

Editor, Captain Albert R. Veldhuyzen
Editorial Assistant, Mr. Charles J. Strong

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Why We Should Be Concerned About the Movement Toward Procurement Reform

Remarks by
Stephen M. Daniels*
Chairman, General Services Board of Contract Appeals
Washington D.C.

Presented at the Government Contract Law Symposium of
The Judge Advocate General's School, 12 December 1996

To tell you the truth, I'm surprised to have received an invitation to speak here this morning. Representatives of the General Services Board of Contract Appeals (GSBCA) used to appear at these conferences on a regular basis. I was here myself a couple of years ago and had a great time. This course has a terrific reputation, so being invited to speak here is a real privilege.

But you didn't invite us because you were nice. You wanted us to come because of a particular role we played in the government procurement system. For eleven years, from 1985 until August 1996, we were the guardians of the integrity of the acquisition part of the system, insofar as it involved information technology goods and services. We heard protests against alleged illegalities in those acquisitions, involving virtually every federal agency. We potentially affected the lives of all of you who serve as procurement lawyers and contracting officers for the government.

But as you know, we don't do that anymore. There have been major changes in the world of government procurement over the past few years, and one of them was the enactment of a law which eliminated our protest jurisdiction. The GSBCA now hears and decides other kinds of cases. Our main jurisdiction involves Contract Disputes Act appeals from decisions by contracting officers of the General Services Administration (GSA), the Department of Commerce, the Department of the Treasury, the Department of Education, and many other civilian agencies. We also settle claims against the government by carriers of government goods, and by federal civilian employees involving travel and relocation expenses.

In addition, by request, we provide alternative dispute resolution (ADR) services on contract-related disputes—both contract formation and contract administration—for all government agencies. We have been providing ADR services for GSA for quite

some time, and we are now expanding the effort. We have agreed to provide three judges to serve as a standing dispute resolution panel on a major GSA construction project. Whenever a dispute arises on the project, one of those judges will mediate. We have also entered into an agreement with the Federal Aviation Administration (FAA), and are about to enter into one with the Department of the Air Force, to provide ADR services on request to those agencies. One of our judges served as special master on an FAA protest, and another is going to help resolve a complex Air Force contract dispute. We are available to other agencies as well.

We're no longer in the business you used to invite us to speak about, though. So why am I here? I hope to provide a service by presenting a perspective on the procurement reform ideas which are making major changes in our professional lives. Often, when leaders speak and act forcefully about the need to do things in particular ways, everyone snaps into line and salutes. This is perfectly natural and understandable. If you are a subordinate in a big organization like the government, you rarely help yourself by telling the boss that his ideas aren't the greatest. If you're a businessman or woman who wants to sell to the organization, you won't get far if you express skepticism about the way the organization works, rather than trumpet its "successes."

I have never been a politically correct type, and as a judge, I have the privilege and responsibility of being independent—saying whatever strikes me as right, regardless of the political consequences. I want to make sure you understand, before I get into any specifics, that I am *not* representing the government, or the General Services Administration, or even the GSBCA. The views I will express are strictly my own. I will discuss the reasons why we should approach what is called "reform" with a great deal of caution, and point out the strengths of the way in which, until recently, the federal government bought goods and services.

* Prior to his appointment as Chairman of the General Services Board of Contract Appeals, Judge Daniels worked as counsel to the Committee on Government Operations of the United States House of Representatives. During his fifteen years with that Committee, he worked on numerous matters involving government contracting, to include assisting in the drafting and enactment of the Competition in Contracting Act of 1984 and the Paperwork Reduction Act of 1980 and its 1986 Amendment. The theme of the 1996 Contract Law Symposium was "Implementing Change" and Judge Daniels' presentation analyzes the recent dramatic changes in the field of federal procurements during this time of government downsizing.

Whether you agree with my message or not, I hope you will agree that it is worth thinking about.

The procurement system of the United States Government is the product of many years of evolution. Until recently, it has been built around four guiding principles.

First, the opportunity to sell goods and services to government agencies must be open to everyone. The system must be democratic; it cannot presume that an agency cannot benefit from doing business with a capable vendor simply because the vendor is unfamiliar to the agency.

Second, vendors' offers must be evaluated fairly. The chance to bid cannot become a sham; equal opportunity must be an ingrained practice, not just a slogan.

Third, the agencies must select for contract award the offers that are in the best overall interest of the taxpayers. Genuine economy is the goal; there is no sense in being penny-wise and pound-foolish.

Fourth, the best way of maintaining the integrity of the system is to give vendors who believe that they have been treated unfairly a full and fair chance to air their grievances; impartial reviewers can then hold the agency personnel's feet to the fire to make sure they remember the importance of the first three principles.

This system, in design, represents the triumph of capitalism at its best. It channels the creative, competitive impulses of private businessmen and women into developing more innovative solutions to government problems and giving agencies the best possible prices for those solutions. Real competition in the government marketplace should bring about the same kind of benefits for the government that it provides throughout the general marketplace to each of us as consumers.

Like all other designs for the operation of government programs, of course, this one has not been implemented perfectly. I'm sure you have heard stories about agencies that paid \$600 for toilet seats, or bought computer systems that didn't meet their needs, or spent more than they expected and took longer than they planned to buy all sorts of things.

These are problems of execution, not design. The errors have primarily been the result of bad definition of needs and bad acquisition planning and management; we really need to focus on fixing them.

But improving our planning and management of acquisitions is hard work; it doesn't make a big political splash. So we have been concentrating instead, over the past three years, on something much more sexy—making major changes in our procurement system through new laws, new regulations, and new administrative practices. The basic principles under which our procurement system had been developing for many years have been relegated to secondary importance. While we still pay lip

service to them, we now care far more about different values—speed and ease of conducting procurements. Full and open competition, which was the cornerstone of our procurement law, is in danger of becoming a slogan, not a standard. Under a recently enacted law, agencies now have to implement competition mandates only "in a manner that is consistent with the need to efficiently fulfill the government's requirements."

What is happening in the bid protest area is symptomatic of this elevation of administrative efficiency over basic democratic and capitalistic values. Over time, a system developed through which bidders who felt that they were being treated unfairly could challenge the government's procurement actions. Opportunities for challenge were limited, though. A bidder could protest to an administrative agency, the General Accounting Office (GAO), but there was very little likelihood that this would do any good. The GAO allowed the agency in the procurement to stack the deck by deciding what facts were relevant to the complaint. On the rare occasions when the GAO found that those facts required ruling for the protester, the decision often came after the agency had already received and paid for the goods or services, so no meaningful relief could be granted. A bidder could also file a protest in court, but few did because of the expense, the great difficulty in getting an injunction against continued action in the procurement, and the length of time needed to get a decision.

In 1984, when Congress enacted what had until recently been our fundamental law in the procurement area, it expressed concern about the existing bid protest processes, but endorsed the concept of protests wholeheartedly. It said that the most efficient means of making agencies accountable for ending favoritism and ineptitude in contracting was to capitalize on the self-interest of the bidders by deputizing those companies to help police the system. Congress left in place the existing protest forums, and also established a new one as an experiment to see whether it could breathe life into this concept.

The new forum, as you know, was the General Services Board of Contract Appeals. The GSBICA brought a fresh approach to the protest process. Let me mention a few of the novel aspects of our practices. We assigned each case to a judge who was experienced in government contracting and could work with the parties on a frequent basis to resolve the case as efficiently as possible. We authorized discovery, so that all parties could learn what really happened during a procurement, not what one party—the government—said happened. We instituted protective orders, under which important information that was proprietary or source selection sensitive could be used only by lawyers and the tribunal during the case; thus, we could base our decisions on the facts without fear that disclosures might prejudice future competition. We had hearings, where appropriate, so that all parties could present the relevant evidence to us. By statute, procurements were suspended while our cases were pending, unless an agency persuaded us that it had good justification for proceeding, so the possibility of viable relief was preserved.

We resolved cases quickly—most settled within a month, and even full consideration, with a hearing and a written opinion, took only two months. Thus, the disruption to procurements

was minimized. We wrote comprehensive decisions which explained procurement law and why we interpreted it in certain ways. This created a body of case law which educated the entire government contracting community and, over time, served to reduce the number of disputes about the conduct of procurements.

Our protest jurisdiction was limited to procurements of computer and telecommunications goods and services. We also never heard more than three hundred cases in any year—challenges to about one percent of procurements in this area. However, as a result of our work, these and other acquisitions (to a lesser extent), became more competitive, more open, and more professionally run than ever before. Government agencies received more innovative solutions to their problems at better prices than before. The competition had an impact on the GAO protest process, too; the GAO improved its process, for example, by allowing protesters to ask for and receive specific agency documents, and by using protective orders to be more fair.

Congress and the President or Executive weren't sold on these virtues, though. In a complete turnaround from 1984, they adopted the bureaucracy's position that protests are bad because they delay procurements and add administrative costs, and a fully informed protest process is especially bad because it delays and costs more. In early 1996, Congress not only did away with our protest jurisdiction, but also eliminated federal district courts' jurisdiction to hear procurement protests, effective in four years. Serious questions are being raised about the value of protests at the GAO, as well. The GAO as a whole has lost more than twenty-five percent of its budget in recent years, and whether the agency will be able to continue to devote sufficient resources to maintain its current protest process is in doubt. The new law cuts the amount of time the GAO has to resolve a protest by twenty percent, to one-hundred days. Whether the agency can give full and thoughtful consideration to every complaint within that time is uncertain. Without competition from the GSBCA, there certainly won't be as much incentive for the GAO to do a fair and thorough job.

Whether GAO protests, or any protests, survive as an effective means of demanding accountability of government officials for their procurement actions is becoming less important, though, as a result of changes in government procurement. Protests can target whether agencies follow rules that are designed to provide fairness to prospective contractors and thereby give the government better deals. They can't guard against choices that are within an agency's discretion, but are unwise. As processes and forms of contracting change, we are building so much discretion into the system that increasingly fewer actions can be protested. The procurement system is losing its accountability to the taxpayers.

I would like to devote the remainder of my time this morning to discussing these changes—changes which, as I have suggested, you should accept with caution and skepticism. The on-going reform is geared to increasing efficiency, speed, and freedom for contracting officials. These are useful goals—but we need to make sure that at the same time we focus on them, we don't lose sight of the ultimate purpose of the system, which is to serve the taxpayer well.

When the government contracts for goods and services, it has to spend money in three ways: conducting procurements, administering contracts, and paying for the goods and services. The design for the way we've been contracting in the past emphasized savings in the third group—the costs of paying for the goods and services. And this is as it should be. The federal government spends about \$200 billion a year through contracts. According to various studies, competition saves anywhere between fifteen and seventy percent on these contracts. Putting these two numbers together, competition has the potential to save from tens of billions to hundreds of billions of dollars per year.

The new approach to contracting emphasizes the first group of costs—the costs of conducting procurements. I have never seen an estimate of how big this amount is, but I'll wager that it is just a tiny fraction of \$200 billion a year. The new approach aims at saving part of this little sum. It may well succeed, but whether it does won't matter much if it has a deleterious effect on the total price taxpayers pay for the goods and services themselves. Protests are one example—the new approach focuses only on immediate costs and ignores the long-term, systemic benefits of stimulating competition.

Let's take a look at some of the other new ideas. A principal one is "empowering" government personnel, bureaus, and agencies to acquire items using their own rules, regulations, and practices. As our government has grown, a constant hallmark of its operation has been disputes between central managers, who want things to run in accordance with standardized principles, and employees in the agencies and bureaus, who want to be free to pursue their own interests. For at least the past half-century, in the procurement area, the centralizers were gaining. Under a unified set of regulations, variations in procurement practices among agencies and bureaus had been reduced to the point at which people in private industry knew to a pretty good degree what to expect when they set out to do business with the government.

Centrifugal forces are now in the ascendancy, though. The government is becoming less of a unified whole, and more of a collection of quasi-corporate entities. As these entities are being encouraged to do business each in its own way, the basic rules under which procurements take place, like the mechanisms for enforcing those rules, are being weakened.

These changes are creating much greater uncertainty about the way in which procurements are conducted. Uncertainty, as anybody who has ever put together a bid or proposal knows, drives potential competitors out of the market and drives up the prices of those who stay in. If a bidder doesn't account for eventualities that might arise (and they do occur), he can lose his shirt. Leaving major decisions to individual discretion in procurements can have devastating consequences for the prices the government pays for what it buys.

The uncertainty is more than just momentary coping with change. As different agencies—and different procuring activities within those agencies, and probably even different program

and contracting officers within those procuring activities—use different ways to acquire goods and services, potential suppliers will face the following problem: To the extent that the government is like a single customer, each company has to spend a certain amount of money to get to know that customer's procedures and practices. If the government becomes multiple customers, each firm is going to have to increase that kind of spending many times. Small companies have to restrict their learning budgets to a limited range of customers, so as the government becomes fragmented, those companies will not have any real chance of satisfying the needs of as many agencies as they might have before.

Government officials who are being encouraged to creatively reinvent procurement practices in what amounts to idiosyncratic ways will have to realize that the more they do this, the more likely they are to cost the taxpayers money. We can save significantly by preserving a large pool of potential suppliers, cutting overhead costs for each one, and cutting overall prices naturally through competition. To do that, though, officials will have to work hard to keep their rules and practices comprehensible and consistent with one another. There should be no incompatibility between uniform basic practices and creative means of implementing those practices with greater efficiency.

Another aspect of the new approach is to give greater importance to firms' past performance, or reputation, in choosing contractors. The government has always paid attention to past performance, of course. For decades, it has used responsibility determinations to avoid having to do business with contractors who don't have the financial or other capabilities to perform in accordance with their promises. We're now seeing an increased emphasis, though often an over-emphasis, on past performance as an evaluation factor in negotiated procurements. Some contracting officers are writing solicitations that make reputation at least as important as technical merit or cost in evaluating proposals. Of course, it would be quick and easy to award contracts primarily on the basis of reputation, but this wouldn't be very wise. Agencies are buying promises of goods and services to be supplied in the future, not the past. Agencies that buy based on reputation would miss out, for example, on much of the innovation in the computer industry where new and small businesses have been the source of many of the terrific advances in hardware, software, and problem resolution generally. Government officials will have to fight the temptation to overvalue reputation if they are going to continue to act as the taxpayers' proxy.

The need to apply reputational judgments judiciously has impacts far beyond individual procurements. We hear much these days about greater partnerships between government and industry, and of course better communications have the potential for good on both sides. We have to remember, though, that there is no single "industry." Whether a firm is part of the "industry" that participates in those informal communications is going to be increasingly important to the company's ability to compete for and win contracts. Reputational judgments, like many forms of regulation, tend to exclude new entrants from the marketplace.

The use of past performance ratings has implications for restricting companies' legal rights and privileges as well. The number of protests and contract claims have been declining over the past few years. Several lawyers and company officials have suggested to me that this is because "it's not cool" to object to government actions anymore. "It's not cool" is code for "I'm afraid that if I do it, my performance ratings will suffer, and I'll lose the chance for future contracts."

Handled the wrong way, past performance, with its impact on inclusion in the club of "industry partners," can become a hammer with which government forces companies to give up rights, and ultimately money, for the opportunity to stay in the contracting game. As valid protests are not filed, the taxpayers suffer—they are denied the benefits that come with informed oversight of the procurement system.

The changing nature of the contract vehicles being used also creates impediments and challenges to keeping the procurement system the servant of the taxpayer. Under a 1994 law, agencies are encouraged to award umbrella contracts within which, at the agencies' discretion and without possibility of outside review, agency officials will issue task or delivery orders. This concept is subject to abuse, which we are seeing in some agencies: the agencies award contracts to most companies that want them, and choose later, for reasons of convenience rather than best value, which ones will get the orders. This process empowers procurement officials without giving them standards against which to make selections. The concept has some utility where differences are measurable, which is frequently true for goods, but where the differences are very difficult to gauge, which is often true for services, the use of umbrella contracts makes decisions about who gets contract money highly subjective. Because the laws about competition (and protests to enforce it) do not apply to issuing of delivery and task orders, we may never know whether the use of umbrella contracts gives taxpayers beneficial results.

Other new contracting devices carry similar problems of highly subjective decisions for which accountability is limited or non-existent. The government is now exploring using oral solicitations without any limitations and, even for written solicitations, making contract awards on the basis of oral proposals. There may be no record of what transpired, and even if there is one, it could be so skimpy, that proving a decision was irrational will be extremely difficult if not impossible. Both sides may later regret that their contract rights and responsibilities were ill-defined.

