receipt of the invoice will be considered the due date. If there is conflict between the dates

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[269] Defense Audit Service, Report No. 907, Report of Audit of Automatic Payment of Invoices, Defense Contract Administration Services Region, Philadelphia, Pennsylvania (12 June 1978).

[270] *See* AR 37–107, note 169, *supra*, para. 5–1; 7 Ag. Reg., note 53, *supra*, sec. 3 para. 88c.

[271] Sadowski, *Cash Management, It's Everyone's Concern*, Navy Supply Corps Newsl. 25 (Jan. 1978).

[272] Joint Financial Management Improvement Program, Money Management Study (Jan. 1976).

[273] *See also* Melburn & Cooley, *Cash Management* in *the Federal Government: Two Points of View*, *28* Fed. Accountant 35 (No. 2, June 1974), for similar statistical studies.

[274] Letters of credit are discussed in the text at notes 369–374, *infra*.

listed on the invoice and in the contract, the date most favorable to the government will be used.[275]

Consequently, the certifying or disbursing officer, in addition to his other requirements, should now check due dates and dates of receipt before scheduling payment.[276] If discounts are available, payment should be made on the last day of the discount period.[277]

This emphasis on the time value of money and the prevalence of payment by check or electronic fund transfer have made the disbursing officer truly a member of the "cashless society." The only cash normally on hand in a disbursing office is that kept by cashiers for imprest funds.[278]

VII. SPECIAL CLAUSES AND CONTRACTS

There are certain contract clauses and contract types of which certifying and disbursing officers must be particularly aware. Most of these (for example, progress payment clauses and cost reimbursement contracts) will be discussed later in the contract financing section of this article. Three specific areas of interest exist, however, which do not qualify as contract financing but which merit the special attention of certifying and disbursing officers. These are **(1)** discounts; **(2)** small purchases; and **(3)** transportation contracts.

A. DISCOUNTS

Since the government contracting process involves millions of contracts worth billions of dollars each year, a savings of **2, 5,** or 10 **per**cent or more on many of these contracts would total an awesome sum.

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[275] TFRM, note 19, ***supra,*** § 6–8040.20; ***see also*** Defense Audit Service Report No. 79–079 (30 Apr. 1979); Terrell, ***Cash Management in Operation in*** *the Navy,* Navy **Sup**ply Corps Newsl. 50 (Dec. 1978). The new Treasury guidance was implemented by the departments, ***e.g.***, Department of Transportation Order No. 2700.13, Cash Management (Apr. 19, 1979). On Dec. 15, 1981, the Senate passed S. 1131, "A bill to require the Federal Government to pay interest on overdue payments and to take early payment discounts only when payment is timely made, and for other purposes." This pending legislation, called the Delinquent Payments Act of 1982, would put on a statutory basis the requirement for the government to pay on time. **127** Cong. Rec. S15256–61 (daily ed. Dec. 15, 1981). The House bill is still in committee.

[276] *See* Terrell, ***supra*** note 275; see *also* AR 37–107, *supra* note 169.

[277] See TFRM, note 19, ***supra,*** § 6–8040.30.

[278] *See* Mayer, *Today and Tomorrow* ***in*** *Navy* ***Financial Management*** Systems, Navy Supply Corps Newsl. 5, 8 (Dec. 1978); Comp. Gen. Dec. B–198134, 59 Comp. Gen. 597 (1980), concerning disbursing officers in the electronic funds transfer program.

It is exactly to effect this type of savings that prompt payment discount clauses are written into many contracts.[279] Such clauses benefit both parties—the government saves money and the contractor gets paid more speedily. The clauses normally provide that a stated percentage (5 percent, for example) may be deducted if payment is made within a certain number of days (usually 20 days) from the date a correct invoice is received in the office designated in the contract.[280]

The importance of such discounts was amply demonstrated in a Navy audit report published in 1979.[281] That report revealed that, at one Navy disbursing office, 905,740 discounts totaling $11,217,268 were offered by contractors over a three-year period. Discounts worth $2,107,312 were lost, primarily because the receiving activities failed to forward properly labeled discount invoices promptly. Less than 4 percent were lost due to actions of finance personnel.[282]

Because of this type of finding, all government agencies put great stress on taking all available discounts.[283] Invoices affected by discounts are conspiciously marked to insure they receive speedy handling in order to meet contract deadlines.[284] This will occur, however, only if the discount is large enough to justify the cost of special handling. If a discount is not sufficiently large, then it is annotated as a "nuisance discount" and processed normally.[285]

An extremely dim view is taken by reviewing authorities if a discount is lost because of late payment. In such cases, a statement giving all pertinent information, especially the reasons for the delay, must be

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[279] *E.g.*, DAR, note 191, *supra*, § 7-103.14.

[280] If the contract contained no such clause (such as an open market purchase order) but the invoice quotes a prompt payment discount, the period of earning the discount begins with the date of receipt and acceptance of the supplies or services or the date of receipt of a proper invoice, whichever is later. VA Manual, *supra* note 220, para. 2.07c(3)(b); *see also* EPA Manual, note 54, *supra*, chapter 2, para. 7b(3); AR 37-107, note 169, *supra*, para. 5-10.

[281] Navy Audit Services, Audit Report A41569, Fleet Accounting and Disbursing Center, United States Atlantic Fleet, Norfolk, Virginia (1979).

[282] *Id.*

[283] *E.g.*, EPA Manual, note 54, *supra*, chap. 2, para. 7a; 7 Ag. Reg., note 54, *supra*, sec. 3, para. 91; Navy Comptroller Manual, para. 046023.

[284] *See* AR 37-107, note 169, *supra*, para. 5-5; VA Manual, note 220, *supra*, para. 2.07c(1); TFRM, note 19, *supra*, ¶ 4-2020.60.

[285] VA Manual, note 220, *supra*, para. 2.07c(2); *see also* AR 37-107, note 169, *supra*, para. 5-3. *See* ASBCA No. 19070, Jets Services Inc., 74-2 BCA 10649 (1974), wherein the contractor explained that he bid large discounts to induce prompt payment because smaller discounts are likely to be ignored.

prepared and submitted to higher authority.[286] The Comptroller General has ruled, however, that even if the government loses money because a certifying officer does not certify a voucher within the discount period, the certifying officer is not liable because there is no legal basis (*i.e.*, no statute or regulation) for imposition of liability. The officer may, however, be subject to administrative sanctions.[287]

The discount period normally starts when a *correct invoice* is received in the *designated office.* In order to be correct, the invoice must be correct on its face and have all necessary documentation attached (such as proof of costs for claims under cost-reimbursement contracts). If the terms of the discount as stated in the invoice are more generous to the government than those expressed in the contract, the greater discount will apply.[288] If the invoice is incorrect for any material reason,[289] it will be returned. The discount period will not begin to run until the corrected invoice is received.[290]

The invoice must be sent to the office designated in the contract.[291] This is normally the certifying or disbursing office, but not always. In one case[292] involving a cost reimbursement contract, the designated office was the Defense Contract Audit Agency's branch office, which would audit the invoice and then forward it to the DCAS disbursing office for payment.[293] The disbursing office made payment within *20* days of *its* receipt of the invoice but not within **20** days of the receipt by the auditors. The Comptroller General ruled that the discount was lost because the contractor complied with the contract and sent a correct voucher to the designated office.[294]

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[286] *See* AR 37–107, note 169, *supra,* para. 5–4; VA Manual, note **220,** *supra,* para. 2.07c(4); TFRM, note 19, ***supra,*** § 6–8040.30.

[287] Comp. Gen. Dec. B–157824, 45 Comp. Gen. 447 (1966).

[288] AR 37–107, note 169, *supra,* para. 5–8. This applies only if the regulation has the force and effect of law and has been published in the Federal Register. Comp. Gen. Dec. B–166159, 3 Jun. 1975, 75–1 CPD 334.

[289] Invoices should not be returned for minor discrepancies, merely to effect a time extension. VA Manual, note **220,** *supra,* para. 2.07c(1).

[290] Comp. Gen. Dec. B–157824, 45 Comp. Gen. 447 (1966); ***see*** *also* ASBCA No. 15650, Society Brand Hat Co., 72–2 BCA 9602 (1972). *But* ***see*** B–172812 January 13, 1972 wherein the submitted invoice omitted the discount but the DD Form 250 contained the discount terms. The Comptroller General said the government was incorrect in delaying start of the discount period since it had all the data necessary.

[291] Ms. Comp. Gen. B–162605, October **30,** 1967.

[292] Comp. Gen. Dec. B–194308, 79–1 CPD 266, April 13, 1979.

[293] This is required by DAR, note 191, *supra,* § 3–809c(1)(i).

[294] *Id.*

If the designated office is changed, the government must promptly notify the contractor. If the invoice is sent to the former office before the notice is received, the government must forward the invoice to the new office in sufficient time for payment to be made from that receipt.[295]

The date of payment is considered the date the check is issued.[296] Failure to take a discount when payment is made within the discount period will render the officer liable.[297] Once taken, however, the discount may be refunded to the contractor if the accountable office notices an error[298] or if, in a price-redeterminable contract, the discounts are in excess of the finally determined price.[299]

Prompt payment discounts are also available if progress payments are made timely.[300]

In keeping with the emphasis on the time value of money, however, the certifying or disbursing office should insure that all discounted payments will be scheduled for check issuance on the last day of the discount period.[301]

B. SMALL PURCHASE PROCEDURES

Government contracting can be extremely complex, involving a multitude of forms and procedures. While such a system is justifiable and cost-effective for multi-million dollar contracts, it is unnecessary and counterproductive for small purchases. Consequently, to simplify purchase methods and reduce administrative costs, the Government has implemented small purchase procedures.[302] These procedures will be

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[295] ASBCA No. **11390,** Centre Manufacturing Inc., **66–1** BCA **5699.**

[296] Comp. Gen. Dec. **B–106702 31** Comp. Gen. **260 (1952).** AR **37–107,** note **169, *supra,*** para. 5–10d; EPA Manual, note **54,** *supra,* chap. **2.** para. 7b(5). Even if the check is sent to the wrong address, the discount is proper unless the contractor can show the Post Office forwarded it after the end of the period. Comp. Gen. Dec. B–184999, 77–1, CPD 322.

[297] Comp. Gen. Dec. **B–157824,** 45 Comp. Gen. **447 (1966);** Comp. Gen. Dec. **A–21265,** 7 Comp. Gen. 537 (1928).

[298] AR **37–107,** note **169,** *supra,* para. **5–7;** ASBCA No. **12624,** Keltic Industries Inc., **68–1** BCA **6989 (1968).**

[299] AR **37–107,** note **169,** *supra,* para. **5–11.**

[300] ASBCA No. **21327,** Metadure Corp., **77–1 BCA 12,477 (1977).** *See also* Ms. Comp. Gen. **B–123987, Dec. 12, 1955,** *aff'd on reconsideration,* Mar. **13, 1956.**

[301] Department of Transportation Order **2700.13,** Cash Management, para. 7 (Apr. **19, 1979);** TFRM note **19,** *supra,* § 6–8040.30.

[302] *See* DAR note **191,** *supra,* § **3–600–609;** FPR, note **197,** *supra,* § **1** Subpart **3.6.**

discussed to show the different forms and procedures that would be used by certifying and disbursing officers. There are three separate small purchase procedures: (1) blanket purchase agreements; (2) the imprest fund method; and (3) purchase orders.

Blanket purchase agreements[303] are essentially "charge accounts" for fulfilling repetitive needs for small quantities of supplies and services at qualified sources of supply. A single call for supplies may not normally exceed $5,000.[304] The billing for such an agreement may be either monthly by summary invoice including all transactions within the period, or by individualized voucher.[305] Either way, the billing must be supported by sufficient documentation.[306]

An imprest fund[307] is a fixed cash or petty cash fund which has been advanced by a disbursing officer to a cashier[308] for cash payments. Imprest funds may be used for small purchases not in excess of $150, except in emergencies, and are typically used for purchases of perishable food or repair of equipment. The cashier must prepare reports to the disbursing officer listing the nature and amounts of transactions, together with any documentation. The disbursing officer will then reimburse the cashier to keep the fund at a constant level.[309]

Purchase orders on Standard Form 44[310] are designed for on-the-spot, over-the-counter purchases, primarily when the buyer is away from the purchasing office or at isolated activities.[311] The amount of the purchase may not exceed $2,500 except in emergencies. The supplies or services must be immediately available. One delivery and one payment will be made.[312]

Standard Form 44 is a multi-purpose, multi-copy form which serves as the purchase order, receiving report, supplier's invoice, and public voucher. The seller will send one copy of the form to the certifying or

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[303] FPR, note 196, *szcpra,* § 1–3.606; DAR note 191, *szcpra,* § 3–605; AR 37–107, note 169, *supra,* para. 6–61.

[304] *See* DAR note 191, *supra,* § 3–605.2, for exceptions.

[305] DAR note 191, supra, § 3–605.3(f)(vii).

[306] *Id.;* FPR note 196, *supra,* § 1–3.606–4.

[307] FPR note 297, *szcpra,* § 1–3.604; DAR, note 191, *szcpra,* § 3–607; AR–107, note 169, *supra,* para. 6–101.

[308] *See* text at note 41, *supra.*

[309] DAR, note 191, *supra,* § 3–607.4h. *See* Navy Comptroller Manual para. 046371, for a discussion of the mechanics of the replenishment process.

[310] This is illustrated at FPR, note 197, *szipra,* § 1–16.901–44.

[311] FPR note 197, *supra,* § 1–3.605–1; AR 37–107 note 169, *supra,* chap. 6, sec. III; Navy Comptroller Manual para. 046054.

[312] *Id.*

disbursing officer for payment where it will be coupled with another copy serving as the receiving report for payment. If a cash payment were made, the seller would have to sign the form, acknowledging receipt of the payment. This signed copy will be forwarded to the certifying or disbursing officer.[313]

Purchase orders may also be on DD Form 1195 or Standard Form 147, Order for Supplies or Services.[314] These forms are used when the purchase does not exceed $10,000. Like the Standard Form 44, they are multi-purpose, multi-copy forms which are a purchase order, receiving report, and a public voucher combined. When the certifying or disbursing officer receives Copy No. 1, coupled with the vendor's invoice and supporting documentation, this provides the basis for payment.[315] As noted earlier,[316] small purchase procedures may utilize a fast pay system in order to speed up payment.

Two notable items about small purchases should be mentioned. First, although the objective of the procedures is to speed up payment, a study discovered that not only were payments not quickened, they were late when such procedures were used.[317] The reason was presumed to be the unfamiliarity of the receivers of the property with the procedure. The blame was not placed on certifying or disbursing officers.

Second, small purchase procedures, mostly imprest funds, have been the subject of a disproportionately large number of Comptroller General decisions.[318] The cases normally involve thefts or loss of funds. This is understandable since, as noted earlier,[319] the money in the imprest fund is normally the only cash in the office. In one case involving an erroneous payment, the Comptroller General said he could not relieve the cashier of liability because statutorily it was the disbursing officer who was liable. He noted, however, that administrative resolution of irregularities under $500 is permitted.[320] This administrative resolu-

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[313] AR 37–107 note 169, *supra*, para. 6-44.
[314] FPR note 197, *supra*, § 1–3.605–2; DAR, note 191, *supra*, 3.608–2.
[315] AR 37–107, note 169, *supra*, chap. 6, sec. 11.
[316] *See* text at notes 231–234, *supra*.
[317] Joint Financial Management Improvement Program, Money Management Study (Jan. 1976).
[318] *E.g.*, Ms. Comp. Gen. B–191942, Sep. 12, 1979; Ms. Comp. Gen. B–191048, May 30, 1978; Ms. Comp. Gen. B–189896, Nov. 1, 1977. *See also* TFRM, note 19, *supra*, § 4–3000; Navy Audit Service, Audit Report X 20029, Unannounced Disbursing Audit, Navy Finance Office, Philadelphia, Pa., 5 Sep. 1979.
[319] *See* Note 278 *supra*, and accompanying text.
[320] Ms. Comp. Gen. B–193104, Jan. 9, 1979. In Comp. Gen. Dec. B–161457, 54 Comp. Gen. 112 (1974) the administrative resolution of amounts less than *$500* was authorized.

tion procedure will normally suffice to eliminate most liability problems for disbursing officers caused by imprest funds.[321]

C. TRANSPORTATION CONTRACTS

Transportation contracts are handled differently because of specific statutes. Section 322 of the Transportation Act of 1940[322] provided that payment for transportation for the government by certain common carriers be made upon presentation of bills, prior to audit or settlement by the General Accounting Office. Overpayments would later be deducted from any amount subsequently due the carrier.

The Agriculture Department decided that this clearly evinced Congressional intent to provide for a more rapid settlement of the claims of carriers. Therefore, it concluded that a departmental pre-audit designed to provide for the verification of rates, freight classifications, or land grant deductions would tend to defeat the act's purpose.[323] The Comptroller General agreed with this and supported the Department's intention to examine simply for the rendition of services and not for rate corrections.[324]

Congress also agreed. The Certifying Officers Act of 1941[325] provided that the Comptroller General shall relieve certifying officers of liability for an overpayment for transportation services made by certain common carriers if the overpayment occurred solely because the administrative examination prior to payment did not include a verification of transportation rates, freight classifications, or land grant deductions. A year later,[326] Congress provided similar protection for both certifying and disbursing officers but limited this solely to transportation furnished on government bills of lading.[327] (This statute affords protection to disbursing officers while the 1941 Act does not.[328])

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[321] *See* text at notes 601–624, *infra,* for a discussion of liability.

[322] Pub. L. No. 785, ch. 722, sec. 322, 54 Stat. 955 (1940), codified at 31 U.S.C. 244 (1976), as amended.

[323] *See* Comp. Gen. Dec. B–13576, 20 Comp. Gen. 347 (1941).

[324] *Id.*

[325] Pub. L. No. 389, ch. 641, sec. 2, 55 Stat. 875–76 (1941), codified at 31 U.S.C. 82c (1976).

[326] Act of June 1, 1942, Pub. L. No. 560, ch. 320, 56 Stat. 306. codified at 31 U.S.C. 82g (1976).

[327] *See* Ms. Comp. Gen. A–2422, Mar. 26, 1963.

[328] *See* 3 GAO Manual, note 30, supra, para. 56.3.

Section 322 of the Transportation Act of 1940[329] was later amended[330] to say that the bills would be paid prior to audit by the General Services Administration. The GAO, however, would still have authority to make audits in accordance with its general responsibilities.[331]

As a result of these enactments, certifying and disbursing officers are authorized to give transportation vouchers a less exacting examination than they theoretically give other vouchers. They will not be held liable unless there is a mathematical error, or the payment was illegal. These vouchers will be forwarded to the General Services Administration for review and audit.[332]

VIII. FINANCING

Contractors often need financing in order to perform a contract. The Government has established an order of preference[333] to determine which form of financing should be used:

1. Private financing, especially the assignment of claims to financial institutions:

2. Customary progress payments;

3. Guaranteed loans;

4. Unusual progress payments; and

5. Advance payments.

The implementation of financing programs for contractors is a complex matter which has received substantial attention.[334] It is obviously an area with which certifying and disbursing officers must be deeply concerned, but there is an incredible dearth of specific guidance on this

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[329] Note 322, *supra.*

[330] General Accounting Office Act of 1974, Pub. L. No. 93-604, sec. 201(1), 88 Stat. 1959, 1960 (1975).

[331] GAO may still prescribe forms and certain standards, and may review settlements of GSA, if requested. 5 GAO Manual, note 31, *supra,* chap. 1, sec. 1.

[332] *See* VA Manual, note 220, *supra,* para. 3.22 and 2.11. *See* 5 GAO Manual, note 31, *supra,* chap. 1, sec. 1.

[333] DAR, note 191, *supra,* E-209; FPR note 197, *supra,* § 1-30.209.

[334] *E.g.,* Gubin, *Financing Defense Contracts,* 29 Law & Contemp. Probs., 438 (1964); Bachman & Lanman, *Defense Contract Financing,* 12 Fed. B.J. 287 (1952); Bachman, *Defense Department Contract Financing,* 25 Geo. Wash. U.L. Rev. 228 (1957); Pace, Negotiation and Management of Defense Contracts, chapter 10 (1976).

subject. Both the Veterans' Administration and the Environmental Protection Agency provide very little guidance (no more than two paragraphs) pertaining to advance and progress payments.[335] The Army combines the two forms of payment and covers them in less than a page and a half.[336]

The certifying or disbursing officer must, therefore, rely on the general guidance and principles discussed earlier. Of particular importance in the financing area are the principles that require the certifying and disbursing officer to:

1. make sure a payment is allowed under the contract; and

2. make sure it has been approved by the appropriate official.

A. ASSIGNMENT OF CLAIMS

In order to aid contractors in their financing, the Assignment of Claims Act of 1940 permits contractors to assign their remunerative claims to a bank, trust company, or other financial institution.[337] Two[338] of the prerequisites to an assignment are that the contract must provide for payments aggregating $1,000 or more,[339] and the contract must not forbid assignments.[340] The assignee must file written notice of the assignment, together with a true copy of the instrument of assignment, with (1) the contracting officer or the head of the department, (2) the surety or sureties upon the bond or bonds, if any, and (3) the disbursing officer, if any, designated in the assigned contract to make payment.[341]

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[335] EPA Manual, note 34, *supra*, chap. 4, sec. 1, para. 3; *id.*, chap. 4, sec. 2, para. 5–6; VA Manual, note 220, *supra*, para. 3.02, 3.24.

[336] AR 37–107, note 169, *supra*, chap. 10.

[337] Pub. L. No. 811, ch. 779, § 1, 54 Stat. 1029, *as amended* by Act of May 15, 1951, Pub. L. No. 30, ch. 75, 65 Stat. 41, codified at 31 U.S.C. 203, 41 U.S.C. 15 (1976). *See also* FPR, note 197, *supra*, § 1–30.7. For a thorough history of the act, *see* Condon, *Assignment of Claims Act of 1940 and the 1951 Amendments*, 11 The Forum 625 (1976); Phillips, *Defense Contract Financing under the Assignment of Claims Act*, 10 William and Mary L. Rev. 912 (1969); Shnitzer, *Assignment of Claims Arising Out of Government Contracts*, 16 Fed. B.J. 376 (1956); Nichols, *Assignment of Claims Act of 1940—a Decade Later*, 12 U. Pitt. L. Rev. 538 (1931).

[338] For a full list of the conditions, *see* FPR, note 197, *supra*, §1–30.702.

[339] 31 U.S.C. 203, 41 U.S.C. 15 (1976).

[340] 31 U.S.C. 203, para. 2; 41 U.S.C. 15, para. 2 (1976).

[341] 31 U.S.C. 203, para. 4; 41 U.S.C. 15, para. 4 (1976). Originally the Comptroller General was to be notified also, but he was removed by the 1951 Amendments. Act of

Consequently, before a certifying or disbursing officer makes a payment to an assignee, he must ensure that there are sufficient supporting documents to show that the assignment is a valid one. An examination of the contract will clearly show if it provides for payments of $1,000 or more. Furthermore, clauses permitting assignment of claims are standard in government contracts.[342] The notice requirement, however, is less straightforward. There are no prescribed forms for the notice of assignment and the assignment itself, but there are suggested formats.[343] The distribution of these documents is rather complicated.

In the disbursing officer system, the assignee will forward an original and three copies of the notice of assignment and a true copy of the instrument of assignment to each of the three required parties. Each party will then return to the assignee three copies of the notice of assignment with acknowledgement of receipt noted thereon. Two copies of the acknowledged notices of assignment furnished by each of the parties (a total of 6 copies) will be attached to the first invoice submitted by the assignee to the office designated in the contract.[344] After payment, the disbursing officer will attach one copy of the notice of assignment to the first voucher submitted for review. The second copy will be kept on file in the disbursing office.[345]

In the certifying officer system, a disbursing officer will not normally be designated in the contract. If not, then service need only be made on the contracting officer or head of department and the surety.[346] Once the contracting officer reviews the required four copies of the notice of assignment and a true copy of the instrument of assignment, he

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May **15, 1951,** Pub. L. No. **30,** ch. **75,** 65 Stat. **41,** codified at **31** U.S.C**203, 41** U.S.C. **15 (1976).**

[342] At FPR, note **197,** *supra,* the clause is set forth which is used in all types of contracts under the FPR. The clause at DAR, note **191,** *supra,* **7.103–8** is used for fixed price supply contracts, cost reimbursement supply contracts, fixed price research and development contracts, facilities contracts, facilities use contracts, time and material and labor hour contracts, communications service contracts, fixed price service contracts, and cost reimbursement type service contracts. The clause at DAR **7–602.8** is used for fixed price construction contracts, cost reimbursement type construction contracts. The clause at DAR 7–607.6 is used for fixed price architect engineer contracts. Personal service contracts may not be assigned. DAR, note **191,** *sup-a,* § **7–503.3**

[343] *See* FPR, note **197,** *supra,* **1–30.704.**

[344] AR **37–107** note **169,** *supra,* para. **11–23.** As an alternative procedure, the contracting officer and surety may return one acknowledged copy to the assignee and send two acknowledged copies directly to the disbursing officer. *Id.*

[345] AR **37–107,** note **169,** *supra,* para. **11–30.**

[346] FPR, note **197,** *supra,* § **1–30.705.**

should notify the appropriate certifying or disbursing officer (Treasury Regional Disbursing Officer) and provide that officer with copies of those documents.[347]

The government, and especially the certifying or disbursing officer, has the right to return the documents for correction if they are deficient. Once the certlfying or disbursing officer is on notice that an assignment is intended, however, even if the formal notification is deficient, he is under no duty to pay the contractor. The Comptroller General has ruled that to pay the contractor once a notice of assignment, even if deficient, has been received, will possibly subject the government to double liability. Payment should be withheld until the assignment is validly made or withdrawn.[348] The accountable officer should, however, require strict compliance with the notice requirements of the regulation.[349]

If the certifying or disbursing officer has any doubt whether the statutory notice has been accomplished, he should not pay without first submitting the matter to the Comptroller General for decision.[350]

One particular aspect must be discussed in this area. Often the certifying or disbursing officer is confronted with demands for payment from a third party such as a Miller Act[351] surety, in addition to an assignee. That officer is singularly illequipped to render a decision in such a situation. The facts will normally be complex and hotly contested and the law may be unsettled, depending on the status of the third-party claimants. For example, sureties are normally entitled to very high priority and take precedence over a contractor's trustee in bankruptcy. However, certain sureties will have a lesser priority than a Government tax lien.[352]

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[347] FPR, note 197, *supra*, § 1–30.706, as implemented by agency procedures, *e.g.*, EPA Manual, note 53, *supra*, chap. 3, para. 4a.

[348] Comp. Gen. Dec. B–192774, Apr. 16, 1971, 79–1 CPD 268. *See also* Produce Factors Corp. v. United States, 199 Ct. Cl. 572, 467 F.2d 1343 (1972); Tutso Corp. v. United States, 222 Ct. Cl ____, 614 F.2d 740 (1980).

[349] Uniroyal, Inc. v. United States, 197 Ct. Cl. 258, 454 F.2d 1394 (1972); Comp. Gen. Dec. B-14686, 20 Comp. Gen. 424 (1941).

[350] Comp. Gen. Dec. B–14686, 20 Comp. Gen. 424 (1941). *But* see Comp. Gen. Dec. B–13862, 20 Comp. Gen. 306 (1940), which states that, while a disbursing officer may accept an affidavit from an assignee that proper notice has been given, such notice does not relieve him of responsibility if the affidavit is false.

[351] 40 U.S.C. 270 (1976).

[352] *See* 2 R. Nash & J. Cibinic, Federal Procurement Law 1958–79 (3d ed. 1980). This controversy has been the subject of numerous law review articles, *e.g.*, Davis, *Govern-*

Rather than make a payment and face potential liability, the officer should work closely with the agency legal counsel, but if necessary should not hesitate to request an advance decision. The Comptroller General, however, (recognizing a hornet's nest when he sees one,) will normally (and quite correctly) say that such a factual and legal question is best left to the courts. Payment should, therefore, be withheld until the question of entitlement is settled by a court of competent jurisdiction.[353]

In making payment to the assignee, the certifying or disbursing officer must, as always, insist upon all the proper documentation.[354] Since the assignee is due only the amounts payable under the contract, the assignee succeeds only to whatever rights the contractor had. Therefore, proper withholdings (for liquidated damages, or to liquidate advance payments, for example) are permitted.[355] One exception exists, however. The Assignment of Claims Act of 1940 permits the use of a contract clause providing that assignments of claims will not be subject to set-off.[356]

B. ADVANCE PAYMENTS

Advance payments[357] are the least preferred method of financing. Consequently, before such payments may be authorized under a contract, the approval of senior level officials in the agency is required.[358] In the face of this prior high-level approval, certifying and disbursing

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ment Contractors, Commercial Banks, and Miller Act Bond Sureties — A Question of Priorities, 14 B.C. Ind. and Comm. L. Rev. 943 (1973); Speidel, *"Stakeholder" Payments under Federal Construction Contracts: Payment Bond Surety vs. Assignee,* 47 Va. L. Rev. 640 (1961); *Comment: The Assignment of Claims Act of 1940: Assignee v. Surety,* 20 U. Chi. L. Rev. 119 (1952); *Note: Government Cross Claim to Recover Money Validly Claimed by Surety but Mistakenly Paid Assignee Not Precluded by Assignment of Claims Act of 1940,* 46 Va. L. Rev. 1014 (1960).

[353] *E.g.,* Ms. Comp. Gen. B–158212, January 31, 1967; Ms. Comp. Gen. B–157563, October 26, 1965; Comp. Gen. Dec. B–119376, 33 Comp. Gen. 608 (1954). See also notes 420–425 and 431, *infra,* and accompanying text for a discussion of similar problems.

[354] *See* AR 37–107, note 169, *supra,* para. 11–27; EPA Manual, note 54, *supra,* chap. 3, para. 5.

[355] FPR, note 197, *supra,* § 1–30.708; *see also* Phillips, *supra* note 336, at 915 n.1.

[356] Note 337, *supra.* See Navy Comptroller Manual para. 046053–6.

[357] *See* 1 R. Nash & J. Cibinic, Federal Procurement Law 634–36 (3d ed. 1977), for a review of the statutes and regulations regarding advance payments. Probably the best known example of advance payment is extraordinary relief under P.L. 85–804, 50 U.S.C. §§ 1431–1435.

[358] For example, AR 37–107, note 169, *supra,* para. 10–3, requires the prior approval of the Comptroller of the Army.

officers will not second-guess the propriety of the decision to advance money. If provision for advance payment is made in the contract, the money will be advanced.

Nevertheless, because there is a statute prohibiting the advance of money "unless authorized by the appropriation concerned or other law,"[359] the vouchers covering the advance payment must cite the law or appropriation authorizing such payment.[360] Commonly, such advance payments are made for small businesses,[361] non-profit organization ~or intra-governmental purchases.[363]

Advance payments require the accountable officer to insure that duplicate payments are not made. Any subsequent requests for payment (partial, progress, or final payment, for example) will be scrutinized to insure that the government is not being billed for items already purchased by advance payment. If the contract is terminated, prompt action should be initiated to recover any advances.[364]

The guidance for making advance payments is fairly detailed[365] but is virtually all aimed at the contracting officer. Distilled from that guidance, however, is information concerning the two most important documents on which the certifying or disbursing officer bases an advance payment: **(1)** a copy of the findings and determination which authorizes advance payments, which should be in the contract file,[366] and **(2)** a copy of the agreement establishing the special bank account with a commercial bank to which the advance payments will be sent.[367]

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[359] 31 U.S.C. **529 (1976).**

[360] VA Manual, note 220, *supru,* para. 3.02b; EPA Manual, note **54,** *supra,* chap. **4,** sec. **1,** para. **3.**

[361] 10 U.S.C. **2307** (1976); **41** U.S.C. § **255 (1976);** DAR, note **191,** *supra,* § **3-408;** FPR, note **197,** *supru,* § **1-30.408;** EPA Manual, note **54,** *supra,* chap. **4,** sec. **1,** para. 3d, and sec. **2,** para. **5.**

[362] DAR, note **191,** *supra,* § **E-408;** FPR, note **197,** *supra,* § 1-30.408.

