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THE TWELFTH ANNUAL GILBERT A. CUNEO LECTURE: THE ORIGINS AND DEVELOPMENT OF THE FEDERAL ACQUISITION STREAMLINING ACT*

THE HONORABLE JEFF BINGAMAN**

I. Introduction

General Gray, Colonel Graves, members of the faculty, and participants in the symposium, I am honored that The Judge Advocate General's School has asked me to present the Twelfth Annual Gilbert A. Cuneo Lecture. Gilbert Cuneo not only had a distinguished career as a procurement attorney in both the public and private sectors, he also actively promoted continuing legal education in the procurement field as a means of providing for continuous improvement in the law. This lecture was endowed in his name with the goal of furthering healthy cooperation between government and the private sector in the field of federal acquisition policy.

Today, I will address the origins and development of the Federal Acquisition Streamlining Act of 1994—legislation that embodies the spirit of the Cuneo Lecture by removing many of the barriers that have inhibited government-industry cooperation on acquisition policy matters. First, I will discuss the impact of the streamlining movement on the legislative process. Second, I will describe the activities that led to the establishment of the Advisory Panel on Streamlining and Codifying the Acquisition Laws—the "Section 800" Panel. Finally, I will discuss the events that resulted in the successful enactment of the Federal Acquisition Streamlining Act.

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*This article is based on a lecture delivered by Senator Jeff Bingaman to members of the Staff and Faculty and students attending the 1995 Government Contract Law Symposium on January 9, 1995, at The Judge Advocate General's School, United States Army, located in Charlottesville, Virginia. The Cuneo Lecture is named in memory of Gilbert A. Cuneo, who was an extensive commentator and premier litigator in the field of government contract law. Mr. Cuneo graduated from Harvard Law School in 1937 and entered the United States Army in 1942. He served as a government contract law instructor on the faculty of The Judge Advocate General's School, then located at the University of Michigan Law School, from 1944 to 1946. For the next twelve years, Mr. Cuneo was an administrative law judge with the War Department Board of Contract Appeals and its successor, the Armed Services Board of Contract Appeals. He entered the private practice of law in 1958 in Washington, D.C. During the next twenty years, Mr. Cuneo lectured and litigated extensively in all areas of government contract law, and was unanimously recognized as the dean of the government contract bar.

**United States Senate (D-N.M.).

II. The Impact of the Streamlining Movement

If you have not had the opportunity to read the first Cuneo Lecture by John E. Cavanagh—which was published in the May 1984 issue of *The* A m y *Lawyer*[1]—I urge you to do so. Mr. Cavanagh outlined the major changes that had taken place in the procurement process during the late 1970s and early 1980s, which reflected a growing adversarial relationship between the government and its contractors. Citing a report by the Defense Science Board, Mr. Cavanagh noted that increased regulatory requirements had established deterrents that prevented smaller companies from pursuing defense business. Those firms that chose to participate in government procurements experienced increased costs as a result of these requirements.

Unlike some critics who simply denounce government regulation, Mr. Cavanagh recognized that in a democracy that depends on the willingness of taxpayers to fund government procurements, some degree of regulation and oversight will always be necessary. What he advocated was a more careful review of acquisition procedures to remove or alter the regulations that unduly promoted adversarial relationships and that inhibited a more cooperative approach. As I will discuss in my remarks, nearly a decade would pass, however, before such a review was undertaken by an advisory panel established under legislation initiated by the Senate Armed Services Committee.

At first, Mr. Cavanagh's call for greater cooperation seemed like a lost cry in the woods. Although Congress was extremely generous in funding defense programs during the 1980s, that generosity was accompanied by an unprecedented level of scrutiny. Congressional involvement in defense procurements—which is our constitutional responsibility under the Constitution[2]—extended beyond concern about specific weapons systems and into detailed concern with the acquisition process. At times, it seemed that every publicized incident of fraud, waste, or abuse—real or perceived—was accompanied by a legislative fix.

While much of the attention was warranted and overdue, the cumulative impact of these intense efforts to regulate the acquisition process often was overlooked. Over time, those of us who followed defense procurement policy in Congress—particularly on the Armed Services Committee—studied with concern the issues raised

[1] John E. Cavanagh, *The First Gilbert A. Cuneo Lecture: The Adversarial Relationship in Government Contracting: Causes and Consequences,* ARMY LAW., May 1984, at 1.

[2] U.S. CONST. art. I, §§ 8, 9.

by Mr. Cavanagh and others about the adverse impact of overregulation on the health of the defense industrial and technology base.