We're also talking about limiting, in the interest of efficient contracting, the numbers of firms allowed to compete in individual procurements. As this happens, some companies which submitted proposals that stood a reasonable chance of award will find themselves on the outside looking in. The message to them will be: "I'm sorry, your offer—you know, the one on which you've spent hundreds of thousands of dollars—had a reasonable chance for award, but for reasons of administrative convenience, we decided that negotiating with you wouldn't have been worth the trouble. It wouldn't have been efficient." Whether those firms could have improved their proposals after discus-

sions, and thereby given the taxpayers a better deal, will be immaterial. What sense does this make? We have to guard against designing a procurement system in which the secret to success is clever marketing. We don't need a system that favors slick over solid or lucky over smart. The ability to limit competitive ranges must be used carefully.

Proposed changes to the basic regulations for negotiated procurements contain other potential opportunities for favoritism or downright chicanery, too. One proposal, while paying lip service to fairness in the treatment of competing firms, says, "Fairness does not mean that offerors and contractors of differing capabilities, past performance, or other relevant factors must be treated the same." The proposal allows agencies to communicate with some offerors, but not others, in the course of a competition; to award contracts to offerors which propose terms and conditions that are inconsistent with requirements the agencies established; and to write contracts which contain provisions that are different from ones in the last written offers of the companies involved. These are all examples of what is commonly considered unfair. If the people who suggested these ideas actually incorporate them into final regulations, the rules will give agencies so much flexibility in contracting that almost any action short of outright acceptance of bribes will be legally permissible.

These are problems encountered in actual competitions, in which companies choose to participate after having notice that difficulties exist. These difficulties, however, pale in comparison with the ones that may result if the competitions are limited without any notice of their existence at all. That's sometimes a problem with umbrella contracts, where, if a company doesn't have the proper instruments, it will never have a chance to fulfill a requirement for which it could submit a very competitive proposal. We're going down the same path in acquisitions of commercial items with values of up to \$5 million. We're planning to use small purchase procedures, in which an agency can award a contract after getting quotes through phone calls to a favored few pre-selected companies. This is also where we are going with the use of multiple award schedule contracts, for commercial items and now increasingly for services.

Schedule contracts are basically agreements against which specified items may be ordered; the orders automatically incorporate the terms and conditions of the contracts. Existing statutes give their blessing to the multiple awards schedule program as a form of full and open competition. These contracts should be used, though, according to Congress, only where the government can negotiate quantity-discount contracts, with delivery to be made directly to the using agencies in small quantities at diverse locations. These restrictions are already out the window. Agencies are using schedule contracts to purchase items in large numbers, without any maximum ordering limitations. The dollar values of schedule buys are reaching the \$150 million range.

Agencies no longer have to announce their use of this program in advance; they need only to ask a few pre-selected vendors to give prices, which may change on an order-by-order basis,

and then choose a winner. This practice is nice and easy. It's not fair to all potential offerors, though; to have a shot at making a sale, a company must be a member of the "club" chosen in advance by the agency. It's not fair to the taxpayers, either; they ought to be getting the best deals capable vendors can offer, not the results of secret competitions among a limited in-crowd of companies.

Who is going to be responsible for all these innovative procurements? The new approach has as one of its maxims that simpler procurements need fewer professionals to conduct. And consistent with this maxim, at the same time that greater discretion is being given to government procurement personnel, the numbers of those employees are being reduced. What we need to be asking, but aren't is, "How big an investment in trained personnel does the government need to do its job well?" I am hearing from many agencies that the personnel cuts are already too severe—they are forcing the contracting professionals who remain to do more work than they are capable of, while at the same time, the veterans who know how to get things done are being enticed out the door through buyouts. More cuts are planned. Government officials are going to have to work hard to keep this trend from going too far.

An inevitable consequence of the personnel cuts, and the new demands on the time of the contracting officials who remain, will be the temptation to cede more authority for procurements to the program offices for which the contracting personnel are doing the buying. This is a real problem. Program offices generally want whatever they need immediately, and as long as the contracting staff can bring it in within the budget for the acquisition, they don't particularly care how much it costs or how it was bought. The problem is made especially acute by the way the government does its budgeting: an office gets its funding year-by-year, and frequently doesn't know how much it has for a procurement until the end of a fiscal year. At that point, the particular office wants to buy right away, because the funding won't necessarily be provided next year. Whether the taxpayer gets a good deal is off the radar screen for many of the people in program offices.

For many years, procurement professionals have been the taxpayers' line of defense against these inclinations. The procurement process, within the government, has been marked by a creative tension between contracting and program officials. While the program people have wanted to buy things fast and easily, the contracting staff have put competition, with its consequent savings, first. The new regime has tilted the balance of this creative tension. The contracting personnel are going to have to work much harder to keep up their critical end of the process.

Contracting personnel are also going to have to be on the lookout, more than ever, to guard against political or unethical influences on procurement decisions. One of the problems with a less structured process is that it makes it easier for people with power to exert improper influences on award decisions. Those of us in the federal government procurement community are proud

that, with very rare exceptions, our procurements are honest and apolitical. As the culture of procurement changes, it will be harder to ensure that this aspect of our procurement culture remains.

I am going to mention one more impact that the new style of government procurement will have, and it's indirect, but in the long run, it could be more important than anything I've discussed so far: The international ramifications of what the government is doing. The United States has been making great efforts to open other governments' markets to fair, open competition in which American companies can participate. If our own government abandons full and open competition, in favor of efficiency and unchecked discretion to choose business partners on the basis of reputation, how can we honestly demand that our trading partners do otherwise? For small savings in administrative spending on the procurement process, we may not only be costing the taxpayers big bucks in purchasing costs, but also undermining efforts to open large markets for American capital and labor abroad.

As you can see, I have serious doubts about the wisdom of some of the changes occurring in the government contracting world today. The so-called procurement reform attempts to make government procurement more efficient by misguidedly cutting back on its most important cost-saving feature—full and open competition. Increased administrative efficiency is great. Indeed, it is absolutely required in these times of shrinking budgets. In my opinion, though, we are not carefully balancing increases in efficiency against damages to the system which will result in decreases in long-term cost savings. We know that a

genuinely competitive marketplace works to the greatest benefit of consumers. Why shouldn't this engine of capitalism continue to benefit all of us as taxpayers, too?

Government procurement is an easy target for political rhetoric. Overall, however, we can be proud of its operation. When people from many other countries hear how our system works, they are amazed. Where they come from, those in power award contracts with very little oversight, sometimes to their friends, sometimes even to themselves. That hasn't been our way—and it shouldn't be. If we put our minds to it, we can make government contracting more efficient without going back to a system which limits participation to a favored few contractors.

It never ceases to amaze me that at a time when people are more skeptical than ever about the government, the government's response is to have its officials spend taxpayers' money under relaxed rules and controls, and with reduced oversight of their actions. If only most Americans would cut through the rhetoric and the catchy buzzwords, and understand what is really meant when people talk about procurement reform, I think the reception would be considerably different.

We need to remember that an honest, open, fully competitive procurement system has enormous benefits for all of us—potential suppliers, government officials, and most importantly, taxpayers. As you work at implementing and applying the new ways, I hope you will keep this message in mind and make the best of the bad hand you've been dealt.

Procurement During the Civil War and Its Legacy for the Modern Commander

Lieutenant Colonel Douglas P. DeMoss
Assistant to the General Counsel
Headquarters, Department of the Army

Introduction

Despite two turbulent years of acquisition reform caused by the much-heralded Federal Acquisition Streamlining Act of 1994,¹ and the Clinger-Cohen Act of 1996,² most of the fundamental aspects of government contracting actually remain unchanged. The government still does business through contracting officers,³ who generally seek competition⁴ before obligating congressionally-appropriated funds⁵ to pay for the goods and services that they buy. A significant number of safeguards still remain to protect the government against poor contractor performance⁶ or outright fraud.⁷ To ensure that the government does not pay exorbitant amounts or suffer unacceptable delays when unexpected contingencies arise⁸ or changes are necessary in the way work must be performed,⁹ the government continues to employ a vast array of contractual risk-shifting mechanisms. Thus, although recent reform legislation has affected many of the more sophisticated aspects of government procurements,¹⁰ most of the fundamentals remain unaltered.

Why do these fundamentals remain in place? Why must commanders or other Army supervisors use contracting officers? Why not eliminate costly government inspection and acceptance procedures? Why does Congress not permit purchasing officials to choose whether to obtain competition for their requirements without restriction like private parties? The answers to these questions lie principally in the Army's history, and in particular in the Army's purchasing experiences during the Civil War.

Historical Perspective on Private Sector Support

Commanders historically have relied to a significant degree on contracted support to supplement the commodities and services available through organic logistics systems. Commanders and their subordinates have procured food, forage, arms, and other goods from private citizens and commercial sources since the first time a warring clan turned to its allies for hunting bows and spears to use against its enemies. As the United States' procurement statutes and regulations became more complex over

¹ Pub. L. No. 103-355, 108 Stat. 3243 (1994).

² Originally passed as Divisions D and E, National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 642-703 (1996), the name of the Clinger-Cohen Act of 1996 flows from the Federal Financial Management Improvement Act of 1996, Pub. L. No. 104-208, § 808, 104 Stat. 3009 (1996), which itself was included as part of the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 104 Stat. 3009 (1996). Division D of the National Defense Authorization Act for Fiscal Year 1996 originally was called the Federal Acquisition Reform Act of 1996, while Division E's original name was the Information Technology Management Reform Act of 1996. Congress renamed both as the Clinger-Cohen Act of 1996 in honor of retiring lawmakers who played key roles in the passage of the two acts, former Representative William Clinger of Pennsylvania and former Senator (now Secretary of Defense) William Cohen of Maine.

³ GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 1.602 (1 Apr. 1984) (as amended) [hereinafter FAR].

⁴ Competition in Contracting Act of 1984, Pub. L. No. 98-369, §§ 2701-53, 98 Stat. 1175-1203 (1984) (implemented in FAR Part 6).

⁵ "No Money shall be drawn from the Treasury but in consequence of appropriations made by Law . . ." U.S. CONST. art. I, § 9, cl. 7; see 31 U.S.C. §§ 1341-42, 1511-19 (1994) (commonly known as the Antideficiency Act).

⁶ See, e.g., FAR Part 46 (Quality Assurance).

⁷ See 10 U.S.C. § 2393 (1994) (debarment and suspension of defense contractors); 18 U.S.C. §§ 286, 287, 371, 1001, 1031 (1994) (criminal penalties for fraud and false statements); see also FAR Part 3 (Improper Business Practices and Personal Conflicts of Interest); FAR Part 9 (Contractor Qualifications).

⁸ See, e.g., FAR 52.212-5 (Liquidated Damages); FAR 52.236-2 (Differing Site Conditions); FAR 52.242-14 (Suspension of Work).

⁹ See generally FAR Part 43 (Contract Modifications).

¹⁰ For instance, the Clinger-Cohen Act of 1996 changes the rules for when a disappointed offeror seeking to do business with the government may request a debriefing explaining why it did not receive a contract award; it exempts providers of commercial items from providing certain cost data to the government; and, it establishes a preference for procuring large information technology systems incrementally through modules rather than all at once. Pub. L. No. 104-106, §§ 1104, 1201, 110 Stat. 186, 644-45, 649-52, 690 (1996).

time, however, commanders became separated from the procurement process. Until recent times, Army commanders often overlooked the usefulness of this technique for satisfying the needs of modern armed forces.

Despite the inconvenience inherent in many of the current restrictions on who may exercise procurement authority and how this authority is used, America's power-projection Army is now more dependent upon contracted support than before the end of the Cold War downsizing which dramatically reduced the Army's size and the capabilities of its combat service support components.¹¹ With this increased reliance on contracted support has come a demand for relaxed restrictions and delegations of procurement authority to lower levels in deployable units.¹² An examination of the Army's procurement experience during the Civil War, however, highlights the need for most contracting controls in existence today, and provides examples of problems that may arise from relaxed procurement safeguards.

The Army's Civil War Procurement Experience

Procurement was more critical to the Army during the Civil War than perhaps in any other conflict due to the lack of significant existing stocks or robust logistics systems to support an un-

precedented mobilization effort.¹³ Because the War Department could not meet the materiel demands of a mobilizing Army as quickly as volunteers filled its ranks, commanders relied on locally procured goods for many of their requirements. Unfortunately, without training, adequate staffs, or effective controls in place to ensure efficient acquisitions, the procurement of inferior or unsupportable equipment, as well as overcharging, corruption, and fraud, seriously tainted early war efforts and drew Congress into an ever-increasing oversight role that continues today.

The pre-Civil War Army's bureau system compartmentalized purchasing by commodity. The Ordnance Bureau bought weapons and ammunition, commissary officers purchased food, and the Quartermaster Department procured clothing, general supply items, and horses.¹⁴ These supply organizations functioned relatively independently, without effective coordination,¹⁵ and proved inadequate for the task of supporting the huge build-up when war broke out.¹⁶

Field commanders' disappointment with the lack of effective support from the bureaus was due at least in part to the bureaus' status as agencies of the War Department outside the structure of the rest of the Army.¹⁷ The Quartermaster Department in par-

¹¹ Recent widespread use of the contracted Logistics Civil Augmentation Program (LOGCAP) to support contingency missions highlights the significant role contracted support operations will play in the future. See DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (1985).

¹² Army units have always wanted greater flexibility and responsiveness in having their small requirements fulfilled. Historically, these requirements were filled by contracting personnel who deployed with their supported units. The provisional contracting offices that these personnel established provided area support if they were within supporting distance of supported units. To supplement the support available from contracting officers, unit ordering officers sometimes were appointed to make purchases and satisfy unit requirements closer to the front lines. Often, too few ordering officers were appointed, and even fewer had the experience and training necessary to enable them to provide effective support without subsequent problems such as slow payments and the acceptance of poor quality goods. See generally DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. 1.602-2-91 (1 Aug. 1996) [hereinafter AFARS].

Recent implementation of the International Merchant Purchase Authorization Card (IMPAC) program has made small purchases easier at the unit level so long as the unit operates in a part of the world where VISA cards are accepted by local merchants. See AFARS Subpart 13.9. Credit card holders under the IMPAC program are now common at fairly low echelons in Army units. This purchasing mechanism has greatly increased the purchasing power available to small unit commanders. Whether the training and experience of cardholders will be adequate to avoid the types of problems addressed in this article remains to be seen.

¹³ The Army expanded to sixty-two times its pre-war size by the end of the Civil War, the greatest proportional increase in the Army's size ever. James Huston, *Challenging the Logistics Status Quo During the Civil War*, DEFENSE MANAGEMENT JOURNAL 33 (July 1976).

¹⁴ Although the Quartermaster General, Commissary General, and Chief of Ordnance supervised the procurement of most of the goods and services needed to support an army in the field, the bureau system further divided responsibilities among the more specialized branches of service. Thus, the Chief of Engineers, Chief of Topographical Engineers, and the Surgeon General were responsible for the procurement of supplies specific to their departments. Charles Shrader, *Field Logistics in the Civil War*, in THE U.S. ARMY WAR COLLEGE GUIDE TO THE BATTLE OF ANTIETAM 256-58 (ed. Jay Luvaas & Harold Nelson, 1987).

¹⁵ *Id.*

¹⁶ A key reason for the inability of the bureaus to support the build-up effectively was that they were continuously understrength until near the end of the Civil War. CARL DAVIS, *SMALL ARMS IN THE UNION ARMY* 27-35 (1971) (Thesis, Oklahoma State University).

¹⁷ *Id.* at 36. The problem of one part of the Army not being totally responsive to the needs of another has not been eliminated in today's organizational structure. Battles are fought by units from U.S. Army Forces Command while the requirements for the materiel that those forces use are defined by U.S. Army Training and Doctrine Command and procured both by U.S. Army Materiel Command and the Defense Logistics Agency. Nevertheless, the present constant migration of personnel between these organizations and oversight provided by Headquarters, Department of the Army, generally has improved intra-departmental coordination from the situation that existed before and during the Civil War when the bureaus exercised considerably more autonomy than any agency within the Department of the Army today.

ticular developed a reputation for never anticipating a need and preparing for it, but instead waiting until an emergency arose and then muddling through the legislative and executive processes required to remedy it.¹⁸ Wartime commanders quickly took matters into their own hands.