[363] 31 U.S.C. **686 (1976).** This thesis will not discuss such intragovernmental purchases. If information is needed in this area, ***see*** EPA Manual, note **54,** *supra,* chap. 7; TFRM, note **19,** *supra,* § 2-2500; Navy Comptroller Manual para. **046131.**

[364] 7 Ag. Reg., note **53,** *supra,* sec. *3,* para. **95.**

[365] The provision and forms for advance payments are contained in DAR, note **191,** *supra,* App. E, part **4,** and FPR, note **197,** *supra,* § 1-30.4. ***See*** *also* Navy Comptroller Manual para. **046358.**

[366] *See* FPR, note **197,** *supra,* I **1-30.410** and DAR, note **191,** *supra,* **E-410** for a copy of this document.

[367] *See* FPR, note **197,** *supra,* § **1-30.414** and DAR, note **191,** *supra,* **E-414.1** for a copy of the necessary form.

Once these two documents are present, the accountable officer may make the advance payment according to the terms of the contract.[368]

C. LETTERS OF CREDIT

One particular form of advance payment, the letter of credit, deserves special attention. The letter of credit method of advance payment is relatively new.[369] This method must be used whenever the agency has, or expects to have, a continuing relationship with a recipient organization for at least one year involving annual advances aggregating at least $120,100.[370] If this method is adopted, a clause will be inserted in the contract whereby the contractor commits itself to initiate cash drawdown only when actually needed, to timely report its disbursements and balances, and to impose similar reporting requirements upon any subcontractors.[371]

Letters of credit are filed and established either at the appropriate Federal Reserve bank or the regional disbursing office. When the receipient organization needs funds, it submits a letter of credit payment voucher to its commercial bank, which in turn presents the voucher to the Federal Reserve bank for payment. If the regional disbursing office is used, then the contractor sends the vouchers directly there, and the drawdowns are effected by Treasury check.

The system was designed to eliminate the need to clear each drawdown through the individual certifying officer. This officer is involved initially in the certification of letters of credit. The certifying officer must be specially authorized to certify letters of credit. This designation will be specifically noted on the Standard Form **210.** The

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[368] *See* FPR, note **197,** *supra,* § **1–30.414.2** for a sample contract clause. Once the contract is made, the accounting sections are tasked to provide reports to the agency on the status of their advance payments. *See* Army Reg. No. **37–151,** Financial Administration: Accounting and Reporting for Operating Agencies, para. **6–101** through **6–105** (1 Sep. 1975), and Army Reg. No. **37–108,** Financial Administration: General Accounting and Reporting for Finance and Accounting Offices, chap. **5,** sec. II **(15** Nov. **1975).**

[369] For a brief history, *see* Capuano & Henderson, *New Developments in Financing by Federal Letter of Credit,* The Government Accountant's Journal **20** (winter **1976);** *see also* **1972** Annual Report of Joint Financial Management Improvement Program **6–7, 31–32.**

[370] Guidance on this is contained in Treasury Cir. No. **1075** (4th rev.), **31** C.F.R. part **205** (1980), TFRM, note **19,** *supra,* **6–2000,** FPR, note **197,** *supra,* § **130.408.1.** Formerly the required amount had been $250,000.

[371] **31** CFR § **205.6** (1980). *See* FPR, note **197,** *supra,* § 1–30.408–1(c) for such provisions. This reduces the government's interest costs. *See* text at notes 270–278, *supra,* and JFMIP, Money Management Study, note **315,** *supra,* **16–20.**

recipient organization must submit a Standard Form **1194,** Authorized Signature Card for Payment Voucher on Letters of Credit, which will list and contain the signatures of those officials authorized to sign vouchers. This form and the letter of credit itself must be certified by the certifying officer prior to forwarding to the Treasury Department.[372] This certification will serve to assure the Federal Reserve or treasury officials that the signature on the disbursing voucher is proper and that payment is correct. Responsibility for signatures rests with the certifying officer.[373]

The letter of credit system is widely used in the civilian agencies but not in the military agencies.[374]

D. PROGRESS PAYMENTS AND PAYMENTS UNDER COST CONTRACTS

Progress payments and payments under costs contracts are supported by different contract clauses and are used in different types of contracts. However, they are handled in a virtually identical manner by the certifying or disbursing officer, and they are treated jointly below.

In cost-reimbursement type contracts, the contract provides for biweekly payment of costs incurred during performance.[375] In fixed-price contracts, a progress payments clause is usually inserted if the contract involves a long lead time, generally in excess of six months between beginning of work and first production delivery.[376] Such payments are designed to provide the contractor with working capital. Normally such payments are based on costs incurred. In construction and shipbuilding contracts, they are based on a percentage of completion of the work.[377] Progress payments are an extremely important method of contractor financing.[378] Because of this, they have been the subject of considerable study.[379]

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[372] EPA Manual, note 53, *supra,* chap. 1, para. 5b; TFRM, note 19, *supra,* § 6–2050.

[373] *Id.*

[374] *See* Capuano and Henderson, *supra* note 369.

[375] *E.g.*, DAR, note 191, *supra,* 7–203.4.

[376] *E.g.*, DAR, note 191, *supra,* 7–104.35; FPR, note 197, *supra,* § 1–30.510; Naval Audit Service, Audit Report No. Z 60026, Interservice Audit of Progress Payments to Defense Contractors (16 Apr. 1976).

[377] *E.g.*, FPR, note 197, *supra,* § 1–30.501, DAR, note 191, *supra,* § E–501.

[378] Indeed, they are the largest single method of contractor fmancing in the Department of Defense. *See* note, *Progress Payments to Government Construction Contractors under the Standard Form,* 35 Geo. Wash. U.L. Rev. 962, n.18 (1967).

[379] *E.g.*, Meador, *Financing Government Contractors with Progress Payments,* 18 A.F.L. Rev. 1 (winter 1976); Note, *Progress Payments to Government Construction*

When confronted with a request for either type of payment, the certifying or disbursing officer should insure that (1) such payments are permitted under the contract; (2) only the amounts authorized by the contract are paid; and (3) documentation of the proper substantiations and approvals accompany the vouchers.[380]

The amounts payable under the various progress payment clauses based on incurred costs vary from 80 percent for non-small business concerns, to 85 percent for small businesses.[381] For those payments based on a percentage of work completed, the government pays 90 percent until performance is 50 percent completed. The unpaid 10 percent is retained until final acceptance of the completed work. After the work is 50 percent completed, the contracting officer may decide to make full payments thereafter, or to continue retaining 10 percent until completion.[382]

Payments based upon rates higher than those set forth above are termed "unusual progress payments." Such payments are highly unusual and must be approved not only by the head of the procuring activity but also by the agency's contract financing office. Such unusual progress payments, once approved, will not be questioned by the certifying or disbursing officer because of the high level approval involved.[383]

Because of the complexity of administering these varying rates of payment and retention, plus the fact that numerous such payments may be made, the certifying or disbursing officer must be particularly careful to guard against overpayment.[384] However, he must rely totally on the accounting branch.

Requests for payments under cost contracts are made to the contracting officer or his representative. Such requests may be stated in the contractor's invoice, but often a public voucher, normally Standard

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Contractors under the Standard Form, 35 G.W.U. L. Rev. 962 (1967); Whelan, *Government Construction Contracts, Progress Payments Based on Costs; the New Defense Regulations,* 26 Fordham L. Rev. 224 (1957). *See also* McClelland, *The Illegality of Progress Payments as a Means of Financing Government Contractors,* 33 Notre Dame 380 (1958). *See* Navy Comptroller Manual para. 046365.

[380] *E.g.,* 7 Ag. Reg., note 53, *supra,* sec. 3, para. 96.

[381] *See* Meador, *supra* note 379, at 6–7; FPR, note 197, *supra,* § 1–30.503(a); DAR, note 191, *supra,* App. E, § E–503.1.

[382] Standard Form 23–A, FPR, note 197, *supra,* § 1–16.901.23.

[383] FPR, note 197, *supra,* §§ 1–30.505, 1–30.517; DAR, note 191, *supra,* App. E, §§ E–505, E–517; AR 37–107, note 169, *supra,* para. 10–5.

[384] *See* note 268 *supra,* for citation to a description of an example of overpayments due to progress payments.

Form **1034,** is used with supporting data attached.[385] The Defense Acquisition Regulation requires such reimbursement vouchers to be sent to the contract auditor, normally the Defense Contract Audit Agency, for examination. The auditor then has the responsibility of sending a p proved vouchers to the disbursing officer.[386] Consequently in DOD the contracting officer will not normally see these vouchers before they are sent to the disbursing officer.

Progress payments must be requested by the contractor[387] and are not made more frequently than bi-weekly. Attached to this request must be the contractor's invoice and a statement of actual costs or a certificate attesting to the work completed. Requests are sent to the contracting officer for approval, because normally audits will be kept to a minimum before the government makes progress payments, "to conserve administrative effort and promote prompt payment."[388] Once approved, the request together with all supporting documents is sent to the certifying or disbursing officer.[389] Because the approval of such payments is uniquely a judgment for the contracting officer, it will normally not be questioned by certifying or disbursing officers.[390]

Progress payments are made on the basis of costs incurred or work completed by a contractor, not deliveries of completed goods. When the contractor makes a delivery, he will submit to the government an invoice for the price of the goods delivered. Before paying the invoice, the government must deduct from the invoice amount all or part of the progress payments made, to avoid reimbursing the contractor twice for his costs. The deduction procedure is called "liquidation." Progress payments may be liquidated by deducting from any contract payment, other than advance or progress payments, the amount of unliquidated progress payments, or 80 percent (85 percent if the contractor is a

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[385] *E.g.*, DAR, note 191, *supra*, § 7–203.4. ***See*** Pace, Negotiation and Management of Defense Contracts 580 (1970).

[386] DAR, note 191, *supra*, § 3–809 (c)(1)(i); Comp. Gen. Dec. B–194308, Apr. 13, 1979, 79–1 CPD para. 266. The FPR does not mandate this. FPR, note 197, *supru*, § 1–3.809 (c).

[387] DOD contractors use DD Form 1195, Request for Progress Payment. ***See*** the appendix to this article for this form. Civilian agencies use the format specified at FPR, note 197, *supra*, § 1–30.529.

[388] AR 37–107. note 169, *supra*. 10–7. Note that DAR. note 191. *supra*. § 3–809(c)(1)(i) may also apply in some circumstances.

[389] *E.g.*, H.I. Lewis Construction Co., ASBCA No. 3655, 57–1 BCA 1164. ***See*** VA Manual Paragraph 3–24 for a sample approval statement.

[390] The approval of vouchers for the reimbursement of costs under a cost reimbursement contract is a decision for the contracting offier, not the Comptroller General. United States **v.** Marion and Hanger Co., 260 U.S. 227 (1922); Bell Aircraft Corp. v.

small business), whichever is less.[391] Generally speaking, if the contractor's performance is completed with only one delivery, all the progress payments will be subtracted from the amount of the invoice covering that delivery. If several deliveries are made, a fixed percentage of reduction will apply until the final invoice is paid.[392]

Once progress payments are made, periodic reports are required to be made to the agency setting forth the number and amount of such payments.[393]

E. PARTIAL PAYMENTS

Partial payments are not considered modes of financing contractors. They are simply payments exchanged for goods or services actually received and accepted.[394] Consequently, they differ from progress payments, which are made solely on the basis of costs incurred or percentage of work completed.[395]

Provisions for partial payments are a normal part of government contracts.[396] Special high-level approvals are not required. Each payment is based on the procedures described previously in the section regarding a fixed-price supply contract.[397] The payment requires a matching of the invoice with the acceptance report. Each voucher

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United States, **120** Ct. Cl. **398 (1951)** *aff'd. per curiam,* **344** U.S. *860* **(1952).** ***See*** **2** Nash & Cibinic, note **352,** *supra,* at 77.

[391] FPR, note **197,** *supra,* § **1–30.510–1;** *e.g.,* DAR, note **191,** *supru,* § **7–104.35.** This does not apply to liquidations under Termination for Convenience. ***See*** text at notes **432–440,** ***infra.*** ***See*** *also* Naval Audit Service Audit Report No. Z60026, Interservice Audit of Progress Payments to Defense Contractor **(16** Apr. **1976).**

[392] The rules and formulae for computation of the correct amount of a deduction are complex. They may be found at DAR, note **191,** *supru,* App. **E, § E–512,** and at FPR, note **197,** *supra,* § **1–30.512.**

[393] DOD Directive **7840.2,** Progress Payment Status Report—Cost Based Progress Payments, February **16, 1972;** AR **37–53** Financial Administration, Status of Progress Payments, **15** June **1979;** AR **37–108,** Financial Administration. General Accounting and Reporting for Finance and Accounting Officers, C **21** June 1980, chap. **5,** Section III. These reports are submitted by the Finance and Accounting Officer in his role as chief accountant rather than as disbursing officer. Therefore there is no corresponding requirement on certifying officers.

[394] *See* DAR, note **191,** *supra,* § E–509.1.

[395] For a discussion of the similarities and differences of progress **and** partial payments ***see*** Meador, *supra* note **379** at **8–10.**

[396] *E.g.,* DAR, note **191,** *supra,* § **7–103.7;** FPR, note **197,** *supra,* § **1–7.102–7.** The Department of Agriculture permits such payments even if they are not specifically permitted in the contract. **7** Ag. Reg., note **53,** *supru,* para. **97.**

[397] *See* text at notes **214–242,** *supra.*

when paid is annotated as the "1st," "2nd," etc., payment. The "final payment" is made after all the goods called for by the contract have been received.[398] Because numerous payments are involved, the possibility for overpayment exists, so the certifying or disbursing officer must insist on adequate accounting safeguards.

F. GUARANTEED LOANS

The Department of Defense and certain other federal agencies and departments are authorized to guarantee loans to contractors under the provisions of section 301 of the Defense Production Act of 1950.[399]

This method of financing is strictly controlled. The Army, for example, designated only one disbursing office, located in the Army's finance center, to make disbursements and to credit collections received under guaranteed loans.[400] This office will credit all collections made by Federal Reserve banks, prepare the necessary vouchers, credit the appropriate accounts, and report the deposits and collections on Standard Form 1219.[401] Disbursements are made on Standard Form 1034 prepared by the appropriate Federal Reserve bank and forwarded.

If it is necessary to "purchase" the guaranteed portion of the loan, the financing institution makes a demand through the Federal Reserve bank to the department. Based on this demand, the disbursing office would make payment. The voucher must be supported by (a) a copy of the demand, (b) a copy of the Federal Reserve bank statement to establish the details of the loan, and (c) a receipt for payment when these documents are received from the Federal Reserve bank.[402] Such loans are controlled at a high level. They will not be discussed in greater detail, because they have little impact on the activities of the vast majority of certifying and disbursing officers.

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[398] *E.g.*, AR 37–107, note 169, *supra*, para. 3–8b; Braswell Shipyards Inc. ASBCA No. 21516, 77–1 BCA 12366 (1977).

[399] 50 U.S.C. App. § 2091 and Section 302b of Executive Order 10480. ***See*** DAR, note 191, *supra*, § E–100 et. **seq.** for the specific guidelines.

[400] *See* Army Reg. No. 37–44, Financial Administration: Accounting Procedures for Guaranteed Loans, para. 1–6 (1 Oct. 1976) (hereinafter cited as AR 37–44).

[401] *Id.* at para. 2–7a.

[402] Such guaranteed loans may also be used to finance contractors on terminated contracts. DAR, note 191, *supra*, § E–305. ***See*** text at notes 432–440 *infra*.

IX. AFTER PERFORMANCE

Once the contractor's performance is ended, either by completion of the contract or by government termination order, the contractual account must be settled. Monies due the contractor must be paid, and, conversely, monies owed the Government must be recouped. The certifying or disbursing officer is a prime actor in all such proceedings.

This section is divided into three subsections: (1) final payment; (2) government collection actions and setoff; and (3) claims. Government collections, setoffs, and claims obviously have a great deal to do with final payments but are important enough to warrant separate study. Conversely, government collections, setoff, and claims may arise at any time during the contract, not only after performance is ended. Nevertheless, since these actions normally arise after performance, they are studied in this section.

A. FINAL PAYMENT

Final payments are an important part of any contract. They are the reward to the contractor for a task hopefully well done, the prize to be won by a host of competing claimants, and the "closing-the-books" action of the contracting and accountable officer on the particular contract.

The following analysis is divided into three sections: (1) final payments in general; (2) withholdings, which often significantly affect the final payment; and (3) the special final payment procedures required if a contract has been terminated for convenience.

1. Final Payment

The phrase "final payment" is meant to distinguish this payment, made after work on the contract has been completed, from the numerous partial, progress, and advance payments also made while the contract was ongoing. It does not necessarily mean that this payment is undoubtedly the absolutely last payment ever to be made on the contract. Often a contractor will assert a claim under the changes clause or some other contract provision when contract performance is nearly completed. Such a claim will survive "final payment," and the contractor can receive further payment, unless there is evidence that the parties specifically intended the claim to be settled through final payment, without additional compensation. The same rule applies if the government is the claimant. If there is no evidence that fmal payment specifi-

cally encompasses previously asserted claims, the parties will still retain the right to submit claims regarding the contract,[403] or to receive relief under Public Law 85–804.[404]

The meaning and implications of final payment are discussed at length in a recent case decided by the Armed Services Board of Contract Appeals[405] and affirmed by the United States Court of Claims.[406] In this case, the contractor, Gulf & Western Industries, Inc., completed performance of a munitions contract in 1972 but waited until 1977 before submitting two claims arising under that contract.[407]

One of the claims, involving an alleged constructive change, had been asserted in general terms in a letter from the contractor to the contracting officer prior to final payment. The contractor was supposed to follow up on this letter with detailed information but did not do so until 1977. No further mention of this claim was made by either the contractor or the government until then.[408] The second claim, based upon alleged defects in specifications, had never before been raised by the claimant in any manner.[409]

The Board found that the claim asserted prior to final payment was not barred and could still be pursued, but that the second claim was so barred.[410] The Court of Claims agreed, holding that the fact that one claim was unresolved at the time of final payment did not mean that final payment did not occur.[411] The two decisions, especially the Board's

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[403] For a discussion of the phrase "final payment", *see* 2 Nash & Cibinic, note 352, *supra*, at 1988–89, and also the *Gulf & Western Industries* case, notes 405–411, *infra*, and text thereat.

[404] Act of Aug. 28, 1958, Pub. L. No. 85–804, 72 Stat. 972, as amended, codified at 50 U.S.C. §§ 1431–1435 (1976). Under the pressure of wartime and in other similar emergencies, procurements sometimes have to be effected without compliance with the usual contract formalities prescribed by law and regulation. Public Law 85–804 enables the government to enter or amend contracts after the fact, or make advance payments under specified circumstances to facilitate the national defense. The statute is implemented by DAR, note 191, *supra*, § XVII. Such extraordinary relief may be granted after final payment as long as it was requested during performance and prior to final payment. Comp. Gen. Dec. B–109832, 31 Comp. Gen. 685 (1952); AR 37–107, note 169, *supra*, para. 3–9b.

[405] Gulf & Western Industries, Inc., ASBCA No. 22204, 79–1 BCA para. 13,706.

[406] Gulf & Western Industries Inc., v. United States, 639 F.2d 732 (1980).

[407] Gulf & Western Industries, Inc., ASBCA No. 22204, 79–1 BCA para. 13,706, pages 67,214 and 67,217. Citations will be to the decision of the Board rather than that of the Court of Claims, because the Board's findings of facts and conclusions of law are much more lengthy and detailed.

[408] *Id.*, pages 67,215–16.

[409] *Id.*, pages 67,216 and 67,220.

[410] *Id.*, pages 67,220, 67,229–30.

[411] 639 F.2d at 736.

decision, provide extensive discussion of prior case law and statutes affecting finality of payment.

If there have been earlier payments on the contract, the final payment voucher should clearly be identified as the "Final Payment."[412] The accountable officers, however, should insure that, in accordance with *Gulf & Western Industries,* discussed above, it is in fact final and there are not claims or agreements yet to be made.[413] Before making the final payment, the certlfying or disbursing officer should insure that:

1. The contractor has submitted sufficient copies of the invoice, as specified in the contract.[414]

2. The payment to be made is the correct amount. While this is true for all payments, it is especially difficult and important in the case of the final payment. The final payment is often made months or years after the contract was entered. During that time, numerous interim payments may be made, various sums withheld for various reasons, and numerous modifications made to the original contract. It is vitally important that the certlfying or disbursing officer be informed by the contracting officer as to what the actual final payment is to be after the necessary inspections, acceptances, and deductions have been made.[415] Further, the certifying or disbursing officer must be informed by the accounting and budget personnel exactly how much money has already been paid out, and how much is still available for payment under the contract.[416]

3. The necessary documentation is attached to support the final payment. In addition to the documents normally attached, an additional

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[412] *E.g.*, AR 37–107, note 169, *supra*, para. 3–8b. ***See*** *also* Braswell Shipyards Inc., ASBCA No. 21516, 77–1 BCA 12366, wherein the final voucher was marked "7th partial and final payment."

[413] *E.g.*, Instrument Associates, ASBCA No. 9098, 65–1 BCA 4857. If the voucher was incorrectly marked "final", ***see*** AR 37–107, note 169, *supra*, para. 3–99, for the procedures to be followed.

[414] *See* Carl B. Todd, ASBCA No. 10340, 65–1 BCA 4823, for an example of an obstinate contractor who refused to comply with this simple request.

[415] E.g., Clark's Aerial Service Inc., ASBCA No. 74101, 75–1 BCA 11273 (1975). ***See*** Parmatic Filter Corporation, ASBCA No. 20763, 76–2 BCA 11974 (1976), wherein the contracting officer neglected to tell the disbursing officer to refrain from making certain payments.

[416] This is to avoid the overpayment problem that occurred in note 268, *supra*, and to avoid violating the Anti-Deficiency Act, 31 U.S.C. 665 (1976), to be discussed below. The accountable officer must ensure also that the proper exchange rates are used if foreign currency is involved. ***See*** A. Padilla Lighterage, Inc., *supra* note 187.

document is often required for final payment—a release. In cost-reimbursement contracts, the contractor is required to include a release with his final invoice before he can receive final payment.[417] Such releases are especially important to accountable officers, because making final payment without a release subjects the officer to possible liability.[418]

4. The payment is made to the correct party.[419] Due to the length of time between the initial conclusion of the contractual agreement and final payment, the cast of characters involved might have grown considerably. In addition to the government and the contractor, there might now be subcontractors, laborers, materialmen, bankruptcy trustees, payment bond sureties, performance bond sureties, joint ventures and assignees. All of these might assert claims for the money due on a final payment.

The respective validity and priority of such claims differs widely depending on the claimant and the circumstances. Clearly, however, if the money is paid to the wrong claimant, the government may be required to pay the claim a second time.[420] Such erroneous and duplicate payments are *prima facie* evidence of negligence on the part of the accountable officer.[421] As a result, that officer should consult with his agency legal staff to determine if a clear priority exists. If it does not, he should refuse to make payment until a court has decided the issue.[422] Payment may be made, however, if all the parties execute releases of their rights against the government.[423] One other method

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[417] *See* DAR, note 191, *supra*, §§ 7–203–4a, 7–203–4b (cost reimbursement contracts), and 7–602.7 (fixed price construction contracts). These clauses, however, permit the contractor to omit specific existing claims. *See* Vacketta, *Settlement and Release—Basic Principles and Guidelines, 80–6* Fed. Publications Inc. (Dec. 1980); Navy Compt. Man., para. 046364.

[418] *See* Comp. Gen. Dec. A–9673, 4 Comp. Gen. 1055 (1925), wherein a disbursing officer erroneously made a final payment upon acceptance of a qualified release.

[419] If the contract is with the Small Business Administration, the payment is made directly to the small business itself. FPR, note 197, *supra*, § 1–1–713–3(d)(1); DAR, note 191, *supra*, 1–705.5(c) (1)(J).

[420] Home Indemnity Co. v. United States, 180 Ct. Cl. 173, 376 F.2d 890 (1967). *See also* 2 Nash and Cibinic, note 352, *supra*, at 1975 and 1979.

[421] Ms. Comp. Gen. B–164138, Nov. 19, 1968. *See also* Comp. Gen. Dec. A–61975, 15 Comp. Gen. 979 (1936), in which a check was sent to the wrong man with a very similar name but to an address certified by the certifying officer. The Comptroller General ruled that therefore it was the certifying officer, not the Treasury disbursing officer, who was liable.

[422] Comp. Gen. Dec. B–182911, Feb. 5, 1975, 75–1 CPD 82; Comp. Gen. Dec. B–160232, 46 Comp. Gen. 389 (1966). *See* notes 353 *supra* and 431 *infra*.

[423] *See* Comp. Gen. Dec. B–160232, 46 Comp. Gen. 389 (1966); DAR, note 191, *supra*, 18–618.5(c)(iii). *See also* Frances Van Wagner, ASBCA No. 11880, 67–1 BCA 6286

available to the government by which the government may make payment and leave the competing claimants to fight it out between themselves is to make the check payable to one claimant but deliver it to another claimant.[424] The accountable officer, however, should insure that, by clerical error, it is not sent to the party to whom the check is payable.[425]

2. *Withholding*

Amounts withheld under a contract will often reduce the final payment significantly. During the course of the contract, the certifying or disbursing officer will often withhold amounts to insure that the work will be completed, that the government will be held harmless if the contractor damages private property,[426] to provide for liquidated damages,@' or pursuant to various contract clauses.[428] This withholding is at the behest of the contracting officer unless the contract specifies whether any particular amounts are to be withheld.[429] Certifying and disbursing officers are given little guidance on such matters other than to follow the directions of the contract and the contracting officer.[430]

While the accountable officer's guidance is little, he is often faced with multiple claimants for the withheld sums. In one case, the accountable officer had withheld sums from a bankrupt contractor, The sums were then claimed by the contractor, the insolvent surety, the Small Business Administration who had agreed to guarantee payment of 90% of the surety's losses, and the unpaid materialmen and subcontractors. The accountable officer wisely went to the Comptroller General for an advance decision. The Comptroller General, equally wisely, opined that this was a matter best left to the courts for resolution.

(1967). Regulatory guidance involving Sureties is contained in DAR, note **191,** *supra,* **18–618.5.**

[424] *See* Fairchild Industries Inc. v. United States, **614** F.2d **740,** 222 Ct. Cl.___ (1980).

[425] Such an error occurred and the Comptroller General ruled that the government was obligated to pay the other party in Comp. Gen. Dec. **B–192516,** Nov. 8, **1978, 78–2** CPD para. 333.

[426] *E.g.,* Ms. Comp. Gen. B–150090, Nov. **9,** 1965.

[427] Ms. Comp. Gen. **B–157563,** Oct. **26,** 1965.

[428] *E.g.,* Trayer Engineering Corp., IBCA **1100–3–76,** 77–1 BCA **12,441 (1977)** (inspection clause); DAR, note **191,** *supra,* **18–704.13** (violation **of** Contract Work Hours Standards Act); Comp. Gen. Dec. **B–181695,** Apr. **7, 1975. 75–1** CPD **211.** For amounts withheld under the Davis Bacon Act or the Contract Work Hours and Safety Standards Act, ***see*** **4** GAO Manual Sections 46, **47.** ***See*** *also* Navy Comptroller Manual para. 046353.

[429] *E.g.,* DAR, note **191,** *supra,* § 7–602.7; FPR, note **197,** *supra,* § 1–7.202–4.

[430] *E.g.,* EPA Manual, note **54,** *supra,* chap. **4,** sec. **2,** para. **7–8.**

Therefore his decision was not to pay anyone, because, if the Comptroller General did say, "Pay X," that decision would not be *res judicata, so* possibly the government would be required to make a double payment later if a court so ordered.[431]

3. Termination for Convenience

Considering the importance of termination for convenience and the fact that such terminations prompt a flurry of activity regarding payments, costs, and financing,[432] it is amazing that the guidance given certifying and disbursing officers is virtually nil.[433] The principle that Seems to be most heavily operative in such occasions is that the payment should be approved by the proper official.

Once a contract is terminated, the contractor begins the preparation of the settlement proposal which will be submitted to the contracting officer. The contracting officer, if the settlement proposal is for $10,000 or more in the Department of Defense, or $2,500 or more in the civilian agencies, must submit the proposal to the agency audit office for examination and recommendation.[434] A cost reimbursement contractor, however, may elect to recover costs by continuing to submit cost vouchers as it did before termination.[435] This is called "vouchering out." If the contractor does not voucher out, a settlement proposal is submitted for his unvouchered costs and the fee. If it does

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[431] Comp. Gen. Dec. B–190181, Dec. 8, 1977, 77–2 CPD 445. However, in another case not involving multiple claimants, the Comptroller General ruled that the surety could be paid amounts withheld if the surety executed an indemnity agreement. Comp. Gen. Dec. B–181695 Apr. 7, 1975, 75–1 CPD 211. *See also* Ms. Comp. Gen. B–157563 Oct. 26, 1965, wherein the Comptroller General ruled, when faced with an assignee-surety contest that the agency involved should withhold payments from both parties and go to Department of Justice and file an interpleader in court.

[432] For general discussion of termination procedures and settlements, *see* Wright & Bedingfield, Government Contract Accounting chap. 11 (1979) Perlman & Goodrich, *Termination for Convenience Settlements — The Government's Limited Payment for Cancellation of Contracts,* 10 Pub. Cont. L.J. 1 (1978); 2 Nash and Cibinic, note 352, *supra,* at 1126–1162; Department of the Army Pamphlet No. 27–153, Procurement Law, para. 11–6–11–7 (1976) (hereinafter cited as DA Pamphlet 27–153).

[433] The Navy, for example, has one paragraph of guidance. Navy Comptroller Manual para. 046372. This, however, is more than is offered by the other agencies studied.

[434] DAR, note 191, *supra,* § 8–208a; FPR, note 197, *supra,* § 1–8.207a. The contracting officer may submit even lesser amounts for audit if he deems it necessary. He is also required to submit the settlement proposals of subcontractors, if such proposals exceed $25,000. DAR § 8–208b; FPR § 1–8207b.

[435] DAR § 8-204; FPR § 1–8.203.

voucher out, the negotiations are confined to adjustment of the fixed fee, if any is claimed.[436]

Frequently on large contracts a significant period of time elapses between the notice of termination and the termination settlement. Because the contractor may face continued financial demands during that period, interim financing may be provided. Partial payments upon termination may be made under the terms of the contract,[437] if requested and approved by the contracting officer.[438] Such requests must be submitted with adequate documentation. Guaranteed loans are also available during this period.[439]

Once the final settlement proposal is offered, negotiations will take place between the contractor and the contracting officer. If the parties are able to reach an agreement, the amount will be approved for final payment. If they are unable to reach an agreement, the contracting officer will unilaterally determine an amount for payment.[440] This decision may be appealed under the disputes clause.

The approved amount, by whatever means arrived at, will be transmitted to the certifying or disbursing officer as approved for payment. With these approvals and the other supporting data, the accountable officer will render payment.

B. COLLECTING GOVERNMENT CLAIMS

Contractors often owe money to the government. Certifying and disbursing officers are an integral part of the government's collection procedures. If these procedures fail, the government may then utilize its right of setoff[441] and collect the debt from amounts otherwise due the contractor. If there is no such amount that can be offset, the government must take the contractor to court. This last method, however, will not involve certifying or disbursing officers other than that they will be required to furnish any needed information to the government

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[436] *See generally* DAR § 8-401-407 and FPR § 1-8.401-406 for a discussion of the proper form and procedures to be used by the contractor. *See also* DA Pamphlet 27-153, *supra* note 432, at para. 11-6d.(2).

[437] *See, e.g.*, DAR, note 191, *supra*, § 7-103.21(b), subpara. (j); FPR, note 197, *supra*, § 1-8.701(j).

[438] DAR 8-213-1; FPR 1-8.212-1.

[439] *See* DA Pamphlet 27-153, note 432, *supra*, para. 11-6e.