III. Legislative Development of Acquisition Streamlining Initiatives

In 1987, at the beginning of the 100lst Congress, the Senate Armed Services Committee, under the leadership of Senator Sam Nunn, established a new subcommittee—the Subcommittee on Defense Industry and Technology—as the successor to the Acquisition Policy Subcommittee. The responsibilities of the new Subcommittee included oversight of the defense industrial base and the technology base, as well as defense acquisition policy. I was pleased to serve as the first chairman of the new Subcommittee. The Ranking Minority Member was Senator Phil Gramm of Texas—who you no doubt will be hearing more of in the next year!

In 1987, we conducted a comprehensive review of defense acquisition policy, during which we received testimony from leading government officials, the defense industry, academic experts, and the oversight community.[3] In our report accompanying the National Defense Authorization Act for Fiscal Years 1988 and 1989, we took note of evidence "suggesting that the procurement system is suffering from regulatory overload as a result of the number and scope of recent regulatory and legislative changes."[4] We also noted that while the individual actions "may well have been taken in a good-faith effort to address a specific acquisition policy problem, . . . in combination these actions may produce a serious adverse impact on innovation and risk taking."[5] Our report called on the Department of Defense (DOD) "to identify promptly any statutory provisions that have a negative impact on innovation."[6]

In addition to seeking DOD proposals, the Subcommittee established an Industry Advisory Group in August 1987, consisting of thirteen senior defense industry officials, led by John Rittenhouse, Senior Vice President of General Electric's RCA Aerospace and Defense Group. The Advisory Group, which was asked "to identify those aspects of the acquisition process that stifle innovation, drain good talent away from defense industries, and threaten our techno-

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[3] *See Department of Defense Authorization for Appropriations for Fiscal Years 1988 and 1989: Hearings on S. 1174 Before the Subcomm. on Defense Industry and Technology of the Senate Comm. on Armed Services*, 100th Cong., 1st Sess., pt. 7. at 3370-574 (1987).

[4] S. REP. No. 57, 100th Cong., 1st *Sess.* 13 (1987).

[5] *Id.* at 14.

[6] *Id.*

logical and industrial lead,"[7] produced twenty issue papers, focussing primarily on ways to streamline and simplify the acquisition process.[8] On February 5, 1988, the Subcommittee released the Advisory Committee's Report, along with illustrative legislative language, in an effort to stimulate broad discussion of these issues during the Committee's 1988 oversight hearings.[9]

Although we were hopeful that our activities would encourage the DOD to submit a comprehensive streamlining proposal, the DOD proposed changes in only five statutes as part of its 1988 legislative package.[10] In testimony before the Subcommittee, the Under Secretary of Defense for Acquisition, Robert Costello, acknowledged his frustration in attempting to develop an acquisition reform agenda, and described the DOD's legislative proposals as "pablum."[11]

In our report on the National Defense Authorization Act for Fiscal Year 1989, the Armed Services Committee identified several themes underscoring the need for acquisition streamlining:

> [T]he acquisition process is beset by cumbersome and contradictory policies that act as a disincentive to innovation and produce delay in fielding new weapons systems.
>
> [T]o achieve significant savings in defense expenditures, the DOD must focus its attention on costs, which . . . will require a rigorous review of nonvalue added regulations and acquisition practices.
>
> [G]overnment and industry must work together to foster a sense of trust and confidence in an environment that establishes clear lines of responsibility and firm procedures for accountability.
>
> [A]cquisition changes often have been justified in terms of addressing isolated elements of procurement policy without regard to the system-wide impact of such changes.
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> [T]he acquisition system is suffering from regulatory overload as a result of the demanding task of implementing numerous legislative and internal changes in recent years. As a consequence, managers must spend excessive time

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[7] *See* S. REP. No. 326, 100th Cong., 2d Sess. 12 (1987) [hereinafter S. REP. No. 326].

[8] The Industry Advisory Group's Report is reprinted in *Department of Defense Authorization for Appropriations for Fiscal Year 1989: Hearings on S. 2355 Before the Subcomm. on Defense Industry and Technology of the Senate Comm. on Armed Services*, 100th Cong., 2d Sess., pt. 7, at 661-729 (1988).

[9] *See id.* at 659. The Subcommittee's hearings on the issues raised by the Industry Advisory Group are set forth in *id.* at 301-630.

[10] *See id.* at 341.

[11] *Id.*

revising and disseminating procedural changes, to the detriment of their ability to manage their programs.[12]

The Committee expressly noted its disappointment that the DOD had not responded to the Committee's repeated encouragement to submit legislation that would "reduce the complexity of the acquisition system."[13] As a result, the Committee initiated legislation, which ultimately was enacted into law, requiring the Under Secretary of Defense for Acquisition to prepare a report on the simplification and streamlining of acquisition procedures, including identification of statutory impediments to timely fielding of new systems, innovation, and cost-effectiveness.[14]

Despite this invitation to submit a comprehensive reform proposal, the DOD produced a report which the Armed Services Committee subsequently described as "insubstantial and incomplete."[15] The report recommended only twelve statutory changes, failed to set forth specific legislative proposals, and provided virtually no justification or supporting analysis for the proposed changes. The report's deficiencies meant that it could not provide an adequate basis for legislative changes, particularly in light of the skepticism about acquisition simplification that accompanied the revelations of fraud accompanying the "Ill Wind" procurement scandal.