Among the most urgently needed supplies were arms for the troops. Legislation required the senior ordnance officer of the Army to contract for ordnance items,¹⁹ but a court decision early in the war recognized that a general's first duty was to arm his troops as best he could in the face of enemy threats, notwithstanding a statute to the contrary reserving ordnance procurements to the Chief of Ordnance.²⁰ Commanders took full advantage of this inherent authority. They also pushed the envelope of ordnance regulations allowing any officer, in circumstances of "urgent necessity," to purchase items normally procured by the Ordnance Bureau, and to submit a report explaining the necessity to obtain government reimbursement.²¹ Although expedient, such uncoordinated procurements, together with purchases of private arms by soldiers in units as small as company size, greatly compounded the logistics problems associated with resupply.²²

Additionally, state governors regularly intervened to press for arms for their troops, sometimes providing them directly through state purchasing agents when the War Department responded too slowly. These actions disrupted planning and made the work of those involved in arms procurement more difficult.²³ Finally, fluctuating Ordnance Bureau policies regarding the procurement

of foreign arms provided opportunities for some military commanders and state governors to dispatch buying agents to Europe, adding still greater variety to the mix of weapons entering the Army's inventory.²⁴

The introduction of nonstandard, difficult-to-support arms in the Army's inventory presented severe logistics challenges during the Civil War, but these problems did not attract the adverse publicity nor Congressional scrutiny that accompanied contractor overcharging and government corruption. These problems began to appear at the first outbreak of hostilities, when, in the unrestrained rush to mobilize a bigger Army, legislation regulating procurement was "flung to the winds in the first flush of war."²⁵

Before the war, in order to check for irregularities, War Department regulations required purchasing officers to send accounts through the bureau chiefs for approval before they went to the Treasury for payment. Slow payments caused by logjams of paperwork in bureau headquarters led to the passage of a 1862 law requiring direct transmission of accounts from disbursing officers to the Treasury; this sped payments but eliminated the checks that the bureaus provided on prices paid and the proper application of appropriations.²⁶ Previously, the failure to follow accepted procedures could have resulted in nonpayment for items provided.²⁷ Without bureau scrutiny of their accounts, commanders essentially gained *carte blanche* procurement authority.

Although many commanders exercised their procurement authority using reasonable business judgment and some measure of

¹⁸ FRED SHANNON, ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY 100 (1928). Later in the war, Quartermaster General Montgomery Meigs reorganized the bureau and made it quite effective. HERMAN HATTAWAY & ARCHER JONES, HOW THE NORTH WON 138-39 (1991). General Meigs achieved increased efficiency first by requiring decentralized purchases to be made by quartermaster officers rather than field commanders, and later through a more centralized procurement system that required all contracts to be forwarded to the Quartermaster General in Washington for payment. Shrader, *supra* note 14, at 267.

¹⁹ James Huston, *Guns for Sale: No Unreasonable Offer Refused*, 6 ARMY LOGISTICIAN 22 (ed. U.S. Army Logistics Management Center, Nov.-Dec. 1971). The law entrusted this responsibility to ordnance officers because they were deemed best qualified to assess the quality of the arms procured, but ordnance officers became so specialized in manufacturing that they often lost touch of the needs of the user. Huston, *supra* note 13, at 28.

²⁰ The United States Court of Claims issued this decision after the United States attempted to avoid payment on a contract for arms not made by the Ordnance Bureau. Huston, *Guns for Sale*, *supra* note 19, at 23. See *The Stevens Case*, 2 Ct. Cl. 95 (Dec. 1866).

²¹ DAVID ARMSTRONG, BULLETS AND BUREAUCRATS 9 (1982). General James Ripley, the Chief of Ordnance, was much more conservative in his approach to procurement than the field commanders; he rigorously followed both the letter and the spirit of every regulation. *Id.* at 26.

²² DAVIS, *supra* note 16, at 95. Aggravating the problem of nonstandard arms in units was the failure of many new soldiers who placed requisitions for supplies through ordnance channels to specify the proper caliber, or any caliber at all, for arms and munitions they needed. *Id.* at 42-43.

²³ *Id.* at 54.

²⁴ *Id.* at 75.

²⁵ HOWARD MENEELY, THE WAR DEPARTMENT, 1861-252 (1928).

²⁶ Huston, *supra* note 13, at 31-32.

²⁷ ARMSTRONG, *supra* note 21, at 40.

discretion, the *carte blanche* authority given commanders proved a great mistake in many cases, the most notable being that of Major General John Fremont, Department of the West, who surrounded himself with "conniving, dishonest men."²⁸ The Department of the West under General Fremont was notorious for its irregular operations,²⁹ particularly those involving General Fremont's assistant quartermaster, Major Justus McKistry. Major McKistry repeatedly agreed to pay contractors above market prices, then suggested that they might have trouble getting their bills paid if they did not make substantial gifts to his or General Fremont's wife.³⁰ General Fremont's command was not the only one in which dishonesty became rampant (the War Department itself even had problems with civilian clerks steering business to certain contractors),³¹ but the irregularities within the Department of the West are among the most notorious and the best documented.

³ Much more widespread than dishonesty in Civil War procurement operations were poor business practices by government personnel and price gouging (overcharging) by contractors. The military simply was more interested in overcoming delay than in paying fair prices during the early months of the war.³² The lack of a robust, centralized procurement system led to the growth of an industry of middlemen, who matched Army buyers with sellers able to satisfy requirements, but whose commissions³³ added significantly to the cost of goods procured.³⁴ Vendors sometimes won contracts when they had no plants in which to pro-

duce the goods ordered, brokering the contracts to others instead, and adding further to the prices paid by the Army.³⁵

Much of the blame for the high prices paid for goods early in the Civil War lies with the War Department, which abdicated a considerable amount of its procurement authority to the states, resulting in confusion, graft, and hardship on soldiers.³⁶ Through haste, carelessness, and occasional criminal collusion, state and federal officers bid against each other, accepting almost any offer and paying almost any price for needed commodities, regardless of quality. Poor business practices resulted in the government sometimes getting sand for sugar and brown paper for leather.³⁷ When Edwin Stanton became Secretary of War in 1862, he tried to reign in the free-wheeling organization, declaring that he wanted everything done systematically and in order through a quartermaster officer at all key locations who would make all contracts and supervise all disbursements.³⁸ This change in the War Department, and General James Ripley's desire for economy and the use of formal advertising in lieu of open market purchases in the Ordnance Bureau,³⁹ gradually brought order to the purchasing chaos that was rampant early in the war.

Congress quickly became aware of the many procurement irregularities associated with the war effort. Its Committee on Contracts severely criticized Lincoln's first Secretary of War, Simon Cameron, for appointing incompetent men and allowing the suspension of contract safeguards without good reason.⁴⁰

²⁸ MENEELY, *supra* note 25, at 271.

²⁹ SHANNON, *supra* note 18, at 58.

³⁰ One substantial gift that Mrs. Fremont received was a horse and carriage. *Id.* at 65.

³¹ DAVIS, *supra* note 16, at 36.

³² James Huston, *Procuring Quick and Dirty*, 5 *ARMY LOGISTICIAN* 22 (ed. U.S. Army Logistics Management Center, Sept.-Oct. 1971).

³³ The five percent commissions paid to the "five-percenters" who lobbied the War Department and Congress to arrange contracts were among the more frequently paid commission amounts levied during the Civil War. *Id.* at 23.

³⁴ Most of the additional costs attributable to middlemen were due to ordinary price markups, but occasionally the higher costs were due to deception and collusion as well. Shrader, *supra* note 14, at 269.

³⁵ DAVIS, *supra* note 16, at 88.

³⁶ SHANNON, *supra* note 18, at 54.

³⁷ *Id.* at 55. This practice was particularly reprehensible because the federal government ultimately bore the cost of all contracts, regardless of whether its own agent or a state's agent awarded the contract initially. *Id.* at 115.

³⁸ HATTAWAY AND JONES, *supra* note 18, at 138.

³⁹ ARMSTRONG, *supra* note 21, at 11.

⁴⁰ MENEELY *supra* note 25, at 267-68.

Congress acted further by passing legislation in July 1862 requiring open bidding and written contracts, prohibiting contract brokering, requiring all contracts to be reported to Congress, and making contractors subject to military law and court martial if they were indicted for fraud.⁴¹ Congress did not pass detailed provisions governing the making of contracts during the war, however, to avoid encumbering the war effort too severely.⁴²

Of course, there were contracting success stories to accompany the many procurement travesties during the Civil War. Quartermaster and commissary officers bought supplies as close to the troops as possible to save transportation costs.⁴³ Union Army procurements normally provided all subsistence requirements, both for men and animals, without resort to pillaging the countryside.⁴⁴ Overall, the procurement practices of the Civil War sustained the Army more or less adequately (if not always efficiently), and enabled it to achieve victory over the Confederacy. Nevertheless, enough abuses like those in the command of General Fremont occurred to warrant close congressional scrutiny. As a result, a body of strict safeguards developed that continues to apply to procurements conducted today; undoubtedly, these safeguards will continue to apply in the future, providing an underlying framework for the federal acquisition system which no procurement reforms are likely to alter significantly.

The Civil War's Procurement Legacy

Today, a variety of control measures in the contracting process seek to avoid the problems that arose in General Fremont's

command by requiring protection of procurement-sensitive information,⁴⁵ separation of the contracting and paying functions during contract performance, and adherence to rigid standards of conduct.⁴⁶ Additionally, a variety of auditing and investigating agencies ensure that those who might be tempted to stray toward dishonesty in the award or administration of government contracts run a high risk of detection and vigorous prosecution.⁴⁷

Since the Civil War, the volume of legislation dealing with federal procurements has expanded to provide comprehensive congressional direction in the conduct of federal procurements through a body of law consisting of some 4000 statutes. These laws provide overall guidance for the conduct of defense-related procurements,⁴⁸ and limit to trained contracting officers the authority to contract for the United States for supplies and services valued above \$2500.⁴⁹ These laws also impose severe penalties for contracting without proper funds for any goods or services,⁵⁰ and highlight the importance of competition in securing fair prices for government requirements.⁵¹ These requirements apply equally during war and peace to help ensure that the procurement debacle of the Civil War is not repeated.

Implementation of these general mandates has affected the conduct of Army and other federal procurements in many ways. To ensure competition, requirements are generally advertised through one or more of several specified publication means.⁵² Contractors must execute a variety of certifications in conjunction with each offer they submit to the government to ensure that the integrity of the procurement process has not been compro-

⁴¹ SHANNON, *supra* note 18, at 74. Despite this congressional initiative to end contract fraud, fraudulent contractual dealings continued to some extent to be a problem through the end of the war. *Id.*

⁴² MENEELY, *supra* note 25, at 254.

⁴³ DARLIS MILLER, *SOLDIERS AND SETTLERS: MILITARY SUPPLY IN THE SOUTHWEST, 1861-1885* 3 (1989).

⁴⁴ Foraging, though officially prohibited unless specifically authorized, was generally overlooked. SHANNON, *supra* note 18, at 240. Commanders would crack down on the practice as necessary to redress the complaints of inhabitants in the areas of operation of the Union Army, unless soldiers' foraging efforts received command sanction.

⁴⁵ Procurement Integrity Act, 41 U.S.C. § 423 (1994 & Supp. II 1996).

⁴⁶ See 10 U.S.C. § 2207 (1994) (gratuities to government contracts personnel in return for the award of a contract are prohibited); DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REG. (30 Aug. 1993).

⁴⁷ See 10 U.S.C. § 2313 (1994) (providing for examination of contractor records by auditing agencies); FAR 52.215-2.

⁴⁸ One of the chief statutes governing procurements conducted by the Department of Defense is the Armed Services Procurement Act of 1947, 10 U.S.C. §§ 2301-31 (1994 & Supp. II 1996) (as amended).

⁴⁹ See 10 U.S.C. § 2311 (1994); FAR Subpart 1.6.

⁵⁰ The Antideficiency Act, 31 U.S.C. §§ 1341, 1342, 1511-19 (1994).

⁵¹ Competition in Contracting Act of 1984, Pub. L. No. 98-369, §§ 2701-53, 98 Stat. 1175-1203 (1984).

⁵² See FAR Part 5.

mised.³³ Both contractor and government personnel are responsible for ensuring that the goods delivered to the government meet specified quality requirements.³⁴ In these and many other ways, the legacy of Civil War procurements, left largely unchanged by recent acquisition reforms, continues to provide a fundamental baseline for the conduct of acquisitions.³⁵

In addition, today's centralized procurement agencies³⁶ and standardization programs³⁷ trace their origins to some of these Civil War problems. Weapons programs today are managed carefully to ensure supportability of fielded systems, and standardized designs are used to the maximum extent possible to avoid the complex logistics problems that arise when an uncontrolled variety of weapons configurations are present on the battlefield. Such organizational and administrative arrangements also are intended, at least in part, to prevent recurrence of procurement problems like those of the Civil War.

Conclusion

The legacy of Civil War procurements for modern commanders is manifest in the many statutory and administrative controls on contracting that have gone into effect since 1861. Civil War abuses cost commanders their ability to contract directly for their requirements, forcing them to rely instead on procurement pro-

fessionals. At least in theory, modern commanders are supported by staffs of officers, enlisted personnel, and civilian employees with the necessary training and experience to conduct government acquisitions properly;³⁸ of course, this theory breaks down if personnel are lacking or they do not have the training and experience needed to provide commanders effective support. With trained personnel, however, current procurement controls effectively safeguard the current federal procurement system without impeding the responsive support essential to deployed forces.

As has been the case in recent deployments, American units deploying to austere environments in the new world order of the late 20th and early 21st Centuries will continue to depend heavily on contracted support for their sustainment because the organic force structure necessary to satisfy all requirements through the Army's logistics system is no longer available. Despite all the talk about acquisition streamlining, however, commanders should not expect relief from the many procurement safeguards that trace their lineage to the Civil War. Instead, commanders should ensure before they deploy that trained procurement personnel and legal advisors will support them in accomplishing their missions so that they can do so in full compliance with the many statutory and regulatory safeguards embedded in today's procurement system.

³³ See *id.* Part 3.

³⁴ See 18 U.S.C. § 287 (1994) (false claims); 18 U.S.C. § 1001 (1994) (false statements); FAR Part 46 (Quality Assurance).

³⁵ But see Clinger-Cohen Act of 1996, Pub. L. No. 104-106, § 4301, 110 Stat. 656-58 (1996) (eliminating nonstatutory contractor certification requirements).

³⁶ The Army Materiel Command and the Defense Logistics Agency procure nearly all the arms, supplies, and other materiel issued to soldiers Army-wide.

³⁷ The Army today seeks to ensure that standardized components are used in fielded systems to the maximum possible extent. See DEP'T OF DEFENSE, DA, 2010.6, STANDARDIZATION AND INTEROPERABILITY OF WEAPONS SYSTEMS AND EQUIPMENT WITHIN THE NORTH ATLANTIC TREATY ORGANIZATION (5 MAR. 1980); DEP'T OF ARMY, REG. 700-142, MATERIEL RELEASE, FIELDING, AND TRANSFER (1 MAY 1995).

³⁸ Defense Acquisition Workforce Improvement Act, 10 U.S.C. § 1735 (1994) (as amended).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Family Law Note

Welfare Reform Act Mandates Adoption of Uniform Interstate Family Support Act

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996,¹ more commonly referred to as the Welfare Reform Act, includes a large section on child support enforcement. In an attempt to make a truly uniform and national system for collection of interstate support payments, section 321 of the Welfare Reform Act mandates that by 1 January 1998 each State must adopt the Uniform Interstate Family Support Act (UIFSA).² Thirty-six states have already adopted the UIFSA.³

Most of the child support issues faced by military clients will involve enforcement or creation of an interstate support order.

Therefore, it is imperative that military attorneys understand the basics of the UIFSA in order to properly advise clients on the creation and enforcement of support orders.

This note briefly sets out the rules for enforcement of support under the UIFSA. One of the UIFSA's primary goals is to establish rules of priority that recognize one controlling order. This is important in interstate support cases where there are frequently multiple orders and confusion abounds on what is the enforceable support amount. Under the UIFSA, priority is given to a support order issued by a state with "continuing, exclusive jurisdiction" (CEJ). This phrase refers to the state that issues a support order and remains the residence of the obligor, obligee, or child.⁴ If there is only one support order, that order controls even if all parties have left the state.⁵ However, if there are multiple orders, then the UIFSA establishes priority rules to determine the one enforceable order. The rules are as follows: (a) two or more orders and one CEJ, then the CEJ order controls; (b) two or more orders and more than one CEJ, then the order issued by the home state⁶ of the child controls; (c) two or more orders, more than one CEJ and no home state of child, then the most recent order controls; and finally (d) two or more orders, no CEJ, and a court enters a new order (assuming personal jurisdiction over the obligor), then the new order becomes controlling.⁷ Under the UIFSA, the enforceable support amount is stated in the controlling support order even if it is the order with the lowest support requirement.