[440] DAR, note 191, *supra*, § 8-204; FPR. note 197. *supra*. § 1-8.203.

[441] *See* Pachter, *Set Off as a Meaning of Collecting Government Contract Claims*, 3 Pub. Cont. L.J. 163 (1970).

attorneys handling the case. Therefore, this last method will not be addressed further.

1. *Collection Techniques*

a. Disbursing Officers

The Department of Defense has detailed procedures for collecting debts,[442] set out in DAR Appendix E, Section 600.[443] While the primary responsibility for determination and collection of a contract debt rests with the contracting officer, the disbursing officer has primary responsibility if erroneous payments or overpayments have been made by the disbursing officer, or if the disbursing officer has been required by the contract to collect specific debts.[444]

The disbursing officer is required to give his utmost cooperation to the contracting officer, auditors, and other pertinent officers, and all are to keep each other appropriately informed.[445] If the disbursing officer receives a request to withhold payments due the contractor in order to liquidate the debt, he will cooperate and assist. He must give "due regard,'' however, to the effect an abrupt cessation of payment may have on the contractor and the interests of the United States.* Each amount withheld will then be transmitted to the disbursing officer on the contract under which the indebtedness arose and will be accompanied by a statement identifying the indebtedness to which it is to be applied. Appropriate notice will be given to the contractor by the agency making the deduction.[447] If the disbursing officer has primary responsibility for debt collection, he will establish a control record for each debt specifying the nature and amount of the debt and listing the dates of demands and notices.[448]

When the contracting officer has primary responsibility for collecting the debt, he will negotiate with the contractor in order to reach an agreement.[449] If negotiations are unsuccessful, the contracting officer will unilaterally fix the amount of indebtedness and serve a written

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[442] Examples of such debts are to be found in **DAR,** note 191, *supra,* § E–601.
[443] *See* Pachter, *Government Collection Techniques,* 75–6 Fed. Publications Inc. 253 (1975).
[444] DAR, note 191, *supra,* § E–602. *See also* **4 GAO** Manual, note 31, *supra,* 10.
[445] **DAR** § E–602.2, E–610.4
[446] *Id.,* § E–602.3. *See* **4 GAO** Manual, note 31, *supru,* para. 76.3.
[447] DAR, note 191, *supra,* § E–602.3.
[448] *Id.,* § E–603.2 and E–603.3.
[449] *Id.,* § E–605, 606.

demand for payment upon the contractor. The notice will explain the indebtedness; inform the contractor that any amount not paid within thirty days will bear interest; and notify the contractor that it may submit a proposal for postponement of payments if it cannot pay immediately, or if it disputes the debt.[450] The contracting officer must serve a copy of the notice on the disbursing officer at the same time the demand is made, and must also inform the disbursing officer as to the wishes of the contracting officer regarding the withholding or nonwithholding of payments during the ensuing thirty days.[451] The contracting officer should then make an appropriate decision under the contract disputes clause and give the contractor notice of its right to appeal.[452]

The disbursing officer may also make such a demand for payment63 but does not have to. If the disbursing officer has primary responsibility to collect and has on hand amounts payable to the contractor and available for offset, the disbursing officer should make the appropriate offset. (Setoff will be discussed in more detail below.) In this case, an explanatory notice to the contractor will take the place of demand.[454] Disbursing officers are not required to offset. During the first thirty days they may withhold or not as deemed best by them.[455] Similar withholding and offset is expected if the contracting officer requests it.[456]

If payment is not effected within thirty days and deferment is not requested, withholdings will be effected at once for principal and interest.&' If 45 days elapse from the date of demand without payment in full, the responsibility for collection is transferred to the Department's Contract Financing Office.[458] After such transfer, this office has full

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[450] *Id.*, § E–608, see Transport Tire Co. Inc., GSBCA No. 5750–5, 80–2 BCA 14,586 (1980).

[451] DAR, note 191, supra, § E–610.2.

[452] *Id.*, § E–606.2.

[453] *Id.*, § E–608.

[454] *Id*, § E–608.1.

[455] *Id.*, § E–610.1.

[456] *Id.* This procedure has keen upheld on the grounds that the contractor may contest the claim before a board of contract appeals. Delta Electric Const. Co. v. United States, 436 F.2d 547 (5th Cir. 1971). In this regard, see Transport Tire Co. Inc., GSBCA No. 5750–5, 80–2 BCA para. 14,586 (1980), holding that setoff prior to the contracting officer's fmal decision was improper.

[457] Subject to the rights of assignees as discussed below. DAR, note 191, supra, § E–610.5.

[458] *Id.*, § E–611. See AR 37–107, note 169, *supra*, para. 6–61, for the procedures to be used to transfer. See also Navy Comptroller Manual para. 013202–4.

responsibility for the collection action. Whatever collections are made must be reflected on Standard Form 1219.[459]

The matter is also referred to the Contract Financing Officer if the contractor requests a deferral of payments, pending the appeal of the contracting officer's decision.[460] Such requests are "freely granted."[461] If no appeal is pending, a deferral will be granted if the contractor provides sufficient information to show financial difficulty if payment were required immediately, and gives a definite schedule of payment.[462]

By whatever method, once the matter is transferred to the Contract Financing Office, it is beyond the jurisdiction of the disbursing officer. It may return to his jurisdiction through the operation of the Hold-Up List, discussed below.

b. Certifying Officer

Certifying officers do not have such specific guidelines to follow. The civilian guidelines for the collection for claims are extremely general and do not specify which action will be taken specifically by the certifying officer.[463] These guidelines provide for a similar demand for payment[464] but do not state whose responsibility it is to send the demand. Collection by offset is authorized.[465] This would undoubtedly be within the area of responsibility of the certifying officer, because the Comptroller General has ruled that, if official records being examined by a certifying officer indicate that an indebtedness exists to the United States, the officer should withhold certification of the full amount, or of such lesser amount as would cover the indebtedness, until such time as the indebtedness ends.[466]

If the indebtedness is definite and certain in amount, it should be offset.[467] The debt may be collected in installments, if the contractor's financial condition so requires.[468]

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[459] See note 246, *supra*. See also Navy Comptroller Manual para. 043004.
[460] DAR, note 191, *supra*, § E–611.
[461] Id., § E–614 subject to the requirements contained therein but see note 518 *infra*.
[462] Id. § E–613, 617.4.
[463] *See* 4 Code of Fed. Regulations (CFR) part 102 (1981). See *also* 4 GAO Manual, note 31, *supra*, chap. 10.
[464] 4 CFR § 102.2 (1981).
[465] Id., § 102.3. See 7 Ag. Reg., note 53, *supra*, para. 151b.
[466] Comp. Gen. Dec. B–81630, 28 Comp. Gen. 425 (1949).
[467] 4 CFR § 102.3 (1981).
[468] 4 CFR § 102.9 (1981).

2. *Setoff*

The right of the United States to setoff debts has long been recognized.[469] Once accountable officers receive notice of indebtedness, either by their own discovery,[470] notification from another office,[471] notification from the General Accounting Office,[472] or from the Hold-Up List,[473] they must make the necessary adjustments or be liable for any overpayments made.[474]

The Hold-Up List was formally established by the Comptroller General in 1952.[475] After each department has made a determination of indebtedness, it is required to furnish the name of the contractor to the Finance and Accounting Center, Department of the Army, which has responsibility for maintaining the list. The contractor's name is then added to the list, which is circulated to government agencies, particularly the certifying and disbursing officers. These officers, once they are aware of such an indebtedness, will offset payments otherwise due and remit them to the agency to which the debt is owed.[476]

One particular but common form of offset is the tax offset. If the department receives from the Internal Revenue Service a Form 668–A, Notice of Levy, to effect collection of tax indebtedness, the amount will be offset after amounts owing the agency are satisfied, and the vendor and contracting officer will be notified.[477]

The right to setoff is very broad,[478] but it is not without limits. Setoff is often limited depending on whether the indebtedness arises un-

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[469] *See* Pachter, *supra* note 441. *See also* 2 Nash & Cibinic, note 352, *supra*, 1954–1958.

[470] DAR, note 191, *supra*, § E–6.

[471] *Id.*; 4 GAO Manual, note 31, *supra*, para. 76.1, 76–3.

[472] *E.g.*, Accounting-Jurisdiction of the Comptroller General, 2 Comp. Gen. 689 (1923). In the present article, the terms "Comptroller General" and "General Accounting Office" or "GAO are used interchangeably to refer to the same agency authority.

[473] 4 GAO Manual, note 31, *supra*, § 75.

[474] Comp. Gen. Dec A–24975, 8 Comp. Gen. 244 (1928); Accounting—Jurisdiction of the comptroller General, 2 Comp. Gen. 689 (1923).

[475] *See* 4 GAO Manual, note 31, *supra*, § 60.

[476] 4 GAO Manual, note 31, *supra*, sec. 75, para. 76.2, sec. 77.

[477] *E.g.*, EPA Manual, note 54, *supra*, chap. 4, § 3, para. 4.

[478] *See* 2 Nash and Cibinic, note 352, *supra*, 1954–1955; *see also* Ms. Comp. Gen. B–158241, Feb. 2, 1966 (disbursing officer "setoff' money due on a later contract because the government did not take discount it was entitled to under earlier contract); Comp. Gen. Dec. A–3942, 4 Comp. Gen. 177 (1924) (for an early Comptroller General discussion of this area).

der the contract,[479] whether the payee is an assignee,[480] which claim came first,[481] and when the government had notice.[482] The certifying or disbursing officer confronted with complicated factual and legal issues such as this will surely have a doubt as to which claimant to pay.[483] Once that doubt arises, the officer's best course of action is to request an advance decision from the Comptroller General.[484]

One matter, however, is clear. If the accountable officer makes an overpayment, it is he, not the payee, who is primarily liable. Setoffs may be made if allowable, but there is no requirement to do this, and it should not be done if the United States is prejudiced thereby.[485] The accountable officer has no inherent right of setoff merely to reimburse his own account.[486]

3. *Terminations for Default*

Default terminations[487] occasion many government collection actions. Before making final payment, the certifying or disbursing officer should insure that any progress or advance payments have been liquidated.[488] Furthermore, he should (1) insure that payment bonds are adequate to cover all lienors' claims; (2) require the contractor to furnish appropriate statements from laborers and materialmen disclaiming any lien rights; (3) obtain appropriate agreement by the

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[479] *See* 2 Nash and Cibinic, note 352, *supra,* 1822–1823.

[480] The Assignment of Claims Act of 1940, 31 U.S.C. § 203, 41 U.S.C § 15 (1976), permits the use of contract clauses prohibiting assigned claims from being setoff or reduced. *See* 2 Nash & Cibinic, note 352, *supra,* 1966–1967, for a listing of the applicable departments and conditions.

[481] Comp. Gen. Dec. 18–188473, Aug. 3, 1977, 77–2 CPD 74. In this case, a Forest Service claim of setoff had priority over the claims of a payment bond surety.

[482] Mercury Chemical Corp. (originally docketed as Coleman Capital Corp.), ASBCA No. 12468, 69–1 BCA 7602 (1969). In this caw, the assignee sent notice of assignment to the contracting officer, who acknowledged receipt and instructed the assignee to send the necessary payment documents to a specific disbursing officer. The assignee did so, but they were returned because the disbursing office had been changed. By the time documents were sent to the correct officer, the setoff had occurred. The Comptroller General disallowed the setoff.

[483] *See Comment, The Surety's Rights to Money Retained from Payments Made on a Public Contract,* 31 Fordham L. Rev. 161 (1962); Note, *Suretyship — Surrogatwn — Rights of Surety to Funds Withheld Under a Government Contract,* 61 Mich. L. Rev. 402 (1962); Pachter, *supra* note 441; and Pachter, *supra* note 443, for a discussion of this complex area.

[484] *See* notes 353, 422, and 431 *supra.*

[485] Comp. Gen. Dec. A–19379, 8 Comp. Gen. 130 (1928).

[486] Comp. Gen. Dec. A–17131, 7 Comp. Gen. 264 (1927).

[487] *See* 2 Nash & Cibinic, note 352, *supra,* 1636–1711, for a discussion of default termination.

[488] *E.g.*, C & M Manufacturing Center Inc., ASBCA No. 17606, 74–2 BCA 10786.

Government, the contractor, and lienors assuring release of the Government from any potential liability; and (4) withhold, if necessary, amounts otherwise due for supplies and materials in order to protect the government's interest.[489]

The defaulted contractor is, of course, liable for any excess costs incurred in procuring similar supplies and services and also for any other damages.[490] These damages will be collected by use of the collection techniques discussed above.[491]

C. *CLAIMS*

Certifying and disbursing officers do not have an active role in negotiating and settling claims.[492] Indeed, if a contractor disputes the accountable officer over the amount of a payment, the normal course of action is to refer the contractor to the contracting officer for resolution of the matter.[493] When paying claims, more so than in any other area in procurement, the guiding maxim for certifying and disbursing officers is, "Do what you're told." The maxim is definite because the "tellers" are normally the contracting officer, the Comptroller General, or a board of contract appeals—all of whose opinions will normally be binding on the certifying or disbursing officer.

1. Contracting Officer

At one time, the capacity of the contracting officer (indeed, of the executive departments and therefore also the certifying or disbursing officer) to settle breach-of-contract claims was disputed by the Comp-

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[489] DAR, note 191, *supra*, § 8-602.2c; FPR, note 197, *supra*, 5 1-8.602-2c. Although these sections refer to the responsibility of the contracting officer, the certifying or disbursing officer should assure they have been complied with.

[490] DAR, note 191, *supra*, § 8-602.2(d); FPR, note 197, *supra*, § 1-8.602-2(d).

[491] DAR 8-602.6(c); 8-602.7; FPR § 1-8.602-6(c); 1-8.602.7.

[492] *See* 4 Comp. Dec. 332 (1897). (The old decisions of the Comptroller of the Treasury should not be confused with the decisions of the Comptroller General.)

> [T]he authority of disbursing officers of the Executive departments to make payments is restricted to the payment of fixed salaries, bills for supplies purchased and approved, and other similar demands which do not require for the ascertainment of their validity the exercise of judicial functions in weighing evidence or in the application of general principles of law.

Id. at 338. 22 Comp. Dec. 350 (1916); Comp. Gen. Dec. A-2719, 4 Comp. Gen. 56 (1924); Comp. Gen. Dec. A-4023, 4 Comp. Gen. 283 (1924). *See also* Park, *Settlement of Claims Arising From Irregular Procurements*, 80 Mil. L. Rev. 220, 243-244 (1978).

[493] *E.g.*, Christian J. Ludwig Co., ASBCA No. 5278, 59-1 BCA 2212 (1959).

troller General,[494] although such capacity had been recognized by the courts.[495] The Comptroller General did, however, recognize the contracting officer's capacity to settle claims arising under the disputes clause of the contract.[496]

In 1977 the Comptroller General modified his position substantially by saying that it was no longer necessary for contracting officers to submit to GAO for approval claims for unliquidated damages for breach of contract by the government, if the agency and the contractor had mutually agreed to a specific settlement.[497] Therefore, if the agencies could validly enter into such an agreement, payment could be made locally by the certifying and disbursing officer without submission of the claim to GAO.[498]

The passage of the Contract Disputes Act of 1978,[499] however, renders the earlier dispute academic. The statute at 41 U.S.C. § 605 now says that *all* contractor claims relating to a contract should be submitted to and decided by the contracting officer. This officer's decision "shall be final and conclusive and not subject to review by any forum, tribunal or Government agency, unless an appeal or suit is timely commenced" either in the Court of Claims or the appropriate Board of Contract Appeals. This very definite language seems to exclude the certifying or disbursing officer or even the Comptroller General from reviewing the contracting officer's decision. Although the statutory language is not absolutely clear, it appears that the only reviewing authorities are the boards of contract appeals or the Court of Claims, if an appeal is timely made.[500]

Consequently, once the contracting officer's decision is made and the accountable officer is informed, the appropriate payment should be certified and paid.

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[494] Comp. Gen. Dec. B-155343, 44 Comp. Gen. 353 (1964).

[495] *E.g.*, Cannon Construction Co. v. United States, 162 Ct. Cl. 94, 319 F.2d 173 (1963).

[496] For a general discussion, see Shedd, Administrative *Authority to* Settle Claims *for* Breach of *Government Contracts*, 27 Geo. Wash. L. Rev. 481, 511–516 (1959); Cibinic & Lasken, *supra* note 11, 362–371.

[497] Comp. Gen. Dec. B-187547, 56 Comp. Gen. 291 (1977). See Park, *supra*. note 492, at 245-247.

[498] *See* Park, *supra* note 492.

[499] Pub. L. No. 95–563, Nov. 1, 1978, 92 Stat. 2383, codified at 41 U.S.C. 601 et *seq.* (1976).

[500] *But see* Comp. Gen. Dec. B-195272, Jan. 29, 1980, 80-1 CPD 79. In that case the Army had purchased an eye cornea for $200 by an informal commitment. Although willing to pay, the Army sent the matter to the GAO payment branch for an advance decision. The Payment branch returned the matter saying that, in accordance with the Con-

2. Comptroller General

The claims settlement authority of the Comptroller General is based on 31 U.S.C. § 71,[501] which states that all claims against the United States should be settled and adjusted in the GAO.[502] Notwithstanding this broad language, the contractual claims jurisdiction of the GAO has long been sharply limited.[503] Now the Contract Disputes Act of 1978 has made even further inroads. The GAO cannot review the decisions of the contracting officer or of a board of contract appeals,[504] and certainly not those of the Court of Claims.

Some contract-related claims, however, will continue to be forwarded to the GAO for resolution, in all probability. Such claims will be accompanied by an administrative report prepared by the contracting officer setting forth all necessary information,[505] a voucher,[506] and copies of all supporting documents.[507] Once these are submitted to GAO, the contractor should be so advised.[508]

Once a claim is settled, the GAO will issue either a Certificate of Settlement, GAO Form 39, or annotate the voucher with a certificate of allowance.[509] All such forms will then be sent to the certifying or disbursing officer for prompt processing and payment.[510] These settle-

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tract Disputes Act of 1978, it should be resolved by the agency. The Army returned the matter to GAO who overruled its payment branch. The rationale was that this was not a claim nor a dispute since the Army was perfectly willing to pay but was unsure of its authority because there was no express contract. GAO said this was simply a "request for payment" of an informal commitment which should continue to be forwarded to GAO.

[501] Revised Statutes § 236; Act of June 10, 1921, c. 18, § 305, 42 Stat. 24. *See* 4 GAO Manual, note 31, *supra*, chap. 1, 2 for the GAO's procedure in such matters.

[502] A simplified procedure, however, has been adopted for claims of $25 or less. These may be settled by the agency, 4 GAO Manual, note 31, *supra*, para. 5.3.

[503] *See* Cibinic & Lasken, *supra* note 11, at 362.

[504] 41 U.S.C. 607g(1) (1976). This statute merely enacted what had already been declared by the Supreme Court in S & E Contractors v. United States, 406 U.S. 1 (1972). *See* note 513, *infra*.

[505] *E.g.*, AR 37-107, note 169, *supra*, para. 5-25, VA Manual, note 220, *supra*, para. 2.11 (requiring the use of VA Form 4-943, Reference of Claim to General Accounting Office) 4 GAO Manual, note 31, *supra*, 8.2.

[506] AR 37-107, note 169, *supra*, para. 5-25a, 4 GAO Manual, note 31, *supru*, para. 8.3.

[507] *See* 4 GAO Manual, note 31, *supra*, para. 8.2, for a listing of general procedures to be used.

[508] 4 GAO Manual, note 31, *supra*, para. 8.4.

[509] 4 GAO Manual, note 31, *supra*, para. 11.1, 11.2. If the entire claim is disallowed a Settlement Certificate, GAO Form 44 is used. Often the GAO will merely return the matter to the agency saying it has no objection to payment.

[510] 4 GAO Manual, note 31, *supra*, para 12-1, 12.2 and 12.3. AR 37-107, note 169, *supra*, para. 5-25f.

ments are final and conclusive upon the Executive Branch.[511] Consequently, certifying and disbursing officers will not be held personally liable for payments made pursuant to such settlements which appear regular on their face, unless they exceed the balance left in the appropriation or fund.[512]

X. GENERAL CONSIDERATIONS

In any and all action taken by certifying and disbursing officers, there arise certain pressures and risks. These intangible matters are analyzed in this section.

A. PRESSURE POINTS

Any examination of the role of certifying and disbursing officers in government contracts would not be complete without illustrating and discussing various types of attempts to influence their actions. Certifying and disbursing officers, because of the important positions they occupy in the payment process, often find themselves the objects of a considerable amount of pressure. Such pressure may be exerted by the agency itself, the contractor, or the Comptroller General, and is designed to induce the certifying or disbursing officer to act or refrain from acting in a particular fashion. Examples of such pressure by each of the protagonists listed above will be discussed.

1. Pressure By the Agency

The agency can exert subtle and not-so-subtle pressure on the accountable officer through a wide range of administrative rewards (promotion, outstanding ratings, incentive awards) and sanctions (reprimands, suspensions, job downgrading). These possibilities impose considerable pressure on the accountable officer to comply with the wishes and directives of his agency superiors. Conversely, agency officials realize that they have more control over such an officer than they do over an outside entity, such as a board of contract appeals.

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[511] 31 U.S.C. 74 (1976); Act of June 10, 1921, c18, § 304, 42 Stat. 24. 4 GAO Manual, note 31, *supra,* para. 14.1. *See* Cibinic & Lasken, *supra* note 11, at 364, wherein it is suggested that if the agency still did not pay, the contractor could bring a mandamus action to compel payments. *See* Comp. Gen. Dec. 14 Comp. Gen. 572 (1935).

[512] 4 GAO Manual, note 31, *supra,* para. 14.3. Indeed such settlement documents should not receive an administrative review by the agency as to legality or correctness. 4 GAO Manual, note 31, *supra,* para. 12.4. If the contractor appeals, the appeal should

The classic example of an accountable officer doing exactly what the agency wanted occurred in the case of S & E Contractors v. United States.[513] A dispute had arisen under a contract between the contractor and the Atomic Energy Commission. Because the Commission did not have a contract appeals board,[514] the Commission referred the matter to a hearing examiner who decided in the contractor's favor on eight of its claims. The examiner remanded the case to the contracting officer to negotiate the amount due. The contracting officer then sought review of this decision by the Commission, which declined to review four of the claims, modified the examiner's findings on three of the claims and reversed him on one claim. The Commission then remanded the case to the contracting officer to proceed to final settlement. The contracting officer, however, had already referred the matter to the certifying officer and suggested that the Comptroller General should review it prior to payment.[515]

The certifying officer followed the suggestion and requested an advance decision from the Comptroller General.[516] Thus the certifying officer was the vehicle by which the contracting officer achieved "a second bite at the apple" in denying the contractor's claims. Although the availability of this particular method has now been sharply curtailed,[517] it illustrates the way such accountable officers may be used.

2. *Pressure* by *the Contractor*

The most recent example of a contractor attempting to force an accountable officer to comply with its wishes was the case of *Warner* v. *Cox*.[518] In that case the Navy had a shipbuilding contract with Litton

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be promptly referred to the Claims Division of GAO. 4 GAO Manual, note 31, *supra*, para. 15.4.

[513] 406 U.S. 1 (1972). The S & E case has been the subject of considerable attention. *E.g.*, Pasley, *The S & E Contractors Case—Beheading the Hydra or Wrecking Devastation,* 1973 Duke L.J. 1.

[514] 406 U.S. at 5 n.3.

[515] Telephone conversation between Professor John Cibinic, George Washington University Law School, and the contracting officer in question.

[516] The result was that the Comptroller General disallowed the payment. Comp. Gen. Dec. 46 Comp. Gen. 441 (1966). After the Atomic Energy Commission said it would comply with the Comptroller General's decision, the contractor sued in the Court of Claims. A commissioner of the court ruled in the contractor's favor but was reversed by the court itself. 193 ct. cl. 335, 433 F.2d 1373 (1970). The contractor then appealed to the Supreme Court, which ruled that the Comptroller General had no authority to review such decisions of the Commission. "The cases deny review by the Comptroller General of administrative disputes clause decisions as 'without legal authority' absent fraud or overreaching." 406 U.S. at 10.

[517] *Id.*

[518] 487 F.2d 1301 (5th Cir. 1974).

Systems, Inc. The contracting officer determined that Litton had received nearly fifty-five million dollars in overpayments. When Litton was informed,[519] it appealed to the Armed Services Board of Contract Appeals. Simultaneously, it applied to the "fmancing officer," actually the disbursing officer, for a deferment of the repayment.[520] This request was denied.

Litton then sued in Federal district court, asserting that the disbursing officer had violated applicable regulations in denying the deferment request. Litton sought a mandamus action in the form of an order restraining the disbursing officer from recouping the ascertained **$55** million overpayment by any means, including refusal to honor Litton's invoice. The district court complied, and such an order was issued, but this decision was reversed by the Fifth Circuit, which held that such a mandamus action was improper.[521]

Such mandamus actions to compel payment are normally not successful.[522] They do, however, represent an attempt by the contractor to force payment from certifying and disbursing officers by having a court supercede the prior orders of the contracting officer to withhold payment.

3. By the Comptroller General

As seen earlier,[523] the advance decision concept has enabled the Comptroller General to exert considerable influence in the procurement process. Advance decisions, however, when requested, if at all, by certifying and disbursing officers, must be made when the voucher

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519 Presumably Litton was given a demand for payment. *See* discussion in text above notes 442–468, *supra.*

520 The request was submitted pursuant to DAR, note 191, *supra,* § E–612.

521 The Fifth Circuit considered it improper in light of the pending administrative a p peal to the Armed Services Board of Court Appeals, and of the jurisdiction of the Court of Claims over such contract matters. 487 F.2d at 1306–1307.

522 *E.g.,* Rose v. McNamara, **225** F. Supp. 891 (E.D. Pa. 1963). *But* see Hangar One Inc., ASBCA No. 19460, 76–1 BCA 11,830 (1976). In that case, the Government was urged to release withheld payments in light of a district court's ruling that a government claim was without merit. ***See*** *also* Boston Pneumatics, Inc., GSBCA No. 4203, 75–1 BCA 11,014 (1975), wherein the Government was ordered to pay its contract liability as determined by the contracting officer's final decision, even though that decision was being appealed to the board by both parties. Such mandamus actions, however, would have a better chance of success if they were based on a certificate of settlement issued by the Comptroller General which is binding on the executive branch. ***See*** note 511, ***infra.***

523 ***See*** text above notes 134–142, *supra. See also* Von Baur, *Fifty Years of Government Contract Law,* **29** F.B.J. **305,** 317 (fall 1970).

is actually presented to them for payment.[524] This may well be months after the contract was made.

The Comptroller General has other vehicles by which to render his opinion. One well-known example of this is the "Philadelphia plan" decision.[525] The Department of Labor had announced a revised Philadelphia plan[526] prescribing that no contracts or subcontracts should be awarded for Federal or federally assisted construction projects unless the bidder had submitted an acceptable affirmative action program. Certain members of Congress submitted questions to the Comptroller General regarding the propriety and legality of such a plan. The Comptroller General stated that it had authority to render decisions with respect to the legality of any action contemplated by the federal agencies involving expenditures of appropriated funds whenever a question as to legality has been raised. The question may be raised by an agency head, the complaint of an interested party,[527] or by information coming to GAO's attention in the course of its other operations.[528]

After considering the questions, the Comptroller General announced that the plan conflicted with existing law. Although such a decision was not binding (no claim or account had yet been submitted to the GAO for settlement), its effect was powerful. Once it is announced that a plan is "unlawful," certifying or disbursing officers would make payments at great risk. Such payments, in the face of such an opinion, would normally be viewed by the GAO as negligent. Conversely, knowledgeable contractors would be extremely reluctant to enter into such contracts because, as one court stated, they would actually be buying a law suit.[529] Interestingly enough, the Executive Branch ignored the Comptroller General's unbinding decision and continued to utilize the Philadelphia plan. Despite its earlier pronouncement, appar-

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[524] *See* text above notes 634–645, *infra.*

[525] 49 Comp. Gen. 59 (1969).

[526] For a discussion of this plan, see *Philadelphia Plan, 45* Notre Dame Law 678 (summer 1970); *Philadelphia Plan: Remedial Racial Classification in Employment,* 58 Geo. L.J. 1187 (1970).

[527] An interested party, for example, could be a contractor.

[528] Such other operations might be its auditing functions. If in the course of an audit, it discovers what it considers an illegality, the GAO may announce in its draft or fmal report that it will withhold credit from the accountable offier if payment is made. *See* Machinery and Allied Products Institute, The Government Contractor and the General Accounting Office 64 (1966).

[529] United States *ex. rel.* Brookfield Const. Co. v. Stewart, 234 F. Supp. 94 (D.D.C.), *affd* 339 F.2d 753 (5th Cir. 1964).

ently the Comptroller General took no action against the accountable officers.

Nevertheless such a case illustrates how the Comptroller General, on its own motion or the motion of an interested party, may attempt to bring its considerable weight to bear on the accountable officer and force him to comply.

XI. LIABILITY AND RELIEF

Although liability and the various methods of relief from liability will be discussed below, it must be emphasized that these two subjects are virtually obverse sides of the same coin, namely, the likelihood of a certifying or disbursing officer actually giving money to the United States Treasury for an official indebtedness. Consequently the discussion of cases under one subheading or another has been done for analytical reasons. Many cases could just as easily have been used in more than one section.

A. LIABILITY

The development of law concerning the criminal liability and pecuniary liability of a disbursing and certifying officer has been described above.[530] It is necessary, however, to look at the present status of their perilous positions to gain a full understanding of the dangers of their jobs. This analysis is divided into three general sections: (1) criminal liability; (2) administrative liability; and (3) pecuniary liability. Within the section on pecuniary liability, attention will be focused on the various methods of collection available to the government.

1. Criminal Liability

As might be expected because of their longer history, more specific criminal statutes deal with disbursing officers than certifying officers. Another more important reason exists, however. Remember that certifying officers have no public funds at their disposal. It is the physical possession of the public funds (or presently the treasury checks representing those funds) which has necessitated stricter punitive measures directed at disbursing officers.

A listing of these criminal statutes is as follows:

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[530] *See* **text above** notes 98–119, *supra*.

1. 18 U.S.C. 286.[531] Conspiracy to defaud the government by obtaining or aiding to obtain the payment or allowance of any false or faudulent claim.

2. 18 U.S.C. 641.[532] Embezzling, stealing or knowingly converting, or without authority selling, conveying or disposing of any record, voucher, money or thing of value of the United States.

3. 18 U.S.C. 643.[533] Failure to render accounts.

4. 18 U.S.C. 649.[534] Failure to deposit public funds.

5. 18 U.S.C. 653, 648.[535] Misuse of public funds by conversion to personal use.

6. 18 U.S.C. 651.[536] False certification that full payment was made in any receipt or voucher when less was paid. The fine (in addition to imprisonment) is to be double the amount withheld.

7. 18 U.S.C. 652.[537] Payment of a lesser amount to a creditor of the United States than that lawfully due him and requiring the creditor to receipt for the greater amount.

8. 18 U.S.C. 654.[538] Embezzling or converting the money or property of another which comes into the possession of government employees as part of their official duties. This section, for example, would penalize a disbursing officer for stealing a contractor's negotiable instrument submitted in lieu of a bid bond deposited with him.[539]

9. 18 U.S.C. 1901.[540] Carrying on a trade or business with public funds.

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[531] Act of June 25, 1948, 62 Stat. 683.

[532] *Id.* Interestingly enough, most case law involving the application of such statutes specifically to disbursing officers has been military case law. *See* United States v. Barrette, 4 C.M.R. 267 (ABR 1952), involving the theft by a disbursing offier of $25,813.00 in military payment certificates used by the occupation forces in Japan.

The statute at 18 U.S.C. 5 285 prohibits taking or using without authority papers relating to claims against the United States.

[533] Act of June 25, 1948, 62 Stat. 683.