The Committee was encouraged by the emphasis on acquisition reform promised by the Defense Management Review (DMR) initiated by Secretary of Defense Dick Cheney in 1989, but expressed concern that "the proposals therein, like those of the Packard Commission, consist primarily of broad principles which can be furthered—or frustrated—in the implementation process."[16]

Events over the next year increased the Committee's frustration over the DOD's unwillingness to take the initiative in developing a comprehensive acquisition reform package. The Ill Wind scandal had resulted in legislation that added to the complexity of the acquisition process.[17] The Senate had agreed to this legislation only after

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[12] S. REP. No. 326, supra note 7, at 12-13.

[13] *Id.* at 111-12.

[14] National Defense Authorization Act for Fiscal Year 1989, Pub. L. No. 100-456, § 809, 102 Stat. 1918, 2012 (1988). See S. REP. No. 326, supra note 7, at 111-12; H.R. REP. No. 989, 100th Cong., 2d Sess. 427 (1988).

[15] S. REP. No. 81, 101st Cong., 1st Sess. 183 (1989) [hereinafter S. REP. No. 81]. The Under Secretary's report is reprinted in Department of Defense *Authorization for* Appropriations for Fiscal *Years 1990* and *1991*: Hearings on *S. 1085* Before *the* Subcomm. on Defense Industry and Technology of *the* Senate Committee on Armed *Services*, 101st Cong., 1st Sess., pt. 7, at 43-76 (1989) [hereinafter *Hearings on S. 1085*].

[16] S. REP. No. 81, supra note 15, at 183.

[17] *E.g.*, Section 27 of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423 (1988), as amended by The Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679.

seeking the views of the Administration. We were advised by the Office of Management and Budget that the final version "satisfie[d] the concerns of the Administration."[18] We were able to make a number of useful clarifications in these laws in 1989, and late in 1989 the so-called "procurement integrity" provisions were suspended for a one-year period. The suspension created an opportunity to determine whether these provisions should be reinstated, modified, or repealed. Once again, however, the DOD failed to produce any legislative proposal.[19]

The DMR led to the development in 1990 of eighteen proposed statutory changes, which were introduced as Title II of Senate Bill **2440,** entitled "The Defense Management Improvement Act."[20] Although the recommendations were more ambitious than previous DOD proposals, the package suffered from the same defect as prior efforts—the complete absence of justifications and supporting analysis for the changes. On March 15, 1990, Senator Malcolm Wallop—who was then serving as the Ranking Republican on the Defense Industry and Technology Subcommittee—joined me in requesting that the DOD provide a detailed analysis of the proposed legislation. By the time we convened our hearings on April **24** of that year, the supporting information had not been provided, apparently because the DOD had been unable to clear its proposed responses through the Office of Management and Budget.[21]

The situation did not improve prior to our markup of the annual defense bill in July 1990. The DOD did not identify the specific laws that needed to be modified or repealed to streamline the acquisition process. Instead, the DOD's approach to streamlining consisted primarily of a request for broad authority to waive the acquisition laws, largely unaccompanied by supporting information justifying any specific waivers.[22] No less an advocate of streamlining than David Packard severely criticized the proposed use of waivers:

> [The proposal] does not address the real reforms which are needed to make commercial product acquisition better. Rather than advancing the important concepts of paper-

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[18] *See Hearings on S. 1085, supra* note 15, at 446. *See also* Lessons *Learned from Recent Procurement Fraud Investigations: Hearings Before the Subcmm. on Defense Industry and Technology of the Senate Comm. on Armed Services,* 101st Gong., 2d Sess. 2 (1990) [hereinafter Lessons *Learned].*

[19] *See Lessons Learned, supra* note 18, at 2.

[20] *Reprinted in Department of Defense Authorization for Appropriations for Fiscal Year 1991: Hearings on S. 2884 Before the Subcmm. on Defense Industry and Technology of the Senate Comm. on Armed Services,* 101st Cong., **2d** Sess., pt. 6, at 1263-1317 (1990).

[21] *See id.* at 244.

[22] *See* S. REP. No. 707, 101st Cong., **2d** Sess. 189, 193 (1990).

