

The Clause

A QUARTERLY PUBLICATION OF THE BOARDS OF CONTRACT APPEALS BAR ASSOCIATION



PRESIDENT'S COLUMN

Steven Porter

A brand new year and a fresh start. The BCA Bar Association has a new slate of officers and three new members of the Board of Governors. I am happy to announce that at our annual meeting, we elected Judge Cheryl Rome as Treasurer for 1995. New members of the Board of Governors include Roger Boyd of Crowell & Moring, Jim McAleese of McAleese & Associates, and Judge Barclay Van Doren. Getting a jump on the new year, the BCABA officers and Board of Governors met on 14 December to begin planning our course for 1995. The meeting was dominated by the issues of training and, to a lesser degree, membership.

In framing the issues related to training, the Board asked: "What can we do through our training efforts to help the membership improve the practice before the Boards of Contract Appeals?"

The first order of business was to establish a new training committee under the able leadership of Judge Elizabeth Tunks. The committee will look at innovative ways we can improve our training. Ideas include a second meeting in the Spring that is focused on training; developing a program to increase the participation of Board judges in our training; and continuing our efforts to train attorneys new to this area of the law. Assisting Judge Tunks is Board of Governors member Jim McAleese, who will assess the workability of smaller training programs for particular group needs. Any members wishing to serve on this committee should contact either Judge Tunks (703-756-8516) or myself.

Changing topics to that of membership... The membership renewal has been less than expected. Our membership

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IN MEMORIAM JOHN J. CORCORAN

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WILLIAMS & JENSEN

John J. Corcoran, a distinguished member of the BCA community, died on December 3, 1994. Judge Corcoran served on the Department of Veterans Affairs Board of Contract Appeals from February 1977 to July 1989. He was named Chairman of that Board in November, 1983, and served in that capacity until his retirement in 1989.

As Chairman, Judge Corcoran guided the VABCA through years in which a rapidly expanding workload and changes to the substantive and procedural aspects of public contract law placed enormous burdens on the Board. Throughout his term, he worked to

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numbers are down, and that is not good. We need to remedy that situation as soon as possible, and get our membership numbers back up to those of years past. In charge of this effort will be Carl Peckinpaugh, currently the Chair of our very active Practices and Procedures Committee.

Carl's move to chair the Membership Committee leaves an opening that we want to fill as soon as possible. I have asked Laura Kennedy, our President-elect, to look for a replacement for Carl, and for others that want

to do more in the BCA bar Association. If you interested in serving, please contact Laura Kennedy at 202-828-5323.

One problem with membership is undoubtedly the reduction in defense and other federal spending. As the amount of contract dollars declines, we can and should expect to see some attorneys drift away from the government contracts arena. However, for those of us who are in this profession for the long term, there will be new opportunities to serve

Make sure your dues are current so that you can continue to receive all our mailings and future issues of *The Clause*.



THE NEW TIME LIMITS ON CONTRACT CLAIMS UNDER THE FEDERAL ACQUISITION STREAMLINING ACT OF 1994

Alan C. Brown

MILLER & CHEVALIER

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On October 13, 1994, President Clinton signed into law the Federal Acquisition Streamlining Act of 1994 (Pub. Law 103-355, 108 Stat. 3243) ("FASA"). This legislation is the most extensive revision of the government procurement system since the Competition in Contracting Act of 1984 (Title VII of Pub. Law 98-369, 98 Stat. 1175).

Most of the attention accorded the new statute has focused of the many significant changes regarding acquisition of commercial items, electronic commerce, small business, and bid protests. Hidden within the Act, however, is a seemingly innocuous provision with far-reaching implication for the contract disputes process.

Section 2351(a) of FASA amends section 6(a) of the Contract Disputes Act of 1978



("CDA")(41 U.S.C. Sec. 605a) to create a new six-year statute of limitations on the submission of CDA claims by contractors and the government. As amended, section 6(a) provides:

(a) Contractor claims. All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of decision by the contracting officer. Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud. The contracting officer shall issue his decision in writing, and shall

mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud¹. [Emphasis added.]

Inherent in this new provision are a number of serious shortcomings, including:

- The statute of limitations applies only to claims under the CDA. Non-CDA claims, such as claims under contracts for the sale of real property, or for the purchase or sale of property by the government, are unaffected.
- The statute requires that a claim be “submitted” within six years from the time it accrues, but does not define how a claim is “submitted.”
- “Accrual” of a CDA claim is undefined, and the concept is particularly difficult to define in view of the Dawco rule that a “claim” may not be made until the matter at issue is “in dispute.”
- The scope of the “fraud” exception is ill-defined.
- There is an inconsistency in the effective date provisions that make it impossible to determine when the new limitations period becomes effective.

These questions are likely to lead to needless litigation unless the statute is implemented clearly and equitably in the Federal Acquisition Regulation (“FAR”). A prelimi-

nary draft of the regulations, however, leaves most of these questions unanswered. The preliminary draft would, if promulgated, impose unequal burdens on contractors and the government, and create a filing requirement that is unfeasible in some circumstances. The regulations need to do more than simply restate the statute; they should also address the many complications arising from the new limitations period. Once the proposed regulations are published, contractors should take advantage of the opportunity to comment and to participate in public hearings to ensure that the regulations are evenhanded and practicable.

FASA also amends the limitations period applicable to shipbuilding claims, and the requirements for certification of claims under Department of Defense (“DOD”) contracts. Each of these provisions is discussed below.

WHAT THE STATUTE OF LIMITATIONS DOES

FASA for the first time imposes a deadline on the submission of CDA claims. Previously, “there [was] no deadline by which a contractor must bring a claim to the CO.” *Farmers Grain Co. of Esmond v. United States*, 29 Fed.Cl. 684, 687 (1993)². In the future, however, CDA claims will have to be submitted within six years from the time they accrue.

Most importantly, the new limitations period governs both contractor and government claims. It is intended to force disputes to a resolution, and to diminish the number of controversies that languish for many years without attention. While shortcomings in the new statute of limitations³ may prevent achievement of this goal, the provision will require contractors and the government alike to be more vigilant in identifying, quantifying, and pursuing contract claims. While it will protect the government, it will also protect contractors from stale government claims, such as those that frequently arise, many years after the fact, under the Truth in

Negotiations Act, various contract warranties, and other provisions.

It is important also to recognize what this new limitations period does not do. It does not require that a suit in the Court of Federal Claims ("COFC") or appeal to a board of contract appeals be filed within six years from when the claim accrues. What *is* required is that the claim be *submitted to the contracting officer* within that period. Regardless of the lapse of time until the contracting officer's final decision on a contractor claim, an appeals still may be filed with a board of contract appeals within 90 days of receipt of the final decision, or a suit may be filed in the COFC within 12 months of receipt of the final decision⁴. While early versions of FASA would have created a uniform 90-day period for appeal to either forum, these 90-day/one-year periods remain unchanged under the final statute.

The new provision also does not alter the statute of limitations applicable to suits on *non-CDA* contract claims, such as suits involving real property, or the sale of goods or services by the government. Such suits in the COFC will continue to be governed by the general six-year statute of limitations on Tucker Act suits established by 28 U.S.C. Sec. 2501.

Finally, the new period does not alter the shorter periods for filing claims that may be established by the terms of existing contracts. Such provisions are common in timber, shipbuilding, and other contracts. Section 2351(a)(2) of FASA expressly provides:

Notwithstanding the third sentence of section 6(a) of the Contract Disputes Act of 1978, as added by paragraph (1), if a contract in existence on the date of the enactment of this Act requires that a claim referred to in that sentence be submitted earlier than 6 years after accrual of that claim, then the claim shall be submitted within the period required by the contract.⁵

By limiting this exception to *existing* contracts, FASA may have arguably overruled the decisions in *Do-Well Machine Shop, Inc. v. United States*⁶ and *Stone Forest Indus. v. United States*.⁷ Those held that the parties were free to agree to binding time limits governing submission of claims and, by extension, that those limits could be shorter than the limits provided by statute. The *Do-Well* decision, however, was premised on Congress's silence on the issue in the CDA. In FASA, Congress has expressed its intention that shorter contractual time limits are valid only in contracts entered into prior to October 13, 1994. This provision should thus preclude the future use of regulations or contract clauses that purport to shorten the time for the filing of a claim to less than six years from accrual of the claim.

THE FAR REGULATION

The Office of Federal Procurement Policy ("OFPP") and the FAR Council have created a special process and an ambitious schedule for issuing regulations implementing FASA. Each provision of FASA requiring revisions to the FAR has been assigned to one of the eleven interagency drafting teams. Section 2351 was assigned to the Protests/Disputes team headed by Craig Hodge of the Army.

FCR has received a draft of the proposed regulation implementing the amendment to section 6(a) of the CDA.⁸ In its present form, the regulation would amend FAR 33.206 to require that contractor claims shall be submitted within six years after the contractor *knew or should have known* the facts and circumstances giving rise to the issue in controversy, while government claims would be required within six years of accrual.⁹ By attempting to redefine the standard applicable to contractors only, the draft regulation would undermine the important congressional goal of a uniform requirement for both contractors and the government. In addition, the "knew or should have known" standard is not the

standard for accrual adopted in the controlling decisions of the Federal Circuit and its predecessor, the Court of Claims, and conflicts with the *Dawco* rule. As will be seen below, the draft regulation fails to address the implications of the *Dawco* "in dispute" requirement as well as the fraud exception and other problematic aspects of the statute. For these reasons, the regulation as drafted would only lead to more litigation.

APPLICATION OF THE STATUTE OF LIMITATIONS PROVISION MEASURING START AND STOP DATES

Section 6(a) of the CDA as amended provides for a six-year period, beginning with the "accrual" of the claim, and ending with the "submission" of the claim. During this period, the claim must be investigated, evaluated and prepared. An initial question that must be answered is, what is the act that must be completed within six years of accrual of the claim? That is, what constitutes "submission" of a claim?

For a contractor, the answer is easy. Section 6(a) of the CDA provides that:

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision.

The CDA itself uses the term "submission" to mean delivery of the claim to the contracting officer for a decision.