[534] *Id.*

[535] *Id.* *See* United States v. Banning, 3 C.M.R. 333 (ABR 1951) in which the Army Board of Review discussed the statutes involved in the court-martial of a disbursing officer who stole $109,000. *See also* United States v. DeAngelis, 4 C.M.R. 645 (ABR 1951); Carter v. McClaughry, 183 U.S. 365 (1901).

[536] Act of June 25, 1948, 62 Stat. 683.

[537] *Id.*

[538] *Id.*

[539] *See* text at notes 206–210, *supra.*

[540] Act of June 25, 1948, 62 Stat. 683.

10. 18 U.S.C. 2073.[541] Making false entries and reports with intent to deceive.

11. 18 U.S.C. 1018.[542] Knowingly making of a false certificate by one authorized to make or give a certificate.[543]

Military disbursing officers also have a myriad of military regulations which they are required by law to obey or face criminal sanctions for disobedience[544] or dereliction of duty.[545] For example, the Army in the nineteenth century had a regulation prohibiting disbursing officers from gambling.[546] The rationale apparently was that if the officer began losing too much of his own money he might be too greatly tempted to dip into the public till.

The criminal statute which probably receives the most emphasis in government financial management is Revised Statutes 3679, The Anti-Deficiency Act.[547] The act prohibits government employees from knowingly making or authorizing an expenditure under any appropriation or fund in excess of the amount available therein or in advance of such appropriation. If the error is not knowingly made, the employee is not criminally liable but is subject to administrative discipline, including removal from office.[548] There have been no criminal prosecutions under the Anti-Deficiency Act, but administrative sanctions have been imposed for transgressions.[549]

The certifying or disbursing officer is a prime candidate for sanctions if a payment is made in violation of this statute. Because of the physical impossibility of keeping a continuing tally on all the accounts for which they certify or disburse, these officers must rely totally on the

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[541] *Id.*

[542] Id.

[543] *See* Ms. Comp. Gen. B–197559, November 21, 1980.

[544] Art. 92, Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. § 892 (1976). *Cf.* United States v. Craig, 8 C.M.A. 218, 24 C.M.R. 28 (1957).

[545] Art. 92, U.C.M.J. 10 U.S.C. § 892 (1976). *Cf.* United States v. Byars, 32 C.M.R. 701 (NBR 1962).

[546] *See* Wintrop, Military Law and Precedents 729 (1920 edition).

[547] 31 U.S.C. 655 (1976). For a thorough examination of the act, *see* Hopkins and Nutt, *The Anti Deficiency Act (Revised Statutes 3676) and Funding Federal Contracts: An Analysis,* 80 Mil. L. Rev. 51 (1978). *See* also Efrost, *Statutory Restrictions on Funding of Government Contracts,* 10 Pub. Cont. L.J. 254 (1978).

[548] Closely allied to the Anti-Deficiency Act is Revised Statutes 3678, which prohibits using appropriated funds for any other than their announced purpose. 31 U.S.C. 628 (1976). *But see* 31 U.S.C. 500 (1976).

[549] The procedures to be followed when such an error is discovered are set forth in AR 37–20, note 201, *supra,* chap. 2.

accuracy of the accounting and program budget personnel to insure compliance with these statutes.

The imposition of criminal sanctions, however, despite their variety and potential severity, is not the main concern of certifying and disbursing officers. Such prosecutions are rare and require the highest standards of proof based on admissible evidence, and the defendant is accorded his full panoply of due process rights.

2. Administrative Sanction

The possibility of imposition of administrative sanctions is a constant threat to any Government employee. For civilian employees, however, such sanctions are only imposable after a series of due process rights (such as notice, reasonable time to reply, legal representation, and a hearing if authorized) have been afforded.[550]

Military personnel would be afforded significant due process protection if attempts were made to separate them from the service.[551] However, they have significantly less protection against reassignment or lowered efficiency ratings.

Such sanctions, however, are usually imposed for fairly egregious conduct or frequently repeated errors. Normally certifying and disbursing officers' errors are due not to malfeasance but to errors in the system. Consequently, administrative sanctions are rarely imposed.[552]

3. Pecuniary Liability

For purposes of analysis, this section will be divided into two main sections: disbursing officers and certifying officers.

a. Disbursing Officers

A disbursing officer is considered an insurer of the public funds in his custody.[553] He is absolutely liable for any loss[554] and is held to the

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[550] *See* 5 U.S.C. 7501 (1976) *et seq.*

[551] *E.g.*, Ar 635–100, Personnel Separations—Officer Personnel, Change No. 26, 15 July 1980.

[552] *See* Comp. Gen. Dec. B–157824, 45 Comp. Gen. 447 (1966), however, in which the Comptroller General suggested that administrative sanctions be imposed on a certifying offier.

[553] *See* King, *Safeguarding of Public Funds,* 6 AF JAG Bull. 30 (No. 4, Jul.–Aug. 1964); Davis, *The Pecuniary Liability of Air Force Accounting and Finance Officers,* 5 AF JAG Bull. 26 (No. 2, Mar.–Apr. 1963); Comp. Gen. Dec. A–15534, 6 Comp. Gen. 404 (1926).

[554] *E.g.*, Comp. Gen. Dec. A–15534, 6 Comp. Gen. 404 (1926). *See also* 20 Op. Atty. Gen. 24 (1891), wherein then-Solicitor General William J. Taft imposed absolute liability.

highest degree of care in the performance of his duties.[555] Liability, however, will differ depending on whether the loss was a physical loss or the result of an erroneous payment.

(1) Physical Loss

A disbursing officer is liable from the moment a physical loss occur ~ Although lack of negligence is not a defense,[557] it may be grounds for relief.[558] The Comptroller General has ruled, however, that the mere fact of the loss is sufficient to raise a presumption of negligence.[559] The burden of proof of showing that there was no negligence rests upon the officer who sustained the loss.[560]

As a result of this heavy responsibility, great stress is placed on safeguarding the public funds in administrative inspections or audits[561] and in regulations.[562] In the event a loss is discovered, the Army, for example, requires that it be reported immediately to the Army Finance Center, and that an investigation be immediately initiated.[563]

(2) Erroneous Payments

As noted earlier, disbursing officers of the Department of Defense and certain other federal agencies[564] do not have the protection of a certifying officer system to insulate them from liability for erroneous or unlawful payments. If such a payment is made, the disbursing officer is liable.[565] If the officer disputes the notice of exception, the burden of proof is on him to prove the legality of the payment.[566]

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[555] Comp. Gen. Dec. **B–166174,** 48 Comp. Gen. 566, 567–68 (1969). ***See*** *also* **1** Comp. Gen. **225 (1921).** This is the view of the Comptroller General, but it should be remembered that the Court of Claims has imposed a reasonable-man standard in cases within its jurisdictions. ***See*** text at notes **124–127,** *supra.*

[556] Comp. Gen. Dec. **B–161475, 54** Comp. Gen. **112, 114** (1974). ***See*** *also* Dworak, *What is a Loss of Funds,* 6 AFJAG Bull. **23** (Jul.–Aug. **1964).**

[557] ***See*** Comp. Gen. Dec. **A–13198, 7** Comp. Gen. **64** (1927), and cases cited therein.

[558] ***See*** text at notes **601–612,** *infra.*

[559] ***See*** Comp. Gen. Dec. **B–166174, 48** Comp. Gen. **566 (1969);** Ms. Comp. Gen. **B–187139,** Oct. **25, 1978.**

[560] Ms. Comp. Gen. **B–191440,** May **25, 1979;** Ms. Comp. Gen. B–177430, Oct. **30, 1973.**

[561] *E.g.,* Naval Audit Service, Report **No.** A20166, Navy Finance Office, Groton, Connecticut **(30** June **1976).**

[562] **AR 37–103,** note **169,** *supra,* chap. **3.**

[563] **AR 37–103,** note **169,** *sup* , para. **3–152.** ***See*** Appendix E, AR **37–103,** for checklists of what is required. ***See*** *also,* Harwell, *Losses of Public Funds and Deficiencies in Disbursing Officer Accounts,* **Army** Finance Journal **11** (Jan.–Feb. **1969).**

[564] ***See*** text at notes **64-67, 149–154,** *supra.*

[565] Comp. Gen. Decs. **A–9895, A–24527,** 8 Comp. **Gen. 244 (1928).**

[566] Comp. Gen. Decs. **A–36301, A–49152, 13** Comp. Gen. **311 (1934).**

Liability is not dependent on the disbursing officer's capability or lack thereof to recoup payment.[567] It arises at the moment an erroneous payment is made[568] and is not excused if the payee is unable to refund the money.[569]

As is the case with physical losses, losses due to illegal, improper, or incorrect payments require prompt investigation and reporting of the pertinent facts to senior levels of financial management in the agency concerned.[570]

b. Certifying Officers

Because certifying officers do not hold public funds, they are in a different position than disbursing officers. There is no possibility of physical loss. They are, however, liable for the amount of any illegal, improper, or incorrect payment resulting from any false, inaccurate, or misleading certificate made by them. They are also liable for any payment prohibited by law or which did not represent a legal obligation under the appropriation or fund involved.[571] As with the disbursing officer, liability attaches the moment the erroneous payment is made.572 Certifying officers are responsible for the existence and correctness of the facts recited in the certificate or otherwise stated on the voucher or its supporting papers,[573] even mathematical computations.[574] Certifying officers cannot escape liability by obtaining and acting on the advice of administrative officials,[575] nor by alleging that they were not in a position to ascertain of their personal knowledge that each item was correctly stated.[576]

4. Collections

Once payment is disallowed or a loss is reported, the accountable officer, if not relieved from liability, is requested to reimburse the gov-

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[567] Comp. Gen. Dec. **A–13198, 7** Comp. Gen. **64 (1927).** The Comptroller General will look fist to the disbursing officer **and** his surety. Comp. Gen. Dec. **A–13215, 7** Comp. Gen. **797** (1928); Comp. Gen. Dec. **A–19379,** 8 Comp. Gen. **130 (1928).**

[568] Comp. Gen. Dec. B–161457, **54** Comp. Gen. **112, 114 (1974).**

[569] Comp. Gen. Dec. **B–5102, 19** Comp. Gen. **306 (1939).** This case involved a serviceman who had left the service. It would appear, however, to have equal applicability to a contractor which had gone bankrupt or out of existence after the erroneous payment. Comp. **Gen.** Dec. A–58702, **14** Comp. Gen. **464 (1934).**

[570] *E.g.*, **AR 37–103,** note **169,** *supra.* chap. **3,** § VIII.

[571] **31** U.S.C. 82c **(1976).**

[572] Comp. Gen. Dec. **B–161457, 54** Comp. Gen. **112, 114** (1974); Comp. **Gen.** Dec. B–184145, **55** Comp. Gen. 297 **(1975).**

[573] **31** U.S.C. 82c (1976) *See* Comp. Gen. Dec. B–42271, **23** Comp. Gen. **953 (1944).**

[574] **31** U.S.C. 82f (1976); Comp. Gen. Dec. B–74820, **28** Comp. Gen. **17 (1948).**

[575] Comp. Gen. Dec. B–108311, **31** Comp. Gen. **653 (1952).**

[576] Comp. **Gen.** Dec. **B–62557, 26** Comp. Gen. **578 (1947).**

ernment. For physical losses, there is not much a disbursing officer can do since he is no longer bonded. For erroneous payments, however, the accountable officers do have two options.[577] They may make demand upon the contractor for a return of the funds. If this is unsuccessful, they may set off an amount due the contractor under the same or a different contract. If this fails, however, it is the accountable officer himself who is responsible.

If repayment is made, it must be reported to the GAO using the original notice of exception, annotated to reflect the deposit or collection voucher number.[578]

The statute at 31 U.S.C. 82d (1976) provides that the liability of certifying officers shall be enforced in the same manner and to the same extent as the liability of disbursing officers. As noted earlier,[579] this liability of disbursing officers is enforced by distress warrant and distress sale.[580] Such proceedings, however, are rarely initiated. The normal method of recoupment would be through deduction from pay due the officer under 5 U.S.C. 5512 (1976).[581] Originally this statute was construed as requiring that the entire salary be withheld until the debt was repaid.[582] The Comptroller General modified this position in 1979 to permit withholding in installments.[583]

The provision at 5 U.S.C. 5512 **(1976)** does require that, if the official requests, the GAO must report the unpaid balance to the Attorney General, who is required to initiate suit against the debtor within 60 days. This will afford the debtor the protection of judicial review of the collection action.[584] Presumably, once the matter is before the court, the debtor may obtain injunctive relief to prevent further deductions until the court has rendered its decision.

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[577] *See* text at notes 442–486, *supra*. *See also* Cable, *The General Accounting Office and Finality of Decisions of Government Contract Officers, 27* N.Y.U. L. Rev. *780, 784* **(1952).**

[578] 3 GAO Manual, note 31, *supra*, para. **64.1.**

[579] *See* notes **91–94,** *supra*, and accompanying text.

[580] 31 U.S.C. 506–518 (1976). Section 508 also calls for imprisonment until the debt is paid, but that provision is normally thought to be no longer viable. *See* Itnyre, *supra* note 11, at 18–19.

[581] Pub. L. No. **89–554.** 80 Stat. **477 (1966).**

[582] 2 Comp. Gen. 689 **(1923).**

[583] Ms. Comp. Gen. B–180957–O–M, Sep. *25,* **1979.** It should be noted that the Comptroller General in this same opinion ruled that the Federal Claims Collection Act does not authorize the termination of collection actions if the accountable officer is still employed by the government. *See* note *586, infra*.

[584] Ms. Comp. Gen. **B–196855,** Dec. 18, **1979.**

However, the impact of 5 U.S.C. 5512 on military personnel is sharply restricted. Under 37 U.S.C. 1007a (1976),[585] the pay of military accountable officers may be withheld only for an indebtedness admitted by the officer, declared by a court judgment, or ordered by direction of the Secretary concerned.[586]

If for any reason the money cannot be withheld from salary (for example, if the officer is no longer employed by the government), the Department of Justice may institute suit.[587]

Because of the possibility of such onerous financial consequences for the actions of accountable officers, various avenues of relief have been created.

B. RELIEF

In theory, liability is absolute and pervasive. In practice, gaping holes exist in the threat of liability. Relief may be granted by (1)Congress, (2) the courts, or (3) those designated by Congress: the Comptroller General or the departmental secretary concerned.

1. Congress

Although Congress has enacted laws[588] to relieve itself of the burden of private relief legislation, such private bills still come before it. Although these bills may be introduced at the individual urgings of the aggrieved accountable officer, the chance of success is markedly improved if they are introduced at the urging and endorsement of the department involved. Such decisions are made on a case-by-case basis after all other methods of relief have failed.[589]

Such bills, however, need not be only for individuals. Statutes have validated an entire class of payments previously made,[590] with corre-

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[585] Pub. L. No. 87-649, 76 Stat. 491 (1962), as amended. *See* Comp. Gen. Dec. B–133705, 37 Comp. Gen. 344 (1957).

[586] The statute at 37 U.S.C. 1007b (1976) specifies that enlisted personnel may pay their debt in installments.

[587] R.S. § 3624, Act of June 10, 1921, Chap. 18, § 304, 42 Stat. 24, codified at 31 U.S.C. 505 (1976).

[588] *See* text at notes 601–648, *infra*. *See also* Dworak, *supra* note 556.

[589] *See e.g.*, EPA Manual, note 54, *supra*, chap. 1, para. 5h(2); 7 Ag. Reg., note 53, *supra*, para. 81c.

[590] *E.g.*, Act of Sep. 6, 1961, Pub. L. No. 87–207, 75 Stat. 480; Act of Sep. 2, 1960, Pub. L. No. 86–699, § 2, 74 Stat. 742; Act of July 5, 1960, Pub. L. No. 86–586, § 2, 74 Stat. 327.

sponding relief to the certifying and disbursing officers involved. Similarly, general relief legislation is often passed after wars to relieve all military disbursing officers.[591]

2. *courts*

As noted earlier, disbursing officers have the right to apply to the Court of Claims for a decree crediting their account with the amount allegedly due from them.[592] That court has not applied the rigid standard of absolute liability heralded by the Comptroller General. Instead, it has imposed a reasonable-man standard,[593] which makes a finding of liability more unlikely.

Both certifying and disbursing officers have a right under 5 U.S.C. 5512 to have a court (presumably a federal district court) pass on the validity of collecting a debt by withholding from salary.[594] Once a case is in that forum, by whatever means, the Comptroller General's decisions concerning the case are not binding. The court will look to judicial precedents for guidance. While the earlier Supreme Court cases dealing with physical losses have been extremely rigorous,[595] the more recent Court of Claims and lower federal court cases have applied a much less strict standard.[596] Indeed, the 1932 decision in *United States. v. Heller*[597] dealt the Comptroller General's theory of absolute liability a severe blow.

A third way for the matter to reach court is for the accountable officer to leave government service. The government, then, must sue him in order to collect.[598]

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[591] *E.g.*, Act of April 21, 1922, 42 Stat. 497; Act of July 26, 1947, 61 Stat. 493. *See also* Act of June 1, 1974, Pub. L. No. 93–302, 88 Stat. 191, relieving disbursing and certifying officers of the Peace Corps and the ACTION Directorate of liability for improper or incorrect payments (except for fraud), notwithstanding 31 U.S.C. 82a2 (1976) and 31 U.S.C. 82c (1976).

[592] *See* text at note 119, *supra; see* 91 C.J.S., *United States* § 58 (1955); Serrano v. United States, 614 F.2d 525 (Ct. C1, 1979).

[593] *See* text at notes 122–127, *supra.*

[594] *See* text at notes 584–587, *supra. See* particularly note 585 and accompanying text stating that military personnel have greater protection in this area.

[595] *See* text at notes 102–107, *supra*

[596] *See* text at notes 122–127 and 157–159, *supra.*

[597] 1 F. Supp. 1 (D.C. Md. 1932).

[598] *See* note 587 and accompanying text.

3. *Comptroller General or Agency Head*

In order to relieve itself of a flood of private bills,[599] Congress has authorized the Comptroller General or agency head to grant relief. These various areas will be studied individually.[600]

a. Physical Losses

(1) Military Disbursing Officers

Under 31 U.S.C. 95a,[601] when a military disbursing officer has incurred a physical loss or deficiency, the General Accounting Office must relieve the officer of liability if the Secretary of the department concerned[602] makes a two-part determination. First, the loss or deficiency must have occurred while the officer was acting in the line of duty. Second, the officer must be found to have acted without fault or negligence. Such a determination is binding and conclusive on the GAO. This statute, however, applies only to physical losses. The Comptroller General has had occasion to remind the Service Secretaries of this when he overruled their determinations, purportedly made under this act, concerning erroneous payments.[603]

This act has been construed to permit relief for disbursing officers from losses by fire, shipwreck, theft, or physical losses resulting from enemy actions or otherwise,[604] or embezzlement by subordinate personnel.[605] The most recent large scale example of such physical losses

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[599] *See* Comp. Gen. Dec. B–94805, 30 Comp. Gen. 298 (1951).

[600] *See* 3 GAO Manual, note 31, *supra,* §§ 57, 58, for a general discussion of the standards and procedures used.

[601] Act of Dec. 13, 1944, c. 552, 58 Stat. 800; Act of Aug. 11, 1955, c. 803, 69 Stat. 687.

[602] The duty of making such determinations is normally delegated to the senior level officer, *e.g.*, AR 37–103, note 27, *supru,* para. 3–152a.

[603] *E.g.*, Comp. Gen. Dec. A–13436, 7 Comp. Gen. 374 (1927), and 2 Comp. Gen. 277 (1922). These decisions apply earlier versions of the same law. The Secretary of the Navy had attempted to use provisions of the act to excuse an erroneous payment. The Comptroller General had not allowed this. 2 Comp. Gen. 277 (1922). The Secretary then appealed the decision to the Attorney General, who a p e d with the Secretary. 34 Op. Atty. Gen. 5, 13 (1923). The Comptroller General adhered to his earlier position, and discussed the history of the act. 7 Comp. Gen. 376–380. The facts of the case are also discussed in 1 Comp. Gen. 536 (1922). The disbursing officer had already been convicted of embezzlement. The Secretary of the Navy had approved the finding. The Secretary then certified that the loss of funds was without fault or negligence. The GAO said such a finding could not set aside the criminal conviction. The embezzlement had occured by paying money to a nonexistent person on the basis of fraudulent vouchers. Consequently it is a hybrid between a physical loss and an erroneous payment.

[604] Ms. Comp. Gen. B–75978, June 1, 1948.

[605] Ms. Comp. Gen. B–133862–O.M., Nov. 29, 1957.

is the loss of money that occurred when disbursing officers were required to leave Vietnam as the government was falling.[606]

(2) *Other Disbursing Officers*

Relief for physical loss is provided to other disbursing officers or other accountable officers under 31 U.S.C. 82a–1.[607] This statute also requires the Secretary concerned to determine that the loss occurred in the discharge of official duties. However, it adds in the alternative, "or that such loss or deficiency occurred by reason of the act or omission of a subordinate." The Secretary must then determine that the officer was free from fault or negligence. Unlike 31 U.S.C. 95a, however, these findings of the Secretary are not conclusive upon the General Accounting Office. That agency must concur in the Secretarial findings before relief will be granted.[608]

Examples of situations in which relief has been denied because of neligence include leaving a safe unlocked,[609] or leaving the key to the cash box ,in a place accessible to others.[610] Even if there is negligence, however, it must be the proximate cause of the loss; otherwise, relief will be granted.[611] Relief will normally be granted for losses due to any type of criminal taking (larcency, robbery, embezzlement),[612] as long as the accountable officer was blameless.

(3) Certifying Officers

Although certifying officers do not have custody of public funds and would rarely incur physical losses, the provisions of 31 U.S.C. 82a–1 apply to accountable officers in general and would therefore afford protection to certifying officers if needed.

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[606] Comp. Gen. Dec. B-186348, 56 Comp. Gen. 791 (1977). This concerned mostly United States disbursing officers of the State Department.

[607] Act of Aug. 1, 1947, c. 441, § 1, 61 Stat. 720; Act of Aug. 9, 1955, c. 694, 69 Stat. 626.

[608] For amounts below $500, however, GAO has delegated this authority to the agencies. 3 GAO Manual, Note 31, *supra*, 57.3; Comp. Gen. Dec. B-161457, 54 Comp. Gen. 112 (1974); Comp. Gen. Dec. B-195227, 59 Comp. Gen. 113 (1979).

[609] Ms. Comp. Gen. B-190506, Nov. 18, 1977.

[610] Ms. Comp. Gen. B-193380, Sep. 25, 1979; Ms. Comp. Gen. B–182480, Feb. 3, 1975.

[611] *E.g.*, Ms. Comp. Gen. B-191912, Sep. 12, 1979; Ms. Comp. Gen. B–144148–O.M., Nov. 1, 1960.

[612] *E.g.*, Ms. Comp. Gen. B-191048, May 30, 1978.

b. Improper or Illegal Payments

(1) Disbursing Officers

Those disbursing officers whose disbursing operations are not handled by the Treasury's Division of Disbursement are not afforded the insulating protection of a certifying officer system.[613] Therefore these officials face a greater potential for liability than Treasury disbursing officers.[614]

Congress recognized this inequality and, in order to rectify the situation (and to reduce the number of private bills submitted to it), enacted 31 U.S.C. 82a–2.[615] This statute provides that, if an erroneous payment has been made, the Comptroller General may in his discretion relieve the officer of accountability and allow the appropriate credit in the officer's accounts. Such relief must be preceded by findings that the erroneous payment was not the result of bad faith or lack of due care by the disbursing officer. The Comptroller General or his designee may take action on his own motion, or upon written findings and recommendations of the agency head. Such relief, however, is premised on diligent collection action against the payee, whose liability is unaffected by the act.[616] This statute was a significant inroad into the theory of absolute liability previously widespread.[617]

Obviously, what is "bad faith or lack of due care" will depend on the facts and circumstances of each case. Certainly if the facts stated on a voucher seen by the disbursing officer are sufficient to apprise him of an irregularity,[618] then a lack of due care would appear to be present. In most present-day systems, however, the disbursing officer does not and cannot physically see all the vouchers and supporting documents for which he has responibility. Consequently, the general rule is that, if a disbursing officer follows officially prescribed procedures in an efficient, carefully policed system under which he was not required to see the document, he is not guilty of bad faith or lack of due care.[619] This

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[613] *See* text at notes 64–67, 149–154, *supra.*

[614] *See* text at notes 149–154, *supra,* for a discussion of the responsibility that the certifying officer has assumed.

[615] Act of Aug. 11, 1955, Chap. 803, § 1, 69 Stat. 687. For the legislative history of the act, *see* S. Rep. No. 1185, 84th Cong. 1st Sess., reprinted in [1955] U.S. Code Cong. & Adm. News 3020.

[616] 3 GAO Manual, note 31, *supra,* para. 57–2.

[617] *See* text at notes 102–107, *supra. See also* 1 Comp. Gen. 739 (1922).

[618] *See* Comp. Gen. Dec. A–13215, 7 Comp. Gen. 797 (1928); 3 Comp. Gen. 441 (1924).

[619] *See* Ms. Comp. Gen. B–141038–O.M., Nov. 17, 1959; Ms. Comp. Gen. B–128377–O.M., Aug. 1, 1956.

represents a common-sense approach in the context of the modern day automated system. Soon a new position will be created, the System Assurance Officer, who must assure the certifying or disbursing officer that the system is trustworthy and may be relied upon.[620]

Navy disbursing officers have extra protection in this area. Under 31 U.S.C. 116,[621] if such an officer is ordered by his commanding officer to make a payment, such a payment may be allowed but the commanding officer shall be accountable for it.[622] The disbursing officer, however, will not escape liability if he acted in concert with the commanding officer to invoke the protection of statute,[623] or if the order contravened a prior Comptroller General decision on the matter.[624]

(2) Certifying Officers

Under 31 U.S.C. 82c,[625] the Comptroller General[626] may relieve certifying officers of liability for erroneous payments if he finds (1) that the certification was based on official records and the certifying officer did not know, and by reasonable diligence and inquiry could not have ascertained the actual facts; or (2) that the obligation was incurred in good faith, the payment was not contrary to any statute prohibiting such payment, and the United States received value for such payment.[627]

This section is important because, from their official creation in 1933 until the statute, certifying officers had been held to virtually absolute

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[620] *See* text at notes 654–655, *infra.*

[621] R.S. 5 285; Act of June 10, 1921, Chap. 18, § 304, 42 Stat. 24. *See* King, *Illegal or Erroneous Payments Made by Order of Superior Authority*, 5 A F JAG Bull. 20 (Jan.–Feb. 1963).

[622] The Army and Air Force have no comparable statute and in fact there is precedent to the contrary. See note 140– but see note 159.

[623] Comp. Gen. Dec. A–20285, 7 Comp. Gen. 781 (1928). *See* Navy Comptroller Manual 041331, for the procedures to be followed if such an order is given.

[624] Comp. Gen. Dec. A–12411, 5 Comp. Gen. 822 (1926).

[625] Act of Dec. 29, 1941, C. 641, § 2, 55 Stat. 875, as amended by Act of June 6, 1972, Pub. L. No. 92–310, § 231(cc), 86 Stat. 213. See Comp. Gen. Dec. B–94805, 30 Comp. Gen. 298 (1951), for a history of 31 U.S.C. 82c.

[626] The Comptroller General has delegated this authority to the General Counsel of the General Accounting Office. Ms. Comp. Gen. B–161457–O.M., Nov. 1, 1974.

[627] The section also grants relief on transportation contracts as discussed earlier in section VIII.C of this article, in the text at notes 322–332, supra.

liability.[628] Certifying officers have had absolute liability shifted to them for disbursing officers,[629] even for mathmatical computation.[630]

The Comptroller General has attempted to give guidance for relief on the above grounds.[631] The first basis for relief is essentially a notice requirement. If the certlfying officer had notice, whether actual or available by reasonable diligence, of the error, then relief is unavailable.[632] It is impossible in present-day systems, especially the automated ones, for the certifying officer to know or by *reasonable* diligence to ascertain the facts contained in the official records in which he certifies. Therefore, this requirement provides a virtually ever-present vehicle for relief.

The second or alternative ground for relief is that the payment was (1)made in good faith, (2) not contrary to statute and, (3) in return for value received by the United States. Because of the pervasive nature of the first ground, this second vehicle is rarely used, but situations have arisen in which neither ground is available for relief.[633]

c. *Advance Decisions*

Often in determining whether the accountable officer acted in good or bad faith, or reasonably and without negligence, the Comptroller General will decide on the basis of whether he requested an advance

Both certifying[635] and disbursing officers[636] may request advance decisions. Disbursing officers may ask regarding any question

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[628] *See* Comp. Gen. Dec. B–4613, 19 Comp. Gen. 104 (1939); and Comp. Gen. Dec. A–'73624, 15 Comp. Gen. 986 (1936). *But see* Comp. Gen. Dec. B–12296, 20 Comp. Gen. 182 (1940).

[629] *See* Act of Dec. 29, 1941, c. 641, § 1, 55 Stat. 875, codified at 31 U.S.C. 82b (1976). *See also* text at notes 149–154, *supra.*

[630] Act of Apr. 28, 1942, c. 247, Title 111, 56 Stat. 244; Comp. Gen. Dec. B–64245, 26 Comp. Gen. 718 (1947). Before this, disbursing officers were liable for computation errors. Comp. Gen. Dec. A–17131, 6 Comp. Gen. 522 (1927).

[631] *E.g.*, Comp. Gen. Dec. 184145, 55 Comp. Gen. 297 1975).

[632] Comp. Gen. Dec. B–119524, *see* 34 Comp. Gen. 52 (1954).

[633] *See* Comp. Gen. Dec. B–159633, 46 Comp. Gen. 135(1966). In that case, certifying officers of the Small Business Administration were denied relief because the Comptroller General determined that the facts could have been reasonably ascertained and the payment was in violation of a statute. Note that the payment must be *prohibited* by statute. It is not enough if the statute does not authorize such payments. *Cf.* 3 Comp. Gen. 749 (1924).

[634] *E.g.*, Comp. Gen. Dec. 184145, 55 Comp. Gen. 297 (1975). For the development of the practice of issuing advance decisions, see the text at notes 134–142, *supra.*

[635] Act of Dec. 29, 1941, chap. 641, § 3, 65 Stat. 876, codified at 31 U.S.C. 82d (1976).

[636] Act of July 31, 1894, Chap. 174, § 8, 28 Stat. 207 as amended, codified at 31 U.S.C. 74 (1976).

involving a payment to be made by them, but certifying officers may only ask regarding a question of law. To avoid a flood of questions regarding trivial matters, the Comptroller General has delegated to the various agencies the authority to render binding advance decisions on amounts of $25 or less.[637] All other requests must be sent to the Comptroller General.[638] The question must have the voucher and all supporting documentation attached.[639] If the decision is rendered on the basis of incomplete facts, the accountable officer will not be protected.[640] Although the Comptroller General does not normally give advance decisions on a hypothetical question or on payments already made, he will if the question is of a recurring nature.[641]

As noted earlier, these decisions are binding on the Executive branch.[642] They take precedence over advice from the Attorney General,[643] or the agency general counsel,[644] and may not be overruled by a disapproving agency official.[645]

d. Remaining Avenues of Relief

If the Comptroller General denies relief under one of the aforementioned statutes, the officer may request reconsideration. The Comptroller General, however, may not reconsider a finding of the Secretary concerned under 31 U.S.C. 95a, because that finding, either granting or denying relief, is conclusive upon the GAO.[646] As with any request for reconsideration, unless new evidence is presented, the chance of success is not great.

The most definite safeguard for certifying and disbursing officers is provided in 31 U.S.C. 82i.[647] That statute declares that the accounts of

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[637] 3 GAO Manual, note 31, *supra*, para. 54.4. *See also* AR 37–103, note 169, *supra*, para. 11–3a; VA Manual, note 220, *supra*, para. 2.11c(2).

[638] *See* Ms. Comp. Gen. B–191329, April 28, 1978. *See* AR 37–103, note 169, *supra*, para. 11–3, for the procedures to be followed. Before such an opinion is requested, agency resources should be fully utilized 7 Ag. Reg., note 53, *supra*, para. 80b.