¹ Pub. L. 104-193, 110 Stat. 2105 (1996).

² Uniform Interstate Family Support Act, 9 U.L.A. 229 (1993). Copies of the Uniform Interstate Family Support Act (UIFSA) can be obtained from the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611, telephone (312) 915-0195.

³ Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming. Each state statute has an implementing date and some do not take effect until the summer of 1997.

⁴ Uniform Interstate Family Support Act, § 205, 9 U.L.A. 229 (1993).

⁵ There are separate provisions in the UIFSA on what court has jurisdiction to modify an existing order.

⁶ Uniform Interstate Family Support Act, § 101(4), 9 U.L.A. 229 (1993) defines home state as the state in which a child lived with a parent or a person acting as parent for at least six consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if the child is less than six months old, the state in which the child lived from birth with any of them. The UIFSA thus defines home state the same way as the Uniform Child Custody Jurisdiction Act.

⁷ Uniform Interstate Family Support Act, §§ 205, 206, 9 U.L.A. 229 (1993).

The federal government is increasingly involved in the enforcement of child support. With the passage of the Child Support Recovery Act⁸ (a federal criminal statute), the Welfare Reform Act, the Federal Full Faith and Credit for Child Support Orders Act,⁹ and the adoption of the UIFSA, we are moving to a more national approach to child support enforcement and military attorneys must be aware of the changes and standards. Major Fenton.

Consumer Law Notes

The Fair Debt Collection Practices Act Notice Provisions Amended

The Omnibus Consolidated Appropriations Act for Fiscal Year 1997¹⁰ [hereinafter "the Act"] contains a variety of consumer protection legislation. The legislation phases in changes to a number of consumer protection statutes at various points during 1997. These changes will be highlighted in *The Army Lawyer* notes as they become effective.

The first change to take effect is a relatively minor modification to the notice requirements of the Fair Debt Collection Practices Act (FDCPA).¹¹ Previously, a debt collector had to inform the consumer of two things in every communication. First, the caller or writer had to make clear that he or she was attempting to collect a debt and, second, that any information gained would

be used in the process of debt collection.¹² This requirement was causing substantial litigation, particularly for attorneys serving as debt collectors.¹³

Effective 30 December 1996, the FDCPA requires the debt collector in the *initial* communication (oral or written) to meet the two-pronged disclosure requirement discussed above. However, in *subsequent* communications, the caller or writer need only identify himself as a debt collector.¹⁴ Further, the change specifically exempts formal legal pleadings from any disclosure requirement.¹⁵ Legal assistance practitioners should keep this change in mind when considering whether a debt collector has complied with the FDCPA. Major Lescault.

Soaring Credit Card Debt, Delinquencies, and Bankruptcies Underscore the Need for Effective Preventive Law Programs

Three reports this past fall reveal the problems with the growing amount of credit card debt among citizens in the country. The Federal Deposit Insurance Corporation (FDIC) reports that two-thirds of the \$3.8 billion dollars "charged off" by banks for debt in the second quarter of 1996 came from credit card debt.¹⁶ This massive amount of debt, along with figures from the Bureau of Labor Statistics, which reveal that real median income has declined 2.4% since 1993,¹⁷ leads logically to the report by the American Bankers Association that credit card delinquen-

⁸ 18 U.S.C.A. § 228 (West 1996).

⁹ 28 U.S.C.A. § 1738B (West 1996).

¹⁰ Pub. L. No. 104-208, 110 Stat. 3009 (1996).

¹¹ 15 U.S.C.A. § 1692 (West 1996).

¹² *Id.* § 1692e(11) (West 1982 & Supp. 1996).

¹³ The litigation centered largely around attorney debt collectors and whether all of their litigation communications had to contain the notices. See generally *Credit Reporting Reforms, Other Consumer Credit Changes Enacted*, Report 745, Consumer Cred. Guide (CCH) at 1 (Oct. 8, 1996); *Debt Collection Act Fixed? Think Again . . .*, Report 749, Consumer Cred. Guide (CCH) at 4-5 (Dec. 4, 1996) (on file in the Administrative & Civil Law Department, The Judge Advocate General's School, United States Army).

¹⁴ 15 U.S.C.A. § 1692e(11), *as amended by* Act of Sept. 30, 1996, 104 Pub. L. 208, 110 Stat. 3009 (1996).

¹⁵ *Id.*

¹⁶ *Credit Card Debt Soars*, Report 745, Consumer Cred. Guide (CCH) at 12 (Oct. 8, 1996) (on file in the Administrative & Civil Law Department, The Judge Advocate General's School, United States Army).

¹⁷ *Id.*

cies have reached a record 3.66% during the second quarter.¹⁸ Additionally, the Administrative Office of United States Courts reported that personal bankruptcy filings reached a record 1,042,110 for the twelve-month period ending 30 June 1996.¹⁹

Why then do banks continue to seek credit card business? Simply put, profit. The chairman of the FDIC points out that, while profitability has declined somewhat since 1994, "credit card lending remains almost twice as profitable as other types of banking business."²⁰ This helps explain why some 2.7 billion credit card solicitations were mailed in 1995.²¹ That is "almost 17 for every American between the ages of 18 and 64."²²

What does this pile of numbers mean to you as a legal assistance practitioner? Well, many of the Americans receiving these credit card solicitations are soldiers. Your preventive law programs need to be active and vigilant to warn soldiers of the traps of credit card debt. Despite the friendly wording of solicitations, credit card companies do NOT have the soldiers interests at heart—they are seeking profit. Helping soldiers protect their interests is OUR job. Major Lescault.

Threatening Legal Action May Violate the FDCPA

The United States Court of Appeals for the Fourth Circuit recently reinforced the strict application of Fair Debt Collection Practices Act (FDCPA) requirements regarding false or misleading representations in communications from debt collectors. In *United States v. National Financial Services, Inc.*,²³ the Fourth Circuit held that language implying legal action would be initiated, when in fact no legal action was contemplated, violated the FDCPA.

The case involved a debt collector, National Financial Services, Inc. (hereinafter National), who mainly collected debts for magazine publishers.²⁴ The publisher would provide names and addresses which National fed into a computer to generate collection letters.²⁵ The initial letter contained language that in a variety of ways implied that a lawsuit would ensue if the consumer did not pay.²⁶ Follow-on letters would be on attorney letterhead and contain more explicit language about a lawsuit, but always couched in qualified terms like "might be filed" or "is

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 13 (emphasis added).

²¹ *Id.*

²² *Id.* (emphasis added)

²³ 98 F.3d 131 (4th Cir. 1996).

²⁴ *Id.* at 133.

²⁵ *Id.*

²⁶ *Id.* Sample language from the collection letters contained in the court's opinion includes the following:

[I]t is now being processed by our NATIONWIDE COLLECTION AGENCY DIVISION to enforce IMMEDIATE PAYMENT from you. Notification is hereby given that the date assigned above is your DEADLINE.

....

If you fail to pay your bill by the DEADLINE, we will then take the appropriate action. Remember your attorney will also want to be paid. An envelope is enclosed for your payment.

....

Our AUDIOTEX telecommunications system remain on line to answer your inquiry, twenty-four hours per day, seven days per week. Call anytime (301) 366-3217.

....

YOUR ACCOUNT WILL BE TRANSFERRED TO AN ATTORNEY IF IT IS UNPAID AFTER THE DEADLINE DATE!!!

Id.

being considered."²⁷ It should be noted that the debt collector never explicitly threatened to sue.

Finding against the debt collector, both the district and circuit courts strictly applied the language of the FDCPA which prohibits "[t]he threat to take any action that cannot legally be taken or that is not intended to be taken"²⁸ and "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt."²⁹ Both courts derived a two-part test from this language, with the circuit court stating the test in this manner: "collection notices violate § 1692e(5) if (1) a debtor would reasonably believe that the notices threaten legal action and (2) the debt collector does not intend to take legal action."³⁰

The district court applied these standards under the "least sophisticated consumer test,"³¹ the approach also followed by the circuit court.³² This test evaluates debt collection practices

as viewed by the "least sophisticated consumer" in order to "ensure that the FDCPA protects all consumers, the gullible as well as the shrewd."³³ The district court found that several aspects of the letters could be understood to threaten suit.³⁴ It further found, based on testimony of the parties, that National never intended to sue.³⁵

On appeal, National claimed that it never actually threatened to sue but always used qualifying language that left the statements "open to interpretation."³⁶ National further claimed that it did intend to sue even though it "knew that filing lawsuits was not viable."³⁷ The circuit court was not swayed, holding:

With these arguments, the defendants ask this court to adopt a hyper-literal approach which ignores the ordinary connotations and implications of language as it is used in the real

²⁷ *Id.* at 133-34. Sample language from the attorney letters contained in the opinion includes:

PLEASE NOTE I AM THE COLLECTION ATTORNEY WHO REPRESENTS AMERICAN FAMILY PUBLISHERS. I HAVE THE AUTHORITY TO SEE THAT SUIT IS FILED AGAINST YOU IN THIS MATTER . . . UNLESS THIS PAYMENT IS RECEIVED IN THIS OFFICE WITHIN FIVE DAYS OF THE DATE OF THIS NOTICE, I WILL BE COMPELLED TO CONSIDER THE USE OF THE LEGAL REMEDIES THAT MAY BE AVAILABLE TO EFFECT COLLECTION . . .

....

I am the collection attorney hired by American Family Publishers to protect their interests in the United States. I have filed suits and obtained judgments on small balance accounts just like yours. My authority to collect these accounts includes the enforcement of judgments . . .

....

LAW OFFICES—DEMAND NOTICE. YOU HAVE TEN DAYS TO PAY YOUR BILL IN FULL. CONTINUED FAILURE TO PAY WILL RESULT IN FURTHER COLLECTION ACTIVITY. ONLY YOUR IMMEDIATE PAYMENT WILL STOP FURTHER LEGAL ACTION.

....

YOUR ACCOUNT MAY NOW BE FOR SALE . . . ACCOUNTS, LIKE YOURS, THAT ARE SOLD . . . RUN THE RISK THAT THE BUYER WILL FILE SUIT AGAINST THEM. JUDGMENT CAN RESULT IN ASSETS BEING SEIZED. INSTRUCTIONS HAVE BEEN GIVEN TO TAKE ANY ACTION, THAT IS LEGAL, TO ENFORCE PAYMENT.

Id. at 134.

²⁸ 15 U.S.C.A. § 1692e(5) (West 1982 & Supp. 1996).

²⁹ *Id.* § 1692e(10).

³⁰ *National*, 98 F.3d at 135.

³¹ *United States v. National Financial Services, Inc.*, 820 F. Supp. 228, 232 (D. Md. 1993) [hereinafter *NFS, Inc.*].

³² *National*, 98 F.3d at 136.

³³ *Id.*, quoting *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2nd Cir. 1993).

³⁴ *Id.* at 136-37.

³⁵ *Id.* at 137.

³⁶ *Id.*

³⁷ *Id.* at 138.

world. We decline to do so. We concur with the district court's analysis of the notices, and conclude that the defendants' notices threatened to take legal action which they had no intention of taking, in violation of § 1692e(5). No reasonable juror could conclude that those statements were not meant to make debtors fear that they would be sued As we have said before in the context of § 1692g, '[t]here are numerous and ingenious ways of circumventing [the law] under a cover of technical compliance. [The defendants have] devised one such way, and we think that to uphold it would strip the statute of its meaning.' Here, we have an obvious intention to make debtors afraid that they would be sued, an effective tactic no doubt, but one which violates the law.³⁸

The circuit court's strong language is a good reminder of the value of the FDCPA to consumers. Language that one might consider "standard" for debt collection often violates the technical requirements of the Act—requirements which courts tend to interpret in the way that will best protect the consumer. Do not accept collection letters like the ones in this case as "part of doing business." Use them, together with the FDCPA, to gain leverage for your legal assistance clients. Major Lescault.

Legal Assistance Reserve Notes

Congress Authorizes Mobilization Insurance for Reserve Component Service Members

As part of the Department of Defense Authorization Act for Fiscal Year 1996,³⁹ Congress authorized the Department of De-

fense to offer optional insurance coverage to members of the Ready Reserve involuntarily ordered to active duty (other than training) for thirty-one days or more.⁴⁰ The insurance coverage does not apply to Reserve Component soldiers on full-time National Guard Duty (FTNGD) or on state duty missions.⁴¹ The activation orders must specify that the Reserve Component activation is in support of war, national emergency, or to augment active component forces for an operational mission.⁴² The new insurance coverage provision went into effect on 1 October 1996.⁴³ The insurance program is not retroactive.⁴⁴ The Assistant Secretary of Defense, Reserve Affairs (Manpower and Personnel) drafted *Department of Defense Instruction 1341.10* (5 July 1996) outlining the program.

This program is an initiative of the Assistant Secretary's Office after it reviewed information gathered following Operation Desert Storm which indicated that almost two thirds of the Reserve Component members activated during that conflict suffered economic hardship from activation, including loss of income, additional expenses, and loss of business income from erosion of professional or business client base. Especially hard hit were health care professionals, private practice lawyers and accountants, and small business owners with relatively high civilian incomes. The mobilization insurance initiative is supported as a means of recruiting and retaining health care professionals and other high income individuals in the Reserve Component.⁴⁵

The optional mobilization insurance program offers Reservists the chance to purchase basic mobilization insurance coverage of \$1000 per month with incremental increases of \$500, up to a maximum monthly payment of \$5000 per month.⁴⁶ Current Reservists were offered the insurance coverage effective 1 October 1996 during a sixty-day enrollment window.⁴⁷ Once the Reservist purchases the mobilization insurance coverage during

³⁸ *Id.* quoting *Miller v. Payco—General American Credits, Inc.*, 943 F.2d 482, 485 (4th Cir. 1991).

³⁹ Pub. L. No. 104-106, 110 Stat. 186 (1996) (to be codified at 10 U.S.C. §§ 12521-12532).

⁴⁰ Memorandum, Assistant Secretary of Defense, Reserve Affairs, to Deputy Assistant Secretary of the Army for Reserve Affairs, Mobilization, Readiness, and Training, subject: Implementing Guidance for Entitlement to Benefits Under the Ready Reserve Mobilization Income Insurance Program (RRMIIP) for Members Who Volunteer for "Covered Service" Prior to a Contingency Operation Executive Order (22 Oct. 1996) [Hereinafter RMIIP Guidance Memorandum #1]. Individuals who volunteer for active duty in support of an operational mission, war, or national emergency may be determined by their military service to meet the definition of "covered service" in section 12521 of Title 10, United States Code, if their orders are amended to reflect active duty for more than thirty days under an involuntary activation authority (e.g., sections 12301 (a), 12302, or 12304 of Title 10, United States Code, for purposes of receiving RRMIIIP coverage).

⁴¹ DEP'T OF DEFENSE, INSTR. 1341.10, READY RESERVE MOBILIZATION INCOME INSURANCE PROGRAM (RRMIIP) PROCEDURES, para. E2a(6) (5 July 1996) [hereinafter DOD INSTR. 1341.10].

⁴² *Id.* at Encl. 1, para. 5.

⁴³ *Id.* para. 2a(1).

⁴⁴ *Id.*

⁴⁵ William Matthews, *Income Insurance A Reality*, ARMY TIMES, Jan. 8, 1996, at 24.

⁴⁶ DOD INSTR. 1341.10, *supra* note 41, para. E2b.

⁴⁷ *Id.*

the enrollment period, the Reserve member may not later change his coverage.⁴⁸ New Reserve Component members, as of 1 October 1996, are automatically enrolled at the basic benefit level of \$1000 per month coverage.⁴⁹ During the sixty-day enrollment window, new Reservists choose one of three options: (1) increase coverage from the automatic base amount (2) decrease desired coverage from the automatic base amount to \$500 a month or (3) decline any coverage. Those who decline coverage during the enrollment window will not be allowed to re-enroll at a later date, with very limited exceptions.⁵⁰ Those current Reserve Component members who were called to active duty after the 1 October 1996 eligibility date but before they had a chance to elect or decline the insurance will be given the option to elect coverage not to exceed the \$1000 basic coverage amount.⁵¹

The mobilization insurance program premiums will be paid directly by private bank account automatic payment plan or by periodic payment of direct billings.⁵² Reserve soldiers must still pay the monthly premiums even if activated.⁵³ The Department of Defense (DOD) will administer the program with premiums deposited to the Ready Reserve Income Insurance Fund, to be established at the Treasury Department.⁵⁴ The initial cost of the

monthly premiums has been set by the DOD Board of Actuaries, and approved by the Secretary of Defense at the rate of \$12.20 per \$1000 of insurance.⁵⁵

Benefits from the insurance fund will be paid monthly to enrolled reservists after they have been activated for the initial thirty days of active duty.⁵⁶ Any payments beyond the first thirty days will be prorated for any period served over the initial thirty days.⁵⁷ Enrollees would receive payments from the fund for up to one year, or a maximum of twelve months in an eighteen month period.⁵⁸

Initial enrollment forms for current Reserve members were sent by the Army Reserve Personnel Center (ARPERCEN) Family Support Directive on or about 1 October 1996 to all Reserve troop units by Unit Identification Codes (UICs). Ready Reserve Mobilization Income Insurance Program (RRMIIP) election letters were sent to Individual Ready Reservists (IRR) according to their last known Standard Installation Division Personnel System (SIDPERS) address.⁵⁹ Individual Ready Reserve members must notify ARPERCEN to obtain enrollment forms and indicate their wish to enroll in the RRMIIP. The ARPERCEN has

⁴⁸ *Id.* para. E2b(3)(a).