The claim referred to is plainly the CDA claim, certified if required, requesting a final decision. It is not mere notice of a claim, a request for equitable adjustment, a proposal, or similar request for relief, and these items will not satisfy the new statute of limitations.¹⁰

With respect to government claims, the answer is different. Section 6(a) of the CDA continues:

All claims by the government against a contractor relating to a contract shall

be the subject of a decision by the contracting officer.

For government claims, there is no separate document denominated a "claim." Rather, it is the final decision itself that constitutes the assertion of a claim. Just as a request for equitable adjustment is not a "claim" by the contractor, a demand letter or similar assertion of a right should not be considered a "claim" by the government. Consistent with the second sentence of section 6(a) of the CDA, the government must issue a final decision asserting its claim against the contractor within six years of the date the claim accrued. This distinction is reflected in the current FAR 33.206, and is continued under the draft regulation.

ACCRUAL OF CONTRACT CLAIMS IN GENERAL

In assessing compliance with the new limitations period, the remaining question that must be answered is when did the CDA claim accrue? This answer likewise may be different for contractors than it is for the government.

The terminology used in section 2351 of FASA is not unique. Many existing federal statutes of limitation applicable to both government and private parties run from "accrual" of the claim, and provide an extensive body of interpretive case law. Among the most analogous provisions are:

- 28 U.S.C. Sec. 2501—general six-year statute of limitations for suits in the COFC.
- 28 U.S.C. Sec. 2401(a)—general six-year statute of limitations governing civil actions against the United States.
- 28 U.S.C. Sec. 2415(a)—general six-year statute of limitations governing contract suits by the United States.
- 28 U.S.C. Sec. 2461—five-year statute of limitations on actions for civil fines, penalties and forfeitures.

As with the new section 6(a) of the CDA, the limitations periods provided in sections

2461 and 2501 begin to run when “the claim first accrue[s].” The limitations periods in sections 2415(a) and 2401(a) run from the date the “right of action” accrues, although section 2401(a) uses “right of action” and “claim” interchangeably.

The starting point for what constitutes “accrual” of claims against the government is *Japanese War Notes Claimants Association v United States*, 373 F.2d 356 (Ct.Cl. 1966), *cert. denied*, 389 U.S. 971 (1967). In *Japanese War Notes*, the Court of Claims announced this test:

A claim first accrues when all the events have occurred which fix the alleged liability of the United States and entitle the claimant to institute an action.¹¹

The remains the controlling definition of “accrual” in the Federal Circuit. *See, e.g., Alliance of Descendants of Texas Land Grant v United States*, 37 F.3d 1478 (Fed. Cir. 1994), although a similar test from *Nager Electric Co. v United States*, 368 F.2d 847 (Ct.Cl. 1966), is also cited frequently.

“First accrual” has usually been put, in broad formulation, as the time when all events have occurred to fix the Government’s alleged liability, entitling the claimant to demand payment and sue here for his money.¹²

See, e.g., Catawba Indian Tribe v United States, 982 F.2d 1564, 1570 (Fed. Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2995 (1993). *See also Chevron U.S.A. v United States*, 923 F.2d 830, 834 (Fed. Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 167 (1991) (cause of action accrues when all events necessary to state a claim have occurred).

Thus, the legal basis of the particular claim must be examined to determine the required elements of liability. Since there traditionally has been no limitations period governing federal government contract disputes, there is little or no decisional law regarding the accrual of most typical government contract

claims. Nonetheless, using the test of “when could a claim be brought,” some common examples can be analyzed.

For example, claims for defective pricing and for constructive change based on defective specifications arguably accrue at the time the contract is signed. At that time, all events giving rise to liability have occurred. That is, the contract price has been increased as a result of defective cost or pricing data provided during negotiations, or the contract has been “changed” by the incorporation of defective or impossible specifications or failure to disclose superior knowledge.

Claims for directed changes should accrue at the time of the direction, while warranty claims should accrue at the time of delivery if the product is defective at that time, or at the time the product fails if it was compliant at the time of delivery. Claims of Cost Accounting Standards (“CAS”) noncompliance should accrue at the time the costs are charged to the government in accordance with a non-compliant or non-disclosed allocation method. In each of these examples, the contractor could immediately submit a claim, or the government could issue a final decision.¹³ *See, e.g., Benjamin v United States*, 348 F.2d 502, 512 (Ct.Cl. 1965) (claim for defective government surplus property accrued upon delivery).

A few Court of Claims and COFC decisions have held that a claim does not accrue until ascertainable damages have been suffered. *See, e.g., Terteling v United States*, 334 F.2d 250, 254 (Ct.Cl. 1964); *Shermco v United States*, 6 Cl.Ct. 588, 591 (1984). However, this rule is questionable under modern CDA jurisprudence. First a contractor is entitled to estimate the amount of its costs, and need not wait until claimed costs are incurred before filing a claim. Second, under the 1992 amendments to the Tucker Act, a contractor or the government may initiate a claim and file suit in the COFC to

have its rights under a contract determined without seeking monetary damages. 28 U.S.C. Sec. 1491(a)(2). Thus, actual incurred damages would no longer appear to be an element of most contract claims under the CDA and, consequently, a claim can “accrue” *before damages are incurred*.

A more difficult question is whether a claim can accrue *before it is known* to the injured party. The draft FAR regulation attempts to address this issue by adopting a “knew or should have known” test of accrual for contractor claims. This test, however, does not comport with prevailing law in the Federal Circuit.

Some cases have added a test of whether the claimant “knew or should have known” of its claim in determining the time of accrual. See, e.g., *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988); *Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988). Nonetheless, the prevailing rule is that the claim “accrues” when the underlying events occur, regardless of knowledge, but the limitations period can be tolled under certain circumstances. There is no longer any doubt that equitable tolling is available in suits against the United States, *Irwin v. Department of Veterans Affairs*, 489 U.S. 89, (1990), but the Court of Claims, the COFC, and the Federal Circuit have been very reluctant to apply the doctrine.

Again relying on *Japanese War Notes*, the Claims Court explained in *McDonnal v. United States*, 9 Cl.Ct. 629, 633 (1986), that a statute of limitations can be equitably tolled only if the defendant has concealed its action with the result that plaintiff was unaware of its existence, or if the plaintiff’s injury was “inherently unknowable” at the accrual date. Accord, *Alliance of Descendants of Texas Land Grants*, 37 F.3d at 1478; *Catawba Indian Tribe*, 982 F.2 at 1571.

In *Catellus Development Corp. v. United States*, 31 Fed.Cl. 399 (1994), the COFC explained:

This standard is objective; it does not matter what plaintiff’s subjective interpretation of the facts may have been. Plaintiff’s ignorance of a claim of which it should be aware is not enough to toll the statute.¹⁴

If the facts are available, failure to recognize a claim will not toll the statute. The law assumes that “the means of knowledge are the same thing in effect as knowledge itself.” *Mitchell v. United States*, 13 Cl.Ct. 474, 477 (1987). Nor do all of the facts need to be known. “Once plaintiff is on inquiry that it has a *potential* claim, the statute of limitations begins to run.”¹⁵ As the court in *Catellus Development* explained:

The fact that a plaintiff happens to be ignorant of a potential claim, whether because the plaintiff was not diligent in monitoring its land or because observing the taking would exact a hardship on plaintiff in terms of money, manpower, time and effort, is not enough to toll the statute. When a claim is inherently unknowable it does not mean that the claim is “somewhat difficult to discover,” or is “not entirely obvious.” That which is inherently unknowable is that which is unknowable by its very essence, i.e., its existence at the critical moment simply cannot be ascertained.¹⁶

In *Japanese War Notes*, the court used an example, often repeated in other cases, of a defendant who delivers a wrong kind of fruit tree to plaintiff, and the wrong cannot be determined until the tree bears fruit.¹⁷ It is the plaintiff’s burden to prove concealment or “inherent unknowability.”¹⁸

Other courts have reached the same result. In *3M Company v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994), the court rejected a “dis-

covery of violation" rule in considering a statute of limitations governing actions for civil penalties, holding that the difficulty the government experiences in detecting violations is irrelevant. The court recognized the policy reasons against such a rule, stating:

An agency's failure to detect violations, for whatever reasons, does not avoid the problems of faded memories, lost witnesses and discarded documents in penalty actions brought decades after alleged violations are finally discovered.¹⁹

The court also acknowledged the waste of time and resources that would result from a rule requiring hearings on the plaintiff's diligence in identifying its claim.

We seriously doubt that conducting administrative or judicial hearings to determine whether an agency's enforcement branch adequately lived up to its responsibilities would be a workable or sensible method of administering any statute of limitations.²⁰

Similarly, the Supreme Court in *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59, 65 (1953) held:

A cause of action is created when there is a breach of duty owed the plaintiff. It is that breach of duty, not its discovery, that normally is controlling.

Thus, the period for submitting a claim may be susceptible to tolling in certain instances, such as in latent defects cases when a defect cannot be discovered until the product is actually placed in service, or in claims based on superior knowledge, where the contractor could not know at the time that a problem in performance had previously been known to government and was not disclosed. *A critical issue that will need to be addressed by the courts is whether the limitations period will accrue prior to completion of a post-award or other audits by the government.* Considering these cases and the generous six-year period, accrual should not be tolled. The six-year

period is far more than enough for diligent auditors to complete their job and provide their results to a responsible government official. It should be expected that the Federal Circuit will not readily extend the six-year period imposed by FASA to cover these or other circumstances.²¹

It is also critical to recognize that the statute will not be tolled during negotiations between the contractor and the government. *Brighton Village Associates v. United States*, 31 Fed. Cl. 324, 333 (1994). Thus, even if a request for equitable adjustment has been submitted and is being discussed or audited, contractors must be vigilant in submitting a CDA claim within the six-year period.²²

The nature of statutes of limitations is that they result in the denial of meritorious claims. Courts often acknowledge that such a result is inherently unfair, but they consider it necessary to ensure prompt resolution of claims while evidence and memories are fresh. *See, e.g., McDonnal v. United States*, 9 Cl. Ct. at 634 (quoting *Braude v. United States*, 585 F.2d 1049, 1054 (Ct. Cl. 1978)). To avoid being victimized, contractors and government contracting personnel will have to be vigilant in identifying and pursuing potential contract claims.