[639] Comp. Gen. Dec. B–31169, 22 Comp. Gen. 588 (1943); Comp. Gen. Dec. B–158371, 55 Comp. Gen. 652 (1976).

[640] Comp. Gen. Dec. B–16422 20 Comp. Gen. 759 (1941).

[641] The decision, however, will *go* to the agency head. Comp. Gen. Dec. B–162021, 51 Comp. Gen. 79 (1971); Comp. Gen. Dec. B–63803, 26 Comp. Gen. 797 (1947); Comp. Gen. Dec. B–26685, 21 Comp. Gen. 1128 (1942).

[642] *See* text at notes 136–137, *supra*.

[643] Comp. Gen. Dec. A–20989, 7 Comp. Gen. 414 (1928).

[644] Comp. Gen. Dec. 184145, 55 Comp. Gen. 297 (1975).

[645] Ms. Comp. Gen. B–129004, Oct. 25, 1956.

[646] *See* Ms. Comp. Gen. R–194782, Aug. 13, 1979.

[647] Act of May 19, 1947, chap. 78, 61 Stat. 101, as amended.

certifying and disbursing officers must be settled within 3 years from the date of their receipt at GAO. After 3 years, absent fraud or other criminality, any debt is eliminated.[648] This statute, however, does not offset the liability of any erroneous payee, and its effect is suspended during periods of war.

An important fact to remember regarding all these avenues of relief is that they are not mutually exclusive. Indeed, they are alternatives which may freely be used. Thus, an accountable officer may request relief from the Comptroller General or Departmental Secretary. If he receives no relief, he may then go to court via the various routes discussed. Finally, if he loses in court, he may then petition Congress for relief. All methods of relief may be attempted without prejudicing rights under any other method.

XII. THE FUTURE

The day-to-day functions of certifying and disbursing officers have been radically changed by the combination of a burdensome problem and its necessary solution.

The problem was the flood of contracts, travel vouchers, payrolls, annuities, and grants, among the other voluminous documents which inundated these accountable officers. It became impossible to give an examination (thorough or otherwise) to all these documents and still make prompt payments.

The solution was the computer and telecommunications equipment. This enabled centralization, which allowed the government to take advantage of discounts and the contractor to receive its money as soon as possible. Such technology, together with the safety of statistical sampling procedures,[649] enabled the system to continue without totally breaking down.[650]

The computer has been adopted to different extents in different agencies. Some have virtually totally automated and centralized sys-

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[648] *See* Ms. Comp. Gen. B–181466, Nov. 19, 1974.

[649] *See* notes 162–163, *supra*.

[650] One other conceptual and technological advance is electronic fund transfer. *See:* Cooley, *Is the Federal Cash Management Movement Colliding with Electronic Fund Transfer Initiatives*, The Government Accountant's Journal 49 (winter 1979–80); Mayer, *supra* note 70, at 7. The implementation of electronic fund transfer would drastically reduce the number of checks needed in a disbursing office since payment would be electronically transmitted to the contractor's bank for credit to its account.

tems. Others are only partially automated but the trend is clearly toward total automation.[651] The computer itself has changed as it has changed the system. "Automated systems grew in stages from the rudimentary punched card systems of the 1950's to the high speed, self-controlled third-generation computers of today."[652] Punched cards and records have been replaced with magnetic tapes. "Hard copies" of the vouchers and supporting documents are becoming less and less frequently available to the certifying and disbursing officer.

Certifying and disbursing officers now must perform their functions not on the basis of visual examination of documents, but on the basis of abstracted information placed in the computer by personnel often thousands of miles away. The accountable officers must, therefore, rely on the accuracy and trustworthiness of the agency's system to such a degree that the examination merely comprises a brief examination of the totals of large groups of payments, with individual payments being contained on an attached magnetic tape. Because of this, the Comptroller General has adopted a commonsense approach and has liberally granted relief to such officers.[653]

Because of this realization, recommendations have been made within the Executive branch to improve the system.[654] The main addition would be a new position of system assurance officer (SAO), who would be responsible for developing and implementing an assurance plan. This plan would provide assurance to certifying and disbursing officers that the system (1) is properly designed and implemented; (2) operated properly; and (3) can be relied on to process legal, proper, and correct payments. If the system is determined to be defective, the SAO will be responsible for certifying (disbursing) payments made until the system is corrected and for recouping erroneous payments. The assurance plan must include the disciplinary sanctions to be imposed on personnel if they are responsible for illegal, improper, or incorrect payments resulting from their negligence. Such SAOs, however, may also be certifying officers and, in fact, should be designated as alternate certifying officers.

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[651] *See* New Methods, *supra* note 12, at 1.

[652] *Id.*, at 5.

[653] *See* notes 619–633, *szcpra,* and accompanying text.

[654] These recommendations are included in the JFMIP Study. They appear likely to be adopted, because the Office of Management and Budget is promulgating an OMB Circular, "Internal Control Systems," which implements some of these recommendations. *See* 46 Fed. Reg. 1380 (1981), and also letter of Dec. 11, 1980, to the Office of Management and Budget from Mr. Kenneth M. Winno, Chairman, Certifying and Disbursing Committee, General Accounting Office.

The difficulty with the proposed improvement is that the problem would still remain. The overwhelming burden of dealing with such a high amorphous mass of paper and magnetic tape has merely been transferred to a new participant, the SAO, who may also be the old participant, the certifying or disbursing officer. Furthermore, if the SAO concept is adopted, then what remains of the certifying officer? His status would be simply that of an innocuous middleman who receives the assurance from the SAO based on which he signs his name for transmittal to the disbursing officer. In such a case, one must question the reason for the continued existence of certifying officer positions.

In any event, technological improvements will undoubtedly continue, and, as they continue, the numbers of certlfying and disbursing officers will decrease. As systems are centralized, what was formerly the job of numerous accountable officers spread over several states will now be the job of one certlfying or disbursing officer at the computer center.[655] As their numbers decrease, their individual responsibilities will increase and their examination will become more perfunctory.

XIII. SUMMARY AND CONCLUSIONS

At the beginning of this article, authority, responsibility, and liability were pointed out as characteristics that certifying and disbursing officers should theoretically have in abundance. Now, after examining the role of these officials in detail, the reality of the situation can be assessed.

A. *AUTHORITY*

Theoretically, certlfying and disbursing officers have awesome authority. They can refuse to make any payment unless they are satisfied of its legality. They can require additional documentation to satisfy them, or they may involve the Comptroller General in the process.

In reality, certifying and disbursing officers will, very wisely, use this authority extremely rarely. Only in a miniscule percentage of cases will the accountable officer question the payment, despite the fact that in the vast majority of cases, he has never examined or even

[655] *See* New **Methods,** *supra* note **12,** at **10-11.**

seen the supporting data. The reason for this "rubber stamping" is clear. It is physically impossible for the officer or his assistants to examine the myriad of documents and make prompt payments thereon. If an officer demands to be shown adequate supporting data (as clearly he is legally entitled to do), the workings of his agency would grind to a halt. Another certlfying or disbursing officer would soon be appointed to replace him, so that the business of government could continue.

B. RESPONSIBILITY

Despite this lack of authority, certifying and disbursing officers still bear responsibility for making proper payments. This responsibility is thus borne by officials who had nothing to do with planning for, negotiating, awarding, or monitoring the contract. It is borne by officials who normally are not procurement experts or lawyers, yet who are expected to be essentially omniscient in those complex fields. It is borne by one official out of a host of contracting officers, contracting specialists, lawyers, accountants, auditors, and inspectors, all of whom actually have more responsibility for the final contract. Such an arbitrary selection of one individual as the bearer of responsibility for lawful payments is capricious. This capriciousness becomes manifestly unfair when coupled with the threat of liability.

C. LIABILITY

Personal liability is an idea whose time has gone. Such liability arose for three reasons: (1) to provide a vehicle for the United States to recoup its monetary losses, (2) to be used as a "sword of Damocles" to insure faithful and conscientious service by Federal certifying and disbursing officers, and (3) to assure the public that its civil servants would do their utmost to protect public money.

Any hope for the government to recoup money from its accountable officers was dealt a crushing blow when the bonding requirement was eliminated. Without a surety to sue, chances for recovering any substantial amount of money are slim. Even if money was available to recover, the government's ability to recover it is hampered by the numerous avenues of relief available to accountable officers.

As the Joint Financial Management Improvement Program Study illustrated, accountable officers are often not aware that they face per-

sonal liability. The value of a "sword of Damocles" that people do not know exists is nil. The author submits, however, that this lack of knowledge that a real threat exists is beneficial for the government. If all certifying and disbursing officers truly believed they would be personally liable for their actions, the results would be disastrous. No rational officer would sign his name to a document about which he had no real knowledge but which could result in him and his family being reduced to penury. Either these officers would resign or request reassignment, or else they would demand physical and verifiable proof of the correctness of each payment, which would stop the operations of government.

The possibility of liability does not reassure the public at all. The vast majority of Americans go through their entire lives never thinking or caring about certifying and disbursing officers or the concept of liability. Those who are familiar with the subject know the concept of liability provides no additional safeguards in the modern system.

Certainly liability should be imposed for willful misconduct or gross negligence, if they are the proximate cause of a governmental loss. The present system, however, to amplify on what one certlfying officer said, "is like punishing the policeman because someone, somewhere, somehow committed a crime."

D. CONCLUSION

The author concludes, therefore, that the role of the certifying or disbursing officer in government contracts is mainly ministerial, but draped with risk. His authority is transparent, his responsibility is unfairly and too selectively imposed, and his potential liability is massive and absurd except for the most routine and verifiable matters. Serious consideration should be given to eliminating the now virtually useless position of certifying officer, and further to eliminating the liability of the disbursing officer except for gross or willful misconduct. Such changes would reflect the modern realities that confront the certifying or disbursing officer.

Standard Form 210
May 1973
4 Treasury FRM 2000
6 Treasury FRM 2000
210–105

SIGNATURE CARD
for
CERTIFYING OFFICER

(Department establishment or agency) (Bureau or office)

(Manual official signature of certifying officer)

For *certification* of. (check one box only–separate card required for each category)

☐ SF 1166 – Voucher and Schedule of Payments (or other approved form) _____
(Location of disbursing office)

☐ Letters of Credit

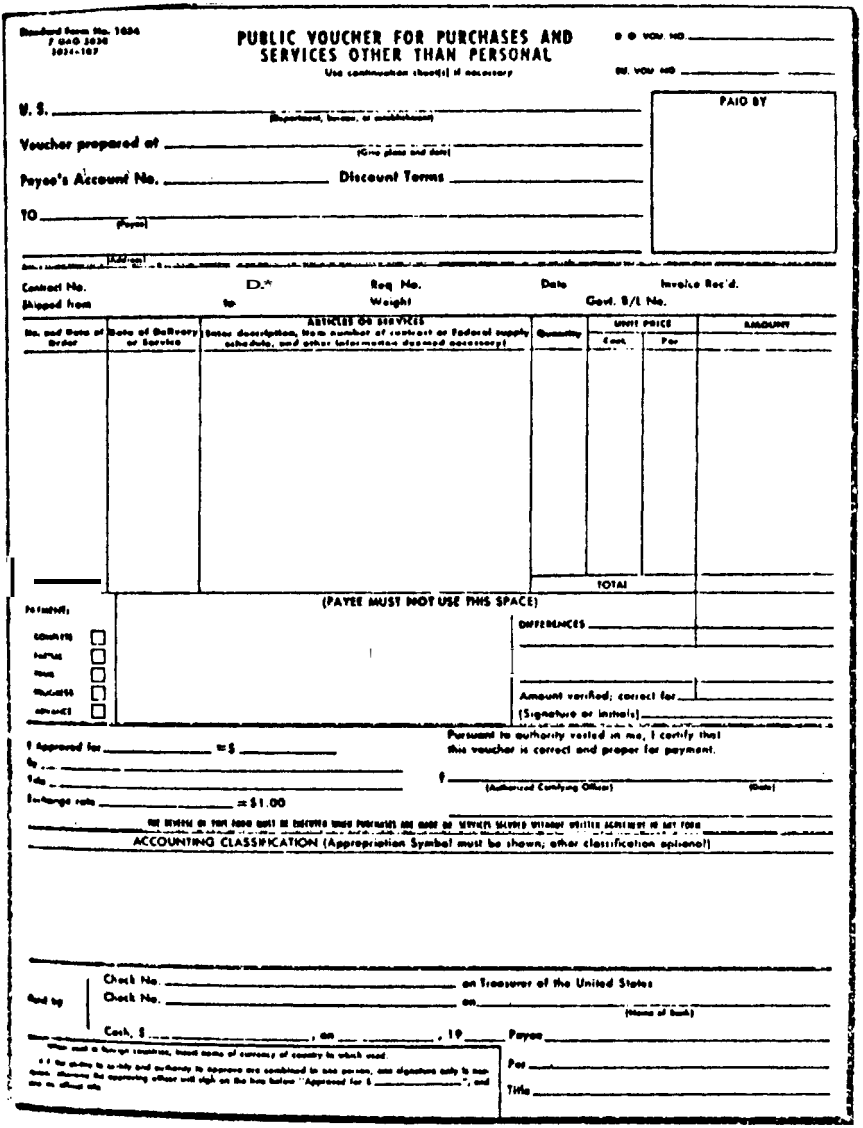
I certify that the above is the official signature of _____
(Full name of certifying officer)

who is designated (in writing) as a certifying officer to certify vouchers or letters of credit as indicated above.

_____ _____
Signature and title of head of agency or his designee Date

GPO : 1973 O-510-463/83-C)

Figure 1. Standard Form 210, edition of May 1973.



PUBLIC VOUCHER FOR PURCHASES AND SERVICES OTHER THAN PERSONAL

Use continuation sheet(s) if necessary

PAID BY

U. S. _____

Voucher prepared at _____

Payee's Account No. _____ Discount Terms _____

TO _____

Contract No. D.* Req No. Date Invoice Rec'd.

Shipped from to Weight Govt. B/L No.

No. and Date of Order	Date of Delivery or Service	ARTICLES OR SERVICES (Enter description, item number of contract or Federal supply schedule, and other information deemed necessary)	Quantity	UNIT PRICE Cost	UNIT PRICE Per	AMOUNT
					TOTAL	

(PAYEE MUST NOT USE THIS SPACE)

Payment:

- complete
- partial
- final
- progress
- advance

DIFFERENCES _____

Amount verified; correct for _____

(Signature or initials) _____

† Approved for _____ = $ _____

By _____

Title _____

Exchange rate _____ = $1.00

Pursuant to authority vested in me, I certify that this voucher is correct and proper for payment.

† _____

(Authorized Certifying Officer) (Date)

THE REVERSE OF THIS FORM MUST BE EXECUTED WHEN PURCHASES ARE MADE OR SERVICES RENDERED WITHOUT WRITTEN AGREEMENT AS SET FORTH

ACCOUNTING CLASSIFICATION (Appropriation Symbol must be shown; other classification optional)

Paid by

Check No. _____ on Treasurer of the United States

Check No. _____ on _____ (Name of bank)

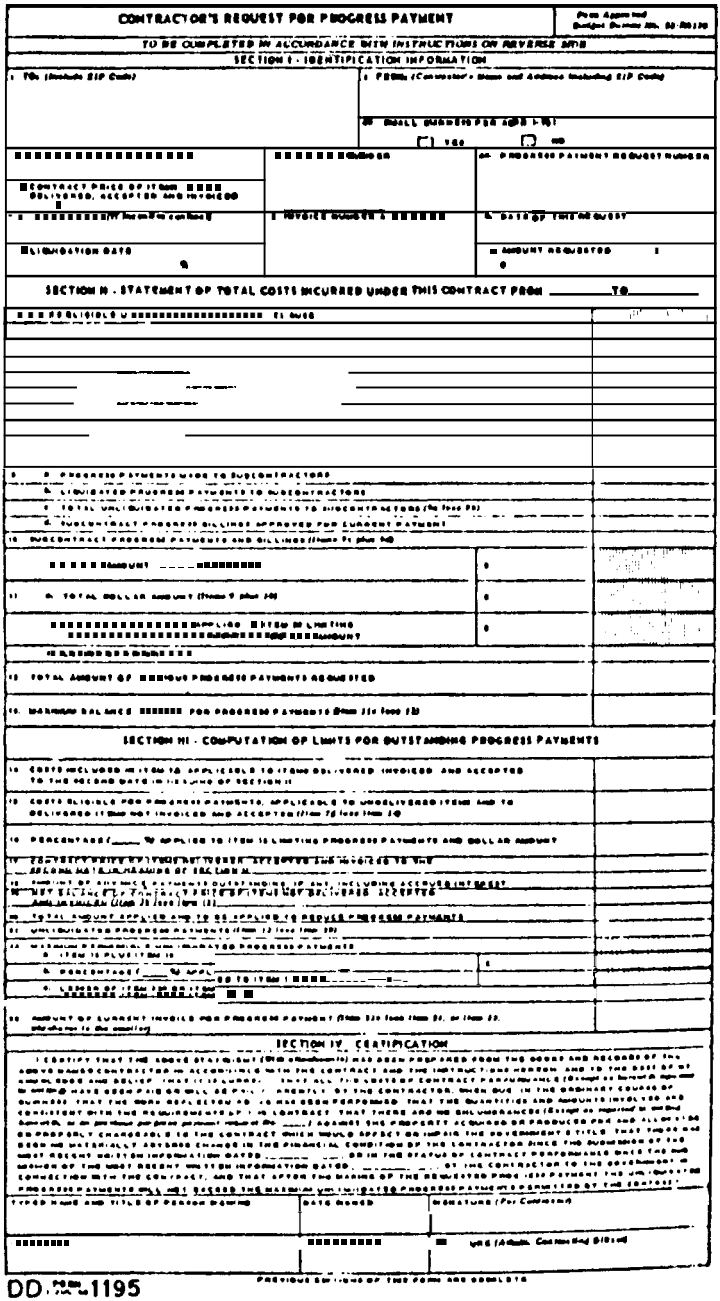
Cash, $ _____, on _____, 19____ Payee _____

Per _____

Title _____

* If the voucher is to be paid and certified to by one person, one signature only is necessary. Otherwise the approving officer will sign on the line below "Approved for $ _____", and one or several more.

Figure 2. Standard Form 1034.



CONTRACTOR'S REQUEST FOR PROGRESS PAYMENT

TO BE COMPLETED IN ACCORDANCE WITH INSTRUCTIONS ON REVERSE SIDE

SECTION I - IDENTIFICATION INFORMATION

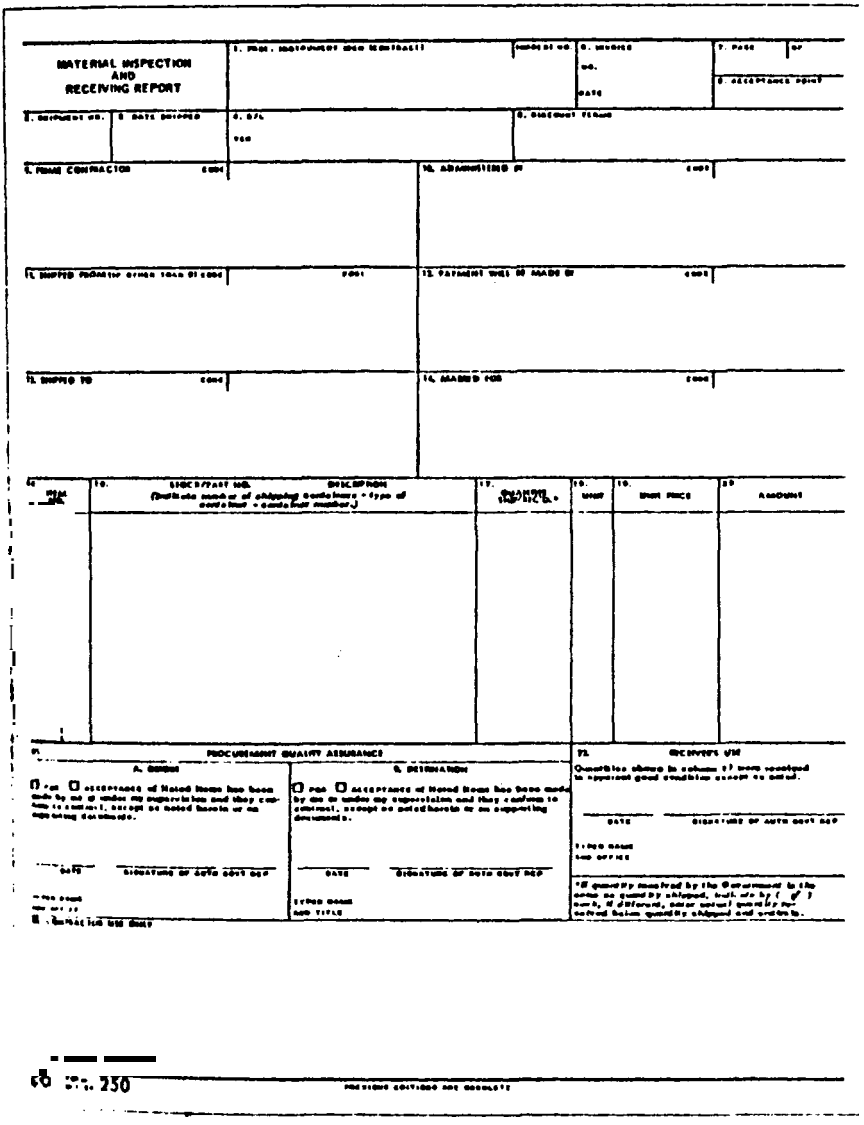
SECTION II - STATEMENT OF TOTAL COSTS INCURRED UNDER THIS CONTRACT FROM _____ TO _____

SECTION III - COMPUTATION OF LIMITS FOR OUTSTANDING PROGRESS PAYMENTS

SECTION IV - CERTIFICATION

DD FORM 1195

Figure 3. Department of Defense Form 1195.


MATERIAL INSPECTION AND RECEIVING REPORT

250

Figure 4. Department of Defense Form 250.

PROCUREMENT FRAUD: AN UNUSED WEAPON*

By Major Eugene R. Sullivan**

In a time of increasingly tight governmental budgets, fraud in government procurement is a matter of special concern. In this article, the author, a trial attorney for the Justice Department, discusses the statute at 18 United States Code § 218 (1976). This statute authorizes the Government to rescind a contract in connection with which there has been a final conviction for bribery or conflict of interest. Further, in such a case the Government may recover all amounts paid to the contractor,' without additional judicial proceedings.

Major Sullivan reviews the history of this statute. He explains its justification, and proposes methods for applying the statute in practice, with appropriate procedural safeguards. He suggests initiation of a pilot program of administrative enforcement of the statute as a means of discovering and dealing with possible due process problems.

I. THE ANTIFRAUD WEAPON EXISTS

The Federal Government has the power to institute a powerful and unique antifraud program in the area of procurement. The power to initiate and operate such a program is derived from 18 U.S.C. § 218,[1] a nineteen-year-old federal criminal statute authorizing the President to exercise a tough, efficient and effective antifraud power. Although there has been many antifraud programs in recent years, this power has never been used.

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

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[1] Act of Oct. 23, 1962, Pub. L. No. 87–849, § 1(e), 76 Stat. 1125. For legislative history, *see* S. Rep. No. 2213, 87th Cong., 2d Sess., reprinted at [1962] U.S. Code Cong. & Admin. News **3852.** 3863.

The statute at 18 U.S.C. § 218[2] provides in pertinent part that:

> ... The President or, under regulations prescribed by him, the head of any department ... may declare void and rescind any contract ... in relation to which there has been a final conviction for any violation of this chapter, and the United States shall be entitled to recover in addition to any penalty prescribed by law or in a contract the amount expended. ...[3]

Under this statute, once there has been a bribery or conflict-of-interest conviction in which a particular government contract has been identified as tainted by the criminal scheme, the President or, if he delegates this power, any head of any executive department or agency could by an administrative declaration void the contract tainted with the bribery or conflict of interest. Once the contract has been declared void and has been rescinded, the Government "shall be entitled to recover.. . the amount expended."[4]

II. THE POWER TO VOID AND RESCIND A CONTRACT

This statutory provision gives tremendous power to the Executive Branch, in that through its application, the Government is authorized, by carrying out an administrative act, full recovery on a contract that is tainted by bribery or conflict of interest. There would not be a need to expend time and effort in costly and uncertain litigation in order to gain a judgment futing the measure of damages in a procurement fraud scheme.[5] Such a concept of futing damages without resort to the court system is extraordinary. Congress was aware that this statute was an innovative measure, but considered it necessary to deter bribery and corruption in the government contracting process. Congress stated in

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[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] Complex procurement fraud cases usually involve years of litigation. For an example, *see* the Alsco-Harvard Fraud Litigation (consolidated *cases),* Civil No. 659-71 (D.D.C.). This case concerns fraud in the procurement of rocket launchers for the Navy. The complaint was originally filed in 1969, and a motion for summary judgment was argued before the district judge on June 26, 1981.

The long time required to reach a final judgment in Federal litigation is attributable chiefly to two causes. First, priority is given to the trial of criminal *cases,* which creates a backlog of civil cases. Second, the discovery process in large procurement cases is often extremely protracted. As Chief Justice Oliver Wendell Holmes, Jr., said, "Lawyers spend a great deal of time shoveling smoke."

its Senate Report that "this Section ... has no statutory counterpart at present time."[6]

Additionally, this power to void a contract gives new possibilities to federal departments or agencies to combat fraud. Under 18 U.S.C. § 218, the executive department or agency which receives this delegated power from the President can control the timing and amount of the contract recovery. The Section 218 process is purely administrative. This means that the agency or department involved is not dependent upon the Department of Justice or one of its United States Attorneys to institute or successfully prosecute a civil suit to recover damages on the contract.[7] The agency controls the decision to void the contract and the amount of the recovery through its administrative process. This process would be far quicker than reliance on litigation and would be more responsive to the priority, direction of emphasis, and needs of the agency involved.

III. THE ADMINISTRATIVE PROCESS

The administrative process contemplated in the operation of Section 218 is quick and simple. If there has been a final criminal conviction of bribery or conflict of interest[8] with regard to a government contract, then the head of the department or agency possessing the delegated Section 218 power may declare the contract void and rescind it. The statute states that, at the time of the voiding of the contract, the Government "shall be entitled to recover" the amount expended on the contract.[9] Therefore, the contractor's liability to refund all sums paid on the contract is fixed by the administrative operation of the statute[10]

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[6] S. Rep. No. 2213, 87th Cong., 2d Sess. at 15 (1962), reprinted at [1962] U.S. Code Cong. & Admin. News 3863.

[7] There could, however, still be the need for recourse to the court system to enforce the recovery after the contract has been rescinded. If the contractor (against whom a Section 218 determination has been made administratively) refused to refund to the Government "the amount expended" upon demand by the department or agency head," then a court action could be used to obtain an order for repayment of the "amount expended." The suit would be in the nature of an enforcement action since the issue of liability and the amount of recovery would have been already determined by the Administrative decision. The anticipated procedure to institute such a suit would be for the head of the department or agency that has made a proper Section 218 determination to request the Department of Justice or one of its United States Attorneys to institute a civil suit against the contractor in the judicial district where the contractor could be served with process.

[8] This means any violation of 18 U.S.C. §§ 201–224 (1976).

[9] 18 U.S.C. § 218 (1976).

[10] Such operation is simply the voiding of the contract by the agency head.

and not by a judicial determination after lengthy litigation. As discussed above, the court system may be used for enforcement purposes if the contractor refuses to return "all amounts expended" after demand by the agency head.

The issue of due process for the contractor and the feasibility of a hearing as part of the administrative process will undoubtedly arise. The process includes the rights to notice and a hearing for the contractor caught in the bribery or conflict-of-interest situation that may lead to the operation of Section **218.** In many instances where Section **218** may be applied, the contractor involved may have already furnished acceptable goods or services under the contract that is being considered for voiding under Section **218.** If the contract is voided and the department or agency head demands back from the contractor all monies expended on the contract, what is the legal effect of this action upon the ownership of the goods or services already delivered to the Government? The answer is unclear. However, this ownership issue does make it clear that the requirements of due process (i.e., proper notice of a hearing) should be satisfied in the administrative process prior to a final Section **218** decision by the department or agency head.

As a basic principle, the Constitution provides that "...private property shall not be taken for public use, without just compensation."[11] In the instance of the voiding of a procurement contract by a federal department or agency head, the contract (with its liabilities and rights) ceases to exist by the operation of a statute.[12] Upon the appropriate administrative decision and demand, the Government is entitled to recover all monies the Government paid on the contract. The Government, however, may have custody or possession of goods, or may have received services as a result of contract performance. Should the Government also declare that these goods and services shall be forfeited free of charge to the Government, in a manner similar to the seizure and forfeiture penalties currently in force in the customs contraband confiscation area? The present writer thinks not.

A better approach would be to include in the administrative process proper notice and opportunity for a hearing prior to the final decision of the department or agency head in the exercise of his Section **218** power. At this hearing the contractor could argue not only the appropriateness of the invocation of Section **218** against his contract, but

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[11] U.S. Const. amend. **5.**
[12] 18 U.S.C. § **218 (1976).**

also for reduction of the amount he must return to the Government by the fair and reasonable value of the goods and services rendered, on the theory of *quantum meruit.*

Such a hearing could head off possible due process claims arising out of a Section 218 voiding. Further, it would satisfy the dictates of the Fifth Amendment by affording the contractor an appropriate administrative forum in which he could seek recovery for the value of the goods and services the Government received from contract performance prior to voiding. In such a hearing, evidence of the value of the goods and services would be presented by the contractor for inclusion with the Section **218** recommendation of the responsible staff office prior to the forwarding of the entire file to the department or agency head. Additionally, other factors could be introduced at the due process hearing to further reduce the amount to be recovered from the contractor. [13]

Under such a procedure it would be possible for the departmental or agency head to determine administratively not only whether to void and rescind the contract at issue, but also, based upon a full record, to determine on an equitable basis the amount that the Government should demand back from the contractor. The amount demanded may be "all amounts expended" on the contract by the Government, minus the value of goods or services that the department or agency head determines the Government received under prior contract performance. That is to say, the amount demanded would be the amount directly attributable to or otherwise involved in the contractor's fraudulent activities. However, the fixing of the demand amount would be within the discretion of the department or agency head.

IV. THE FRAUD PROBLEM

The exact magnitude of the fraud and waste inherent in present government operations is unknown and incapable of accurate quantifica-

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[13] Factors that would be relevant for presentation at such a hearing might include: (1) economic damage to the contractor — and to his employees and creditors if he *goes* bankrupt — if the full contract price is determined to be the refund amount; **(2)** the relative inappropriateness and harshness of the application of Section 218 in a particular case, as when a $25.00 bribe is paid to a minor inspector on one occasion during the performance of a multi-year, multi-million dollar shipbuilding contract; **(3)** coercion of the contractor against his will by a corrupt government official soliciting a bribe; and **(4)** other similar factors that may be important in a particular case.

tion, although estimates range from $10 to $34 billion annually.[14] Experience has taught that much procurement fraud is linked with bribery or conflict of interest, because these are the tools whereby a fraudulent scheme is usually implemented and concealed from governmental detection systems.

The fraudulent schemes perpetrated upon the Government in recent times are often clever, imaginative, and well-executed.[15] They are sometimes so well executed that many times even though there may be a successful criminal prosecution of the government contractor and others involved in the fraud scheme, the Government is unable to collect the damages suffered from the operation of the scheme. The operation of a typical fraud scheme in the area of government food supply contracts will serve as an example.

In its food procurement, the Government will specify in the contract a certain grade of food product. The government contractor soon realizes that a large profit can be made on the contract if he can substitute subgrade products in the performance of the contract. Thus, the government contractor may give gratuities to government inspectors in order (i) to enlist the inspectors to participate actively in the subgrade substitution scheme, or (ii) to gain the friendship of the inspectors to ensure such laxness in the inspection procedures that the contractor will be able to implement his scheme without knowledge of or detection by the inspectors. A food supply contract is an ideal vehicle for a subgrade substitution scheme because the items are quickly consumed by the end user. Once the evidence is consumed, the damages to the Government are difficult to trace or identify. On a large food procurement tainted by a subgrade substitution, it would not be unusual for the Government to be overcharged to the extent of 10–15% of the contract price.[16]

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[14] Address by U.S. Comptroller General Elmer B. Staats, Los Angeles, California, Jan. 13, 1981.