⁴⁹ *Id.* para. E2a(1).

⁵⁰ Telephone Interview with Captain Gerald Fleming, USCGR, Office of the Assistant Secretary of Defense for Reserve Affairs (Aug. 27, 1996). See DOD INSTR. 1341.10, *supra* note 41, para. E2b(4). The DOD Authorization Act for Fiscal Year 1997 modified the one time election rule for members of the Individual Ready Reserve (IRR) who join the Selected Reserve (drilling Reserve unit, or Individual Mobilization Augmentee program participant), unless the member had previously declined coverage while a member of the Selected Reserve. See Pub. L. No. 104-201, § 542, 110 Stat. 2422 (1996) (to be codified at 10 U.S.C. § 12524(g)).

⁵¹ Guidance Memo 2-96, Assistant Secretary of Defense, Reserve Affairs, to Deputy Assistant Secretary of the Army for Reserve Affairs, Mobilization, Readiness and Training, subject: Implementing Guidance for Entitlement to Insurance Coverage Under the Ready Reserve Mobilization Income Insurance Program (RRMIIP) (14 Nov. 1996) [hereinafter RRIIMP Guidance Memo 2-96].

⁵² DOD INSTR. 1341.10, *supra* note 41, para. E3d.

⁵³ Press Release, Office of the Assistant Secretary of Defense for Reserve Affairs, *Questions & Answers Concerning the Ready Reserve Mobilization Income Insurance Program* (Aug. 1996).

⁵⁴ Pub. L. No. 104-106, 110 Stat. 186 (1996).

⁵⁵ Press Release, Office of the Assistant Secretary of Defense for Reserve Affairs, *Questions & Answers Concerning the Ready Reserve Mobilization Income Insurance Program* (Sept. 1996).

⁵⁶ DOD INSTR. 1341.10, *supra* note 41, para. E1a.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Telephone Interview with Lieutenant Colonel Mary Westmoreland, Office of the Chief, United States Army Reserve (Aug. 27, 1996).

established a toll-free number for Reservists to obtain enrollment forms and information: 1-800-648-5487.⁶⁰ Each State or Territory Area Command Military Personnel Office is distributing the enrollment forms to Army National Guard members.⁶¹

Reserve soldiers interested in obtaining this insurance coverage should understand that it is not intended "to be a dollar-for-dollar replacement of lost civilian income."⁶² Soldiers need to determine what their families need to live on if they are activated, how much they can afford to pay in monthly insurance premiums, and the likelihood of their activation.⁶³ The insurance proceeds will be federally taxable as income because they are not specifically exempted under the Internal Revenue Code and are not subject to the Combat Zone Tax Exclusion.⁶⁴ Attorneys briefing Reserve soldiers regarding the program should pass on the advice of Command Sergeant Major John E. Rucynski, United States Army Reserve Command, that "If you think you are in a unit that's never going to get mobilized . . . right now, I'd take the minimum."⁶⁵ Major Conrad,

Uniformed Services Employment and Reemployment Rights

During the last session, the 104th Congress passed a series of technical amendments to the Uniformed Services Employment and Reemployment Rights Act (USERRA)⁶⁶ as part of the Veterans' Benefits Improvement Act of 1996.⁶⁷ While most of the amendments simply updated references to the mobilization statutes in Title 10, United States Code,⁶⁸ and clarified the USERRA wording, a significant change was the addition of the following sentence to section 4316(d) of the USERRA, "No employer may require any such person to use vacation, annual, or similar leave during such period of service."⁶⁹ The addition of this wording to section 4316(d) of the USERRA codifies the holdings of *Hilliard v. New Jersey Army National Guard*⁷⁰ and *Graham v. Hall-McMillen Company, Inc.*⁷¹ that employers may not require employees to use their vacation pay and time for military absences. Section 4316(d) of the USERRA also provides that service members may choose to use vacation time and pay in lieu of military leave at the employee's request.⁷² Major Conrad,

⁶⁰ Telephone Interview with Major Jay Englehart, Army Reserve Personnel Center (Sept. 27, 1996).

⁶¹ Telephone Interview with Lieutenant Colonel Ductor, National Guard Bureau (Oct. 10, 1996).

⁶² Press Release, Office of the Assistant Secretary of Defense for Reserve Affairs, *Questions & Answers Concerning the Ready Reserve Mobilization Income Insurance Program* (Aug. 1996).

⁶³ *Id.* at 6.

⁶⁴ Electronic Mail Message 1 and 2 from Lieutenant Colonel Mary Westmoreland, Office of the Chief, Army Reserve Personnel Division, subject: RRIIMP Update from DFAS (5 Dec. 1996). The Combat Tax Exclusion Zone is the name commonly given the "Qualified hazardous duty area" defined in Section 1, Pub. L. No. 104-117, 110 Stat. 827 (1996). See also IRC §§ 112, 3401(a) (1994).

⁶⁵ Kristin Patterson, *Rucynski: Tackling the Challenge*, ARMY TIMES, Aug. 19, 1996, at 20.

⁶⁶ Uniformed Services Employment and Reemployment Act (USERRA), Pub. L. No. 103-353, 108 Stat. 3150 (1994), codified at 38 U.S.C. §§ 4301-33 (1994).

⁶⁷ Veterans' Benefits Improvements Act of 1996, Pub. L. No. 104-275, § 311, 110 Stat. 3322 (1996). The technical amendments are to the Uniformed Services Employment and Reemployment Rights Act (USERRA) as codified in Chapter 43 of Title 38, United States Code.

⁶⁸ 10 U.S.C. §§ 688, 12301(a), 12301(g), 12302, 12304, or 12305 (1994).

⁶⁹ Veterans' Benefits Improvements Act of 1996, Pub. L. No. 104-275, § 311(6), 110 Stat. 3322 (1996).

⁷⁰ *Hilliard v. New Jersey Army National Guard*, 527 F. Supp. 405, 412 (D. N.J. 1981).

⁷¹ *Graham v. Hall-McMillen Company, Inc.*, 925 F. Supp. 437 (N.D. Miss. 1996).

⁷² 10 U.S.C. § 4316(d) (1994).

Notes from the Field

My Observations of the Other Tribunal

During the last week of September 1996, I visited the International Criminal Tribunal for Rwanda (ICT-R) in Arusha, Tanzania, as it opened for business. It was a revealing experience, especially in light of my trip last May to the International Criminal Tribunal for the Former Yugoslavia (ICT-FY) at The Hague.

Before going to Tanzania, I spent two weeks in Kigali, Rwanda, where I met with several prosecutors in their offices and discussed the ICT-R proceedings. I then traveled to Arusha where I met with the Tribunal's legal advisor, the judges, and several other staff members. We discussed the physical set-up of the court, the hardships encountered by the staff, their interaction with the ICT-FY, the unique legal issues facing this Tribunal, and the impact this Tribunal will have on history.

The ICT-R has a staff of about fifty individuals, most of whom speak French. The Tribunal is located in an old building which at one time was Tanzania's parliament and which later became an International Conference Center. The Arusha Peace Accords were drafted and signed there. Though the Tribunal is in Arusha, the prosecutors currently have an office only in Kigali. The Information Officer is in a small room which he shares with another. He stores copies of all official documents and press releases on a desk in this office. Copies are made upon request. Pre-trial motions are kept by the Registrar and, to-date, none of them have been made available to the public.

There are two trial teams, each composed of a trial attorney, an assistant trial attorney, a legal assistant, and a legal advisor. Among this group are three Americans, two attorneys from the Department of Justice and one law professor, none of whom have extensive international law experience; all were asked to volunteer because they speak French. No one could explain if this was due to a court decision or was his personal decision.

The ICT-R prosecutors have not viewed court television proceedings of the ICT-FY nor are they acquainted with their counterparts at The Hague. There are no built-in cameras to record the proceedings at the ICT-R and court television will not be present at all time. There is one manually operated television camera selected from a press pool each day allowed in the courtroom.

The courtroom is set up similar to the ICT-FY with the accused sitting on a low bench rather than at a table. Headsets allow for simultaneous translation into French or English. Translation is a problem as it is difficult to find interpreters who speak Kenyan, French, and English; even when they are found, there are many words which simply do not translate adequately. There is room for about 100 spectators in the courtroom. Bullet-proof glass separates press and spectators from the accused and court personnel. There are no computers or monitors on the

attorney's or judges benches as at the ICT-FY. Spectators cannot see close-ups of witnesses' faces nor exhibits.

The Tribunal has only been functioning since October 1995 when the Registrar was appointed. The judges were not on a payroll until 19 June 1996 and were not permanently located in Tanzania until 6 September 1996. Their offices are sparse, their housing is not what they are used to, and there is no reliable electricity, telephones, or safe drinking water. There is no funding for support staff, and no library; there are no legal assistants nor any books. Significantly, there is no separate prison and disease and crime are rampant. Just getting to the Tribunal is difficult because there are no direct flights or passable roads to Arusha and no real modern infrastructure in the area. The judges do not speak a common language as three of them only speak French and the other three, only English. Half are African. The judges all wanted to stress, however, how much this court has done with so few assets in such a short time. They have already issued twenty-one indictments and have five individuals in custody. Trial dates have been set for four of the accused. Their first trial began in January 1997.

The ICT-R is targeting leaders, organizers, and inciters. Twelve of the twenty-one indictees were arrested in other countries prior to the ICT-R investigating or indicting them. The arresting countries, recognizing the Tribunal's primacy in jurisdiction, wanted to turn them over to the Tribunal either because the status of the person required attention from the ICT-R or because Rwanda has the death penalty. Most pre-trial motions are duplicates of ICT-FY motions. Witness protection is more difficult here than in the Former Yugoslavia because most witnesses are not refugees but rather still live in their villages, among the killers. For this reason, prosecutors withhold names of witnesses until shortly before trial.

All indictments so far have charged Genocide, Crimes Against Humanity, and Geneva Convention Common Article 3 and Protocol II violations. The perception amongst those I spoke to was that genocide would not be hard to prove. However, they will have to address the defenses to the element of "intent to destroy an entire group" which are "change of mind" and "I saved some so I had no intent to destroy all." This is the first time genocide is being prosecuted in an international forum, so it remains to be seen what will happen. The same is true for Common Article 3 violations. Common Article 3 violations are those war crimes that occur during internal armed conflict and which had previously been left for national courts to try. Common Article 3 violations concern the basic right to be treated humanely. Many of the Common Article 3 violations are the same as we see in the named grave breach categories.

One of the most interesting developments in this area is the expanded application of the command responsibility concept. The Tribunal adopted language similar to our definition of command responsibility; however instead of holding commanders

responsible, it holds "superiors" responsible. This is a substantial expansion of customary law. Rwanda's culture of obedience to commune and prefecture leaders magnified the serious abuses incited by civilian leaders. These leaders, such as mayors of various villages, are being prosecuted under the "superior" responsibility concept.

I was present on the Tribunal's first day of business at a hearing requested by defense counsel for Georges Anderson Nderubumwe Rutaganda. He was seeking the names and identification of witnesses. He also requested a delay of the October trial due to his client's poor health and asked that the ICT-R pay for transfer of his client to a Belgian hospital for better treatment. The prosecutors asked for protection for the victims and witnesses. The Tribunal ordered that protection be provided to the witnesses and that their names be given to the defense no earlier than three months prior to trial. The trial was delayed until March 1997 and the request for hospital transfer was denied. Many believe the accused may not live until his trial.

The next day, I attended a hearing in the Jean-Paul Akayesa case, scheduled to immediately proceed to trial. The defense made a motion for the names and witness identification of prosecution witnesses and asked that the trial be delayed. The Tribunal ordered the release of the names and witness identification to the defense counsel and the trial was delayed until 31 October 1996. Both cases required *in camera* hearings to discuss witness protection issues and all spectators were removed from the courtroom at those times.

Everyone I spoke to had great hopes for substantial support and increased interest in the Tribunal. The new Chief Prosecutor, Judge Louise Arbor, has already visited the Tribunal and the Prosecutors Office and she is aware of the funding and staff support issues.

I was impressed by the dedication of those I met and their belief in the Tribunal. They stated that its creation makes it clear that Africa is important and actions there must be handled humanely. The Tribunal will hold individuals responsible for their behavior and thus help change the inculcated blind obedience responsible for so much of the bloodshed. They believe justice will bring peace. Finally, it is hoped the work of this Tribunal will lay the groundwork for the establishment of a permanent criminal court where the common people will have access to relief.

I registered my frustration with all the parties I spoke with concerning the difficulty in obtaining information or documents from the ICT-R. On 30 October 1996, the *Washington Post* carried an article announcing that United Nations officials are investigating charges of administrative irregularities and improper treatment of staff members at the ICT-R and on 2 February 1997, it announced that the Registrar and the Deputy Prosecutor for Rwanda had resigned due to the findings of the Investigation. These are the very persons I was repeatedly told were hampering the flow of paper and information outside of Rwanda. Hopefully, these changes will improve communications with the ICT-R.

This trip to the ICT-R was an eye-opener. It was so different from the proceedings and surroundings of the Hague that I came away cheering for their success because they are the "international underdog." Without the interest of the international community however, the Tribunal is destined to have a limited impact on international law while actually dealing with more precedent setting issues. Major Marsha Mills, Professor of Law, International and Operational Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Rates of Courts-Martial and Nonjudicial Punishment

The rates of courts-martial and nonjudicial punishment for the fourth quarter of fiscal year 1996 are shown below.

Rates per Thousand

Fourth Quarter Fiscal Year 1996										
	ARMYWIDE		CONUS		EUROPE		PACIFIC		OTHER	
GCM	0.37	(1.49)	0.36	(1.46)	0.59	(2.35)	0.34	(1.38)	0.36	(1.45)
BCDSPCM	0.13	(0.51)	0.12	(0.46)	0.18	(0.71)	0.22	(0.86)	0.00	(0.00)
SPCM	0.02	(0.07)	0.01	(0.06)	0.04	(0.14)	0.02	(0.09)	0.00	(0.00)
SCM	0.13	(0.52)	0.16	(0.65)	0.00	(0.00)	0.04	(0.17)	0.72	(2.90)
NJP	21.06	(84.24)	22.39	(89.56)	16.66	(66.64)	24.73	(98.93)	35.16	(140.65)

Note: Based on average strength of 488,104. Figures in parenthesis are the annualized rates per thousand.