THE EFFECT OF THE DAWCO 'IN DISPUTE' REQUIREMENT

The time of accrual of CDA claims is significantly clouded by the Federal Circuit's decision in *Dawco Constr. Co. v. United States*, 930 F.2d 872 (Fed. Cir. 1991). In *Dawco*, the court held that a contractor could not submit a claim to the contracting officer under the CDA until the matter involved was actually "in dispute," that is, until the government had indicated an unwillingness to meet the contractor's demand and negotiations were at an impasse. The *Dawco* decision and its progeny, such as *Santa Fe Engineers v. Garrett*, 991 F.2d 1579 (Fed. Cir. 1993),

establish that a contractor has no right to submit a claim until there is a dispute.

It is well established that accrual of claims and suits against the government requires not only accrual of the cause of action, but also that the plaintiff have a right to institute and maintain a suit in court, or in this case, to file and pursue a claim with the contracting officer. *Crown Coat Front Co. v. United States*, 386 U.S. 503, 510-11 (1947); *Ortiz v. Secretary of Defense*, ___ F.3d ___, 1994 LW 675278 (D.C. Cir., December 6, 1994); *Spannaus v. Dep't of Justice*, 824 F.2d 52, 56-57 (D.C. Cir. 1987).

This rule is typically applied where there is a requirement to exhaust administrative remedies. In *Crown Coat Front*, for example, the Supreme Court held that, because resort to the disputes process was mandatory for claims arising under a contract, the statute of limitations on a suit in the Court of Claims under the Tucker Act did not begin to run until the board of contract appeals had ruled on the claim. If the administrative process is only *permissive*, however, the statute begins to run *immediately*, notwithstanding any administrative proceedings. *P.B. Dirtmovers, Inc. v. United States*, 30 Fed. Cl. 474, 476-77 (1994).

Since *Dawco* holds that a dispute is a prerequisite to a claim, the result of *Dawco* must be that a contractor claim does not accrue until the subject matter of the claim is in dispute. Of course, this unintended result vitiates the very purpose of section 2351(a) of FASA. If the Federal Circuit continues to follow *Dawco*, then there is, in effect, *no limitation* on contractor claims.²³ There will continue to be, in general, no limitation on the time for submitting a request for equitable adjustment or other request for relief, and no limit on the time for the government to audit and "dispute" the request. By designating the time of "dispute" as the trigger, the *Dawco* decision means that a claim will

continue to be timely many years after the events giving rise to the claim occurred.

The draft FAR regulation ignores this issue by purporting to impose on contractors a duty to submit claims within six years of when they knew or should have known of the claim. Attempting to redefine "accrual" in a manner inconsistent with well established legal principles cannot be valid, however, and creates an untenable situation in which contractors would be required to submit a claim at a time when, under *Dawco*, they have no right to submit a claim. Notably, the regulation writers did not attempt to impose this obligation on the government, but continued to use "accrual" as the test for government claims.

In any event, it is unclear whether the government stands to benefit from the *Dawco* rule. The CDA itself does not define the term "claim." Instead, the *Dawco* decision is premised on the definition of "claim" in FAR 33.201 and the standard Disputes clause, FAR 52.233-1. Since these definitions apply to both government claims and contractor claims, the same "in dispute" requirement would logically be a prerequisite to both. The Federal Circuit appears to have accepted this result in *Sharman Co. v. United States*, 2 F.3d 1564, 1571 (Fed. Cir. 1993), but has never explicitly held that a dispute is a jurisdictional prerequisite to a government claim.

Nevertheless, an agency may not rely on a procedure it has created by regulation to toll a statute of limitations. *United States v. Commodities Export Co.*, 972 F.2d 1266 (Fed. Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1256 (1993). In *Commodities Export*, the Customs Service had adopted a regulation requiring that it give notice of a demand for payment under a customs bond prior to initiating suit. The Service argued that compliance with this provision was mandatory and that the applicable limitations period did not begin to run until this notice requirement

was met. The Federal Circuit rejected this argument and held that the limitations period had expired:

The trial court erred in postponing commencement of the limitations period until after Customs complied with its own regulations. While Customs' self-imposed internal procedures may constrain its right to sue, a question we do not decide here, they cannot change the defendants' right to repose after the statutory six-year period. Customs' internal procedures are a unilateral effort to settle the dispute without resort to legal action. This court cannot, however, permit a single party to postpone unilaterally and indefinitely the running of the statute of limitations.²⁴

Extending the *Dawco* decision to government claims would negate entirely the limitations period imposed by FASA. Contracting officers could sit on matters for as long as they chose before issuing notices or demands to the contractor. Arguably, only after contractors "disputed" these demands would the six-year period begin to run.

These same concerns also led the Fifth Circuit to reject tolling of the statute of limitations governing suits for penalties under the Export Administration Act to allow for completion of agency administrative proceedings. In *United States v. Core Laboratories, Inc.*, 759 F.2d 480, 482-83 (5th Cir. 1985), the court held:

The progress of administrative proceedings is largely within the control of the Government...A limitations period that began to run only after the government concluded its administrative proceedings would thus amount in practice to little or none...The interpretation of Sec. 2462 advanced by the government is in derogation of the right to be free of stale claims, which

comes in time to prevail over the right to prosecute them.

The judicially created "in dispute" requirement enunciated in *Dawco* is not mandated by statute. In fact, it is inconsistent with Congress's intent to encourage negotiations and settlement *after* a claim is submitted that underlies the award of interest to the contractor. It arises only from government-imposed regulations and, under *Commodities Export*, the government should not be permitted to rely on its own regulation to "postpone unilaterally and indefinitely the running of the statute of limitations."

The proper regulatory solution to this problem is not to attempt to replace the statutory language "within six years after the accrual of the claim" with a different legal test. Indeed, the "knew or should have known" test in the draft regulation is completely unworkable, since it would require contractors to submit claims before they are "in dispute" and can legally be submitted under *Dawco*. rather, the answer is for the FAR Council and OFPP to address the cause of the problem by eliminating the "in dispute" requirement from the FAR definition of a claim. The government should use the opportunity presented by the FASA regulation process to redefine the term "claim" along the lines proposed by the American Bar Association Section of Public Contract Law and various trade associations. This change would permit section 2351 of FASA to operate as intended, and eliminate the litigation and confusion generated by the *Dawco* line of cases.

THE SCOPE OF THE FRAUD EXCEPTION

The limitations period established in section 6(a) of the CDA, as amended, "does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud." In all likelihood, the government will argue that this exception

should be read broadly to exempt all fraud claims from operation of the statute. In reality, however, the exception is extremely narrow. Indeed, this provision, together with the decision in *Bath Iron Works Corp. v. United States*, 20 F.3d 1567 (Fed. Cir. 1994), may impose a severe limitation on government fraud claims relating to contracts.

Section 6(a) of the CDA, as amended by FASA, imposes a six-year limitations period on *all* claims against a contractor "relating to a contract," and requires that all such claims be the subject of a final decision.

The government has long maintained, relying on the last two sentences of section 6(a),²⁵ that all fraud claims are excluded from the CDA. However, such a broad exclusion is not found in the statute. Instead, the second-to-last sentence of section 6(a) excludes only claims or disputes for *penalties or forfeitures* assigned by law to another agency. This sentence does not purport to exclude *damages* suits based on fraud from the CDA.

The last sentence of section 6(a) merely prohibits the *agency head* from settling or paying a claim involving fraud. The *Bath* decision establishes that this provision does not exclude a claim involving fraud from the CDA, does not preclude a contracting officer from deciding and denying such a claim, and does not bar a suit on the denied claim in the COFC.

Bath addressed 10 U.S.C. Sec. 2405—the 18-month limitations period for claims under shipbuilding contracts. Like section 6(a) of the CDA, that statute barred the agency head from settling certain claims, but did not bar suit on the claim or implicate the court's Tucker Act jurisdiction. The Federal Circuit held that section 2405 is not applicable to the courts and does not preclude suit on the claim. Instead, the provision merely bars the agency from settling or paying the claim from agency funds.

The *Bath* court also rejected the argument that the inability to *grant* a claim necessarily results in an inability to *deny* a claim:

The government's argument is fundamentally flawed because it equates the CO's authority to render a final *decision* with the authority to grant relief. The fact that the CO was statutorily required to deny the untimely claim does not mean that the CO did not make a decision. It merely means he made a negative decision denying the claim. We note that the government cites no authority whatsoever supporting its assertion that in order to constitute a "decision" under the CDA, the CO must have authority to *grant* a claim. Nor are we aware of any case authority that so holds. Certainly, nothing in the CDA or the FAR so provides, or even suggests. Nor has the government explained why such a requirement would implement the purpose of the CDA section.²⁶

The last sentence of section 6(a) is indistinguishable from the statute at issue in *Bath*. It does not bar consideration of an allegedly fraudulent claim, nor does it bar a decision denying that claim. If the claim is denied, or if it is deemed denied as a result of the contracting officer's refusal to issue a final decision, the contractor is free to file suit in court.

When these fraud exceptions are thus construed properly, it becomes clear that the new limitations period applies to *all* claims relating to a contract, except to: (1) those for fines and penalties, and (2) those excluded by the new fraud exception of FASA.

The exception to the limitations period must be read in the context of section 6(a). Section 6(a) uses the term "claim" multiple times, each time referring to a CDA claim. Read in this context, the exception provides that the six-year limitations period does not apply to a *CDA claim by the government* that

is based on a CDA claim by the contractor involving fraud. Thus, only a claim by the government that the contractor has submitted a certified (if over \$100,000) claim to the contracting officer involving fraud would be exempt. Government claims based on fraudulent invoices, proposals, requests for equitable adjustment or overhead submissions, or on "intentional" defective pricing, would still be subject to the six-year limitations period.

In all likelihood, claims under statutes such as the False Claims Act, 31 U.S.C. Secs. 3729-3731, are claims, at least in part, for penalties or forfeitures assigned by law to the Attorney General, and are exempt from the CDA. Most other fraud claims "relating to a contract" should be subject to the CDA disputes process and to the six-year limitations period of section 6(a) of the Act.