15A German proverb states, "Who will not be deceived must have as many eyes as hairs on his head."

[16] The 10–15% overcharge figure is a reasonable estimate. Due to the difficulty of tracing damages resulting from a complex fraud scheme in the food supply area, exact fraud figures are not likely to be quantified. In a recent criminal prosecution of a major Department of Defense (hereinafter DOD) food contractor, the indictment outlined a fraud scheme whereby cheaper, subgrade breaded shrimp was substituted on DOD supply contracts. A part of the scheme involved payment of various gratuities in the form of U.S. currency, shrimp, and liquor to Air Force inspectors assigned to the shrimp processing plant. Indictment, United States v. G. Cecil Hartley, *et al.*, Crim. No. 79–69–CR–T–GC (M.D. Fla. 1979).

It is extremely difficult for the Government to recapture the excess charges paid as a result of such a scheme where the Government inspection system has been invalidated by bribery, or has been bypassed through a system of fraud. Once the products are consumed, the extent of the loss through fraud is almost impossible to determine.[17] Thus, when the subgrade substitution and bribery scheme is eventually discovered, the Government may not be able to make itself whole for lack of ability to prove its damages. The amount of cash or value of gratuities paid to government inspectors usually can be determined through sophisticated accounting procedures. By law, such amounts are recoverable in full by the Government[18] from either the bribing contractor or the bribed inspectors.[19] However, the amounts of the bribes recovered are small in comparison with the total amount lost in a subgrade food substitution scheme. Moreover, in order for the Government to recover from the contractor for the overcharges due to

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In one of the counts of the indictment it was alleged that 13.16% of the contractor's proceeds from total Government purchases of $12,948,000.00. (or over $1.7 million) were acquired by the contractor via his racketeering or fraud activity. Count 33, Indictment, *id.* Although the $1.7 million recovery provision in this racketeering count was dismissed at trial as an improper criminal recovery provision, the corporation and two of its officers were convicted of thirty-one counts of fraud, one count of conspiracy, and the racketeering count. United States v. G. Cecil Hartley, *et al.*, supra (jury conviction—June 18, 1980).

To underscore the need for civil recovery on fraud schemes, it should be noted that the criminal fines in this case were only $167,000 for the corporation and $25,000 for one of the executives, even though the estimated loss to the Government (according to the indictment) amounted to over $1.7 million.

'' Methods are available to estimate the total damage suffered by the Government during the entire period of operation of a fraudulent scheme. Although imperfect, the method of random sampling applied to the food product remaining in the Government's inventory may produce a useable result.

[18] United States v. Carter, 217 U.S. 286, 304-305 (1910); United States v. Drumm, 329 F.2d 109 (1st Cir. 1964).

The Department of Defense has available by statute an additional, unique tool for use in the procurement area. *See* 10 U.S.C. § 2207 (1976). Section 2207 is important in cases where a contractor has given a gratuity to an officer of the United States to obtain a contract or to gain favorable treatment in connection with a contract previously awarded. The provision requires that all DOD contracts contain a clause empowering the Secretary of Defense to terminate the tainted contract. Further, the Secretary is authorized to assess against the contractor exemplary damages in the amount of at least three and not more than ten times the value of the gratuity given. *Id.* This remedy is in addition to other common law remedies that the Government may possess. Although there are no reported court decisions reflecting use of this provision, there may have been instances of its use in administrative cases or unreported court decisions.

[19] Continental Management, Inc. v. United States, 527 F.2d 613, 619, 208 Ct. Cl. 501, 512-13 (1975).

the substitution scheme,[20] the Government must have a reasonable estimation of its damages.[21]

Thus, since the damage figure on the substitution scheme is often difficult to prove, the Government frequently can recover only the amount of the bribe, which may be equal to only a small fraction of the total overcharge to the Government. Therefore, in a practical sense, when a government contractor decides to implement a food substitution scheme by bribery, it normally can expect a large profit on the contract. The firm generally risks only repayment of the bribes paid and minimal provable damages beyond that amount, if caught. From the view of the corporation doing business with the Government, procurement fraud may thus seem profitable. With practical immunity from a prison term,[22] the corporation can receive large profits from a successful scheme. If caught, the firm would have to repay only the provable bribes and, at most, double the damages the Government can prove on the fraud scheme. The scheme will therefore be carefully planned to insure that, as a result of its operation, the damages will be difficult to trace. Additionally, the corporation will insure that higher corporate officers are insulated from contact with the actual bribery payoffs. Lower-level corporate employees, under pressure from their superiors to produce large profits on government contracts, are likely

[20] The Government may recover for fraud damages under a wide variety of legal theories. Under the False Claims Act, 31 U.S.C. §§ 231 *et seq.*, the Government may recover double damages plus a $2,000 statutory forfeiture for each false claim. In a food supply case, the contractor's invoice with the certification on it that all government specifications have been met would be the false claim under the act. United States v. American Packing *Corp.*, 125 F. Supp. 788 (D. N.J. 1954). Additionally, there are a number of common law legal theories that the Government may use to recoup overcharges on its contracts, including (1) unjust enrichment, (2) money paid under mistake, (3) breach of contract, and (4) fraud and deceit.

[21] Damages claimed need not be exact. As the Supreme Court stated in Bigelow v. R.K.O. Radio Pictures, 327 U.S. 251, 264–65 (1946):

> In such a case, even where the defendant by his own wrong [i.e., fraud] has prevented a more precise computation [of damages], the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly . . .
>
> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.

Id.

[22] Corporations never go to jail. Moreover, when a corporation defrauds the Government out of $1 million by a false statement (a one-count violation of the False Statement Act, 18 U.S.C. § 1001), the maximum criminal fine imposable on the firm is $10,000.

to make the payments. In short, there is little or no incentive for the corporate control group[23] to prevent fraud by their firm on government contracts.

From this description of the corporation as a rational criminal, it can be surmised that 18 U.S.C. § 218 could be highly effective in deterring a corporation from participating in or encouraging a fraudulent scheme to secure or perform a government contract. Under Section 218, the corporation could lose not only its illegal profit (the contract overcharge), but also all other money paid under the contract, whether or not involved in illegality. In addition, after the contract is declared void, the corporation might not recover *in quantum meruit* for any products otherwise legitimately furnished under the contract.[24] Section 218, therefore, could be a powerful deterrent against solicitation of bribery, or exploitation of conflicts of interest, by government officials on procurement contracts. In fact, with this remedy in operation, corporations would be motivated to self-police their internal operations to insure that no bribery of government officials occurs. Such motivation is lacking under present government procurement policies.

V. A PILOT PROGRAM

Section 218 should not be implemented government-wide without a trial or pilot program within one agency or department. Such a program would provide necessary experience and understanding which will enable smoother implementation of Section 218 operations within other federal agencies or departments. An agency or department with a fairly large and diverse spectrum of procurement requirements should be selected to serve as the pilot agency to implement a trial program. The department or agency head who receives Section 218 authority by delegation from the President should designate one staff of-

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[23] In complex, large-scale fraud cases involving corporate defendants, it is usually difficult to trace the specific individual in the corporate control group who intentionally devised the fraudulent scheme. Many schemes take advantage of technical loopholes or laxness in government procurement or insurance operations and could be viewed as no more than sharp business practices of a corporation, and not as criminal acts of individuals. In a recent large-scale student loan fraud case, an indictment was returned against only the corporate defendants. Indictment, United States v. LTV Corporation, *et al.*, Crim. No. CR 3-78-200 (N.D. Tex. 1978). This leaves one to wonder whether a corporate entity can on its own decide to break criminal laws. Usually, however, the corporation and several of the middle-to-high-level corporate officers will be indicted in procurement fraud cases. *E.g.*, Indictment, United States v. G. Cecil Hartley, *et al.*, note 16, *supra*.

[24] *Cf.* United States v. Mississippi Valley Co., 364 U.S. 520, 563 (1961).

fice to monitor the antifraud program within his agency or department. In performing this monitoring function, this office would receive reports on all suspected or known instances of bribery and conflict of interest within that agency. These reports would come from the criminal investigating unit within the agency, or from the Federal Bureau of Investigation where and when a sharing of criminal investigation information is appropriate or lawful.[25]

It is anticipated that the staff office charged with monitoring Section 218 violations will also conduct liaison with the responsible office of the United States Attorney or with the section of the Criminal Division, Department of Justice, that is in charge of the criminal investigation. The object of this liaison is to insure that criminal investigators are aware of the possible effects of Section 218 on disposition of the criminal case.

In order for Section 218 to be most effectively implemented, it is important that bribery or conflict of interest be specifically charged in the indictment or criminal information filed. Additionally, it is essential that the prosecutor include as part of the factual basis for the charge an identification of a specific procurement contract involved in the alleged bribery or conflict of interest. Since the prosecutor faced with procurement fraud has available many charging options ranging from bribery to criminal tax violations, the agency staff office should make the prosecutor aware of Section 218. This may affect the prosecutor's ultimate decision in drafting the indictment or information.

If the contract has been identified in a criminal charge, and if there is a criminal conviction[26] for bribery or conflict of interest under Chapter 11, Title 18, the prerequisites for agency administrative action under Section 218 are satisfied. The conviction may be a result either of a guilty plea or a jury vote. The agency head may then proceed to declare the contract void, and take other action to effect reimbursement of sums previously paid to the defrauding contractor by the Government.

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[25] Rule 6 of the Federal Rules of Criminal Procedure, 18 U.S.C. App. (1976), prohibits the disclosure of grand jury material to any person not involved in the official criminal investigation. *E.g.*, In Re Grand Jury, *583* F.2d 128 (5th Cir. 1978). Thus the agency may need to obtain a disclosure order pursuant to Rule 6(e) from the district court supervising the criminal investigation, in order to receive certain criminal investigation reports that may be needed to perform its § 218 function.

[26] Once there is a fmal conviction, the doctrine of *res judicata* or estoppel by judgment will, as a matter of law, establish all facts underlying the convictions as true. Emich Motors Corp. v. General Motors, 340 U.S. 558, 569 (1951).

Because the statute reads, "in relation to which there has been a final conviction,"[27] the agency head should not attempt to void the contract under Section 218 until all appeals have been exhausted, in the case of a jury conviction. However, in the case of a guilty plea[28] there may be an immediate determination by the secretary of a department or the agency head that the contract in question is void.

As a matter of procedure, the staff office charged with the responsibility to advise the department or agency head in Section 218 matters should advise him or her once the criminal conviction has been obtained.

At this stage, notice should be given to the contractor, and a due process hearing, discussed above, should be held if requested. Following the completion of the hearing, the staff office should prepare a decision memorandum for the secretary of the department or agency head. This memorandum should set forth recommendations concerning possible voiding of the contract and the amount of recovery to be demanded on the contract. Section 218 is not mandatory but permissive in its contract voiding power, "the head of any department or agency *may declare void and rescind any contract. . . .*"[29] The recommending staff office should forward to the secretary or agency head an analysis of the circumstances and the ramifications of exercise of the voiding option.

The power inherent in Section 218 can yield a harsh remedy in particular cases. This power should be used cautiously to insure that the benefits to the Government in the procurement process are balanced against the harmful effect of the remedy upon the contractor involved in bribery or conflict of interest. In this regard, the statute seems to give complete discretion to the agency head to demand all, none, or only a portion of contract money expended in the tainted procurement.[30] This is consistent with the general law concerning voidable

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[27] 18 U.S.C. § 218 (1976).

[28] Normally there is no appeal from a guilty plea since it is a voluntary act entered into by the defendant and in effect precludes appeal. As an exception, an appeal may be based upon allegations that the trial court either lacked jurisdiction or imposed a sentence which exceeds that authorized by law. Stokes v. Slayton, 340 F. Supp. 190, 192–93 (W.D. Va. 1972), affd, 473 F.2d 906 (4th Cir. 1973).

[29] 18 U.S.C. § 218 (1976). Emphasis supplied.

[30] The statute declares that the Government is entitled to all "the amount expended" on the contract. However, the secretary or agency head can choose to demand return of only a portion of this amount if he or she finds this to be just or appropriate in the circumstances of the individual case.

contracts. As Professor Corbin has stated concerning voidable contracts:

> There is a power to validate [the contract], as well as the power to avoid; and most such contracts as are commonly said to be voidable can be described with equal accuracy as validatable.[31]

VI. THE BACKGROUND OF SECTION 218

The legislative history of Section 218 does not offer much additional clarification beyond the express wording of the section itself.[32] On April 27, 1961, President Kennedy submitted a proposed bill to Congress recommending changes to the then existing laws dealing with conflicts of interest in government procurement and operations.[33] As President Kennedy pointed out in his transmittal message to Congress, revision of the criminal laws pertaining to conflict of interest was long overdue in that "[flive of these statutes were enacted before 1873 . . . There is both overlap and inconsistency."[34]

The initial bill was consolidated with four similar bills.[35] After initial hearings on these bills, all five bills were consolidated into H.R. 8140, the bill that eventually became the present Chapter 11 (bribery and conflict of interest) of Title 18.[36] The momentum for this legislative proposal and its eventual passage was generated by the furor following the Billy Sol Estes scandal.[37]

Most of the debate and hearing testimony on H.R. 8140 did not focus on Section 218 but on the more controversal portions of Chapter 11; such as Sections 202 and 205, which for the first time, among other matters, addressed the conflict-of-interest impact of the part-time "government consultant," a type of position becoming popular in "the military-industrial complex."[38] In the 1962 revision of the

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[31] 1 Corbin on Contracts § 6 at 14 (1963).

[32] *See* note 1, *supra.*

[33] H.R. 7139, 87th Cong., 1st sess. (1961).

[34] S. Rep. No. 2213, 87th Cong., 2d Sess. 5, reprinted at [1962] U.S. Code Cong. & Admin. News 3852, 3853–54.

[35] These were H.R. 302, 3050. 3411, and 3412.

[36] 18 U.S.C. §§ 201–218 (1976).

[37] E.g., Remarks of Senator Keating, Hearing on H.R. 8140 of Senate Committee on the Judiciary, 87th Cong., 2nd Sess., Vol. 11, at 8 (June 21, 1962). Billy Sol Estes was an entrepreneur who among other things obtained credit by pledging as security large quantities of nonexistent soybean oil.

[38] The phrase was coined by President Eisenhower in the late 1950's.

conflict-of-interest criminal statutes, almost all attention was directed to the definition and refining of practical conflict-of-interest guidelines for what became to be defined as the "special government employee" (or part-time consultant or officer of the Government), and for retired or reserve military officers. The special groups that were involved in much of this activity included groups such as the New **York** Bar Association, the Commissioned Officers Association, and the Reserve Officers Association of the United States. No special interest group or legislator focused attention on, or expressed any real interest in the contract voiding provisions of the proposed legislation. Accordingly, Section 218 never received much notice or attention during the legislative process.

Even after enactment, Section **218** was largely ignored. In fact, the power inherent in the statute has not been used to date. The probable reasons for this are two-fold. First, the President has never had the time or the inclination to involve himself in the process of voiding a specific contract of any of the many departments or agencies he controls in the Executive Branch. The demands on the President's time make it impractical for him to exercise this power. Clearly, to have any practical effect, the power should be delegated; and Congress has provided for such delegation in the statute itself.[39]

Second, Section 218 has never been used because there has been no presidential delegation, and therefore no opportunity for a department or agency head to exercise the power. The use of this existing power by an agency or department head would be innovative and powerful if the present administration were to wield in its already declared campaign to extirpate fraud and waste from government procurement. The deterrent effect alone could be of immeasurable value in the war on fraud. The flavor and tenor of the present administration's pronouncements make implementation of a pilot program under Section 218 a realistic option to exercise.

VII. THE PROCESS OF DELEGATION

As discussed above, the Section 218 power to void an individual procurement contract should be delegated to the head of an individual de-

[39] Section 218 clearly provides for the delegation. Congress has explicitly granted the power to void contracts to "the President or, under regulations prescribed by him, the head of any department or agency involved. . . ." 18 U.S.C. § 218 (1976).

partment or agency. Congress foresaw this need and provided for delegation. Specifically, Section 218 provides:

> [T]he President or, under regulations prescribed by him, the head of any department or agency involved, may declare void and rescind any contract.[40]

The Section 218 power could be delegated through an executive order.[41] The power to issue regulations specifying the administrative process to be followed by a department or agency in voiding a contract under Section 218 could also be delegated in the same executive order.[42]

VIII. USE OF THE REMEDY IS SUPPORTED BY LAW AND PRECEDENT

The application of 18 U.S.C. § 218 to void a government contract tainted by bribery or conflict of interest may be viewed as a harsh remedy.[43] This especially so where the contract is otherwise satisfactorily performed by the delivery of acceptable products or services to the government under the contract. For example, a corporation may obtain by bribery a contract award of $300,000 to perform consulting services to the Department of Defense and may render satisfactory services under the contract. The corporation will undoubtedly find it unfair if, pursuant to 18 U.S.C. § 218, the Secretary of Defense voids and rescinds the contract and demands that the corporation return all $300,000 paid on the contract.

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[40] 18 U.S.C. § 218 (1976).

[41] At the present time the President does not directly prescribe regulations. Rather, through executive orders, he directs others to issue regulations. An executive order of the President is to be accorded the force and effect given to a statute enacted by Congress. Independent Meat Packers Ass'n. v. Butz, 526 F.2d 228, 234 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976); Farkas v. Texas Instruments, Inc., 375 F.2d 629, 632 n.1 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967).

[42] By way of example, this procedure was used in another executive order and its authorizing legislation. To combat inflation, Congress in 1969 authorized the President to establish credit controls for the Federal Reserve System. 12 U.S.C. § 1904 (1976). The President delegated statutory authority to monitor pay practices in the national economy, and to issue regulations to encourage non-inflationary pay and price behavior by private industry and labor, to the Chairman of the Council on Wage and Price Stability. Exec. Order No. 12092 (Nov. 1, 1978). Accordingly, a similar process could be used by the President to establish a pilot antifraud program in a department or agency under 18 U.S.C. § 218 (1976).

"This may be another reason why Section 218 has not been implemented before. The harshness of the remedy makes the establishment and close monitoring of a pilot program a practical method to implement Section 218 gradually.

The answer to such a charge is simple: The law[44] provides such a remedy in order to deter as powerfully as possible the use of bribery and graft in the government contracting process. However, such a harsh remedy is not new. Prior common-law remedies have provided for similar remedies when bribery has tainted a government contract.[45]

In the recent *K&R* Engineering case,[46] the plaintiff sued the United States to recover $132,000 in damages for an alleged breach of several contracts to perform repair work on Army Corps of Engineers barges. The government had terminated the contracts for its convenience when the plaintiff failed to complete performance of the contracts. Subsequent investigation during the termination settlement negotiations revealed that the plaintiff had procured the contracts through bribery of a Corps of Engineers employee. Further, that employee illegally provided substantial assistance to the plaintiff during contract performance.[47]

The bribed employee was convicted of conflict of interest,[48] and two of the plaintiff's employees were convicted of bribery of a public employee.[49] In the Court of Claims suit, the Government filed a counterclaim for damages to recover all amounts of money expended on the tainted contracts. The Court of Claims unanimously agreed with the Government's position and denied the plaintiff's claims of damages. The court further ordered the plaintiff to return all amounts expended on the contract.[50] The court held:

> Effective implementation of the conflict-of-interest law requires that once a contractor is shown to have been a participant in a corrupt arrangement, he cannot receive *or* retain any *of the amounts* payable *thereunder*.[51]

Further, the court stated that, where such contracts were "fraught with fraud and corruption . . . the contracts themselves were each in-

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[44] 18 U.S.C. § 218 (1976).
[45] *E.g.*, K & R Engr. Co., Inc. v. United States, 616 F.2d 469 (Ct. Cl. 1980).
[46] *Id.*
[47] *Id.* This is a typical arrangement. The bribed employee will continue to aid the contractor throughout performance. *See, e.g.*, United States v. Jordan, Crim. No. 76–112–A (E.D. Va. 1976).
[48] 18 U.S.C. § 208 (1976).
[49] 18 U.S.C. § 201 (1976).
[50] 616 F.2d at 477.
[51] 616 F.2d at 476. Emphasis supplied.

fected by this corruption, and each was void *ab initio.*"[52] Thus, courts already have created or recognized a remedy similar to the Section 218 remedy.

In a similar vein, other courts have held that the Government can cancel contracts tainted with corruption. In the 1961 case of *Mississippi Valley Generating Co.*,[53] the Supreme Court, in reversing a decision of the Court of Claims, held that a government contractor whose contract was terminated could not recover damages or costs on the terminated contract. Recovery was denied because an illegal conflict of interest during negotiation of the contract made the contract unenforceable as a matter of public policy.[54]

In *Mississippi Valley,* a private banking official of First Boston Corporation, while acting as an unpaid government consultant to the Bureau of the Budget, helped negotiate a major construction contract for the Atomic Energy Commission, whereby Mississippi Valley Generating Company would construct a $100,000,000 steam power plant for the Commission in the Memphis, Tennessee, area. Unknown to the Government, Mississippi Valley had arranged for First Boston to be involved in the fmancing of this project.[55]

Before the plant was constructed, but after Mississippi Valley had expended costs in preliminary construction steps, the Commission canceled the contract because the power to be generated by the proposed plant was no longer needed. Mississippi Valley sued for its costs and damages on the terminated contract in the Court of Claims, and was granted a judgment. The court held for the firm notwithstanding the Government's assertion that the conflict of interest arising from participation of the officer of First Boston in negotiation of a government contract in which his employer would derive a financial interest tainted the entire contract.[56] The Supreme Court reversed the Court of Claims and held that no costs or damages could be recovered on the contract. The Court held, moreover, that the Government can "disaffirm a contract which is infected by an illegal conflict of interest."[57]

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[52] 616 F.2d at 477. *See, e.g.,* S.T. Grant, Inc. v. City of New York, 32 N.Y. 2d 300, 344 N.Y.S. 2d 938, 298 N.E. 2d 105 (1973); Town of Boca Raton v. Raulerson, 108 Fla. 376, 379, 146 *So.* 576, 577 (1933).

[53] United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961).

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] 364 U.S. at 566. Congress was aware of the decision in *Mississippi Valley* when it enacted Section 218. In fact, then-Deputy Attorney General Katzenbach, testifying be-

In the 1966 case of *Acme Process Company*,[58] the Supreme Court, again reversing the Court of Claims, held that a contractor could not recover damages on a contract tainted by illegal kickbacks. In *Acme*, the prime contractor sued the Government in the Court of Claims for damages for breach of a contract to manufacture 75–mm. recoilless rifles, claiming an improper termination by the Government. The Government presented evidence that the contract was canceled because three key contractor employees had accepted illegal kickbacks in awarding subcontracts under the rifle contract.[59]

Although the Court of Claims had awarded damages, the Supreme Court reversed, holding that "public policy requires the United States be able to rid itself of a prime contract tainted by kickbacks."[60] In reaching this result, the Court at length outlined the dangers to be guarded against which justify a strict policy against corruption in government contracts:

> Though they [kickbacks] necessarily inflate the price to the Government, this inflation is rarely detectable. This is particularly true as regards defense contracts where the products involved are not usually found on the commercial market and where there may not be effective competition. Such contracts are generally negotiated and awarded without formal advertising and competitive bidding, and there is often no opportunity to compare going prices with the price negotiated by the Government. Kickbacks will usually not be discovered, if at all, until after the prime contract is let. . . . Of course, a subcontractor who must pay a kickback is likely to include the amount of the kickback in his contract price. But this is not all. A subcontractor who anticipates obtaining a subcontract by virtue of a kickback has little incentive to stint on this cost estimates. Since he plans to obtain the subcontract without regard to the economic merits of his proposal, he will be tempted to inflate that proposal by more than the amount of the kickback. And even if the Government could isolate and recover the inflation attributable to

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fore the Senate on H.R. **8140,** stated that Section **218** would not modify the common law remedy of *Mississippi Valley* but would enact a new statutory remedy. Hearing before the Committee on the Judiciary on H.R. **8140,** *supra* note **37,** at **22.** *See also S.* Rep. No. **2213,** *supra* note 6, at 15.

[58] United States v. Acme Process Co., **385** U.S. **138 (1966).**

[59] *Id.*

[60] 385 U.S. at **146.**

> the kickback, it would still be saddled with a subcontractor who, having obtained the job other than on merit, is perhaps entirely unreliable in other ways. This unreliability in turn determines the security of the prime contractor's performance — a result which the public cannot tolerate, especially where, as here, important defense contracts are involved.[61]

Thus, although Section 218 offers a harsh remedy, a similar remedy has been available and justified in common-law decisions on public contracts.

IX. CONCLUSION

The authority to void a contract provided in 18 U.S.C. § 218 is a practicable and powerful weapon that can be employed to combat and deter fraud in the field of government contracting. Section 218 can be used as an effective administrative remedy without the need for judicial intervention. However, because of the harshness of the remedy and potential due process issues that might be raised, a pilot program should be used initially to implement Section 218 within federal departments and agencies.

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[61] *Id.* at 146–147.

PUBLICATIONS RECEIVED AND BRIEFLY NOTED

I. INTRODUCTION

Various books, pamphlets, tapes, and periodicals, solicited and unsolicited, are received from time to time at the editorial offices of the *Military Law Review*. With volume 80, the *Review* began adding short descriptive comments to the standard bibliographic information published in previous volumes. These comments are prepared by the editor after brief examination of the publications discussed. The number of items received makes formal review of the great majority of them impossible.

The comments in these notes are not intended to be interpreted as recommendations for or against the books and other writings described. These comments serve only as information for the guidance of our readers who may want to obtain and examine one or more of the publications further on their own initiative. However, description of an item in this section does not preclude simultaneous or subsequent review in the *Military Law Review*.

Notes are set forth in Section IV, below, are arranged in alphabetical order by name of the first author or editor listed in the publication, and are numbered accordingly. In Section II, Authors or Editors of Publications Noted, and in Section III, Titles Noted, below, the number in parentheses following each entry is the number of the corresponding note in Section IV. For books having more than one principal author or editor, all authors and editors are listed in Section II.

The opinions and conclusions expressed in the notes in Section IV are those of the editor of the *Military Law Review*. They do not necessarily reflect the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

II. AUTHORS OR EDITORS OF PUBLICATIONS NOTED

Bologna, Jack, *Computer Crime: Wave of the Future* (No. **4).**
Burnett, Arthur L., *A Survey of Significant Federal Court Decisions on the Rights of Federal Employees Since the Civil Service Reform Act of 1978* (No. 5).
Butler, William E., *Anglo-Polish Legal Essays* (No. 6).
Byrne, Edward M., *Military Law* (No. **7).**
Caldwell, Dan, *American-Soviet Relations: From 1947 to the Nixon-Kissinger Grand Design* (No. 8).
Cleveland State Law Review, *Symposium: Clinical Legal Education and the Legal Profession* (No. **9)**
Degenhardt, Henry W., *Treaties and Alliances of the World* (No. 10).
De Sola, Ralph, *Crime Dictionary* (No. **11).**
Devine, Frank J., *El Salvador: Embassy Under Attack* (No. **12).**
Huckabee, Harlow M., *Lawyers, Psychiatrists, and Criminal Law: Cooperation or Chaos* (No. 13).
Hurst, Walter E., *The Music Industry Book: Protect Yourself Before You Lose Your Rights & Royalties!* (No. **14).**
I.C.L.E.S., *The Common Law Lawyer* (No. **15).**
International Common Law Exchange Society, *The Common Law Lawyer* (No. **15).**
Kaufman, Herbert, *The Administrative Behavior of Federal Bureau Chiefs* (No. **16).**
Kramer, Charles, and Daniel Kramer, *Evidence in Negligence Cases* (No. **18).**
Kramer, Daniel, and Charles Kramer, *Evidence in Negligence Cases* (No. **18).**
Kurian, George T., *Encyclopedia of the Third World* (No. **17).**
Leutze, James, **A** *Different Kind of Victory: A Biography of Admiral Thomas C. Hart* (No. **19).**
MacGregor, Morris J., and Bernard C. Nalty, *Blacks in the Military: Essential Documents* (No. **22).**
Martin, Laurence, *Strategic Thought in the Nuclear Age* (No. **20).**
Michie Company, *Federal Ethics Handbook: Annotated Legal Guide* (No. **21).**
Nalty, Bernard C., and Morris J. MacGregor, *Blacks in the Military: Essential Documents* (No. **22).**
National Lawyers Guild, with Michael Avery and David Rudovsky, *Police Misconduct: Law and Litigation* (No. **2).**
Novosti Press Agency Publishing House, *Soviet Economy Today: With Guidelines for the Economic and Social Development of the USSR for 1981–1985 and for the Period Ending in 1990* (No. **23).**
Nufer, Harold F., *American Servicemembers' Supreme Court: Impact*

of the U.S. Court of Military Appeals on Military Justice (No. **24).**

Patton, Gerald **W.,** *War and Race: The Black Officer in the American Military, 1915–1941* (No. **25).**

Pittsburgh, University of, School of Law, *Journal of Law and Commerce* (No. **26).**

Rhoades, Lawrence J., *Treating and Assessing the Chronically Mentally Ill: The Pioneering Research of Gordon L. Paul* (DHHS Publication No. (ADM) 81–1100) (No. **27).**

Rogan, Helen, *Mixed Company: Women in the Modern Army* (No. 28).

Rudovsky, David, and Michael Avery, with National Lawyers Guild, *Police Misconduct: Law and Litigation* (No. **2).**

Smith, George P. 11, *Genetics, Ethics, and the Law* (No. **29).**

Steiner, Gilbert **Y.,** *The Futility of Family Policy* (No. **30).**

Stockholm International Peace Research Institute, *World Amaments and Disarmament: SIPRI Yearbook 1981* (No. 31).

111. TITLES NOTED

Administrative Behavior of Federal Bureau Chiefs, *by Herbert Kaufman* (No. **16).**

American Servicemembers' Supreme Court: Impact of the U.S. Court of Military Appeals on Military Justice, *by Harold F. Nufer* (No. **24).**

American-Soviet Relations: From **1947** to the Nixon-Kissinger Grand Design, *by Dan Caldwell* (No. 8).

Anglo-Polish Legal Essays, *by William* E. *Butler* (No. **6).**

Blacks in the Military: Essential Documents, *by Bernard* C. *Nalty and Morris J. MacGregor* (No. **22).**

Clinical Legal Education and the Legal Profession; Symposium, *by Cleveland State Law Review* (No. **9).**

Common Law Lawyer, *published by the International Common Law Exchange Society* (No. **15).**

Computer Crime: Wave of the Future, *by Jack Bologna* (No. **4).**

Crime Dictionary, *by Ralph De Sola* (No. **11).**

Different Kind of Victory: A Biography of Admiral Thomas C. Hart, *by James Leutze* (No. **19).**

El Salvador: Embassy Under Attack, by *Frank J. Devine* (No. **12).**

Encyclopedia of the Third World, *by George T. Kurian* (No. **17).**

Evidence in Negligence Cases, *by Charles Kramer and Daniel Kramer* (No. 18).

Federal Ethics Handbook: Annotated Legal Guide, *by Michie Company* (No. 21).