Military Justice Statistics, FY 1992-1996

General Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Guilty Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/ 1,000
1992	1,168	93.9%	88.2%	60.0%	66.6%	19.4%	23.0%	1.75
1993	915	93.6%	84.8%	56.2%	65.3%	23.6%	20.7%	1.56
1994	843	92.8%	87.9%	60.1%	64.5%	26.0%	20.2%	1.51
1995	825	92.9%	83.5%	58.1%	66.0%	28.1%	20.7%	1.57
1996	789	93.5%	85.5%	56.6%	65.3%	26.4%	24.4%	1.60

Bad-Conduct Discharge Special Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Guilty Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/ 1,000
1992	543	90.2%	63.6%	59.1%	67.9%	20.6%	16.3%	.82
1993	327	85.3%	54.1%	51.3%	63.3%	28.7%	16.5%	.58
1994	345	89.8%	54.1%	57.1%	58.2%	34.2%	24.3%	.62
1995	333	87.3%	56.4%	55.6%	64.5%	28.8%	19.5%	.64
1996	329	87.2%	60.9%	51.6%	62.6%	33.1%	21.8%	.67

Other Special Courts-Martial

FY	Cases	Conv. Rate	Disch. Rate	Guilty Pleas	Judge Alone	Courts w/Enl	Drug Cases	Rate/ 1,000
1992	70	62.8%	NA	21.4%	50.0%	38.5%	2.8%	.11
1993	45	51.1%	NA	20.0%	48.8%	33.3%	0.0%	.08
1994	32	62.5%	NA	18.7%	50.0%	37.5%	9.3%	.06
1995	20	80.0%	NA	40.0%	60.0%	35.0%	5.0%	.04
1996	28	71.4%	NA	21.4%	50.0%	42.8%	10.7%	.06

Summary Courts-Martial

FY	Cases	Conv. Rate	Guilty Pleas	Drug Cases	Rate/ 1,000
1992	684	90.1%	37.0%	10.2%	1.03
1993	364	86.3%	36.3%	10.2%	0.62
1994	349	92.0%	35.2%	11.2%	0.63
1995	304	93.1%	34.5%	11.8%	0.58
1996	238	89.9%	37.8%	17.2%	0.48

Nonjudicial Punishment

FY	Total	Formal	Summarized	Drugs	Rate/ 1,000
1992	50,066	78.6%	21.4%	6.6%	75.20
1993	44,207	77.5%	22.5%	6.4%	75.42
1994	41,753	78.3%	21.7%	6.6%	75.00
1995	38,591	79.3%	20.7%	8.4%	73.64
1996	36,622	78.3%	21.7%	7.8%	74.18

Average strength for rates per 1000: FY 1992, 665,800; FY 1993, 586,149; FY 1994, 556,684; FY 1995, 524,043; FY 1996, 493,700.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin (Bulletin)* which is designed to inform Army environmental law practitioners about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically which appears in the Announcements Conference of the Legal Automated Army-Wide Systems (LAAWS) Bulletin Board Service (BBS). The ELD may distribute hard copies on a limited basis. The latest issue, volume 4, number 4, dated January 1997, is reproduced below.

Ten Percent Increase in Civil Penalties

On 31 December 1996, the United States Environmental Protection Agency (USEPA) issued a Civil Monetary Penalty Inflation Adjustment Rule (IAR), the first of the USEPA's periodic inflation adjustments to its civil monetary penalty policies.¹ The purpose of the IAR, as mandated by the Debt Collection Improvement Act of 1996, is to ensure that the penalty policies keep pace with inflation and thereby maintain the deterrent effect that Congress intended when it originally specified penalties.²

The IAR, which will take effect 30 January 1997, will increase almost all penalty provisions within the major environmental statutes by ten percent (with the exception of the new

penalty provisions added by the 1996 amendments to the Safe Drinking Water Act). For example, the new statutory maximum penalties for civil, judicial, or administrative proceedings for the Resource Conservation and Recovery Act (RCRA) will be \$27,500, an increase from \$25,000 as of 30 January 1997. The USEPA will review its penalties at least once every four years and will adjust them as necessary for inflation according to a specified formula. Captain Anders.

Did you know? . . . The seven ton Killer Whale can reach swimming speeds of 50 miles per hour.

Candidate Species Final Decision

On 5 December 1996, the United States Fish and Wildlife Service (USFWS) announced a final decision to discontinue the practice of maintaining a list of species regarded as "category 2 candidates."³ The summary of the Notice states in part:

Future lists of species that are candidates for listing under the Endangered Species Act (Act) [16 U.S.C. §§ 1531-1544 (1988)] will be restricted to those species for which the Service [USFWS] has on file sufficient information to support issuance of a proposed listing rule. A variety of other lists describe "species of concern" or "species in decline" and the Service believes that these lists are more ap-

¹ Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69,360 (1996) (to be codified at 40 C.F.R. pt. 19.4).

² Debt Collection Improvement Act of 1990, Pub. L. 101-410, 104 Stat. 890 (1990) (codified at 28 U.S.C. § 2461), as amended by the Debt Collection Improvement Act of 1996, Public Law 104-134, 110 Stat. 1321 (1996) (codified at 31 U.S.C. § 3701).

³ Endangered and Threatened Wildlife and Plants; Notice of Final Decision on Identification of Candidates for Listing as Endangered or Threatened, 61 Fed. Reg. 64,481-64,485 (1996) (to be codified at 50 C.F.R. pt. 17) [hereinafter *Threatened Wildlife*].

appropriate for use in land management planning and natural resource conservation efforts that extend beyond the mandates of the Act.

Army Regulation 200-3 requires installations to consider candidate species in making decisions that may affect those species.⁴ Previously, the USFWS categorized candidate species as Categories 1, 2, or 3 with the result that approximately 1400 species were considered candidate species. In the past, Category 1 candidates consisted of (1) proposed species, and (2) species for which the USFWS had sufficient information on file to support issuance of a proposed rule.

The present practice is to term these species simply (1) proposed species, and (2) candidate species. Also in the past, Category 2 candidates were those species for which the USFWS had information on file to suggest that listing action was possibly appropriate. Under this final decision, the USFWS is discontinuing the designation of these species as Category 2 species and does not regard these species as candidates.⁵ The USFWS also clarified previously that Category 3 species, species that were once considered for listing but are no longer under such consideration, are not to be considered candidates for listing.⁶ Major Ayres.

Overseas Environmental Compliance

Although signed in April 1996, the Department of Defense (DOD) only recently released *Department of Defense Instruction (DODI) 4715.5* entitled *Management of Environmental Compliance at Overseas Installations* (22 April 1996).⁷

The DODI 4715.5 sets guidelines for compliance to environmental standards at United States installations overseas. Like its predecessor, DODI 4715.5 requires DOD components to establish and comply with Final Governing Standards (FGS) to protect human health and the environment for each foreign country where the Department of Defense maintains substantial installations. The Instruction also requires the continued maintenance of the Overseas Environmental Baseline Guidance Document (OEBGD) as a set of objective criteria and management practices developed to protect human health and the environment for use in foreign nations where no FGS has been

established. The OEBGD is generally based upon environmental standards applicable to DOD installations, facilities, and actions within the United States. The FGS is a comprehensive set of country-specific substantive provisions, typically specific management practices or technical limitations on effluent, discharges, and other items.

The FGS is promulgated by the designated DOD Environmental Executive Agent and is determined by applying the stricter of applicable host-nation environmental standards, standards under applicable international agreements (e.g., Status of Forces Agreements), or standards within the OEBGD. Environmental law specialists (ELs) desiring a copy of DODI 4715.5 or the OEBGD should contact me via electronic mail at ayrestho@otjag.army.mil. Major Ayres.

Did you know? . . . Farmers use approximately 1/10th of the pesticides per acre that private homeowners use.

Legislative Update

Look for heightened congressional focus on reform of the Clean Water Act (CWA)⁸ and the Resource Conservation and Recovery Act (RCRA)⁹ in the 105th Congress.

In the RCRA arena, the focus is likely to be on the reform of the corrective action program, and will evolve from legislation introduced in the Senate during the last session.¹⁰ Opposition to reform is expected from environmental groups. Because of increased dialog among environmental groups, industry, the USEPA, and Congress, however, this legislation could have a strong chance of passing in the next session if negotiations are successful. That Congress will not include the RCRA reforms as part of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Reauthorization, which will be a separate focus for reform, will increase the chances of successful legislation in this area.¹¹ Of significance in the version proposed in the 104th Congress is the provision that if cleanup wastes are managed under a state or the USEPA approved cleanup plan, they will be exempted from the hazardous waste management requirements of the RCRA Subtitle C.

⁴ DEP'T OF ARMY, REG. 200-3, NATURAL RESOURCES-LAND, FOREST, AND WILDLIFE MANAGEMENT, para. 11-4(a) (28 Feb. 1995).

⁵ *Threatened Wildlife*, 61 Fed. Reg. at 64,481.

⁶ *Endangered and Threatened Wildlife and Plants; Review of Plant and Animal Taxa That Are Candidates for Listing as Endangered or Threatened Species*, 61 Fed. Reg. 7,596-7,613 (1996) (to be codified at 50 C.F.R. pt. 17).

⁷ This DODI replaces *DOD Directive 6050.16, DOD Policy for Establishing and Implementing Environmental Standards at Overseas Installations* (20 Sept. 1991), that was canceled by *DOD Directive 4715.1, Environmental Security* (24 Feb. 1996).

⁸ 33 U.S.C. §§ 1251-1387 (1990).

⁹ 42 U.S.C. §§ 6901-6992k (1988).

¹⁰ S. 1274, 104th Cong., 1st Sess. (1996).

¹¹ *Comprehensive Environmental Response, Compensation, and Liability Act*, 42 U.S.C. §§ 9601-9674 (1994) [hereinafter CERCLA].

Similarly, the CWA is expected to be a priority in the 105th Congress. Where the RCRA reform is likely to build on previous legislation, the CWA reform will depart from earlier, much criticized, legislative reform efforts in 1995. Highlighted areas for reform to date include pollutant trading and wetlands mitigation. Although no mention has been made of expanding the federal waiver of sovereign immunity under the CWA, reform efforts will build on the compromise that led to the Safe Drinking Water Amendments of 1996. If so, a similar broadening of the waiver of sovereign immunity could be likely. Such an expansion would have great impact on federal installations because federal entities currently are exempt from paying fines and penalties under the present CWA.

Regardless of what factors facilitate compromise, legislation implementing reforms probably will not be enacted until late in the session. Any reforms that appear to be imminent will be synopsisized in the *Environmental Law Division Bulletin (ELD Bulletin)* and *The Army Lawyer*, and the legislation itself will be loaded onto the Environmental Law Files Area on the Legal Automation Army-Wide Systems Bulletin Board Service (LAAWS BBS) as soon as it is available.

There is now a separate environmental law file area on the LAAWS BBS. Undoubtedly, this will please those users who are tired of sifting through message files for the information they need. Now that information, which includes the *ELD Bulletin*, is in the files area. All files are saved in Word Perfect 5.1 format. Our vision is to use the area as a mini-practice resource location where environmental law attorneys can read and download policy memos, information papers, and solutions to environmental problems. We also plan to include media specific lists of resources for practitioners. We encourage your input on resources you would like to see on-line, but always remember that this area is a complement to rather than a substitute for accurate, up-to-date research.

The Environmental Law Division (ELD) soon expects to launch a web site of convenient environmental and general law links to be used as a springboard for on-line research. Also included in the site will be a listing of the ELD personnel for e-mail contact. Captain DeRoma.

Did you know? . . . It takes approximately 100 times more water to produce a pound of beef than it does to produce a pound of wheat.

Dithiocarbamate Task Force v. EPA

On 1 November 1996, the United States Court of Appeals for the District of Columbia Circuit ruled that USEPA had acted arbitrarily and capriciously in listing certain carbamate compounds as hazardous wastes under RCRA.¹² The petitioners, Dithiocarbamate Task Force (DTF), represented manufacturers who make or use four classes of carbamate compounds. The case concerns the listing of certain derivatives of carbamic acid that are used as pesticides, herbicides, and fungicides, as well as for various purposes used by the rubber, wood, and textile industries.

The USEPA proposed listing various carbamates as hazardous wastes under RCRA's implementing Regulations.¹³ The regulations require the USEPA to consider ten specified factors when determining whether a waste poses a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed, or otherwise managed. These factors include the nature, concentration, and toxicity of constituents, their potential for persistence and bioaccumulation, and "the plausible types of improper management to which the waste could be subjected."¹⁴ The DTF challenged the listing determinations on a number of theories, one of which was the USEPA's failure to consider each of the ten regulatory factors.

The court found that the USEPA must consider each factor and that even a finding that a factor is unimportant or irrelevant would be subject to deferential review. In this case, however, the USEPA did not consider each factor for each product listed. Additionally, the court found that the USEPA's consideration of the mismanagement factor was flawed. The court dismissed some of the "plausible mismanagement" scenarios that the USEPA relied on in making the listing determination. The ruling specified that USEPA must provide some support for the conclusion that a particular mismanagement scenario is plausible. The USEPA should only consider those scenarios that may reasonably occur and result in probable harm.

¹² *Id.* §§ 6901-6992k (1988).

¹³ Criteria for Listing Hazardous Waste, 40 C.F.R. § 261.11 (1992).

¹⁴ *Id.*

¹⁵ 98 F.3d-1394 (D.C. Cir. 1996).

It is unclear whether the USEPA will appeal the ruling in *Dithiocarbamate Task Force v. EPA*.¹⁵ The court's decision will restrict USEPA's ability to list certain hazardous wastes. At the same time, the decision also lends support to the USEPA's decision not to list some wastes as hazardous using the "plausible mismanagement" factor. Another approach would be for the Agency to allow the case to stand and rewrite the listing criteria to fit its current approach to listing determinations. It is clear that this case mandates careful consideration of the regulatory factors, in particular "plausible mismanagement" in future hazardous waste listing determinations by the USEPA. Major Anderson-Lloyd.

Required Agreements Between the Army and the USEPA for Army Facilities on the National Priorities List

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires federal agencies with facilities on the national priority list (NPL) to enter into an interagency agreement (IAG) with the USEPA within 180 days after completion of the facility's Remedial Investigation/Feasibility Study (RI/FS).¹⁶ All such IAGs shall include public participation as set forth in CERCLA section 117.¹⁷ The IAG must include the following:

- (1) A review of alternative remedial actions and the selection of a remedial action;
- (2) A schedule for the completion of the remedial action; and,
- (3) Arrangements for long-term operation and maintenance of the facility.¹⁸

The USEPA and a federal facility must enter into a Federal Facility Agreement (FFA), which is intended to serve as a procedural "blueprint" for the facility's cleanup, and to meet the requirements of CERCLA section 120. At most installations, it is anticipated that the FFAs will be entered into years before a record of decision (ROD) is signed. The ROD, an agreement between the Army and the USEPA with concurrence by the affected state, addresses the specific requirements found in CERCLA section 120(e)(4). Case law and the USEPA guidance do not consider the RI/FS process complete until the ROD for an operable unit is signed. With respect to CERCLA section 120 requirements, because the FFA is signed before the ROD is completed, the FFA will not contain analysis of reme-

dial alternatives nor contain a detailed cleanup schedule, because these are two of the ROD's roles.

The FFA, however, can and should include how the ROD process will be completed, when the cleanup schedule will be attached to the ROD, and provisions for long-term operation and maintenance. By having an FFA in place before the ROD is completed, the ROD signing perfects CERCLA section 120(e)(4) requirements. Therefore, the FFA, supplemented by the ROD, serves as the comprehensive CERCLA IAG between the USEPA and the Army at NPL sites. Major Cook.

Did you know? . . . Red-cockaded woodpeckers prefer placing their nesting cavities on the westerly side of trees.

Third Circuit Rules on Passive Migration

The United States Court of Appeals for the Third Circuit recently held that passive migration of contamination released prior to a party's ownership of property does not constitute "disposal" during that party's tenure as owner for purposes of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹⁹

The current owner of the property, HMAT, was sued by the United States pursuant to the CERCLA for the costs of the response action, and sought contribution on a passive migration theory from the company that had sold it the land, Dowel Associates. HMAT argued that disposal occurred because contamination that was released on the land prior to Dowel's purchase of the property spread during Dowel's ownership.

The court rejected HMAT's migration theory, holding that there had been no disposal during Dowel's ownership of the property and, therefore, Dowel did not fall within the definition of a responsible party.²⁰ The court based its ruling on the plain language of CERCLA's definition of "disposal," as well as on the structure of the statute's liability scheme.

The court rejected several rulings by other jurisdictions that have held that passive migration can constitute disposal, including one from the United States Court of Appeals for the Fourth Circuit.²¹ The Third Circuit found that the words "leaking" and "spilling," by their definitions, require some active human conduct. Even if they did not, however, the court found that neither

¹⁶ CERCLA § 120(e)(2), 42 U.S.C. §§ 9620(e)(2) (1996).

¹⁷ CERCLA § 117, 42 U.S.C. § 9617 (1986).

¹⁸ 42 U.S.C. § 9620(e)(4) (1996).

¹⁹ *United States v. CDMG Realty Co., et al.*, 96 F.3d 706 (3rd Cir. 1996).

²⁰ CERCLA § 107(a), 42 U.S.C. § 9607(a) (1994).

²¹ *See United States v. Waste Indus., Inc.*, 734 F.2d 159, 164-65 (4th Cir. 1984).

word denotes the gradual spreading of contamination that was alleged by HMAT. Moreover, the court found that the passive migration theory would create a complicated way of making liable all people who owned or operated facilities after the introduction of hazardous substances, an intent that the court was not willing to impute to Congress. Ms. Fedel.