Of course, the potentially longer period for filing False Claims Act suits relating to contracts raises the specter that the statute will be misused to revive claims on which the CDA limitations period has expired. The government, for example, may attempt or threaten to bring a False Claims Act suit on a defective pricing dispute in order to avoid the six-year time bar. Hopefully, courts will view such efforts with skepticism and will impose sanctions where such tactics are employed without a proper foundation in fact.

SHIPBUILDING CLAIMS

Since 1983, shipbuilding contracts have been subject to a special time limit on submission of claims, requests for equitable adjustment, or other demands for payment. Under 10 U.S.C. Sec. 2405, all such claims, requests, or demands must be properly certified and submitted within 18 months of the events giving rise to the claim.

For new contracts, section 2302 of FASA amends 10 U.S.C. Sec. 2405 to extend this period from 18 months to six years. It is important to recognize, however, that while the new time period is the same as the new

CDA limitations period, the calculation is completely different. Whereas the six-year CDA period runs from "accrual" of the claim, section 2405 continues to run from the occurrence of the "events giving rise to the claim." There is no requirement for a prior dispute and no requirement that the claim be known or damages incurred. Rather, once the events on which the claim, request or demand is based occur, the six-year period begins to run.

It is also important to realize that this new, lengthened period applies only to claims under contracts entered into on or after October 13, 1994. For shipbuilding contracts entered into between December 7, 1983 and October 12, 1994, the 18-month time limit still applies. Moreover, under FASA *shipbuilders lose the opportunity to correct a defective certification*. In 1992, 10 U.S.C. Sec. 2405(c) was added to provide shipbuilders an opportunity to recertify and resubmit a claim after the 18-month period if the original claim was defective because it had been certified by the wrong person. Section 2302(b) of FASA limits the application of this provision to claims submitted prior to October 13, 1994.

In sum, the following rules now apply to shipbuilding claims:

(1) For shipbuilding contracts entered into after December 7, 1983 and before October 13, 1994, claims, requests for equitable adjustments, and other demands for payment must be submitted within 18 months of the events giving rise to the claim. This 18-month limit will continue to apply to these contracts until completion, even for future claims. For claims under these existing contracts submitted before October 13, 1994, the contractor may correct some defective certifications. For new claims under existing contracts, however, the claim must be

submitted and properly certified within 18 months, and there will be no opportunity to correct a defective certification.

(2) For contracts entered in or on or after October 13, 1994, claims, requests for equitable adjustment, and other demands for payment must be submitted within six years of the occurrence of the events giving rise to the claim.

Any material implications 10 U.S.C. Sec. 2405 might have had, however, were largely nullified earlier this year by the *Bath* decision. In *Bath*, the Federal Circuit held that section 2405 is a limitation only on the power of the agency head to use appropriated funds to pay an untimely claim. Section 2405 does not limit the authority of the COFC to hear and to grant judgment on a shipbuilding claim submitted after the expiration of the section 2405 time period. FASA does not alter the operative terms of section 2405 or the result in *Bath*. Consequently, shipbuilding contractors will continue to have the right to bring suit in the COFC notwithstanding section 2405.

For future shipbuilding contracts, in which six-year periods will be applied under both 10 U.S.C. Sec. 2405 and section 6(a) of the CDA, the *Bath* decision will remain significant because of the different method of calculation. That is, if claims "accrue" under section 6(a) at a point in time after the events giving rise to the claim have occurred, contractors will continue to be able to sue on claims in the COFC that may be barred from administrative settlement under section 2405.

Pursuant to section 2302(a) of FASA, all of these changes regarding shipbuilding claims became effective on October 13, 1994. While an implementing regulation has yet to be issued, the new limits and the elimination of the opportunity to resubmit defective certifications are already in effect. According to

administration officials involved in the FASA regulatory implementation effort, the regulation implementing section 2302(a) will not be issued as part of the FASA implementation effort but rather will be handled separately, either as an amendment to the DOD FAR Supplement or the Navy FAR supplement.

DOD CERTIFICATION

Under 10 U.S.C. Sec. 2410 claims, requests for equitable adjustment, and requests for extraordinary relief under Pub. Law 85-804 in excess of \$100,000 on DOD contracts must be certified by a senior official of the contractor at the time of submission. The identification of the proper official to sign the certification has in the past caused great confusion and, in 1992, Congress enacted a new section 2410e, which required regulations providing that such claims and requests in excess of \$100,000 be accompanied by a CDA certification, executed by an authorized person with knowledge of the claim, the basis for the claim, and the supporting data. Section 2410 was repealed upon promulgation of the regulations under section 2410e. The section 2410e regulations were published on May 13, 1993, effective April 30, 1993. 58 F.R. 28458 (May 13, 1993). This amendment, however, left in place a dual, inconsistent requirement for certification of CDA claims pursuant to section 6(a) of the CDA, and all claims under DOD contracts pursuant to the section 2410e regulations.

FASA has eliminated the conflict. Section 2301 of FASA repeals 10 U.S.C. Sec. 2410e and adds a new 10 U.S.C. Sec. 2410 which entirely eliminates the separate DOD certification for CDA claims. For requests for equitable adjustment and Pub. Law 85-804 relief in excess of the simplified acquisition threshold (now \$100,000, under FASA), a person "authorized to certify the request on behalf of the contractor" must certify that:

- (1) the request is made in good faith, and
- (2) the supporting data are accurate and complete to the best of the person's knowledge and belief.

The requirement that the certifying official be "knowledgeable" concerning the claim has been eliminated, and certifications with respect to contract claims will be required and governed solely by the CDA.

Section 2301 of FASA does not contain a specific effective date, and it is not identified as immediately effective in section 10001(c) of FASA—the statute's general "effective date" provision. Thus, while there would seem to be no need for regulations to implement these straightforward changes, the changes may not be effective until final regulations are promulgated, or until October 1, 1995. Hopefully, the regulation writers will implement the plain intent of Congress to clear up the confusion regarding claim certification, and will make these changes effective immediately or retroactive to October 13, 1994, for all contracts and claims.²⁷

EFFECTIVE DATES

As discussed above, section 2302 of FASA relating to shipbuilding claims became effective October 13, 1994 upon enactment of FASA. With respect to sections 2351 and 2301, however, the statute is ambiguous regarding the effective date, retroactive effect, and application to existing contracts.

Section 10001 of FASA apparently was intended to create a process in which the statute itself would become effective immediately, but most of its specific provisions would become effective, and would be applied to existing contracts, at the time and in the manner specified in the implementing regulations, but in any event no later than October 1, 1995. The regulations are to be issued and become final within 330 days (September 8, 1995). As explained in the Conference Report on FASA:

The Senate bill contained a provision (sec. 10001) that would provide that the Act would take effect on the date of enactment, except as otherwise provided in the Act. Under the Senate provision, amendments made by the Act would take effect on the date on which final implementing regulations are prescribed.

The House amendment contained a similar provision:

The House recedes with an amendment that would make clarifying changes and provide that the amendments made by the Act would take effect on the date provided in final implementing regulations or October 1, 1995, whichever is earlier.²⁸

This approach is supported further by the savings provisions in section 10002(f) of FASA, which provide that nothing in the Act shall be construed to affect the validity of any act prior to the date specified in the regulations, and that the laws amended by the Act shall continue to be applied as before FASA until the date specified in the regulations, or October 1, 1995.

Confusion arises, however, because section 10001 of FASA does not correspond to the description in the Conference Report. Section 10001(a) not only makes the Act effective immediately, but also states that "this Act *and the amendments made by this Act* shall take effect on the date of enactment of this Act." [Emphasis added.]

It is impossible to reconcile section 10001(a) with sections 10001(b) and 10002(f). Section 10001(a) makes all the amendments immediately effective, while the latter provisions make them effective as specified in the implementing regulations. To enforce one provision is to read the others out of the statute. Furthermore, due process concerns may be implicated to the extent that immediate application would bar existing

claims without adequate notice or an opportunity to bring the action after enactment of the statute. *Compare, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991); *American Trucking Assoc., Inc. v. Smith*, 496 U.S. 167 (1990); and *Lewis v. Long Grove Trading Co.*, 13 F.3d 1028 (7th Cir. 1994).²⁹

The effective dates applicable to FASA eventually will require judicial resolution. The new statute of limitations on contract claims is a likely vehicle for such a decision. Until this issue is resolved, contractors may legitimately argue that government claims more than six years old—in particular, defective pricing claims—are now time-barred.

CONCLUSION

FASA's new six-year limitations period on contract claims could, if properly implemented, result in more timely and efficient resolution of contract disputes. Unfortunately, however, the more likely scenario over the next few years will be pointless litigation over procedural issues, and unsuspecting contractors caught in unforeseeable traps—in other words, another quagmire on a scale equal to those resulting from the decisions in *Dawco*, *United States v. Grumman Aerospace Corp.*, 927 F.2d 575 (Fed. Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 330 (1991), and *Overall Roofing & Constr., Inc. v. United States*, 929 F.2d 687 (Fed. Cir. 1991).

Much of the problem could be resolved by carefully crafted and evenhanded regulations. Such regulations should provide, at a minimum:

- that a claim “accrues” on the date on which all elements necessary to the claim have occurred;
- that the limitations period will be tolled during period in which the claimant is unaware of the existence of the claim because (1) the facts essential to provide notice of the potential claim have been concealed by the defendant, or (2) the facts

essential to provide notice of the potential claim are inherently unknowable;

- that a contractor claim is “submitted” when delivered to the contracting officer or his or her authorized representative; that a government claim is “submitted” when a final decision is delivered to the contractor;
- that if the final day falls on a Saturday, Sunday or government holiday, a claim is timely if submitted on the following business day;
- a specified date, no later than October 1, 1995, on which the limitations period is effective for all claims under existing contracts, that is, that claims that are more than six years old on the specified date are time-barred. Adequate advance notice of this date should be provided as soon as possible;
- that provisions apply equally to both the government and contractors, to the maximum extent possible;
- a new definition of “claim” that eliminates the requirement that the matter be “disputed” before there can be a claim.