Futility of Family Policy, *by Gilbert Y. Steiner* (No. 30).
Genetics, Ethics, and the Law, *by George P. Smith II* (No. 29).
Heroin and Politicians: The Failure of Public Policy to Control Addiction in America, *by David J. Bellis* (No. 3).
Journal of Law and Commerce, *University of Pittsburgh School of Law* (No. 26).
Lawyers, Psychiatrists, and Criminal Law: Cooperation or Chaos, *by Harlow M. Huckabee* (No. 13).
Military Law, *by Edward M. Byrne* (No. 7).
Mixed Company: Women in the Modern Army, *by Helen Rogan* (No. *28).*
Music Industry Book: Protect Yourself Before You Lose Your Rights & Royalties! *by Walter E. Hurst* (No. 14).
Police Misconduct: Law and Litigation, *by Michael Avery and David Rudovsky, with National Lawyers Guild* (No. 2).
Soviet Economy Today: With Guidelines for the Economic and Social Development of the USSR for 1981–1985 and for the Period Ending in 1990, *by Novosti Press Agency Publishing House* (No. 23).
Strategic Thought in the Nuclear Age, *by Laurence Martin* (No. 20).
Survey of Significant Federal Court Decisions on the Rights of Federal Employees Since the Civil Service Reform Act of 1978, *by Arthur L. Burnett* (No. *5).*
Symposium: Clinical Legal Education and the Legal Profession, *by Cleveland State Law Review* (No. 9).
Treaties and Alliances of the World, *by Henry* W. *Degenhardt* (No. 10).
Treating and Assessing the Chronically Mentally Ill: The Pioneering Research of Gordon L. Paul (DHHS Publication No. (ADM) 81–1100), *by Lawrence J. Rhoades* (No. 27).
War and Race: The Black Officer in the American Military, 1915–1941, *by Gerald* W. *Patton* (No. *25).*
World Armaments and Disarmament: SIPRI Yearbook 1981, *by Stockholm International Peace Research Institute* (No. 31).
Your Rights to Social Security Benefits, by *David Andrews* (No. 1).

IV. PUBLICATION NOTES

1. Andrews, David, *Your Rights to Social Security Benefits.* New York City, New York: Facts on File, Inc., 1981. Pages: v, 186. Price: $12.95, hardcover; $4.95, paperback. Index. Publisher's address: Facts on File Publications, 460 Park Avenue South, New York, N.Y. 10016.

The Social Security system is a topic of interest to every American. Best known for retirement pensions and Medicare benefits, the system

also provides many other benefits, some of them highly specialized, that are not at all well known. Applicable statutory provisions and their implementing regulations are lengthy and complex, and some potential beneficiaries are probably unaware of their entitlements. The book here noted seeks to fill this gap.

This is not a law book, but a practical guide for laypersons through the governmental maze of the largest insurance and benefit program in the history of the world. Each of the eleven chapters is followed by a section, "Questions and Answers," in which illustrative fact situations are offered to show the application of the system's rules and regulations. The text is written in plain English that should be intelligible to anyone with a high school education.

After a short table of contents, the opening chapter provides an overview of the Social Security system, its history and purposes, and some points concerning the everyday mechanics of the system. Eligibility for benefits is discussed in broad terms. The second chapter explains how to collect benefits. Subsequent chapters discuss retirement, disability, and survivors' benefits. Supplemental Security Income for people with low incomes is examined. Four chapters are devoted to the intricacies of Medicare, both outpatient and hospitalization coverage. A concluding chapter reviews a variety of special cases and situations not covered by the general rules. The work closes with a subject-matter index.

The author, David Andrews, is a free-lance writer who has published other works on Social Security and other topics.

2. Avery, Michael, and David Rudovsky, with National Lawyers Guild, *Police Misconduct: Law and Litigation* (2d ed.). New York, New York Clark Boardman Co., Ltd., 1980. Pages: xvii, 359. Price: $55.00. Looseleaf binder, annual supplementation, seven appendices, table of cases cited, index. Publisher's address: Clark Boardman Co., Ltd., 435 Hudson St., New York, N.Y. 10014.

Governmental misconduct has received considerable public attention during the past decade. Most public interest has focused on high-level federal and state officials. Less publicized, but perhaps more significant in numbers of incidents, is the misconduct of lower ranking officials, such as police officers. The book here noted deals specifically with this topic. Of concern to the authors are not cases of honest mistakes of police officers made in the heat of responding to violent and dangerous crimes. Rather, their subject is calculated and deliberate vi-

olation of civil rights through unlawful searches and confinement, and occasionally physical injury and death resulting from intentional abuse.

The noted work is a second edition. The first edition was published in **1978** by the National Lawyers Guild under the title, *Police Misconduct Litigation Manual*. The National Lawyers Guild is a civil rights-oriented organization of attorneys, students, and others working to oppose racism and sex discrimination, and to alleviate the burdens of poverty. The Guild publishes several periodicals, including the *Guild Notes,* the *Guild Practitioner,* and newsletters dealing with immigration, labor law, and feminist issues.

Police Misconduct is organized in thirteen chapters. An introductory chapter is followed by a discussion of what constitutes actionable conduct under the various Federal civil rights acts. Jurisdiction, liability, and case development are considered next. Drafting of complaints, discovery procedures, and various defenses and notice requirements are the subjects of several chapters. The work is concluded with chapters on damages, attorneys' fees, voir dire, jury selection, and jury instructions. **A** substantial part of the work consists of seven appendices. These set forth a litigation checklist, sample pleadings and interrogatories for use in particular types of cases, and other documents, as well as the texts of several Federal civil rights acts.

Reader aids include a table of chapters, detailed table of contents, explanatory introduction, table of cases cited, and subject-matter index. Most citations are presented in the text, in the format of a legal brief; but extensive textual footnotes are also provided, and appear at the bottoms of the pages to which they pertain. The text is divided into numbered sections with topic headings.

The authors, Michael Avery and David Rudovsky, are associated with the National Lawyers Guild.

3. Bellis, David J., *Heroin and Politicians: The Failure of Public Policy to Control Addiction in America.* Westport, Connecticut: Greenwood Press, **1981.** Pages: xx, **239.** Price: **$27.50.** Bibliographic essay, index. Publisher's address: Greenwood Press, 88 Post Road West, Westport, CT **06881.**

Drug use in its various forms ranks as a major social problem of the present day. The military services have been applying their own solutions to the problem for years. The author of the work here noted does not discuss the military drug and alcohol abuse programs. However, it would be interesting to know if his conclusion would remain

unchanged: that governmental drug abuse programs have been and continue to be failures. The author suggests, further, that drug use may be ultimately uncontrollable.

The book focuses on heroin use, with some mention of morphine, and considerable discussion of the problems and pitfalls of methadone use, a supposed cure that proved to be even more addictive than heroin itself. Marihuana and hashish are not discussed; presumably they raise a different set of issues and problems. Other "hard" drugs, such as the amphetamines, are not considered either.

Heroin and Politicians is organized in ten chapters and two parts. Part I, "Formulating Heroin-Control Policy," discusses the history of heroin use, its criminalization in this century, and the campaign against heroin traffic waged by the Nixon Administration. The physiology and politics of methadone maintenance are examined. The failure of the Nixon Administration to solve the heroin problem, and the continuation of that failure through the Ford and Carter Administrations, is detailed.

The second part, "Heroin Addiction Treatment and Its Outcome,'' reviews the goals of methadone maintenance and its failure; heroin detoxification and aftercare counseling; and residential programs and jailhouse therapeutic communities. A chapter entitled "The Drug-Abuse Industrial Complex" explains how futile drug-abuse programs are continued in operation as a result of the pressure applied by those who profit from them. This includes urine-testing firms, operators of treatment centers, and the like. Additionally, organized crime would suffer if heroin were decriminalized and became available lawfully. The author concludes with a gloomy prognosis concerning future efforts at public control of mind-altering substances and devices generally.

Reader aids include a detailed table of contents and a subject-matter index. A bibliographic essay reviews and criticizes the available literature on heroin addiction and treatment, and suggests directions that future research should take. Many footnotes are provided, and are collected together at the ends of the chapters. Some citations are included in the text.

The author, David J. Bellis, is director of economic planning for the East Los Angeles Community Union (TELACU), and is a city councilman in Signal Hill, California. He was formerly on the faculty of the University of Southern California, and of California State University, Long Beach. He has worked as a consultant to various drug treatment programs.

4. Bologna, Jack, *Computer Crime: Wave of the Future.* San Francisco, California: Assets Protection, 1981. Pages: 102. Price: $15.00. Paperback. Tables; diagrams; six appendices. Publisher's address: Assets Protection, 500 Sutter St., Suite **503,** San Francisco, CA 94102.

Computer technology has been one of the great social and economic developments of the post-World War II world. Computers make possible the processing, storage, and retrieval of hitherto unimaginably vast quantities of information, and have been a great boon to the conduct of business, research, governmental activities, and other enterprises. However, along with all the benefits have come exotic new methods of stealing money, violating privacy, carrying out espionage, and other undesirable developments. The book here noted provides an overview of the subject of computer crime: how it is committed, and how to investigate and control it.

The book is organized in twenty short chapters and four parts, supplemented by six appendices. Part I, "The Present State of Computer Security," describes computer crime, and also white collar crime in general. Criminal motivation, the types of people likely to commit crimes, work situations conducive to computer crime, are all probed, together with investigative techniques. Parts 11, 111, and IV all deal with preparations for crime prevention in the future. Attention is focused on people who work around computers: their ethics, motivations, and values. Psychological testing is discussed, together with means of making honesty more attractive than dishonesty. Planning for the future receives considerable attention. The six appendices present materials for use in preventing computer crime: a case study, an orientation package, and questionnaires. A crime report form is also included.

Reader aids include a table of contents and an explanatory introduction. Many tables and diagrams are provided. There are no footnotes or bibliography, but some description of sources is provided in the text.

The author, Jack Bologna, is president of George Odiorne Associates, Inc., of Plymouth, Michigan, a management consulting firm. In the past he has been employed by the Internal Revenue Service, the Senate Antitrust Subcommittee, and other federal agencies, the National Bank of Detroit, and Arthur Young & Company. He was vice president of Intertel. Mr. Bologna has lectured and written extensively on computer crime, fraud, auditing, and related topics. He is a member of the editorial advisory board of the magazine *Assets Protection.*

5. Burnett, Arthur L., **A** *Survey of Significant Federal Court Decisions on the Rights of Federal Employees Since the Civil Service Reform Act of 1978.* Washington, D.C.: Federal Bar Association, 1981. Pages: **123.** Price: $10.00. Paperback. Looseleaf format. Publisher's address: Federal Bar Association, 1815 H Street, N.W., Washington, D.C. 20006.

The past year has seen many cutbacks in the federal civil service, as programs have been curtailed or terminated. The work here noted is timely, explaining as it does the case law which has grown up during the past couple of years. Statutes pertaining to the federal civil service are collected together in Title 5, United States Code, including the changes effected by the Civil Service Reform Act of 1978. The author also reviews case law concerning many provisions of civil service law not affected by the 1978 legislation. Mr. Burnett was employed by the Civil Service Commission and by its successor, the Office of Personnel Management, during the years when the legislation of 1978 was being prepared, staffed, and, following enactment, implemented.

Following an explanatory introduction, the main body of the essay opens with a section called "Application of General Federal Personnel Law Concepts and Principles." This section deals with selection and appointment of federal officials, probation, promotion, reassignment, demotion, and suspension. Removal from office and coerced resignations receive extensive discussion. Subsections on estoppel and hearsay evidence complete the first general section. There follows a short section entitled "Cases Involving the Provisions of the Civil Service Reform Act of 1978." This covers the applicability of the savings clause of the act, the roles of the various federal courts, and judicial recognition of changes in the law affecting adverse personnel actions. Subsequent sections are entitled "Constitutional Issues in Federal Employee Litigation,'' and "Extraordinary Relief in Federal Personnel Cases.'' The work closes with the author's conclusions.

The essay is extensively footnoted, and notes are placed at the bottoms of the pages to which they pertain. **A** typewriter typeface is used, and is printed on pages 8-½ inches by **11** inches, like the typescript of a law review article. The essay is bound looseleaf in a paper cover such as might be used for a research thesis or term paper. There are no table of contents, outline, index, or table of authorities cited.

The author, Arthur L. Burnett, is a United States Magistrate for the U.S. District Court of the District of Columbia. From 1975 to 1980 he served first as assistant general counsel, Legal Advisory Division,

Civil Service Commission, and later, after the reorganization of the Commission, as associate general counsel of the Office of Personnel Management, successor to the Commission for personnel management functions. He received research assistance from George N. Brezna, a student at Antioch Law School.

6. Butler, William E., editor, *Anglo-Polish Legal Essays*. Dobbs Ferry, N.Y.: Transnational Publishers, Inc., 1982. Pages: xiv, 258. Price: $19.50. Index. Publisher's address: Transnational Publishers, Inc., P.O. Box 361, Dobbs Ferry, N.Y. 10522.

The work here noted is a collection of thirteen essays by legal scholars of the University of London and Warsaw University. The essays' purpose is to compare the English common law in its current setting, with the Polish civil law in its Marxist setting. The work is of particular interest in the wake of the labor upheavals in Poland which have attracted worldwide attention; and some of the essays touch briefly on these events. Less dramatically, the United Kingdom has been experiencing significant social and economic changes during the past decade which are at least loosely parallel with some of the changes in Poland. The theories of law followed by the two countries may be helpful in explaining some parts of their recent history, and in predicting possible future developments. The essays are an outgrowth of a colloquium held in February and March of 1981 by the law faculties of Warsaw University and the University of London.

The book is organized in four parts. The first part, "Legal Theory," provides an overview of Polish and English jurisprudence, ways of looking at law, the relationship between values and law, and directives of the Polish Supreme Court as sources of criminal law. The second part, "Civil Law," deals with the law of civil liability and trespass, and with current developments in Polish economic law.

"Public Law," the third part, discusses constitutional developments in Britain and Poland during recent years, judicial review of executive decisions, and trade union freedom in Britain. The fourth and last part, "International Law and Commerce," discusses Polish regulation of international contracts, and also the various international or transnational economic organizations and joint enterprises of Poland and the other Eastern-bloc COMECON countries.

For the convenience of readers, the book offers a table of contents and a subject-matter index. An explanatory introduction provides a summary of the essays following. The articles are footnoted, and notes appear at the bottoms of the pages to which they pertain.

The editor, W.E. Butler, is a professor of comparative law at the University of London. He received his A.B. degree from American University, his J.D. from Harvard, and other degrees from Johns Hopkins University and the University of London.

7. Byrne, Edward M., *Military Law* (3d ed.). Annapolis, Maryland: U.S. Naval Institute, **1981.** Pages: xxiii, **790.** Table of abbreviations, forty-seven appendices, selfquizzes with answers, glossary, bibliography, table of cases cited, and index. Publisher's address: Marketing Dept., Naval Institute Press, U.S. Naval Institute, Annapolis, MD **21402.**

Military justice, or military criminal law, continues as for decades past to be a subject of major interest to commanders in all the services. This work by a senior naval officer provides extensive, detailed information about all major aspects of the subject. It is intended for use by civilian and military lawyers, and also non-lawyers whose work brings them in contact with military justice, such as convening authorities, provost marshals, and the like. The format is that of a law school textbook, with cases and lists of questions interspersed among sections of text. The book is thus ideal for use in a training program in military law, or for self-instruction.

The volume here noted is a third edition. Both previous editions have been noted in the *Review*. The second edition, published in **1976,** was reviewed by Major David A. Schlueter at 78 Mil. L. Rev. **206–207 (1978).** The first edition bore the title, *Military Law: A Handbook for the Navy and Marine Corps,* and was published in **1970.** It was reviewed by Lieutenant Commander G.B. Powell, Jr., JAGC, USN, at 53 Mil. L. Rev. **203–204 (1971).** The second edition had **745** pages, with **25** pages of introductory material, substantially the same as the third edition here noted. Much smaller, the first edition consisted of **396** pages, with **19** introductory pages.

Military Law is organized in fifteen chapters, supplemented by dozens of appendices. The book reminds one slightly of the *Manual for Courts-Martial,* except that the official publication has nothing of the character of a textbook, and is purely a reference work. Captain Byrne's book is both a text and reference volume.

The opening chapter provides a short history of military law. Chapter II, "Apprehension, pretrial restraint, & speedy trial," is followed by "Investigations & prosecutorial discretion," the third chapter. An entire chapter is devoted to unauthorized absence, and another to both larceny and "orders offenses.'' The sixth chapter discusses nonjudicial

punishment. Subsequent chapters deal with the summary court-martial, the convening authority, counsel, court members, and other personnel. Chapter XI discusses evidence very briefly. Two chapters are devoted to trial procedure and review of proceedings. The fourteenth chapter concerns various kinds of administrative fact-finding bodies, and the final chapter focuses on line-of-duty and misconduct determinations.

The forty-seven appendices fill over one-third of the volume. Like the appendices to the *Manual for Courts-Martial,* they set forth sample forms, scripts to be used by counsel before courts-martial, the text of the Uniform Code of Military Justice, and other materials. Also included are a wide variety of forms and textual excerpts from other publications peculiar to each of the several military services. These include the Army's "Procedural Guide for Article 32(b) Investigating Officer," and various Army materials for use in connection with nonjudicial punishment.

Reader aides include a detailed table of contents, explanatory preface, table of abbreviations, glossary, bibliography, table of cases cited, and subject-matter index. The text of each chapter is organized in numbered sections. Most chapters are followed by cases for discussion, some with interpretive notes, and a self-quiz consisting of questions about hypothetical fact situations. Answers to the quiz questions appear after the last of the appendices.

The author, Edward M. Byrne, is a judge advocate and a captain in the U.S. Navy. Born in 1935, he earned his J.D. degree at Syracuse University, and an LL.M. at George Washington University, Washington, D.C. He has held many posts during his career, including assignments to the U.S. Naval Academy, and later the Naval Justice School, Portsmouth, R.I. At the time of publication of the third edition, Captain Byrne was an appellate judge on the Navy-Marine *Corps* Court of Military Review, and served as deputy assistant judge advocate general of the Navy for military justice. He has published many writings on military law.

8. Caldwell, Dan, *American-Soviet Relations: From 1947 to the Nixon-Kissinger Grand Design.* Westport, Connecticut: Greenwood Press, 1981. Pages: xiv, 285. Price: $27.50. Tables, bibliography, index. Publisher's address: Greenwood Press, 88 Post Road West, Westport, CT 06881.

Relations between the United States and the Soviet Union continue to be a matter of great importance to Americans, and also to Europe-

ans and many others whose long-term welfare and safety are dependent upon the peaceful character of those relations. The work here noted is a history of Soviet-American relations since the end of the Second World War, to the end of the Ford Administration in **1977.** Examined are the cold war policies of Presidents Truman and Eisenhower, the slightly more complex approach of Presidents Kennedy and Johnson, and finally the detente era.

The author closes his analysis in **1976** because, in his view, the policies of Presidents Carter and Reagan represented a sharp break with the immediate past. In the detente era of Henry Kissinger, realistic cooperation with the Soviet Union was emphasized. President Carter, in contrast, made human rights a top priority in his foreign policy. Toward the end of his term, he emphasized deterrence of Soviet action through military preparedness, a theme which has become dominant under President Reagan.

The book is organized in three parts and eight chapters. Following a general introduction, the four chapters of Part I provide a chronological account of modern Soviet-American relations. The second part, "Comparative Case Studies," reviews the U.N. Disarmament Subcommittee Negotiations, the SALT talks, trade negotiations, the Cuban Missile Crisis of the Kennedy years, and the October War in the Mideast during **1973.** The concluding third part concentrates on the detente strategy of the Nixon-Kissinger years.

Aids for readers offered are a table of contents, explanatory preface, afterword, bibliography, and subject-matter index. Statistical tables and charts are scattered throughout the text. Footnotes are collected at the end of each chapter.

The author, Dan Caldwell, is **an** associate professor of political science at Pepperdine University, Malibu, California. He has written extensively on international relations, arms control, and trade. The book here noted is No. **61** in the Greenwood Press series called "Contributions in Political Science."

9, Cleveland State Law Review, *Symposium: Clinical Legal Education and the Legal Profession* (Volume **29,** Nos. **3 & 4).** Cleveland, Ohio: Cleveland State University, **1980.** Pages: vii, **504.** Price: **$12.00** for annual subscription; **$3.50** for single issues. Publisher's address: Cleveland State Law Review, Cleveland-Marshall College of Law, Cleveland State University, Cleveland, OH **44115.** Distributor's address: Dennis & Co., Inc., **251** Main St., Buffalo, N.Y. **14203.**

This special issue of the Cleveland State Law Review sets forth fourteen articles and commentaries, as well as other materials, on the subject of clinical legal education. The compilation commemorates the work of the Council on Legal Education for Professional Responsibility, Inc., established in 1967 by the Ford Foundation to promote clinical legal education. The face of American legal education has changed over the past decade, in part due to the efforts of this organization. The traditional socratic method of teaching, while still widely used, has ceased to be clearly dominant. Most and perhaps all American law schools now offer their students some opportunity to learn the practical mechanics of working with clients, opposing counsel, the courts, and public and private agencies in dispute resolution, problem solving, and civil and criminal litigation.

The *Cleveland State Law Review* is not a new publication. Now in its 31st volume, the *Review* is published by the Cleveland-Marshall College of Law of Cleveland State University, Cleveland, Ohio. The editor-in-chief for the clinical legal education symposium issue was Richard J. Marco, Jr. The *Review* is a member of the National Conference of Law Reviews, and is indexed in the Index of Legal Periodicals.

The symposium issue here noted is organized in four parts. The first is a collection of prefatory remarks by prominent professors, judges, and others interested in clinical legal education. This section is followed by a group of six articles, the first of which was authored by Chief Justice Warren E. Burger. The third part is a short article based upon a panel discussion concerning measurement of student performance in clinical legal education activities. The discussion was sponsored in January 1980 by the Association of American Law Schools. The fourth and last part is a collection of eight commentaries, again by judges, professors, and others. Two appendices at the conclusion of the **book** provide descriptions of law school clinical education programs, and set forth student practice rules and, in tabular form, the rules followed by various courts in the United States with regard to law student practice.

The volume offers a table of contents, and also an annual index for all of volume 29 of the *Review*. (The symposium issues comprises only pages 345 through 848 of that volume.)

10. Degenhardt, Henry W., *Treaties and Alliances of the World* (3d ed.). Detroit, Mich.: Gale Research Co., 1981. Pages: ix, 409. Price: $70.00. Tables, diagrams, index. Publisher's address: Gale Research Co., Book Tower, Detroit, MI 48226.

International lawyers, diplomats, and businessmen may often find it useful to have information about the alliances of foreign countries with whom they deal. The work here noted provides detailed descriptions of hundreds of bilateral and multilateral treaties, conventions, protocols, and other agreements currently in force as of about 1980. Not every treaty in the world is listed; but all the major ones appear to be covered. Quotations from the treaties listed and from interpretive documents are provided in many cases. Lists of signatories, maps showing the territorial application of multilateral agreements, and other information are provided. This work would be a good companion to the State Department's publication, *Treaties in Force.*

The book is organized in nineteen sections, or chapters. The first section discusses early agreements, mostly from the nineteenth century and the World War I era. The next few chapters deal with the groups of treaties arising out of the conduct and conclusions of World War II, the establishment of the United Nations and its agencies, and efforts at disarmament. Several chapters are devoted to treaties pertaining to economic cooperation and development, and various scientific and environmental endeavors. Later chapters concentrate on mutual defense agreements, primarily NATO and the Warsaw Pact, as well as other assorted agreements of communist states. The British Commonwealth, the French Community, the various pan-American agreements, the Arab League and related groups, the Organization of African Unity and other African groupings, and regional agreements of southeast Asian and Pacific countries, are the subjects of further chapters. The work closes with a chapter on efforts of the Third World countries to achieve cohesion.

Reader aids include a detailed table of contents and a subject-matter index. Maps, tables, and diagrams are scattered throughout the text. There are no footnotes or bibliography, but some citations to sources are provided in the text.

The author and compiler of the work is Henry W. Degenhardt. The book is one of a series called "Keesing's Reference Publications," for which Alan J. Day serves as general editor.

11. De Sola, Ralph, *Crime Dictionary*. New York, N.Y.: Facts on File, Inc., 1982. Pages: xiii, 219. Price: $19.95. Separate sections for foreign terms and place-name nicknames; list of selected sources. Publisher's address: Facts on File Publications, 460 Park Avenue South, New York, N.Y. 10016.

Crime is a subject of intense interest, an interest compounded of fear and fascination. The work here noted should appeal to many readers, whether they are detective-story readers, lawyers, law enforcement officials, or others. Thousands of technical terms, slang expressions, abbreviations, foreign phrases, and place names are listed and explained. Names of prisons and police departments, illegal drugs and fraudulent schemes, and dozens of other crime-related matters, are included, in both colloquial and formal varieties. Criminal organizations of all sorts, weapons and ammunition, poisons, and a great variety of other subjects are covered as well.

Each entry consists of the term or expression to be defined, printed in bold-face type, followed by a short definition. Pronunciations and etymologies are not provided, although for some entries an explanation of the origin of the expression is provided. The general dictionary fills about eighty percent of the volume. This is followed by separate listings for foreign terms and phrases not appearing in the general dictionary, and for nicknames of places, such as prisons and cities. The work closes with a list of references.

The author, Ralph De Sola, is a teacher of English at San Diego City College and other schools in the San Diego, California, area. He has compiled and published a number of other dictionaries and similar reference works.

12. Devine, Frank J., *El Salvador: Embassy* ***Under Attack.*** New York City, N.Y.: Vantage Press, Inc., 1981. Pages: ix, **209.** Price: $10.00. Glossary. Publisher's address: Vantage Press, Inc., 516 West 34th St., New York, N.Y. 10001.

During the past couple of years, the small Central American country of El Salvador has received frequent attention in American news media. The plight of the people of El Salvador, victims of a bloody conflict between intransigent political opponents, has attracted the sympathy of the entire world. American national policy toward El Salvador is a subject of debate at the highest levels of our government. The book here noted is extremely timely, and also highly authoritative, written as it is by a career diplomat who served as America's ambassador to El Salvador from 1977 to 1980.

Ambassador's Devine's book is organized in twenty-four chapters, which provide a generally chronological account of events in El Salvador during the author's four years there. The opening chapters provide background information about the country, its government, economy, people, and recent history, and about Mr. Devine himself

and his considerable qualifications as an observer and interpreter of events. Subsequent chapter titles describe the contents of the work: "Threat of Kidnapping from the Left," "Human Rights," "Attacks on Foreign Embassies," "Reform Versus Repression," "Trying to Save an Election," "Rise and Fall of the First Junta," and many others.

The book offers a table of contents and a glossary of abbreviations and acronyms. The author, Frank J. Devine, was born in **1922,** and served in the U.S. Army during World War Two. He entered the Foreign Service in **1948** and served in many foreign posts, chiefly in Latin America.

13. Huckabee, Harlow M., *Lawyers, Psychiatrists, and Criminal Law: Cooperation or Chaos.* Springfield, Illinois: Charles C. Thomas, Publisher, **1980.** Pages: xiv, **203.** Price: **$16.75.** Publisher's address: Charles C. Thomas, Publisher, **301–327** East Lawrence Ave., Springfield, IL **62717.**

This work on psychiatry and the law by an attorney in Arlington, Va., has been reviewed at length by Major Susan McMakin, USAR. Her review is published at **94** Mil. L. Rev. **153–168** (fall 1981). Mr. Huckabee is a retired lieutenant colonel, USAR. The work is noted here only to update the pricing information. With Major McMakin's review, the price was stated to be **$16.00.** It should now be **$16.75.**

14. Hurst, Walter E., *The Music Industry Book: Protect Yourself Before You Lose Your Right & Royalties!* (2d ed.). Hollywood, California: Seven Arts Press, Inc., **1981.** Pages: xii, **92.** Price: **$15.00.** hardcover; **$10.00,** paperback. Sample contract forms, index, bibliography. Publisher's address: Seven Arts Press, Inc., 6253 Hollywood Blvd., Suite **1100,** Hollywood, CA 90028.

This book explains the contractual mechanics of the popular music industry. It is not a law book, although it could be used by lawyers who advise clients in the music business. The material is directed primarily at songwriters and their managers, and at music publishers, as well as other interested laypersons. It is No. **2** in the Entertainment Industry Series of Seven Arts Press, which now numbers twenty-two titles, including works on income taxation, copyright requirements, and the like. Several of these publications have previously been noted in the *Military Law Review,* most recently in volumes **87,** 88, and **93.**

The book is organized in eighteen chapters. Each chapter opens with a story, or hypothetical fact situation, and closes with a sample contract form pertaining to that situation. The reader is taken step by

step through various stages of publication, sale, and distribution of music, and is shown alternative possible business arrangements at each stage. The sample contracts are annotated with comments concerning important choices to be made. The work opens with several pages of cartoon-like illustrations by artist Don Rico which provide an overview of the subject for the reader.

Reader aids include an explanatory foreword, a detailed table of contents, a subject-matter index, and a bibliography. Lists of contract forms and other publications for sale are provided.

The author of the work here noted and of most other numbers in the Entertainment Industry Series, Walter E. Hurst, is an attorney practicing entertainment industry law in Hollywood, California. Born in **1930,** he received his B.B.A. degree from City College of New York, and his LL.B. from New York University, Mr. Hurst was admitted to the California bar in **1953.**

15. International Common Law Exchange Society, ***The Common Law Lawyer.*** Palo Alto, California: International Common Law Exchange Society, **1976** to present. Periodical published bimonthly. Pages: varies from 8 to 40 per issue. Price: $80.00, one year subscription; $200.00, three year subscription; $12.50, single copy. Back issues and certain special reprints available. Publisher's address: International Common Law Exchange Society, P.O. Box **51,** Palo Alto, CA **94302.**

The periodical here noted is an international, transnational, and comparative law publication dealing with such topics as immigration laws, taxation of the foreign business activities in various countries, criminal law around the world, treaties and other international agreements on many topics, and legal history. The phrase "common law" in the title refers not to the Anglo-American common law, but rather to the editors' conviction that there is fast developing a worldwide common law, derived from many sources and many different systems of law.

A sampling of some of the titles of articles published in the six issues of **1981** gives a flavor of the scope and variety offered by this periodical. "Charter of the Forest: Forgotten Companion of the Magna Carta," is featured in the January-February **1981** issue. Later comes "Royalties Paid for the Use of a U.S. Patent by a Dutch Corporation to a Citizen-Resident of a Country Other than the U.S. or Holland Held Subject to United States Taxation." Melvin M. Belli, Sr., contributed "Law in the 'Good Old Days."' Other titles include "Global Solar

Treaty: Energy for Peace, A Proposal,'' and "Spain's 'Workers' Statute.'"

Most of the articles are short, a half dozen pages or less, and the 1981 issues generally have only one or two articles apiece. The 1980 issues are much thicker. Articles are amply footnoted; notes are collected at the ends of the articles. There are a few illustrations, and some past issues include commercial advertising. Page size is 8-½ inches by 11 inches, and three holes are provided to make possible storage of issues in a standard three-ring binder. The paper is off-white, good for preventing eyestrain.

The editor for the past several years has been Ira B. Marshall of Palo Alto, California, who in the past has served as president of the publishing organization, the International Common Law Exchange Society. The managing editor is Dan P. Danilov, of Seattle, Washington, whose publications on immigration law have been noted previously in the *Military Law Review*. The I.C.L.E.S. also publishes the *Transnational Immigration Law Reporter.*

16. Kaufman, Herbert, *The Administrative Behavior of Federal Bureau Chiefs.* Washington, D.C.: The Brookings Institution, 1981. Price: $22.95, hardcover, $8.95, paperback. Pages: xiv, 220. Three appendices, bibliography, index. Publisher's address: Director of Publications, The Brookings Institution, 1775 Massachusetts Ave., N.W., Washington, D.C. **20036.**

This work is a study of the day-to-day activities of the heads of various federal agencies. The author starts with several questions in mind: To what extent are agency heads autonomous, or independent, in their exercise of power? How do they use power and influence? Are they in fact as powerful as they are commonly thought to be?

Six agencies were selected for study among dozens available. They include the Internal Revenue Service and the Social Security Administration. No Defense Department agencies are included, because their characteristics and orientation set them apart from the rest of the government, as seen by the author. The same is true of State Department agencies. The author studied the six selected chiefs for a year, in 1978 and 1979. The book here noted sets forth his observations, together with some tentative conclusions about desirable characteristics in a bureau chief, and possible restructuring of federal agencies.