District of Columbia Circuit Invalidates Aggregation Policy

The United States Court of Appeals for the District of Columbia recently invalidated a USEPA policy on aggregating sites for listing on the national priorities list (NPL).²² The USEPA policy provided for listing noncontiguous facilities on the NPL as a single site on the basis of such factors as whether the two areas were part of the same operation (historically), whether the potentially responsible parties were the same or similar entities, whether the target population was the same or overlapping, and the distance between the noncontiguous areas.²³

The court held that the policy, as used to justify the listing of noncontiguous sites whose listing cannot be individually justified by reference to risk criteria, is unlawful because USEPA lacks statutory authority to list sites in this manner. The court found the inclusion of low-risk sites on the NPL contrary to Congress' intent in creating the NPL, namely to create a system of prioritizing sites for response based on risk levels.

The court rejected the USEPA's argument that its authority in the liability section of CERCLA was broad enough to encompass the aggregation policy.²⁴ The court held that section 104(d)(4) authority, which allows the USEPA to treat noncontiguous facilities that are reasonably related on the basis of geography or risk as one facility for the purposes of liability, did

not affect USEPA's listing authority in section 105.²⁵ Nor does the USEPA's ability to group separate facilities together on the NPL for response priority purposes include those sites that do not qualify as priority sites.²⁶

The court also restated its previous recognition of the harmful effect that the status of being ranked on the NPL has on business entities. In doing so, the court rejected the USEPA's argument that Mead Corporation's ranking on the NPL would have no effect on Mead's liability for the low-risk site because the NPL is merely a response planning tool. Ms. Fedel.

Litigation Division Note

What is a Case Worth? How to Defend the \$300,000 Cap on Compensation Damages in Title VII Suits

Introduction

Title VII employment discrimination suits filed against the Army in federal court are often the culmination of several different formal complaints of discrimination that were processed administratively. Many of the plaintiffs who file these suits are members of more than one protected class and assert intentional discrimination claims on every available basis.²⁷ This results in several different claims and theories of liability within each suit against the Army. With increasing frequency, plaintiffs seeking large settlements, or trying to uphold excessive jury verdicts, are claiming that the \$300,000 compensatory damages cap²⁸ applies to each individual claim or at least each different basis of discrimination for which a decision is rendered, rather than to each suit filed.

The damage cap issue is currently pending before the United States Court of Appeals for both the Sixth and Eleventh Cir-

²² *Mead Corp. v. Browner*, 100 F3d 152 (D.C. Cir. 1996).

²³ *Aggregation Policy*, 48 Fed. Reg. 40,663 (1983).

²⁴ CERCLA § 104(d)(4), 42 U.S.C. § 9604(d)(4) (1992).

²⁵ CERCLA § 105, 42 U.S.C. § 9605 (1986).

²⁶ CERCLA § 105(a)(8)(B), 42 U.S.C. § 9605(a)(8)(B) (1986).

²⁷ Title VII, Civil Rights Act of 1964, *as amended* by 42 U.S.C. §§ 2000e-2000e-17 (1994) prohibits discrimination against applicants for employment, employees, and former employees on the basis of race, color, religion, sex, or national origin.

²⁸ The relevant portion of Title VII provides: "In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory . . . damages as allowed in subsection (b) of this section . . ." Subsection (b)(3) provides: "The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses . . . awarded under this section, shall not exceed, for each complaining party—

....
(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000." 42 U.S.C. § 1981a(a)(1) (1994).

cuits.²⁹ Until a decision is rendered and ultimately ruled upon by the United States Supreme Court, more and more complainants alleging intentional employment discrimination at both the administrative and litigation stages will seek compensatory damages in excess of \$300,000. Increasingly, Army labor counselors may find themselves faced with outrageous settlement offers and threats of astronomical liability figures in federal court under the theory of multiple compensatory damage caps.

Plaintiffs have been aided in their efforts to obtain multiple damage caps by the Equal Employment Opportunity Commission General Counsel (EEOCGC). In an *Amicus Curiae* brief filed in the United States Court of Appeals for the Eleventh Circuit, the EEOCGC contended that, according to the history and purpose of Section 1981a, Congress did not intend a plaintiff who prevails on multiple claims of discrimination to be limited by a single cap on damages.³⁰

Because labor counselors are likely to encounter arguments similar to those advanced in the EEOCGC's amicus brief in support of a complainant's claim for multiple damage caps, this note will discuss ways labor counselors can counter these arguments and present the current legal standard.³¹

The EEOC General Counsel's Position

First, the EEOC General Counsel asserts that the language "in an action" found in subsection (a) of 42 U.S.C. § 1981a does not modify the limitations on damages set forth in subsection (b). The language simply describes the type of proceeding to which section 1981a applies—a Title VII action challenging intentional discrimination. The EEOCGC contends that since subsection (b) does not contain similar language or make any other reference to a per suit limitation on the amount of compensatory damages recoverable by a plaintiff, there is no cap on damages awarded for the entire action.

Second, the EEOC General Counsel argues that because subsection (b) does provide that the amount awarded "for each com-

plaining party" shall not exceed the applicable cap, Congress did not intend the statutory caps to be applied as a per suit limitation on the amount of compensatory damages.

Third, because subsection (b) only limits the amount of compensatory damages for future losses and not compensatory damages for past losses such as back pay, the cap was not intended to impose a single limit on Section 1981a damages recovered in a particular lawsuit.

Fourth, the EEOC General Counsel warns that to hold otherwise would result in irrational consequences that could not have been intended by Congress. Plaintiffs faced with a per suit limitation on damages would file all of their distinct claims in separate lawsuits so that they might receive a separate cap for each action filed. It should be presumed, argues the EEOC, that Congress did not intend this unreasonable result that is produced by a per suit limitation on compensatory damages.

Finally, when interpreting the legislative history, the EEOC General Counsel relies upon an interpretive memorandum placed in the *Congressional Record* by seven sponsors of the bill that became the Civil Rights Act of 1991. The memorandum describes the caps as limitations "placed on the damages available to each individual complaining party for each cause of action under section 1981a."³² The General Counsel contends that the use of the term "cause of action" strongly suggests that the framers of Section 1981a intended the caps to be applied on a per claim basis. Further support is elicited from the remarks of Congressman Edwards, a sponsor of the House version of the bill. Congressman Edwards states that "the limitations on damages awards in the legislation . . . apply to the damages available to each individual complaining party for each *cause of action* brought under Section 1981[a]."³³

Congressman Edwards notes that individuals may have different independent causes of action under section 1981a arising out of the same or different factual situations. An individual suffering discrimination on the basis of two or more protected grounds, such as disability or sex, would be entitled to recover

²⁹ *Reynolds v. CSX Transportation, Inc.*, 1995 U.S. Dist. LEXIS 9853 (M.D. Fla. June 14, 1995) *appeal docketed*, No. 95-3364 (11th Cir. 1995); *Hudson v. Reno*, Civ. 3:92-CV-737 (E.D. Tenn. Oct. 14, 1995) *appeal docketed*, No. 96-5232 (6th Cir. 1996).

³⁰ The EEOC, in accordance with 42 U.S.C. § 2000e-5, can prevent anyone from engaging in any unlawful employment practice; it also possesses litigating authority in the lower federal courts independent of Solicitor General review which is otherwise required under 28 C.F.R. § 0.20. However, the EEOC does not possess such independent authority before the Supreme Court. *See* 28 U.S.C. § 518(a) (1993). The view expressed in the EEOC amicus brief is not shared by the United States as determined by the Solicitor General of the United States. "The EEOC position articulated in *Reynolds* is contrary to the plain meaning of the statute and thus should not be followed." Brief for Appellees Janet Reno and United States Department of Justice at 18 n.4, *Hudson*.

³¹ Though edited to present a more general application for Army labor counselors, the arguments presented against the EEOC's position are largely adapted from the Department of Justice brief submitted in *Hudson*.

³² Sponsors' Interpretive Memorandum, 137 CONG. REC. S15484 (daily ed. Oct. 30, 1991).

³³ 137 CONG. REC. H9527 (daily ed. Nov. 7, 1991) (emphasis added).

damages on each of the independent causes of action. The EEOC concludes by emphasizing that the per claim cap interpretation conforms to the overall purpose of Section 1981a—to fully compensate persons harmed by discrimination and to deter businesses from engaging in further discrimination.

The Plain Language of the Statute

To successfully refute arguments for compensatory damages in excess of \$300,000, labor counselors must first look to the plain language of the statute. The plain language of 42 U.S.C. § 1981a is very clear. The dollar limitations in subsection (b) apply “in an action” described in subsection (a). To find that subsection (b) stands alone and places dollar limits on “causes of action” is to ignore the plain meaning of the words and the statutory construction of the section.

A complaining party may not recover more than the cap “in an action” brought under sections 706 and 717 of the Civil Rights Act of 1964. An “action” brought under those sections is simply a “civil action” for intentional discrimination. Other sections of the Act also support this interpretation: “a civil action may be brought against the respondent named in the charge;”³⁴ and, an aggrieved federal employee “may file a civil action as provided in section 2000e-5 of this title.”³⁵ *Black's Law Dictionary* defines “civil action” or an “action” as simply “a suit brought in court.”³⁶ The *Federal Rules of Civil Procedure* (FRCP) also use the terms “action” and “civil action” to refer to all claims for

relief alleged in a *single lawsuit*. Rule 2 states: “There shall be one form of action to be known as ‘civil action’.” Rule 3 states: “A civil action is commenced by filing a complaint with the court.” Additionally, by stating that the sum of compensatory damages shall not exceed, “for each complaining party,” the prescribed amounts, subsection (b) reinforces the conclusion that a single plaintiff in a single lawsuit is entitled to a single award.

In sum, a complaining party's total compensatory damages are capped for the entire “civil action.” The clear language within the statute alone should end the argument in favor of labor counselors who are contesting damages in excess of \$300,000. “[W]hen a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.”³⁷

Judicial Treatment

The trial courts that have considered the multiple cap issue have uniformly rejected contentions that the cap applies to each claim rather than the entire civil action.³⁸ These results are also consistent with the federal circuit court precedent.³⁹

Limited Waiver of Sovereign Immunity

The United States, as sovereign, defines the terms and conditions upon which it may be sued.⁴⁰ Any waiver of this tradi-

³⁴ 42 U.S.C. §§ 2000e-5(f)(1) (1994).

³⁵ *Id.* § 2000e-16(c).

³⁶ BLACK'S LAW DICTIONARY 26 (5th ed. 1979).

³⁷ *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

³⁸ See *Solomon v. Godwin and Carlton, P.C.*, 898 F. Supp. 415, 416 (N.D. Tex., 1995) (“the cap imposes a single limitation on both types of damages, so that the total of compensatory and punitive damages awarded may not exceed the applicable cap amount”); *Flor v. O'Leary*, Civ. 93-1343 JC/WWD, at 2 (D. N.M. July 25, 1995) (because Congress set the cap on damages “in an action brought by a complaining party,” the limitation applies “whether liability was premised on a single post-Act violation or multiple post-Act violations if brought in the same litigation”); *Rogerson v. Widnall*, Civ. 92-5038, at 2 (D. S.D. May 11, 1995) (“the law and the statute clearly provide” that the plaintiff is limited to \$300,000 for the entire action rather than for each discriminatory act found by the jury); *Baker v. Dalton*, Civ. 92-1082, at 3 (S.D. Cal. Jan. 28, 1994) (denying plaintiff leave to amend her claim for damages from \$300,000 to \$3.6 million on the grounds of futility in light of the “plain meaning of the statute”); *Reynolds v. CSX Transportation, Inc.*, 1995 U.S. Dist. LEXIS 9853, at *3 (M.D. Fla. June 14, 1995) (“the language of the statute on its face makes it clear that the limitation is for the entire action”); *Hudson v. Reno*, Civ. 3-92-CV-737 (E.D. Tenn. Oct. 14, 1995) (reducing a jury award of \$1.5 million to \$300,000 pursuant to the cap on compensatory damages set forth in 42 U.S.C. § 1981a(b)(3)(D) (1994)).

³⁹ See *Hogan v. Bangor and Aroostook R.R.*, 61 F.3d 1034, 1037 (1st Cir. 1995) (“The statute is clear on its face that the sum of compensatory damages (including its various components) and punitive damages shall not exceed \$200,000”); *Selgas v. American Airlines, Inc.*, 858 F. Supp. 316, 326 (D.P.R. 1994), *affirmed in part, vacated in part*, 69 F.3d 1205 (1st Cir. 1995) (the court reduced the jury award of \$350,000 in punitive damages to \$300,000, the maximum award permitted against an employer with more than 500 employees); *E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995) (“[T]he Civil Rights Act of 1991 limited the amount of monetary recovery under Title VII . . . by placing caps on the total amount of compensatory and punitive damages that could be awarded to any complaining party.”); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1355 (7th Cir. 1995) (“In fashioning new remedies under Title VII, Congress determined that a company the size of Penril, with more than 100 but less than 201 employees, should have to pay no more, in total compensatory (with back pay excluded) and punitive damages, than \$100,000”); *Emmel v. Coca-Cola Bottling Co. of Chicago, Inc.*, 904 F.Supp. 723, 739-41 (N.D. Ill. 1995) *affirmed*, 1996 WL 517292 (7th Cir. Sept. 12, 1996) (upholding a punitive damage reduction from \$500,000 to \$300,000, the maximum award permitted against an employer with more than 500 employees).

⁴⁰ *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *United States v. Testan*, 424 U.S. 392, 399 (1975); *Lehman v. Naskshian*, 453 U.S. 156, 160 (1981).

tional sovereign immunity is strictly construed in favor of the government⁴¹ and therefore it must be unequivocally expressed and not implied.⁴² The statutory cap on compensatory damages is a limitation or condition on the waiver of the government's sovereign immunity and, as such, must be strictly construed, in terms of its scope, in favor of the government.

Legislative History

Although the amendments imposed by the Civil Rights Act of 1991 now permit compensatory damage awards to plaintiffs who establish intentional discrimination, the Act does not guarantee compensation to plaintiffs for the full extent of their injuries. The monetary cap on damages was a key component of the compromise needed for the passage of the Act.⁴³ Section 1981a was not intended to provide full relief.

The limited legislative history reveals that the damage cap provision was enacted to address the concern that American businesses, particularly smaller ones, might not be able to withstand unlimited damages.⁴⁴ The damage caps were a compromise that balanced these concerns with the overall goal of deterring intentional workplace discrimination and making reasonable remedies available to victims of discrimination.⁴⁵

Plaintiffs and administrative complainants may point to a statement in a memorandum submitted by seven sponsors of the 1991 Act that describes the caps as "limitations . . . placed on the damages available to each individual complaining party for each *cause of action* under section 1981a."⁴⁶ However, this statement has

been taken out of context. The phrase "cause of action" in the Interpretive Memorandum was not used in response to an argument that the cap applies per lawsuit, but rather as part of a discussion distinguishing Title VII claims from claims made under 42 U.S.C. § 1981.⁴⁷

Some plaintiffs also may find support in the extension of remarks placed in the *Congressional Record* by individual congressmen after final passage of the Civil Rights Act of 1991.⁴⁸ However, such post-enactment statements are not part of the legislative history of the Act and could not possibly have influenced Congress in passing the Act. Moreover, the isolated remarks of a single legislator are to be given little weight.⁴⁹

Truly Distinct Claims May Still Recover Multiple Caps

Under the Civil Rights Act of 1991, a plaintiff with distinct claims may, under the appropriate circumstances, recover multiple caps by bringing separate lawsuits. Noting this, the plaintiff's bar argues that limiting a plaintiff to one cap in a given action will encourage plaintiffs to file multiple lawsuits to challenge a course of conduct that would normally have generated a single lawsuit. However, this concern over the lack of judicial economy is misplaced.

First, if a plaintiff has asserted distinct but related claims in separate actions, the court may consolidate the actions for trial pursuant to Rule 42(a) of the *Federal Rules of Civil Procedure*.⁵⁰ Second, a Title VII plaintiff is barred from splitting a single claim

⁴¹ *Lane v. Pena*, 116 S. Ct. 2092, 2096 (1996).

⁴² *Soriano v. United States*, 352 U.S. 270 (1957); *United States v. King*, 395 U.S. 1 (1968).

⁴³ 137 CONG. REC. S15472, S15486 (daily ed. Oct. 30, 1991) (Statements of Senators Dole and Kohl).

⁴⁴ 137 CONG. REC. S15478-79 (daily ed. Oct. 30, 1991) (comments of Senator Bumpers); 137 CONG. REC. S15486 (daily ed. Oct. 30, 1991) (comments of Senator Kohl).