To implement this limitation effectively, the last item above is essential. So long as the *Dawco* rule exists, the time of accrual, at least for contractor claims, will be unrelated to the timing of the underlying events and will be totally within the control of the parties. *In other words, there will be no meaningful “statute of limitations” on claims.* Indeed, the inability to implement this provision effectively within the current structure demonstrates the inconsistency of the “in dispute” requirement with the congressionally contemplated CDA process.

Contractors can and should protect themselves immediately by establishing systems to identify potential claims. The necessary documentation should be gathered promptly to determine the earliest possible date on which the claim might be said to have accrued. A tickler system should then be established to ensure that the claim is timely filed.

The process of preparing and submitting a request for equitable adjustment and conducting negotiations should begin early enough so that a settlement can be achieved or an impasse can be reached in time to permit the filing of a claim with six years without running afoul of the *Dawco* decision. Until the intricacies of the limitations period have been explicated by the Federal Circuit, contractors should be very conservative in estimating when claims are due, and should not assume that the *Dawco* "in dispute" requirement will be effective in delaying accrual of the claim.

Since the effective date of the provision and the application to claims under existing contracts are still uncertain, contractors also should examine closely all of their programs to identify claims that today may be nearly or more than six years old. The cautious approach would be to submit such claims immediately, regardless of whether the matter is "in dispute." If a claim is dismissed by a board or a court as premature, presumably it cannot be held to have already accrued. Special attention should be paid to matters on which requests for equitable adjustment are already pending, and to matters such as CAS controversies which may have been simmering for several years without action. Remember that, depending on the effect of *Dawco*, the existence of a request for equitable adjustment or long-running negotiations may not avoid the six-year limitations period if a formal claim has not yet been submitted.

Finally, contractors should examine carefully all claims made by the government—in particular, defective pricing claims—to determine whether the claim accrued more than six years ago. With respect to defective pricing claims, the dates of the certification, the final agreement on price, and the execution of the contract document should be identified as possible dates of accrual. The limitations period already may be a powerful weapon

against old claims, and should be asserted aggressively during negotiations and litigation. Indeed, the question of whether the statute became immediately effective on October 13, 1994, thus barring claims accruing prior to October 13, 1988, likely will be litigated.

With proper attention and recognition of the risks of delay, contractors should be able to avoid the inevitable traps, and turn this new provision into a powerful tool. Vigilance with respect to potential claims, prompt action, and care regarding deadlines are the keys.

ENDNOTES

- ¹ Contract Disputes Act of 1978, Section 6(a), 41 U.S.C. Section 605(a), as amended by section 2351 of the Federal Acquisition Streamlining Act of 1994, Pub. Law 103-355, 108 Stat. 3243 (1994) (amendment shown in italics).
- ² See also *Travelers Indemnity Co. v. United States*, 16 Cl.Ct. 142, 151-52 (1988).
- ³ Technically speaking, a "statute of limitations" is a time limit on the initiation of judicial, not administrative, proceedings. Nonetheless, for convenience, the term is applied commonly to administrative limitations, and will be used herein to refer to the new limit on submission of CDA claims created by FASA.
- ⁴ See *Pathman Constr. Co. v. United States*, 817 F.2d 1573 (Fed.Cir. 1987).
- ⁵ FASA, Section 2351(a)(2). Notwithstanding the reference to "paragraph (1)" in paragraph (2), the first paragraph of section 2351 is simply labeled "(a)." Apparently by oversight, there is no section 2351(a)(1).
- ⁶ 870 F.2d 637, 640 (Fed. Cir. 1989).
- ⁷ 26 Cl.Ct. 410 (1992).
- ⁸ These draft regulations are preliminary and may be changed prior to publication, or during the public comment period.
- ⁹ Draft amendments to FAR 33.206 (December 13, 1994).

¹⁰ Courts frequently have held that if a limitations period ends on a Saturday, Sunday or holiday, the suit is timely if filed on the next business day. See *Wood-Ivey Systems Corp. v. United States*, 4F.3d 961 (Fed. Cir. 1993) and cases cited therein. These cases are typically premised on Rule 6(a) of the Federal Rules of Civil Procedure or the comparable Rule 6(a) of the Rules of the Court of Federal Claims, which specifically addresses computation of time periods. There is no comparable rule governing submission of claims to a contracting officer, and the *Wood-Ivey* result may not apply to the submission of a claim under section 6(a) of the CDA. The regulation writers should address this issue specifically by providing in the regulation that if the government offices are closed on the day the limitations period expires, a claim will nonetheless be timely if submitted on the next business day.

¹¹ 373 F.2d at 358.

¹² 368 F.2d at 851.

¹³ As discussed below, however, this rule may be altered by the application of the *Dawco* rule.

¹⁴ 31 Fed. Cl. at 405.

¹⁵ 31 Fed. Cl. at 405 (quoting *Coastal Petroleum Co. v. United States*, 228 Ct. Cl. 864, 886 [1981]) *emphasis added*.

¹⁶ 31 Fed. Cl. at 407.

¹⁷ 373 F.2d at 359; *McDonnal v. United States*, 9 Cl. Ct. at 633.

¹⁸ *McDonnal v. United States*, 9 Cl. Ct. at 633.

¹⁹ 17 F.3d at 1461.

²⁰ 17 F.3d at 1461.

²¹ A number of cases involving Medicare Part B have held that the applicable limitations period does not begin to run until the audit is complete. These holdings, however, rest on the preliminary nature of the periodic pre-audit payments and the unique role of the audit in this program, and will not necessarily be applied to CDA claims.

²² As discussed below, however, this rule may be altered by the application of the *Dawco* rule.

²³ On December 5, 1994, the Federal Circuit granted en banc review, and withdrew the panel decision in *Reflectone, Inc. v. Kelso*, 34 F.3d 1031 (Fed. Cir. 1994). On December 29, 1994 the court issued a briefing order directing the parties to address, inter alia, whether *Dawco* was properly decided. See Fed. Contr. Rept., vol. 63, No. 1 at 22. Hopefully, the court will take this opportunity to overrule *Dawco* and eliminate the confusion that it has caused. The unworkability of the new CDA limitations period on claims only highlights the inconsistency between the "in dispute" requirement of *Dawco* and the disputes resolution process envisioned in the CDA.

²⁴ 972 F.2d at 1271 (footnote omitted).

²⁵ "The authority of this subsection shall not extend to a claim or dispute for penalties or for forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud." 41 U.S.C. Section 605(a).

²⁶ 20 F.3d at 1579.

²⁷ With respect to claims submitted before section 2301 is effective, the *Bath* decision casts considerable doubt over whether the DOD certification limits the right of the contractor to bring suit and obtain judgment in the COFC. While sections 2410 and 2410e prohibit "payment" of uncertified claims, section 2405, which is addressed in *Bath*, is more specifically addressed to the authority of the Secretary of the military department to pay a claim. Much of the rationale of *Bath*, however, is equally applicable to the DOD certification requirements. There is no indication that Congress, by enacting this requirement, intended to limit the power of the courts to decide claims under the CDA. By virtue of their inclusion in Title 10, sections 2410 and 2410e limit the use of DOD appropriated funds, but not the payment of judgments under 31 U.S.C. Sec. 1304. *Bath*, 20 F.3d at 1580-83. Of course, once section 2301 of FASA is effective, the issue is moot because section 2410 will no longer have any application to contract claims.

²⁸ Conference Report at 239.

²⁹ Retroactive application to existing claims should not be a problem if the regulations provide an adequate period for filing old claims that would otherwise be time-barred. See *Fust v. Armar-Store Laboratories, Inc.*, 736 F.2d 1098, 1100 (5th Cir. 1984).

NEW APPROACHES TO SECURITY FOR GOVERNMENT AND INDUSTRY



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[Editor's Note: Jeffrey Smith, a partner in the law firm of Arnold & Porter, was Chairman of the Joint Security Commission.]

INTRODUCTION

The end of the Cold War led to a reevaluation of many basic assumptions underlying our nation's defense and foreign policy.¹ One of these was the creation, in May 1993, of the Joint Security Commission by Secretary of Defense Les Aspin and Director of Central Intelligence (DCI) R. James Woolsey, to examine the security policies and practices in the defense and intelligence communities. The Commission released its final report, "Redefining Security," on February 28, 1994. Unlike most others, the Commission remained in place for several weeks as its recommendations were considered and adopted.

The Commission's recommendations, the majority of which are in the process of being adopted, were designed to streamline the security system in both government and industry. Many of these changes should have a significant impact on companies and individuals who perform classified work for the government. As such, the changes should be of interest to government contractors, their counsel and accountants.

The Commission was created because there was broad recognition that the existing security system was inefficient, costly and cumbersome. In Desert Storm, the government learned that some information was so highly classified that it could not reach commanders who needed it. In industry, vast amounts of money are spent on duplicative inspections and unnecessary security requirements. It was also clear that our security was

not as good as it should be—as was borne out by the arrest of Aldrich Ames and his wife on espionage charges.²

METHODOLOGY/OVERVIEW

Over a nine-month period, the Commission met with senior government officials, members of Congress, and representatives of industry and public interest groups.

The Commission's principal findings are:

- First, the current security system, which is rooted in the Cold War, must be changed. The government is spending far too much protecting against assumed threats for which there is almost no evidence (e.g., a Russian agent climbing over the fence at 2:00 in the morning), and not nearly enough on matters for which there is plenty of evidence (e.g., an employee who stuffs classified documents in his or her briefcase, walks out the front door, and sells them to our adversaries);
- Second, there is no effective method for evaluating the threat, getting it to those who need it, and developing appropriate countermeasures; and
- Third, the development of security policy is fragmented throughout the government. There is no central mechanism to develop security policy or oversee its implementation.

The Commission report recognized that the first responsibility of government is to provide security for its citizens. There are, of course, many aspects of that responsibility—including military strength, economic vitality and moral soundness. The Commission was asked to review one aspect of that security, namely, the policies and practices that protect

government information, facilities, and people. In a democracy, the people's security also depends on the health of the democracy itself. This, in turn, depends on careful maintenance of the balance between the right of the public to know and the government's need to keep some things secret. The Commission tried to strike the right balance.