The book is organized in five chapters, supplemented by three appendices. The introductory chapter explains the author's methodology

and his desire to fill a gap in the literature on public administration. The second and third chapters describe the activities of bureau chiefs—reviewing information, coordinating with Congress and other Executive agencies, supervising subordinates, and the like. The limitations on their power are reviewed. In Chapter 4, the author discusses the significance of the information presented in the earlier chapters, i.e., how much autonomy the bureau chiefs really have. The fifth and last chapter sets forth the author's conclusions, or "inferences," with suggestions concerning desirable qualities in a chief, and possible ways of restructuring the federal bureaucracy. The three appendices set forth information about the author's method of selecting the particular bureaus studied.

For the convenience of readers, the book offers a detailed table of contents, a bibliography, and a subject-matter index, as well as an explanatory foreword. Many footnotes are used, and are placed at the bottoms of the pages to which they pertain.

Herbert Kaufman is a senior fellow in the Brookings Governmental Studies program. He has authored three earlier Brookings books. The Brookings Institution describes itself as "an independent organization devoted to nonpartisan research, education, and publication in economics, government, foreign policy, and the social sciences generally." Its purposes are stated to be "to aid in the development of sound public policies and to promote public understanding of issues of national importance."

17. Kurian, George Thomas, *Encyclopedia of the Third World* (2d ed.). New York, New York: Facts on File, Inc., **1982.** Pages: Vol. I, xxvii, **1–725;** Vol. II, **726–1485;** Vol. 111, **1486–2125.** Price: **$125.00.** Many tables and maps; ten appendices, general bibliography, index. Publisher's address: Facts on File Publications, 460 Park Avenue South, New York, N.Y. **10016.**

This monumental work provides extensive and detailed information concerning over one hundred of the world's nations and dozens of international organizations. The deceptively brief phrase "Third World" encompasses peoples and societies of bewildering variety and complexity. The author uses an elaborate system of organization to make sense of his abundant data. The result is a work which is valuable for reference and fascinating for browsing.

The *Encyclopedia* is published in three large volumes totalling over **2,000** pages of text. Volume I presents an explanation of the organization and use of the work. This is followed by **22** pages of descriptions of

several dozen Third World international organizations and agencies, such as the Arab League, the Organization of African Unity, the Organization of American States, the United Nations, and the World Bank. This section closes with lists of other international organizations, more limited in membership and more specialized in function. Country entries begin thereafter. Volume I contains the entries for Afghanistan through Guinea-Bissau; Volume II, Guyana through Qatar; and Volume 111, Rwanda through Zimbabwe. The third volume also presents extensive statistical appendices.

Each country entry opens with sections setting forth basic facts, and information about location, area, weather, population, ethnic composition, languages and religions. Most entries have a historical note describing the country's experience, if any, as colonies prior to independence. The descriptions proceed with sections concerning each country's constitution, government, and record concerning political and personal freedom and guarantees of human rights. Discussion of the country's civil service, local government, foreign policy, parliament, and political parties comes next.

Most of each country entry is devoted to information about the country's economy. An extensive general overview is followed by sections on specialized topics, such as the national budget, finance and banking, and particular industries such as agriculture, mining, energy, and transportation and communications. There are sections also on labor, foreign commerce, and education.

The country entries are concluded with entries describing each country's defense establishment, legal system, law enforcement apparatus, health services, information and cultural media, and system of social welfare. A glossary of foreign terms, a chronology of recent historical events, and a selected bibliography complete each country entry.

Ten statistical appendices in the third volume provide comparative information about the dozens of countries described in the *Encyclopediu*. Population trends and policies, foreign aid, the status of women, and information about the 422 largest multinational corporations that do business in the Third World, the extent of their local and foreign ownership, and other matters. Banking is the subject of one table, and American-owned corporations, another. Governmental takeover of foreign enterprises is also discussed.

Reader aids are extensive. A detailed table of contents and an explanatory preface are followed by a lengthy section describing how the

information presented is organized. A table of acronyms and abbreviations is presented.

The author and compiler, George Thomas Kurian, has prepared a number of other dictionaries and other similar statistical compilations. He served as editor for the first edition of the *Encyclopedia,* published in two volumes in 1978. A native of India, Mr. Kurian was educated at the University of Madras.

18. Kramer, Charles, and Daniel Kramer, *Evidence in Negligence Cases* (7th ed.). New York, New York: Practising Law Institute, 1981. Pages: xi, 169. Price: **$20.00.** Tables of authorities cited; index. Publisher's address: Practising Law Institute, 810 Seventh Ave., New York, N.Y. 10019.

It has often been noted in recent years that the volume of litigation in American courts has increased. A great portion of this litigation concerns torts or negligence, and the usefulness of treatises on evidence is obvious. The present work reviews the substantive and procedural law of evidence, and provides suggestions to trial attorneys, both for the plaintiff and for the defendant in negligence suits.

The book is organized in fifteen chapters. These discuss direct and cross-examination, the rules of hearsay, various types of evidence, damages, and other topics. For example, Chapter 1, "The Direct Case," covers exclusion of witnesses and others from the courtroom, order of proof, competency of witnesses to testify, swearing witnesses, use of interpreters, privileged communications, especially those between physician and patient, and personal transactions with a deceased under the Dead Man's Statute. The other chapters also cover a number of subtopics; some are lengthy, such as the chapter on hearsay, and others are very short, such as the chapters on the doctrine of *res ipsa liquitur* and on pleadings.

For the convenience of users of the book, a detailed table of contents is offered. The text is extensively footnoted, and notes appear at the bottoms of the pages to which they pertain, a desirable feature. Most of the cases cited were decided in New York courts, which may limit the usefulness of this work for non-New York attorneys. Tables of cases and rules cited are provided, together with a subject-matter index.

The authors, Charles Kramer and Daniel Kramer, are father and son respectively, and are members of the New York City firm of Kramer, Dillof, Tessel, Duffy & Moore. Both are also graduates of St. John's

Law School. Charles Kramer has published a number of works on medical malpractice.

19. Leutze, James, *A Different Kind of Victory: A Biography of Admiral Thomas C. Hart*. Annapolis, Maryland: U.S. Naval Institute Press, 1981. Pages: xi, 362. Price: $21.95. Notes and acknowledgements, bibliography, index. Publisher's address: Marketing Department, Naval Institute Press, U.S. Naval Institute, Annapolis, MD 21402.

Admiral Thomas C. Hart may not be well known to members of the Army, but he was an important figure in American naval history in the 1930's, through the opening stages of World War 11. As commandant of the Naval Academy in 1933 and 1934, he helped that venerable school update its training and curriculum in time for its graduates to be ready to assume important posts during World War 11. In other positions, he influenced submarine design and other matters significantly. Admiral Hart held many important posts, but narrowly missed going to the top in his profession because of disagreements with President Roosevelt. Through a quirk of fate, Admiral Hart was not in command at Pearl Harbor at the time of the Japanese attack in 1941; if he had been that episode might have ended very differently.

The book is organized in eleven chapters, telling Admiral Hart's life story in chronological sequence from childhood through retirement from the Navy in 1945 and brief service as an appointed U.S. Senator from Connecticut. A number of pictures are scattered throughout the text. The author's style is eminently readable, without dryness or pedantic qualities.

For the assistance of readers, the book offers a table of contents, explanatory preface, bibliography, and subject-matter index. Footnotes are collected together at the end of the book.

The author, James Leutze, is a professor of history at the University of North Carolina, and a specialist in modern American military history. He based this biography in part on a twenty-one volume diary prepared by Admiral Hart during his half-century of public service.

20. Martin, Laurence, editor, *Strategic Thought in the Nuclear Age*. Baltimore, Maryland: The Johns Hopkins University Press, 1981. Pages: ix, 233. Price: $18.50, hardcover; $6.95, paperback. Index. Publisher's address: Johns Hopkins University Press, Baltimore, MD 21218.

The specter of nuclear war is always present, influencing the military preparations and strategic planning of every major nation. The work here noted is a collection of essays on various aspects of strategic thought by prominant scholars. Discussed are such topics as the importance of economic considerations in strategic planning; problems of strategic intelligence-gathering; the significance of American experience in Vietnam for limited-war strategic planning; crisis diplomacy; and disarmament and arms control.

The book consists of seven numbered essays by different authors. The editor, Laurence Martin, vice-chancellor of the University of Newcastle upon Tyne, is also the author of the first essay, "The Role of Military Force in the Nuclear Age." The other contributors are Louis-Francois Duchene, Klaus Knorr, Robert E. Osgood, Henry S. Rowen, Coral Bell, and John Garnett. All currently hold academic posts, as administrators or instructors in various universities and schools; all have previous publications to their credit. Several have previously held important positions in government or in public or private research institutes.

The book offers a table of contents, explanatory preface, and subject-matter index. There is some use of statistical tables. Most notes and references are collected together after the last of the seven articles.

Listed as "general editor" is Hossein Amirsadeghi, who has fostered the publication of various books on international political, economic, and strategic issues. The first of these was *Twentieth Century Iran*. The work here noted, *Strategic Thought*, was first published in **1979.**

21. Michie Company, *Federal Ethics Handbook: Annotated Legal Guide*. Charlottesville, Va.: Michie/Bobbs-Merrill Law Publishers, **1981.** Pages: 520. Price: $75.00. Looseleaf binder (5-ring) with tabs; index. Publisher's address: Michie/Bobbs Merrill Law Publishers, P.O. Box **7587,** Charlottesville, **VA 22906.**

This work is a collection of reprints of federal statutes, regulations, and other materials pertaining to ethical behavior and obligations of, and limitations on federal employees. Much of the material pertains chiefly to civil servants in the Senior Executive Service, but some portions pertain to all employees, and to military personnel as well. The material is presented in a looseleaf binder, which suggests that supplemental or updating material will be published in the future, although no information to that effect is provided.

During the past decade the attention of the public has repeatedly been drawn to problems of bribery and conflict of interest involving high government officials. It is reassuring to know that a compilation such as that here noted exists. The work has been prepared by a private, commercial publisher, and not by any governmental agency, but at least it exists and will be available for purchase by the general public, including attorneys who advise government officials concerning their business dealings. In the Army, material on prohibited activities has long been made available and indeed is usually required reading for officers and noncommissioned officers. Presumably the other military services have similar programs.

The work is organized in eight sections or "divisions." The first division sets forth the texts of relevant executive orders of the President. One order prescribing standards of ethical conduct is reprinted, dating from 1965. Division B, Statutes, and Division C, Regulations, are much longer, and together comprise more than half the book. The statutes quoted are from six titles of the U.S. Code, and the regulations are from four titles of the Code of Federal Regulations. Division D, Advisory Opinions, is currently empty. Division E, Forms and Model Trusts, sets out at some length the texts of and instructions for completion of executive and congressional financial disclosure reports. Sample trust instruments are reproduced, for use by high-level officials in separating themselves from their personal wealth during their terms of office. Division F, Ethics Officers, is a list of addresses, and Division G, Agency Regulations, is a table of citations to ethics provisions of the Code of Federal Regulations. Division H, Comptroller General Decisions, contains the text of one 1967 decision concerning acceptance of gifts and payments from private sources under certain circumstances.

For the most part, the materials are simply copies of previously published statutes, regulations, and other public documents. Annotations appear only in Division B, Statutes, and a few footnotes are appended to the regulatory material in Division C. As the materials are exclusively governmental documents pertaining to a wide range of employees, there is no mention of such materials as the various American Bar Association standards, or the Federal Ethical Considerations of the Federal Bar Association.

Reader aids include a general index, and tabs. The pages measure approximately 8-½ inches by 11 inches, and could easily be fitted into a standard 3-ring binder. Unfortunately, the publisher chose a 5-ring binder of special design. No author or editor is identified.

22. Nalty, Bernard C., and Morris J. MacGregor, *Blacks in the Military: Essential Documents,* Wilmington, Del.: Scholarly Resources, Inc., 1981. Pages: xi, **367.** Price: $29.95. Extensive reprinting of original documents; index. Publisher's address: Scholarly Resources, Inc., 104 Greenhill Ave., Wilmington, DE 19805.

Racial discrimination has been a subject of great concern to the military services since World War 11. The services have been ahead of civilian society in some respects in taking action to end discrimination. This was not always so. The services, reflecting the attitudes of the larger society of which they are a part, were slow in recognizing the need for change. The work here noted tells the story of discrimination and change in the American military services. The text of the book consists primarily of reprinted official documents, chiefly reports, recommendations, orders, and directives, issued by the military services over the years.

The book is organized in eleven chapters, which relate in chronological order segments of the history of blacks in the American military services. The first four chapters take the story from the slavery era through the Civil War and World War I, up to the eve of the Second World War. The next six chapters focus on developments during the 1940's, leading to formal desegregation of the services from 1948 onward. Some subsequent refinements of the integration program are dealt with in the concluding chapter. Each chapter is opened with a short explanatory note, one or two pages in length, tying together the documents therein.

Reader aids include a table of contents, explanatory preface and introduction, and subject-matter index. Some footnotes are provided, to identify sources of documents reprinted, or to explain abbreviations and obscure references in the text of the documents. A list of the documents reprinted, or at least a more detailed table of contents, would be helpful. The page size is ample at seven by ten inches, and the text is easy to read.

The two editors of this work are both professional military historians. Bernard **C.** Nalty is a historian in the Office of Air Force History, and has served as historian for the Marine Corps and the Joint Chiefs of Staff. Morris J. MacGregor is a senior historian in the U.S. Army Center of Military History, and has had responsibility for the official Department of Defense history of the integration of the armed forces. Both editors have various publications to their credit. They have coedited the thirteen-volume work, *Blacks in the U.S. Armed Forces:*

Basic Documents, published in 1976 by Scholarly Resources, Inc., at a price of $695.00.

23. Novosti Press Agency Publishing House, *Soviet Economy Today: With Guidelines for the Economic and Social Development of the USSR for 1981–1985 and for the Period Ending in 1990.* Westport, Connecticut: Greenwood Press, 1981. Pages: viii, 356. Price: $35.00. Appendix; index, Publisher's address: Greenwood Press, 88 Post Road West, Westport, CT 06881.

This work is of special interest because it presents a Soviet view of the Soviet economy today and its prospects for development during the next few years. A collection of essays by Soviet economists, the work was prepared by an official publishing organization located in Moscow. This is not a law book, although one chapter presents the Soviet constitutional basis for centralized economic planning and direction. The book is part of the Greenwood Press series, "Contributors in Economics and Economic History." Most of the titles in that series deal with the American economy.

The book is organized in eleven chapters by different authors. Following an introduction by the editor of a Soviet journal of economics, several chapters provide background information about the Soviet Union, its terrain, resources, population, governmental organization, history, and economic system. Later chapters focus on industry, construction, agriculture, and foreign economic relations. The concluding chapters discuss the general purposes of economic production, social security, public education, and public health services. A statistical supplement follows the last chapter. Finally, an appendix sets forth the document identified in the book's subtitle, "Guidelines for the Economic and Social Development of the USSR."

For the convenience of readers, the book offers a table of contents, a list of statistical tables used in the text, and a subject-matter index. A few statistical tables are scattered through the text. There are no footnotes or bibliography, and very few textual citations to published authorities or sources.

The several authors seem to be primarily academic *figures.* Most bear the title of professor, and several are associated with the USSR Academy of Sciences and other similar agencies.

24. Nufer, Harold F., *American Servicemembers' Supreme Court: Impact of the U.S. Court of Military Appeals on Military Justice.* Lanham, Maryland: University Press of America, 1982. Pages: xiv,

197. Price: $20.25, hardcover; $10.25, paperback. Index. Publisher's address: University Press of America, 4720 Boston Way, Lanham, MD 20801.

This work provides a description and review of the United States Court of Military Appeals, its procedures, jurisprudence, and history, together with some changes proposed in recent years. The book differs from most writings about CMA in that its author is a political scientist rather than a lawyer. An Air Force reservist who served on active duty in the 1960's, Professor Nufer has written this book to make the public aware of the existence of the court, so important within the military services and so little known outside. Professor Nufer does not offer criticism of his own concerning the military justice system, but quotes extensively the observations of other writers.

The book is organized in four chapters. After a foreword by Francis X. Gindhart, Clerk of CMA, and an explanatory preface and introduction, the first chapter presents an overview of military justice of the present day, with discussion of nonjudicial punishment, the various types of courts-martial, and related matters. Chapter 2, "The Modus Operandi of CoMA," explains how the CMA judges do their work. Their independence and individualism are subjects of comment. The internal administrative operations of the court are described.

The third chapter discusses eleven important CMA decisions, selected by the court members. These cases were decided chiefly in the 1970's, although some earlier decisions are also discussed. The final chapter discusses several recommended changes, such as an increase from three to five in the number of CMA judges. Also examined is one change enacted into law, fixing the judges' term of office at fifteen years regardless of when appointed, with transitional provisions for judges on the court at the time this change became law. In his conclusions, the author praises military justice in general, but recommends that Congress act on various proposals designed to increase the stability of the court's membership, among other matters.

For the convenience of readers, the book offers a table of contents and a subject-matter index. The work is extensively footnoted, and notes are collected at the ends of the chapters. A typewriting typeface is used for text and notes.

The author, Harold F. Nufer, is an associate professor of political science at Michigan Technological University, Houghton, Michigan. He has previously published a book on the United States trust territory in the Pacific, Micronesia. Professor Nufer is a lieutenant colonel in the

Air Force Reserve, and served on active duty in Norway and Vietnam during the 1960's. He received his education at U.C.L.A. and Tufts University.

25. Patton, Gerald W., *War and Race: The Black Officer in the American Military, 1915–1941.* Westport, Connecticut: Greenwood Press, 1981. Pages: x, 215. Price: $25.00. Table of abbreviations, three appendices, bibliography, index. Publisher's address: Greenwood Press, 88 Post Road West, Westport, CT 06881.

During the past generation, the military services have tended to be in the forefront of efforts to promote equal opportunity for blacks. This is not to say that the Army and the other services have been free of racism, any more so than American society as a whole. But opportunities for advancement, including enlisted and officer promotions, commissioning, school assignments, and the like, have often been superior to those available in civilian society. Moreover, the services' efforts at consciousness-raising and education of their members about ethnic identity are a model for other organizations to follow.

Sadly, it was not always so. The book here noted is an account of the status of blacks in the officer corps of the United States Army from World War I to World War 11. Some mention is made of earlier American wars; there have always been black soldiers. However, until the 20th century, very few blacks were ever allowed to receive commissions. Despite occasional short-lived attempts to train and promote more black officers and to give them desirable assignments, the Army as a whole practiced fairly extreme discrimination against black officers during those decades. Under the circumstances, the service of blacks in the officer corps was of little or no value to themselves or to the black population in general.

The book is organized in eight chapters, providing a chronological description of some of the experiences of black Army officers during the decades covered. The establishment of a black officers' training camp at Fort Des Moines, Iowa, during World War I, was the beginning of the modern participation of blacks in the Army's officer corps. Experiences of black officers in France and after the war are described, together with the policies and attitudes of the white officers and civilians who controlled the War Department. Extensive quotation from letters, internal memoranda, official reports, and the like, show clearly the lack of confidence of the white hierarchy in black officers, which led to denial of opportunities to the officers to prove their competence and efficiency in meaningful ways.

For the convenience of readers, the book offers a table of contents, table of abbreviations, bibliography, and index. The text is heavily footnoted, and notes are collected at the ends of the chapters. Three appendices set forth various official documents concerning the training of black officers and the organization of the 92d Division, a black unit.

The author, Gerald W. Patton, is an assistant professor of history and assistant dean at the Graduate School of Arts and Sciences, Washington University, St. Louis, Missouri. The book is Number 62 in the Greenwood Press series entitled "Contributions in Afro-American and African Studies."

26. Pittsburgh, University of, School of Law, *Journal of Law and Commerce*. Pittsburgh, Pa.: Univ. of Pittsburgh School of Law, 1981, Periodical published twice yearly. Pages: vi, 186 (vol. 1, 1981). Price: $9.00 per year; *$5.00* for single copies. Publisher's address: Business Manager, Journal of Law and Commerce, University of Pittsburgh School of Law, 3900 Forbes Ave., Pittsburgh, PA 15260.

This new periodical states that its goal is "to become a central forum for scholarship elaborating or clarifying commercial law as it now exists and is likely to develop. The editors state that they "will steer a course between the practical and the theoretical, addressing issues that the practicing commerical lawyer is likely to encounter." The first issue was financed by grants from six Pittsburgh law firms.

The opening issue presents a symposium on commercial impracticability, consisting of three articles on the subject. The articles were prepared by Professor E. Allan Farnsworth of Columbia University School of Law; Richard W. Duesenberg, a senior executive of the Montsanto Company, and Dean John E. Murray, Jr., of the University of Pittsburgh School of Law. The symposium is followed by an article on sellers' rights by Professor D. E. Murray of the University of Miami School of Law. Four student notes and comments on commercial law and taxation complete the issue.

The appearance or format of the new *Journal* is generally similar to that of other law reviews. Titles of articles are listed on the outside of the front cover. Faculty members and student editors are listed between the title page and the table of contents. Articles are copiously footnoted, and the notes are presented at the bottoms of the pages to which they pertain. The page size is approximately 6% inches by 10 inches, with printed matter on an area measuring 4–⅝ inches by 8 inches. The editor-in-chief for the first issue was Rosemary Carroll. She was succeeded by Thomas K. Hyatt.

27. Rhodes, Lawrence J., *Treating and Assessing the Chronically Mentally Ill: The Pioneering Research of Gordon L. Paul* (DHHS Publication No. (ADM) 81–1100). Rockville, Maryland: National Institute of Mental Health, 1981. Pages: vi, 65. Statistical tables, figures, bibliography. Publisher's address: National Clearinghouse for Mental Health Information, National Institute of Mental Health, Room 11A21, 5600 Fishers Lane, Rockville, MD **20857.**

The chronically mentally ill are the so-called "hopeless" cases, people who seemingly cannot survive outside a mental hospital. They generally receive little or no therapy or rehabilitative training, because they are considered untreatable. The booklet here noted describes the research and conclusions of Gordon L. Paul, Ph.D., which sharply contradict this gloomy view. Dr. Paul is a clinical psychologist and a professor in the psychology department at the University of Houston, in Texas. For approximately seventeen years, he has studied chronically mentally ill patients intensively, and has published many articles on their treatment.

Dr. Paul has concluded that, through continuous, frequent interaction with normal people, chronically mentally ill patients can learn to overcome their problems in whole or in large part. Further, they can leave mental hospitals, sometimes to live semi-independent lives with other people, or even to be completely self-sufficient. Therapeutic drug use can be substantially reduced or eliminated for these patients. Moreover, the training staff members need not all be psychiatrists or psychologists; most need only be high school graduates. Patients who completed Dr. Paul's "social training" program were able to leave mental hospitals at a much higher rate, and to stay out longer (or indefinitely) than patients in other types of treatment programs.

For the assistance of readers, the work offers an explanatory foreword, a table of contents, various figures and statistical tables, and an extensive bibliography. The author, Lawrence J. Rhodes, Ph.D., is a staff science writer for the National Institute of Mental Health.

The work here noted is one of a series of National Institute of Mental Health Science Reports. The NIMH, with headquarters at Rockville, Maryland, is part of the Alcohol, Drug Abuse, and Mental Health Administration, of the Public Health Service, within the U.S. Department of Health and Human Services. The Public Health Service is one of the seven federal uniformed services.

28. Rogan, Helen, *Mixed Company: Women in the Modem. Army.* New York, N.Y.: G.P. Putnam's Sons, 1981. Pages: **333.** Price: $14.95.

Bibliography. Publisher's address: G.P. Putnam's Sons, 200 Madison Ave., New York, N.Y. 10016.

Women have served in the American army for many years. However, during the past decade they have donned the uniform in far greater numbers than ever before, and they have served in many more specialties, both as officers and as enlisted persons, than was possible a few years ago. This development has been extremely controversial and has received intense publicity. In the book here noted, a journalist provides a close look at women in today's Army, at their experiences, problems, and achievements, and at the attitudes and actions of men toward them.

The book is organized in fourteen chapters. An introductory chapter presents the various arguments commonly raised against giving women any important duties in the Army. Thereafter, the author deals with military women in a variety of settings. Considerable space is given to basic training at Fort McClellan, Alabama, where the author spent several weeks. Accounts of women in military history, both American and foreign, are provided. One chapter is devoted to the women at West Point and the special problems they have faced there. The question of women in combat receives considerable attention toward the end of the book. One chapter is devoted to the experiences of Army nurses who became Japanese prisoners of war after the fall of Corregidor in World War 11.

The author skillfully integrates quotations from her many interviews and conversations. Written in an almost conversational style, the book is eminently readable and moves at a fast pace. The book offers a table of contents and a selected bibliography. There are no footnotes. The source material used is chiefly conversations of the author with the men and women she interviewed.

The author, Helen Rogan, has written for *The New York Times Book Review* and many other periodicals. She has been an associate editor of *Harper's*. A native of Scotland, she was educated at Cambridge University, England, and presently lives in New York. She travelled throughout the United States to collect the information presented in the book here noted.

29. Smith, George P., 11, *Genetics, Ethics, and the Law*. Gaithersburg, Maryland: Associated Faculty Press, Inc., 1981. Pages: xii, 241. Price: $28.50, hardcover; $18.50, paperback. Ten appendices; table of cases cited; index. Exclusive distributor: University Publications of America Inc., 44 North Market Street, Frederick, MD 21701.

With the rapid advances of recent years in the medical and biological sciences, especially as they pertain to human reproduction, lawyers and others will increasingly have to grapple with questions raised by the practical application of such scientific developments to human beings in hospitals and elsewhere. The work here noted deals with two topics in this area: sterilization and consent thereto, and the so-called "wrongful birth" action for pre-natal injuries suffered by a fetus. The author, a professor at the Catholic University School of Law, Washington, D.C., reviews at length the case law and statutes governing both sterilization and pre-natal injuries in various states and the Federal jurisdiction.

The book is organized in nine chapters. After an introductory chapter on changing values and perceptions, the author discusses the possibilities of implementing a "negative eugenics" program to prevent production of children with hereditory defects. A chapter on problems of informed consent follows, focusing on sterilization, human experimentation, and the like. Chapter 4 distinguishes "wrongful life" (based on failure of birth control measures or sterilization) from "wrongful birth," and discusses the possibilities of recovery in tort. The next several chapters discuss a program for "positive eugenics" (artifical insemination and related techniques) and the legal, scientific, and ethical implications of such a program. The work closes with a chapter presenting the Roman Catholic, Protestant, and Jewish religious views concerning the scientific developments discussed in the earlier chapters.

For the convenience of the reader, this work offers a detailed table of contents and an explanatory introduction. The text is very heavily footnoted. The author's conclusions are summarized after the ninth chapter. Ten appendices set forth the texts of various model laws and sets of standards proposed by various organizations working to protect the rights of the retarded and others. A table of cases cited follows. The book closes with a subject-matter index.

The author, George P. Smith, II, received his B.S. and J.D. degrees from Indiana University, Bloomington, Indiana, and his LL.M. from Columbia University School of Law. He has held a variety of fellowships and other academic posts, and has published many works and lectured frequently on legal medicine.

30. Steiner, Gilbert Y., *The Futility of Family Policy.* Washington, D.C.: The Brookings Institution, 1981. Pages: ix, 221. Price: $15.95, hardcover; $5.95, paperback. Index. Publisher's address: Director of

Publications, The Brookings Institution, 1775 Massachusetts Ave., N.W., Washington, D.C. 20036.

The importance of the American family is often mentioned in social commentary and political rhetoric. Frequently such mention is negative in tone, as when the alleged decline of the family, abdication of parental responsibility, and so forth, are bewailed. During the administration of President Carter, 1977–1981, an attempt was made in government circles to develop a family policy, a set of guidelines and programs to preserve and strengthen the American family. Laudable as such an aim may be, the author of the work here noted concludes that implementation of family policy by government is largely impossible as a practical matter.

Family policy, properly understood, should cover a wide variety of problems, such as divorce, child abuse, adolescent pregnancy, abortion and birth control, child care programs for working mothers, aid to dependent children, runaway children, adoption, child support by absent fathers, and so on. To list the problems afflicting the family is to see that no one policy can reasonably be expected to encompass the entire spectrum of family needs. A more realistic approach is to attack specific problems. Small achievements may be attainable where large ones are not; and small achievements are better than no achievements.

The book is organized in three parts, with seven chapters. The first part introduces the theme of family policy as a whole, with its recent history. Part Two considers some of the specific problems, related and unrelated, that fall within the scope of family policy as defined by the Carter Administration. The third and last part examines the experience of European governments with family policy, and discusses the problems and frustrations to be expected in developing and applying any family policy in practice.

The author, Gilbert Y. Steiner, is a senior fellow in the Brookings Governmental Studies program, with several previous publications to his credit. The Brookings Institution describes itself as "an independent organization devoted to nonpartisan research, education, and publication in economics, government,. foreign policy, and the social sciences generally." Its purposes are declared to be "to aid in the development of sound public policies and to promote public understanding of issues of national importance."

31. Stockholm International Peace Research Institute, *World Armaments and Disarmament: SIPRI Yearbook 1981.* London, U.K.: Taylor & Francis, Ltd., 1981. Pages: xxvii, 518. Price: US $50.00 or

UK pounds 19.50. Address of U.S. distributor: Oelgeschlager, Gunn & Hain, Inc., 1278 Massachusetts Ave., Harvard Square, Cambridge, MA 02138. Publisher's address: Stockholm International Peace Research Institute, Bergshamra, S–171 73 Solna, Sweden.

This annual publication is the twelfth in a series of SIPRI yearbooks. It provides a description of changes in the arsenals of the world's nations during 1980, and an analysis of trends in the worldwide arms race. All types of military weapons technology, production, marketing, and deployment are examined. Attention is focused also on efforts to halt or at least slow the pace of the arms race and of nuclear proliferation. Much space is devoted to the United States, the Soviet Union, and other major powers. International negotiations and agreements affecting arms control, especially the Nuclear Non-Proliferation Treaty and the SALT documents, are examined.

The book is organized in eighteen chapters, following a long introduction which states SIPRI's pessimistic assessment of arms control efforts. The chapters are grouped in three parts. Part I, "The 1970s, developments of the past decade," provides statistics showing worldwide military expenditures and production of and trade in conventional weapons. The evolution of military technology and deterrence strategy, and the growth of military use of outer space are also detailed. The picture presented is of an explosion of arms production and distribution throughout the world.

The second part, "Developments in world armaments in 1980," covers much the same list of topics as Part I, restricted to one year. Part 111, "Developments in arms control in 1980," focuses on international agreements and conferences. The second Non-Proliferation Treaty Review Conference is the subject of one chapter. Others discuss United Nations activities, implementation of various multilateral arms control agreements, the SALT agreements and negotiations, the new convention and protocols prohibiting inhumane and indiscriminate weapons, and a European conference held at Madrid.

Reader aids include a detailed table of contents and an explanatory introduction. Extensive charts and statistical tables are provided, with some illustrations as well. Several chapters are supplemented by a p pendices. Many footnotes are provided, and are collected together at the ends of the chapters. A list of errors and an index close the volume.

The Stockholm International Peace Research Institute describes itself as "an independent institute for research into problems of peace

and conflict, especially those of disarmament and arms regulation." It is financed by the Swedish Parliament, and was established in 1966. The staff and governing organs of the Institute are international in membership. The present director, or chief executive officer, is Dr. Frank Barnaby. Many SIPRI publications have been noted or reviewed, in the *Military Law Review*. Most recently, the *Yearbook* for 1980 was noted at **92** Mil. L. Rev. 181–183 (spring 1981).

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NOTE TO READERS

With this issue, the *Military Law Review* is discontinuing the practice of including an index in each volume. The *Review* is returning to its earlier practice of providing an annual index, covering writings in the four volumes issued during one calendar year.

As an interim measure, a cumulative index will be included in volume **96** (spring 1982), which will cover volumes **92** through **96.** To re-initiate annual indexing, a cumulative index is planned for volume **98** (fall **1982).**

For further information about *Review* indexing, please see page ii, at the beginning of this volume.

By Order of the Secretary of the Army:

E. C. MEYER
General, United States Army
Chief of Staff

Official:

ROBERT M. JOYCE
Brigadier General, United States Army
The Adjutant General