⁴⁵ 137 CONG. REC. S15479 (daily ed. Oct. 30, 1991) (comments of Senator Bumpers); 137 CONG. REC. S15234 (daily ed. Oct. 25, 1991) (comments of Senator Kennedy).

⁴⁶ Sponsors' Interpretive Memorandum, 137 CONG. REC. S15484 (daily ed. Oct. 30, 1991) (emphasis added).

⁴⁷ 42 U.S.C. § 1981 protects against discrimination on the basis of race or alienage and protects a limited range of civil rights (to, *inter alia*, make and enforce contracts, to sue, to be parties, to give evidence) outside the employment arena governed by Section 1981a. Liability under 42 U.S.C. § 1981 is unaffected by the cap provisions of Section 1981a and defendants are subject to unlimited damages under that statutory provision.

⁴⁸ See, e.g., 137 CONG. REC. H9527 (daily ed. Nov. 7, 1991) (Remarks by Congressman Edwards).

⁴⁹ See *Chrysler v. Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history."); *Monterey Coal Co. v. Federal Mine Safety & Health Review Commission*, 743 F.2d 589, 598 (7th Cir. 1984) (noting that to give "decisive weight" to the remarks of a single legislator "would be to run too great a risk of permitting one member to override the intent of Congress as expressed in the language of the statute").

⁵⁰ Under Rule 42(a) of the *Federal Rules of Civil Procedure*, a court may order consolidation of actions involving a common question of law or fact.

⁵¹ *Sutcliffe Storage & Warehouse Co. v. United States*, 162 F.2d 849, 851 (1st Cir. 1947).

into multiple lawsuits. This doctrine is "one application of the general doctrine of *res judicata*."³¹ For *res judicata* to attach, it is sufficient that a claim in one suit could have been presented in a previously filed suit.³² Thus, the question whether a plaintiff has alleged independent claims will depend on whether *res judicata* would bar the second claim. This prohibition against splitting a claim will prevent plaintiffs from bringing a multiplicity of separate suits arising from a common set of facts.

Unauthorized Punitive Awards

Finally, awarding damages under a theory of multiple caps may camouflage excessive awards that are actually unauthorized punitive damages. A jury that is shocked or appalled by the underlying discriminatory conduct that gave rise to the complaint may award "compensatory damages" that far exceed the amount necessary to actually compensate the plaintiff for the harm committed. When this happens, the amount awarded is actually a punitive assessment against the government presented in the only manner made available to the jury—through the compensatory

damage award. However, the 1991 Act clearly precludes a complaining party from recovering punitive damages against the government.³³ Furthermore, as noted above, in establishing the caps on compensatory damages, Congress sought to control excessive damage awards by the juries. "An award of compensatory damages is excessive if it exceeds a rational appraisal of the damages actually incurred."³⁴ Allowing multiple damage caps may frequently result in compensatory damages that exceed a rational appraisal of the damages which in effect is an unauthorized punitive assessment.

Conclusion

Government counsel defending discrimination complaints at both the administrative and district court levels are faced with increasingly proficient and aggressive plaintiffs who creatively plead their case to maximize monetary compensation. Until the Supreme Court has definitively ruled on the issue, counsel must use the arguments presented above, and set forth in detail why the Army should not be exposed to multiple damage caps or unlimited liability. Major Berg.

³² See *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321-22 (1927) ("The injured respondent was bound to set forth in his first action for damages every ground of negligence . . . upon which he relied, and cannot be permitted . . . to rely upon them by piecemeal in successive actions to recover for the same wrong and injury"); *Brown v. Felson*, 442 U.S. 127, 131 (1979) ("[r]es judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding").

³³ 42 U.S.C. § 1981a(b)(1) provides:

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual. (Emphasis added).

³⁴ *Hogan v. Bangor and Aroostook R.R.*, 61 F.3d 1034, 1037 (1st Cir. 1995).

Claims Report

United States Army Claims Service

Personnel Claims Notes

Don't Throw It Out

The Army recently lost an appeal because claims office personnel told the claimant he could discard broken items. This was wrong advice; broken items must be kept for carrier inspection.

The claimant, a lieutenant colonel, owned expensive Baccarat and Atlantis crystal which was delivered broken. He shipped twenty-four crystal glasses of varying size, four crystal decanters, eight coasters, and a crystal punch bowl with twelve crystal glasses. The total value was \$1450. Unfortunately, the claimant followed the advice of the claims office and disposed of the broken crystal.

The carrier sent a repair person to the shipper's home well within the forty-five day inspection period. When the carrier discovered that the crystal had been discarded, it informed the claims office that it intended to deny all liability because it had been denied its right to inspect.

In *National Forwarding*,¹ the Comptroller General noted that "[a] carrier cannot usually avoid being held *prima facie* liable for loss or damage to the household goods it transports merely because circumstances prevent it from inspecting the damage. This general rule applies where the carrier's conduct contributed in any manner to its failure to inspect."²

In this situation, however, the general rule did not apply because the carrier complied with all requirements and did not compromise its inspection rights. The Comptroller General noted that:

Our decisions also recognize that a carrier is not liable when it vigorously pursues its inspection rights within the time permitted in its

contract; the shipper discards the damaged item within the time that the carrier was permitted to inspect it and before the carrier had the opportunity to do so, and the record indicates that the carrier had a substantial defense involving facts discoverable by inspection.³

Discarding the broken crystal violated two Military-Industry Memorandums of Understanding (MOU). The MOU on Loss and Damage does not permit disposal of broken glass prior to carrier inspection.⁴ The MOU on Salvage specifically indicates that broken crystal items worth more than \$50 must be retained for carrier salvage.⁵ The Army was told to refund the entire \$1450.

The Army appealed arguing that the carrier did not deserve a "windfall" as the inventory clearly reflected shipment of crystal. The Army agreed that the claimant should not have thrown out the crystal, but also contended that the carrier should be partially liable, suggesting a reduced liability of \$915.60, a figure based on a more moderately priced crystal.

The Comptroller General rejected this attempt at compromise and reaffirmed its prior holding⁶ stating, "As we found in our original decision, it is undisputed that the carrier pursued its inspection rights and that the Army did not accord such rights."⁷

A similar situation occurred in *Stevens Worldwide Van Lines*.⁸ In *Stevens*, a shipment was delivered to Alabama, and the shipper subsequently relocated to Florida. All of the items were moved, except a damaged water bed which the soldier gave to a neighbor to repair. The neighbor in Alabama could not repair the water bed and threw it out. Though the Comptroller General denied the carrier's argument that it was denied its right to inspect for the items moved to Florida, the Comptroller General allowed offset for the water bed. The Comptroller General noted that the carrier vigorously pursued its inspection rights, but the water bed was discarded before it could inspect, and prior to the termination of the carrier's inspection period.

¹ Comp. Gen. B-260769 (Nov. 1, 1995).

² *Id.* at 2.

³ *Id.*

⁴ DEP'T OF ARMY, PAM. 27-162, LEGAL SERVICES: CLAIMS, app. E, sec. II (15 Dec. 1989).

⁵ *Id.* app. E, sec. I.

⁶ *National Forwarding*, Comp. Gen. B-26076.2 (June 27, 1996).

⁷ *Id.* at 2.

⁸ Comp. Gen. B-251343 (Apr. 19, 1993).

Claims offices must inform soldiers that the carrier has a right to timely inspection of damaged items, and that items should not be disposed of prior to the termination of the inspection period. It would be wise to have soldiers telephone the claims office before they dispose of any article. If the carrier's forty-five day inspection period has expired (*i.e.*, forty-five days have passed since dispatch of the last DD Form 1840R, Notice of Loss or Damage), it may be permissible to discard the item. However, if it appears that the full depreciated value may be paid for the item, then the question of salvage is important. In that case, it would be wise to ask the carrier if it has any interest in the item for salvage purposes. If the carrier is interested, then the item must be kept for possible salvage. Detailed records of these phone calls must be made on the chronology sheet. Ms. Schultz.

Unclear Correspondence

In some cases, letters sent to claimants are either unclear or just plain confusing. Phrases like "have not substantiated," "failed to show proof of tender," and "no proof of ownership" may be clear to claims personnel, but are not clear to claimants. Such confusion often results in a request for reconsideration that might have otherwise been avoided.

A claim recently sent to the United States Army Claims Service (USARCS) for reconsideration involved a request for \$75 for a broken vase. The field office allowed \$20 and told the claimant he had not substantiated the value claimed. The claimant requested reconsideration asking what he needed to do. The field office again replied that he had "failed to substantiate his claim" and sent the file to the USARCS.

Such confusing responses waste time and this particular response led to a request for reconsideration, requiring the field office to draft a seven paragraph memorandum forwarding the claim to the USARCS. A better approach is to draft a personalized letter telling the claimant the reason for the adjudication in plain, simple English. Anything less than the full amount claimed may not satisfy the claimant but knowing the full reason for the settlement may make it more acceptable. Mr. Lickliter.

Tort Claims Note

Problems with Settling Environmental Claims

Unique issues are involved in the handling of claims based upon environmental contamination, or toxic torts, under the Federal Tort Claims Act (FTCA).⁹ The term "toxic tort," which has become a generally accepted legal phrase, is used to refer to a wide variety of factual situations which range from very specific single incidents with a definite number of claimants and no long-

term tort risks (such as a pipeline break involving limited damage to adjacent property), to very general allegations of liability for neurotoxic or other deleterious effects caused by specific chemicals in our industrial operations.

For the claims officer in the field, it can be intimidating to deal with a claim based upon an allegation of damage from a toxic substance allegedly released by the Army. Though the investigation of a toxic tort is similar to that of other claims, knowing some basic initial steps can help focus your actions.

A toxic tort is often defined or classified by a range of characteristics. Like any claim, the complexity of the facts surrounding the claim often determines the scope of the investigation required. Are there many potential claimants? Is the contamination widespread and migratory? Are the claims for present as well as future personal injuries? Are the claims based on an isolated event with allegations of only property damage? Are the causation issues highly technical or readily ascertainable?

Tort damage issues are complicated by the potential for additional non-tort related liabilities because of environmental regulatory statutes, such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹⁰ Moreover, the resolution of tort liability may need coordination with ongoing investigations and cleanup activities conducted pursuant to the Defense Environmental Restoration Program (DERP)¹¹ or with other active facility operation and maintenance funded response actions. The DERP is a statutory program that authorizes the Secretary of Defense to carry out a program of environmental restoration at current and formerly used defense sites without resorting to either Superfund or Environmental Protection Agency (EPA) jurisdiction. Investigations are performed by the United States Army Corps of Engineers (USACE). It is important to note that these programs do not create any new FTCA remedies, nor is action taken under them an admission of liability under the FTCA.

Potentially complex damage issues involve the diminution of property values, loss of income, and other elements of property damages that are often difficult to determine when there are ongoing remedial efforts and long-range clean-up plans. Environmental claims amenable to settlement at the administrative stage are often isolated incidents. At times, they allege damages that are both relatively easy to determine and readily distinguishable from DERA response obligations.

Keep in mind that filing a claim is an administrative requirement prior to filing suit under the FTCA. For claims involving large environmental damages, the filing of the administrative claim is often done only because it is a necessary prerequisite to litigation.

⁹ 28 U.S.C. §§ 2671-2680 (1994).

¹⁰ 42 U.S.C. §§ 9601-75 (1995).

¹¹ 10 U.S.C. § 2701 (1996).

As a practical matter, the settlement of an environmental claim as an ordinary tort is likely only if it involves property damage. If personal injury or wrongful death are either alleged or a future possibility, the handling of the claim will be done in consultation with the Environmental Law Division, Office of the Judge Advocate General, and Environmental Torts Branch, Civil Division, Department of Justice.

The initial response from the responsible Area Claims Officer or Claims Processing Officer should include the following steps:

a. Upon receipt, send a copy of what you believe may be an environmental claim to your USARCS Area Action Officer. A determination will be made whether the claim should be processed as an environmental claim. If so, the USARCS will notify ETB and ELD for instruction.

b. For claims involving active installations or activities, notify your local military or Department of the Army civilian

environmental law specialists who are located at either the installation or MACOM level to determine whether there is a file on the site in question.

c. For claims involving closed installations or activities, contact the USACE Headquarters' Environmental Restoration Division's Formerly Used Defense Sites (FUDS) Branch in Washington, D.C., at (202) 761-1272 for information on the USACE district that might be involved in DERP-FUDS related activities at the site. Involved districts, though not responsible for dealing with FTCA claims at FUDS, can provide historical information, the status of any ongoing or planned investigations or clean ups, and technical data on contaminants present on the site.

d. Determine the stage and status of the clean up which may take several years to complete. The legal staff must ensure that the command and the civilian community understand that if an installation elects to take affirmative responsive action, it is done under DERP and not because of FTCA tort liability. Mr. Savino.

Regimental News from the Desk of the Sergeant Major

Sergeant Major Jeffrey A. Todd

The following note was written by SSG Louis "Dino" Dinatale who is a member of Team Personnel Command (PERSCOM). From personal experience, I know that the enlisted members of The Judge Advocate General's Corps are the best informed soldiers in the Army. I say this without hesitation or reservation. I speak to them individually and in groups when conducting Article 6 visits and, suffice it to say, our soldiers are aware of what is going on within The Judge Advocate General's Corps and the Army. One very large reason for this is the work of Master Sergeant Jenkins, Staff Sergeant Dinatale, and our newest member of the Team, Mr. Paul Smith. This team works tirelessly to ensure our soldiers know what career enhancing assignments are available to them. Sergeant Major Todd.

Individual Assignment Focus

The 71D (Legal Specialist) Career Branch Professional Development noncommissioned officers are asked a variety of questions, but the following question tops the list: "What good assignments are available to me?" It is a common question that you may ponder while reviewing the list of assignments, from exotic to everyday, posted frequently on the Legal Automation Army-Wide System Bulletin Board Service. The answer for each soldier depends on what he has determined to be his assignment focus.

In contemplating your next assignment, what "drives-the-train"? Some soldiers consider the proximity to family or recreational pursuits when looking into their next assignment. While these soldiers have weighted their assignment focus towards satisfying personal endeavors, the majority of soldiers watch assignments as opportunities for upward mobility and seek certain duty positions accordingly. These are the soldiers that study their career map diligently to ensure they are taking the right steps as they visualize their upward climb towards the senior ranks. There are also soldiers who look at assignments as simply Army-business. They take a passive position in their assignments by allowing the career managers to determine their individual focus. The career managers then make their decisions based on the needs of the Army and any available documentation contained in their personnel records.

Interest in assignments vary, but selection for assignments is more competitive than ever. The soldier with the most skills and varied experience ends up with the better assignments. A soldier should write out his career goals and a timeline to achieve

them. When planning career goals, soldiers should consider the personal satisfaction, sacrifices, and obtainability of the varied positions. One way to help ensure a variety of assignments is to talk with the Career Branch about available assignments and the criteria used for selection. Many soldiers focus on the "hard-assignments," or Tables of Organization and Equipment (TO&E) assignments as the litmus test of promotion potential, but in reality, a combination of Tables of Distribution and Allowance (TDA) and TO&E assignments presents a better picture of a soldier's versatility to perform in various environments and his functionality in the Army of the 21st Century.

Assignment decisions can be very tough for career managers when the only tools available for making assignments are the Personnel Qualification Record and the noncommissioned officer evaluation reports. To help ensure soldier involvement, The Judge Advocate General Regimental Sergeant Major has directed the 71D Career Branch members to visit soldiers in both Continental United States and Outside the Continental United States locations. The Career Branch coordinates visits with the installation chief legal noncommissioned officers to plan briefings and one-on-one interviews with soldiers. This enables the Career Branch to tell the "PERSCOM Story" on the assignment process. It also allows soldiers the opportunity to personally speak with their Career Manager about decisions that will have an impact on their lives and careers.

Regardless of what one's individual assignment focus may be, all soldiers need to continually work towards self-improvement through military and civilian education. PERSCOM decisions for "specialized" assignments such as instructor, medical claims investigator, drill sergeant, and recruiter involve looking at the soldier's technical knowledge, but also for communication skills, leadership, and completion of college. Many times, this involves the soldier submitting a resume outlining his experience and ability to perform the prescribed duties. Some soldiers who are fully qualified are not selected for assignment due to stabilization requirements. Those soldiers still remain active for consideration at a later time based on their availability for assignment and desire to be accepted for selection.

While the Army's primary goal is to meet the personnel requirements of the Army, it's secondary goal is to meet soldiers' personal desires and provide the greatest opportunity for professional development. Staff Sergeant DiNatale III.