The world has changed significantly in the last few years. These changes have profound implications for our society and our government. With the end of the Cold War, different issues compete for resources and attention. International economic competition, the environment, health care, AIDS, and narcotics trafficking have captured our attention.

In some respects, the military threat has waned but the world remains a very dangerous place. The Commission pointed out that the United States is the most important intelligence target in the world. Many countries—and many private organizations ranging from foreign corporations to terrorists and drug cartels—want our secrets. They want sensitive economic, technical, and commercial information. That information must be protected but with fewer dollars.

In the past, most security decisions have been based on assumptions about threats postulated on an all-knowing, highly competent enemy. Under this approach, we sought to avoid totally all security risks by maximizing our defenses and minimizing our vulnerabilities. Today's threats are more diffuse, and dynamic. There are some situations in which the consequences of security failures are so profound that exceptional protective measures are justified. But in most cases, the consequences are less severe. The Commission urged the adoption of a new philosophy, characterized as "risk management," to choose the level of protection necessary. The approach balances the risk of loss against the cost of countermeasures. It enables the

selection of security measures that provide adequate protection without excessive cost.

In its deliberations, the Commission was guided by four principles:

- First, our security policies and practices must match the threats we face. The system must be sufficiently flexible to facilitate change as the threat evolves.
- Second, our security policies and practices must be consistent and coherent, thereby reducing inefficiency, and enabling us to allocate scarce resources more effectively.
- Third, our system must ensure fair and equitable treatment of the individuals and companies upon whom we rely to protect the nation's security.
- Finally, the system must provide the needed security at a price the nation can afford.

RECOMMENDATIONS

The principal recommendations of the Commission are:

- First, much more must be done in the personnel security field. More attention must be paid to spotting employees who are, or may become, spies;
- Second, increased effort must be made to protecting our Information Management Systems. Our nation is increasingly dependent on information systems, but the interconnections that give us increased productivity also leave us vulnerable. Our government is only now beginning to understand the ramifications of this issue. Much more must be done;
- Third, a Security Executive Committee should be established, as a subcommittee of the National Security Council, to develop government-wide security standards, and to eliminate the current fragmentation of security policy development;
- Fourth, a new classification of information system is needed. There should be only two levels of classification: Secret and Secret Compartmented Access. This is a radical

simplification from the current system which has upwards of 12 different classification categories; and

- Fifth, a methodology must be developed to account for security costs. At the moment, no one knows how much we pay for security. It's very difficult to manage something that can't be measured.

With the exception of the recommendation to create a new classification system, all of the Commission's major recommendations were adopted.

Personnel Security

Let us now turn to the recommendations in more detail.

First, the Commission recommended that increased attention and resources be devoted to personnel security. Personnel security is the very heart of the government's security system. Safes, locks, fences and guards are useless if we cannot ensure the trustworthiness of those to whom we entrust our secrets. The Commission noted in its report that over the past twenty years, the most damage to national security has been caused by already cleared personnel who sell classified information to foreign governments.

The Commission believed that a number of improvements are possible to increase both the effectiveness and efficiency of our personnel security system. For example, additional information should be obtained prior to granting an initial clearance. It is very important that government investigators have access to financial information about applicants and employees. In that regard, the Commission urged Congress to support the recommendations of an earlier commission, the Jacobs Commission, that recommended specific legislation to provide the government with enhanced access to financial information.

The Commission also recommended that personnel security investigations be centralized and automated. The process currently used to clear individuals in the defense and

intelligence communities vary widely from agency to agency. Although it was not adopted, the Commission recommended the creation of a joint investigate service to conduct background investigations and periodic updates of personnel in the defense and intelligence community, both in government and industry.

As is widely known in industry, one of the great frustrations in the current system is that one organization will frequently not honor a clearance granted by another. For example, the Commission learned of a contractor who needed to reassign 170 employees to work a new contract for the Defense Intelligence Agency ("DIA"). Despite all of the clearances for these employees being on record in the intelligence community's data base, DIA required new personal history statements from each person and readjudicated each case. After six months, only 32 employees had been processed. In the meantime, the company could not perform the contract, the engineers had to be paid, the background investigations proceeded, and the taxpayers paid for it all.

While reinvestigations provide an important way to monitor the integrity of the workforce, Employee Assistance Programs, or "safety nets," are also needed to help ensure that personnel do not become counterintelligence risks after they obtain a clearance. Most American spies turned to espionage as a way to resolve a personal problem or crisis. A few convicted spies have stated that at the time they began spying, they were emotionally distraught and in need of counseling. Better education and training is needed so that supervisors and fellow employees can spot potential trouble. Although only a very small percentage of employees with personal problems become involved in espionage, the damage that can be caused by even one person with sensitive access illustrates the value of programs that help employees resolve

personal problems. The Commission supported those agencies that have established Employee Assistance Programs, and recommended that all agencies in the defense and intelligence communities ensure that similar programs or contractual services are available to employees, particularly those with access to sensitive information.

The Commission also proposed a number of recommendations to simplify and speed up the clearance process. The personnel security process has too many forms, too many delays and too many inconsistencies. Personnel security is needlessly complex, costly, and cumbersome. For example, there are over 45 different prescreening forms used in government and industry that request essentially the same information. The Commission recommended that a standard form be developed.

To ensure the reciprocity needed to facilitate personnel assignments, clearances must be based on a common set of adjudication standards. Also, using modern information technology, clearance status can be centrally verified, and economies of scale can be achieved by utilizing a common badge throughout the defense and intelligence communities. This would eliminate one of the greatest frustrations with the current system—clearance verification. The Commission received countless complaints about the enormous waste of time and money caused by the need for security officers to verify the clearances of visitors from outside their immediate organization who must attend a meeting or receive a document.

The Commission noted that homosexuality, *per se*, is not now a bar to a security clearance. The Commission urged that the non-discrimination guidelines recently issued by the Attorney General be the basis for government-wide standards.

The Commission struggled hard with the issue of polygraphs. In the end, the Commission recommended the continued use of the

polygraph by those defense and intelligence community organizations that currently use it, with some significant revisions in the way it is used to enhance oversight and minimize abuses.

The polygraph is not a perfect instrument; spies have passed it and innocent people have failed it. Too much reliance has been placed on it in the past. But the Commission reviewed much evidence that the polygraph also elicited information from applicants and employees that was not produced by other means. A typical example is an initial applicant who on his or her personal history form states that they used marijuana only briefly in college, then admits in the polygraph exam that they are an active cocaine user. Despite its reservations, the Commission concluded that on balance the polygraph should be retained—but with improved safeguards.

The Commission recognized that many people who will have access to the most highly classified information will not be required to take polygraph examinations, and so the polygraph must not serve as a bar to clearance reciprocity or the exchange of classified or sensitive information.

Information Systems Security

The second major area requiring increased attention and funding is information systems security. The proliferation of computers and the arrival of the National Information Infrastructure means that the security of information systems and networks is *the* major security challenge of the next century. The Commission was concerned that there is not sufficient awareness of the serious dangers that we face in this area. In addition to protecting information systems for military and diplomatic reasons, the nation must also protect those information systems that control the basic functions of the country's infrastructure, including the air traffic control system, power distribution and utilities, telephone system, stock exchanges, the

Federal Reserve monetary transfer system, credit and medical records, and a host of other services and activities. Never have this nation's information resources been more accessible or more vulnerable. This vulnerability applies not only to government information, but also to the information, technology and intellectual capital held by private citizens and institutions.

Increased connectivity is vital for our continued economic growth; we must master the Information Age. But this connectivity also creates greater vulnerability. Technology associated with information systems is evolving at a faster rate than information systems security technology. Our policies and procedures, developed for the isolated computer systems of the past, are no longer sufficient for the networked systems of today. Overcoming these gaps will require careful threat assessments, comprehensive investment strategies, skilled information systems security specialists, and sufficient funding for an R&D effort to develop cost effective solutions that will protect both classified and unclassified information systems.

A New Classification System

Third, the Commission recommended a radical new classification system that would greatly simplify the current system with its three primary levels, CONFIDENTIAL, SECRET and TOP SECRET, and a potential of nine different control systems. If one boils the current system down, there are, despite all the complexity, two levels: Ordinary classified information and compartmented information. Therefore, the Commission argued that there should be only two sets of procedures—one for general and one for compartmented information—rather than the myriad of rules that now exist. The Commission recommended that these two degrees of protection be denominated SECRET and SECRET COMPARTMENTED ACCESS.³

Threat Assessments and Risk Management

Fourth, the Commission recommended that security countermeasures be based upon accurate, timely threat assessments. Currently, such information is provided on an ad hoc basis. Reports are often late and overclassified. Many counterintelligence organizations do not routinely pass CI information to security organizations. Conversely, security officials rarely ask CI officials for threat information. The Commission recommended that there be a "one-stop-shop" where security officials could get up-to-date threat information. As noted below, such an organization has been created.

The Commission also recommended that, except for very limited applications based on specific threat information, technical security programs, such as the TEMPEST program, be reduced or completely eliminated for domestic applications. The Operations Security, or OPSEC, program should be integrated into the risk management analysis of security issues. It should not be an additional, duplicative program.

Nowhere will the payoff for improving our security policies, practices, and procedures be higher than in the industrial base supporting the defense and intelligence communities. The present system is complex, rigid, inconsistent, and often contradictory. Security requirements imposed on industry often exceed the requirements we impose on the government in protecting the very same information. There are far too many inspections of the same facility by different government security agencies applying different standards. For example, the government requires companies to account for each and every SECRET document they hold. Vast amounts of time and money are spent in frequent inspections tracing these documents. Yet no such requirement is levied on government facilities. That requirement should be lifted. Also, there should be fewer inspections

and those that are conducted should apply common standards.

These different requirements add unnecessary cost and confusion to the security process. The Commission found little reason to treat industry differently from government for security purposes. A partnership is needed between government and industry to achieve common security goals.

Cost Accounting

Fifth, the Commission also felt it essential to establish mechanisms that will allow us to trace security costs. Risk management means managers must know how much a given security measure costs. This is virtually impossible because today's accounting systems are not designed to collect those costs. The Commission believes that establishing a standardized system to capture security costs is urgently needed. We recommend the creation of a uniform cost accounting methodology and tracking system for security resources expended by the Defense Department, the intelligence community, and supporting industry. As noted below, this process is now underway.

The Security Executive/Security Policy Board

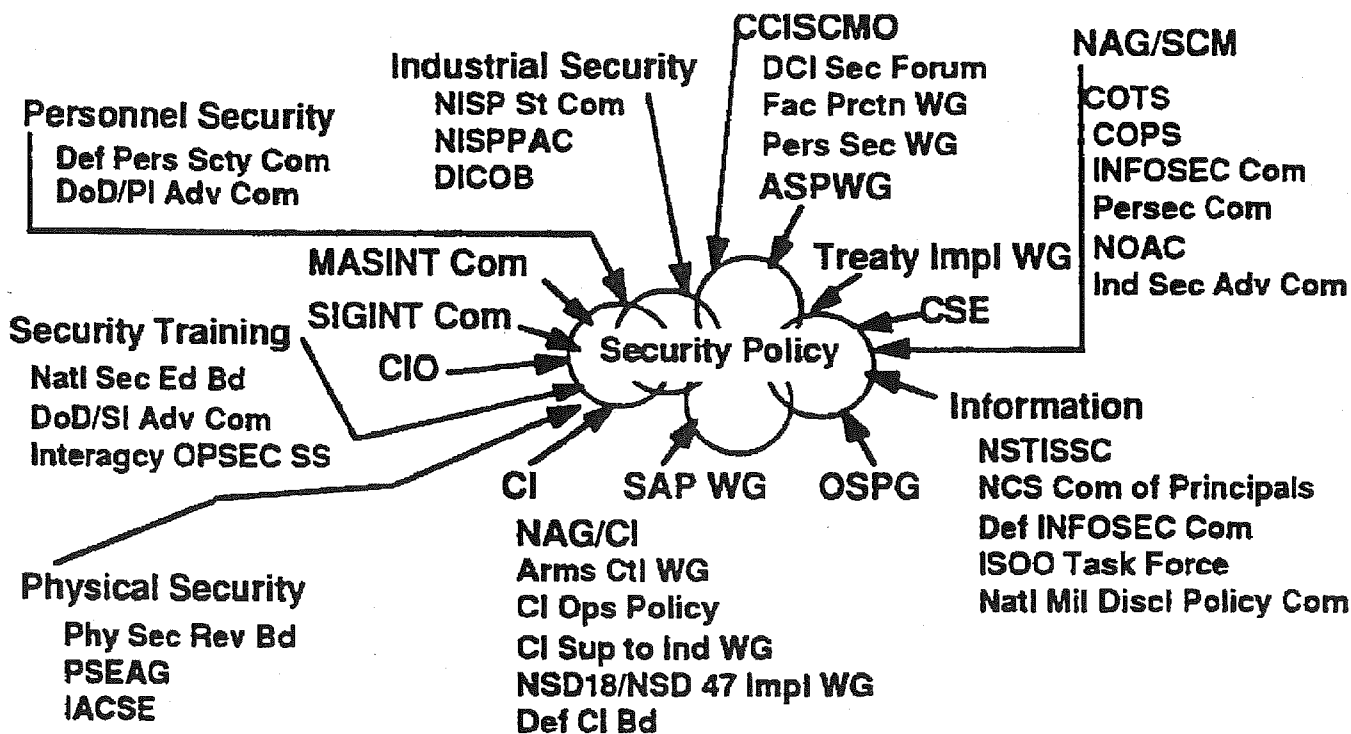
Sixth, but among the most important recommendations, is the formation of the Security Executive Committee.

As discussed earlier, current security policy formulation and execution is fragmented throughout the government. This fragmentation is probably the greatest single cause of confusion, waste, and inefficiency in the system. The chart in Figure 1 shows those agencies and committees that now contribute to security policy. This chart demonstrates the plethora of organizations that make, or attempt to make, security policy. The Commission strongly urged the creation of a Security Executive Committee, as a subcommittee of the National Security Council ("NSC"), to develop and coordinate security policy government-wide. The existing security policymaking committees shown on the chart should be either abolished or reconstituted as working groups of the Security Executive Committee.

Implementation

The report was presented to Secretary Perry and Director Woolsey on March 1, 1994. The Senate Select Committee on

FIGURE 1



Intelligence and the House Permanent Select Committee on Intelligence held hearings on the report and the Vice President was also personally briefed.

The initial implementation steps were taken by the Department of Defense and the Central Intelligence Agency. Secretary Perry and Director Woolsey established a "Joint Security Executive Committee," as recommended by the Commission, to oversee the development and implementation of security policy in the defense and intelligence communities and their contractors. The President, however, agreed with the recommendation of the Security Commission and, on September 16, 1994, established the Security Policy Board as a subcommittee of the NSC. The Joint Security Executive Committee, previously established by Defense and CIA, was absorbed into the Security Policy Board and its membership was expanded to include the Deputy Secretaries of State, Energy, Commerce, the Deputy Attorney General, the Deputy Director of the Office of Management and Budget, and one "nondefense related agency" on a rotational basis. The Board will be cochaired by the Deputy Secretary of Defense and the DCI. As recommended, most of the existing security policy bodies were either abolished or folded into the Security Policy Board structure.

The President also established, as recommended by the Joint Security Commission, the Security Policy Forum to assist the Security Policy Board. The Policy Forum, which will have representatives of all the agencies on the Board and certain other agencies, has been directed:

to consider security policy issues raised by its members or any means; develop security policy initiatives...evaluate the effectiveness of security policies; monitor and guide the implementation of security policies and oversee the application of security policies.

A common staff for both the U.S. Security Policy Board and the Forum is located at 1215 Jefferson Davis Highway, Suite 1101, Arlington, Virginia 22202. The Staff Director is Mr. Peter Saderholm and the phone number is 703-602-6997. Interested members of the public, including government contractors, are encouraged to contact the Security Policy Board staff with suggestions for improvement in security practices or to express concerns about the way in which the new procedures are being implemented. This is the first time that the government has established a central point to handle concerns from the public.

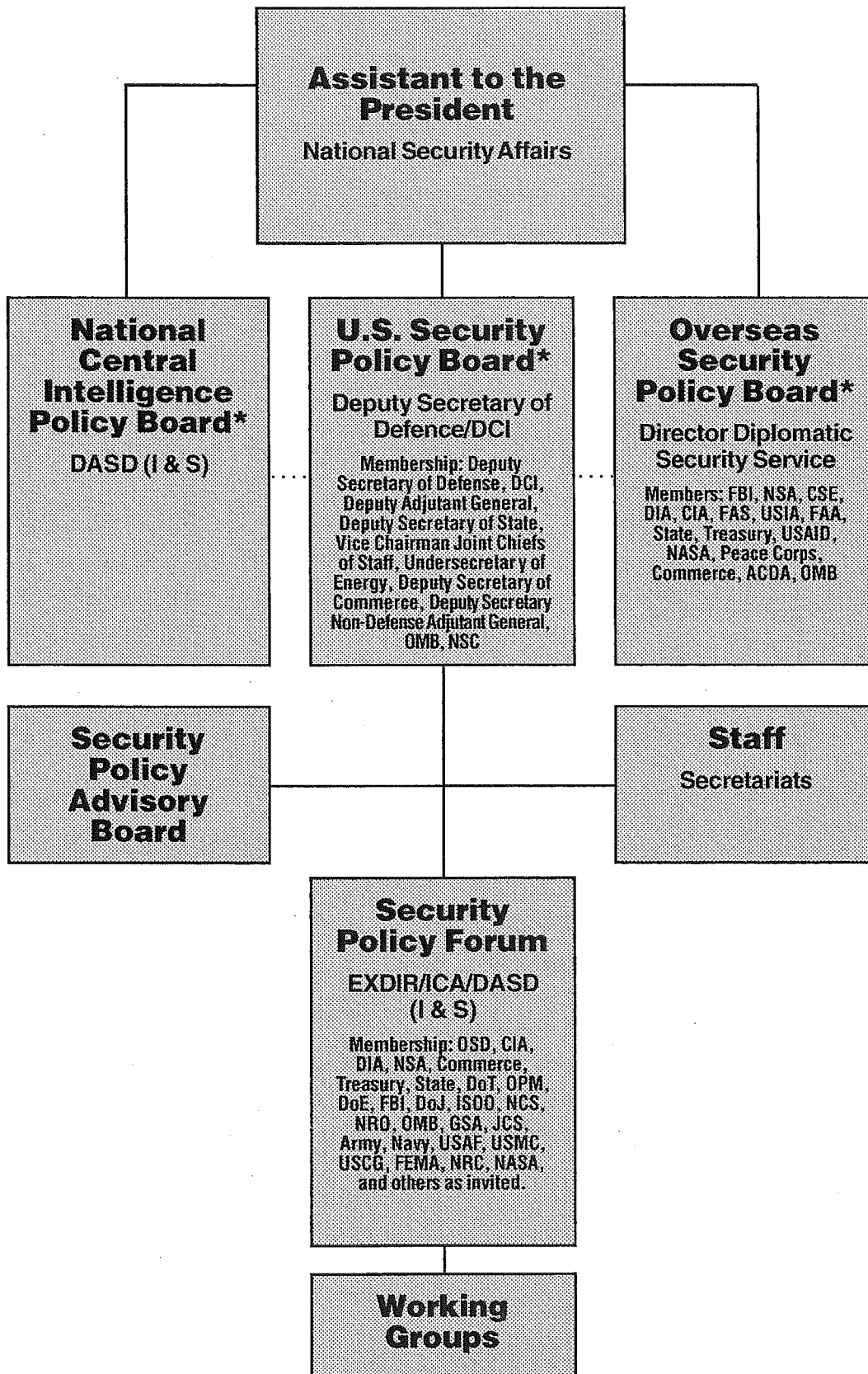
As recommended by the Commission, the Director of Central Intelligence has established, in his Counterintelligence Center, "one stop shopping" for information about possible threats. This information will be available to the government and, eventually, to industry.

Earlier in 1994, in response to criticism that the CIA and FBI had not adequately cooperated in investigations of espionage cases, such as the Ames case, the President established the National Counterintelligence Policy Board. This Board is principally concerned with coordination of counterintelligence *operations* and will remain in place. The President has directed that the Counterintelligence Policy Board coordinate with the Security Policy Board. Any disputes will be reported to and resolved by the Principals Committee of the National Security Council.

The President has also left intact the Overseas Security Policy Board, chaired by the Secretary of State, which is charged with coordinating security policies for the overseas operations of nondefense agencies, i.e., the Departments of State and Commerce, AID, CIA, FBI, etc. As with the National Counterintelligence Policy Board, the Overseas Security Policy Board is directed to coordinate with the Security Policy Board and disputes will be resolved by the Principals Committee.

U.S. SECURITY POLICY STRUCTURE

FIGURE 2



* UNRESOLVED CONFLICTS WILL BE REFERRED AS APPROPRIATE TO EITHER NSC PRINCIPALS OR THE DEPUTIES COMMITTEE

Finally, the President established a Security Policy Advisory Board which will consist of five members of the public appointed by the President for terms of up to three years. The purpose of the Advisory Board will be to provide a nongovernmental and public interest perspective on security policy. The Board will report annually to the President on the implementation of the new security policies. It will also be a forum that will be receptive to expressions of concern from the contracting community.

The resulting structure, which is vastly more streamlined than the previous organization, is reflected Figure 2.

CONCLUSION

As a result of the recommendations of the Joint Security Commission, the government currently has underway many major changes in security processes and procedures. It is hoped that these changes will lead to a sea change in the way security is viewed. The changes reflect a new approach, one in which security is customer oriented and service driven. Security should value problem prevention over problem resolution, and individual responsibility over external oversight.

CORCORAN

CONTINUED FROM PAGE 1

make the BCA system function to achieve the goals set by the Contract Disputes Act of providing and inexpensive, expeditious, and above all, a fair adjudicatory process. He pursued these goals in the same manner in which he approached each individual appeal on his docket—with diligence, attention to detail, and a strong commitment to justice.

Judge Corcoran's devotion to his profession transcended his day-to-day duties. He was involved in a number of bar associations, and served as president of the BCAJA in 1984. He was supportive of bar association

and continuing education activities undertaken by those who worked with and for him, believing that the pursuit of knowledge was a lifelong process and was to be encouraged. He believed in the law as a profession which demanded the highest of ethics, and he endeavored to meet those demands and to inspire others to do the same.

These changes should also make security more effective, while reducing costs and inefficiencies. It should make life much easier for both government and industry. But industry can help assure success by closely monitoring the implementation of the recommendations of the Joint Security Commission, and making their views known directly to the Security Policy Board staff. If all works well, the change should increase security, reduce costs for both industry and government, and eliminate many of the problems that are so frustrating to so many.

ENDNOTES

¹ See, e.g., James Schlesinger, "Quest for a Post-Cold War Foreign Policy," *72 Foreign Affairs* 17-28, 1993.

² In fact, Director Woolsey asked the Commission to review specific security policies and procedures at the CIA in the wake of the Ames case. The panel was advised by former Secretary of Defense Harold Brown, retired General Brent Scowcroft, and former Associate Deputy Director of the FBI for Investigations, Douglas Gow.

³ As noted, this recommendation was not accepted. As of this writing, President Clinton is considering a new Executive Order on classified information. Although the new Order reportedly makes many changes, it does not adopt this two level approach recommended by the Commission.

and continuing education activities undertaken by those who worked with and for him, believing that the pursuit of knowledge was a lifelong process and was to be encouraged. He believed in the law as a profession which demanded the highest of ethics, and he endeavored to meet those demands and to inspire others to do the same.

Judge Corcoran's dedication to public service began long before he joined the public contracts bar and continued after his retirement from the VABCA. He served as a pilot in the Army Air Corps during World War II and was awarded the Distinguished Flying Cross, Air Medal with three oak leaf clusters,

and the Distinguished Unit Citation. Released from active duty with the rank of captain, he remained in the Air Force Reserve where he earned the Legion of Merit.

Judge Corcoran received his B.S. degree in 1948 from the Georgetown University School of Foreign Service, and his J.D. from the Georgetown University School of Law in 1951. He was admitted to practice in the District of Columbia in 1952, and was subsequently admitted to the bars of the U.S. Supreme Court, the U.S. Court of Appeals for the Federal Circuit, the U.S. Court of Appeals for the District of Columbia Circuit, the U.S. Court of Federal Claims, the U.S. Court of Military Appeals, and the U.S. Court of Veterans Appeals.

Judge Corcoran's early career centered around service to American veterans. Except for a brief period from 1956 to 1958 when he was with the National Security Agency as an attorney adviser, he was associated with the American Legion's rehabilitation program, serving as Director of the Legion's Veterans Affairs and Rehabilitation Division from 1958 until 1969, when he was appointed General Counsel of the Veterans Administration, a position he held until his 1977 appointment to the VABCA.

Upon the leaving the VABCA, Judge Corcoran again brought his energies to bear in support of veterans' interests, joining the Disabled American Veterans on July 3, 1989 as counsel to the DAV's staff at the Board of Veterans Appeals. He had joined the DAV, however, at an historic point and he devoted the majority of his time there to establishing the DAV's new Court of Veterans Appeals

Office. That office opened, with Judge Corcoran as its senior counsel, on September 11, 1989. In that position, he represented veterans in some of the first cases to be heard by the new Court of Veterans Appeals. During his tenure at the DAV, Judge Corcoran also helped to establish a Veterans Appeals section in the Federal Circuit Bar Association and became the first chair of the section. Judge Corcoran left his full-time position with the DAV on December 31, 1990, but continued to advise the organization on a consultant basis for several years.

Judge Corcoran's distinguished history of public service and professional accomplishments only begin to describe the man. To recognize Judge Corcoran, one must also recognize his enduring devotion to his wife, the former Evelyn Dynan (Pat) Madden, and to their five children and numerous grandchildren, for to Judge Corcoran, family was at the center of life. One must also acknowledge his great loyalty and support to those who were privileged to be his friends, for he understood the value of friendship and was an honorable and true friend to many. Perhaps the best tribute to John Corcoran is to remember a favorite bit of advice which he offered from time to time, always with a smile and a look in his eye that conveyed both irony and sincerity, for he knew both how simple and difficult that advice would be to follow. That advice was, "Just do the right thing." Judge Corcoran did his best to live by his own advice. As a judge, as a lawyer, as a man—he endeavored always to do the right thing.

He will be missed.

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BCABA TRIAL PRACTICE MANUAL

John Nichols

MOTOROLA, INC.

Steven Porter commented in his interview in the Summer 1994 issue of *The Clause* that the BCABA “continue our education efforts, and expand those efforts whenever possible.” I heartily agree. This was one of the major goals of the Armed Services Trial Lawyers Association, the predecessor organization to the BCABA. Consistent with that theme, I suggest that the BCABA examine the need for developing a BCABA Trial Practice Manual to be used by practitioners before the BCAs.

In the mid-eighties, the Army Chief Trial Attorney’s Office began development of a Trial Attorney’s Practice Manual (TAPM). This manual was organized to cover the major areas of trial practice, providing Army trial attorneys with a ready reference to enable them to practice before the ASBCA more efficiently and effectively. It was intended to serve as a “road map” through the litigation process. Individual trial attorneys were assigned to write chapters of the TAPM, and subsequently to train other trial attorneys on the subject(s) covered in their chapter. In addition, the Chief Trial Attorney envisioned that these trial attorneys would have a continuing responsibility to update their assigned chapter. Each chapter explained the hows and whys of each practice area, provided illustrations, examples, and checklists. To facilitate changes in the TAPM, it was published in loose leaf format.

No doubt the other Chief Trial Attorneys may have considered and implemented similar manuals. Such a practice manual is particularly useful in offices where there is a high



turnover of attorneys, and consequently a continuous need to train new attorneys in the basics of BCA practice.

It would appear that a practice manual would be equally valuable for the private bar since new associates in law firms could benefit from its use. This would help make those law firms more productive and cost efficient because more experienced practitioners would not have to spend as much time educating associates on matters of basic practice.

The BCABA is well positioned to draft such a practice manual because its membership includes such a broad representation from the government, the private bar, industry and the BCA judiciary. There is little doubt that such a manual would contribute significantly to improving the quality, efficiency, and effectiveness of practice before the respective BCAs.

A suggested table of contents appears below:

Chapter	Subject
1	Introduction
2	Case Planning
3	Ethics
4	Briefs
5	Trial Book
6	Pleadings
7	Pretrial Motions
8	Marshalling Evidence
9	Discovery
10	Witnesses
11	Stipulations
12	Legal Research
13	Record Submissions
14	Trial
15	Settlements
16	Motions for Reconsideration
17	Quantum
18	Use of Paralegals
19	Use of Automation
20	Travel
21	Mega Cases
22	Overseas Cases

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Application for Membership

Annual Membership Dues: \$25. [Note: The information you provide in this section will be used for your listing in the BCA Bar Directory. Accordingly, neatness and accuracy count.]

SECTION I

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Dept./Suite/Apt. Street Address: _____

City/State/Zip _____

Work phone _____ :Fax: _____

SECTION II (THIS SECTION FOR COMPLETION BY NEW MEMBERS ONLY.)

I am applying for associate membership.

I am admitted to the practice of law and am in good standing before the highest court of the:

District of Columbia: _____ State(s) of: _____

Employment: Firm _____ Corp _____ Govt. _____ Judge _____ Other _____

SECTION III

Date: _____ Signature _____

FORWARD THIS APPLICATION WITH A CHECK FOR \$25 PAYABLE TO THE BCABAR ASSOCIATION TO THE TREASURER AT THE FOLLOWING ADDRESS:

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Department of Interior
Board of Contract Appeals
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Arlington, VA 22203