> work reduction, real market research, quality buying, market acceptability, or other critically needed changes to the culture of the procurement process, it seems to be directed to achieve some other policy objective.23

He added that "legislation should not focus on . . . arbitrarily sweeping aside all basic statutory checks and balances of the system."[24] The Public Contract Law Section of the **ABA,** while emphasizing the need for streamlining, stated that "simply removing existing procurement procedures will not magically solve the problem."[25]

IV. Establishment of the Section 800 Panel

After three years of exhorting the DOD to develop a comprehensive streamlining proposal, the Armed Services Committee concluded in 1990 that it simply would not happen unless the Committee developed an alternative approach. With the support of the Ranking Republican on our Subcommittee, Senator Malcolm Wallop, I proposed legislation—which was enacted as Section 800 of the National Defense Authorization Act for Fiscal Year 1991[26]—to encourage government and private sector cooperation in the development of acquisition reform legislation.

The legislation required the DOD to establish an Advisory Panel on Streamlining and Codifying the Acquisition Laws, composed of "recognized experts in acquisition laws and procurement policies . . . [who] reflect diverse experiences in the public and private sectors."[27]

In recommending this legislation, the Armed Services Committee was mindful of the numerous studies of the acquisition system by government agencies and commissions since the end of World War 11—most recently the Packard Commission and DMR.[28]

The purpose of the Section 800 Panel was not to plow the same ground; rather, the goal was to take the general principles set forth in these studies and prepare a pragmatic, workable set of recommended changes to the acquisition laws.[29]

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[23] *Id.* at 189.

[24] *Id.* at 193.

[25] *Id.*

[26] Pub. L. No. 101-510, § 800 104 Stat. 1485, 1587 (1990) [hereinafter Pub. L. No. 510].

[27] *Id.* § 800(b).

[28] S. REP. No. 384, lOlst Cong., 2d Sess. 194 (1990) [hereinafter S. REP. No. 384].

[29] *Id.*

The statute established an ambitious agenda, calling on the Panel to undertake the following tasks:

> First, review the acquisition laws . . . with a view towards streamlining the acquisition process.
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> Second, recommend repeal or amendment of existing laws to the extent necessary to
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> > eliminate . . . laws that are unnecessary for the establishment and administration of buyer and seller relationships in procurement;
> >
> > ensure the continuing financial and ethical integrity of defense procurement programs; and
> >
> > protect the best interests of the Department of Defense.[30]

We also knew that comprehensive streamlining legislation could not be enacted if we merely received a set of conclusions accompanied by platitudes. The Panel's report would have to stand up to detailed public and congressional scrutiny from a diverse set of committees and constituencies. To ensure that the report included the necessary supporting materials, we set forth a specific reporting format, requiring the Advisory Panel to list each specific acquisition law, accompanied by the following:

> (1) a legislative history that describes the purpose of the original provision and any subsequent amendments;
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> (2) a description of the role of the law in current acquisition practices . . . ; and
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> (3) a recommendation as to whether the law should be retained, repealed, or modified.[31]

We further directed the Panel, when considering whether a particular statute should be retained, repealed, or modified, to consider:

> (1) whether the statutory purpose remains valid in light of subsequent changes in the acquisition system;
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> (2) if so, whether the wording of the statute should be changed to reflect subsequent developments; and
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> (3) whether the detailed requirements should be replaced by broad statutory guidance.[32]

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[30] Pub. L. No. 510, *supra* note 26, § 800(c).

[31] S. REP. No. 384, *supra* note 28, at 194.

[32] *Id.* at 195.

Finally, we directed the Panel to prepare a detailed legislative proposal, accompanied by a sectional analysis.[33]

Congress directed that the Panel be established under the sponsorship of the Defense Management Systems College,[34] located at Fort Belvoir, Virginia, to ensure that the Panel was adequately staffed and supported by an institution knowledgeable in acquisition policy.

The legislation, enacted on November 5, 1990, established a two-year timeframe for preparation and completion of the report. To ensure that valuable time was not lost, the statute required the DOD to establish the Panel by January 15, 1991.[35] The statute called for the Panel to submit its recommendations to the Under Secretary of Defense for Acquisition not later than December 15, 1992, and for the Under Secretary to transmit the report and any accompanying comments to Congress by January 15, 1993.[36] The timing was designed to provide the Administration and the Congress with a report, at the outset of the 103d Congress, to provide a solid foundation for consideration of acquisition reform during that Congress.

Despite this strong showing of congressional support for acquisition streamlining, the Executive Branch initially appeared indifferent to the opportunity for comprehensive acquisition reform. Month after month passed without any appointments to the Panel. On a bipartisan basis I joined with Senator Dan Coats—who had become The Ranking Minority Member of our Subcommittee—in urging the Administration to promptly establish the Panel. The months continued to slip by, however, without any appointments until we raised the public visibility of the issue at the hearing on the nomination of Donald Yockey to be the Under Secretary of Defense for Acquisition.[37] Mr. Yockey acknowledged that "we have been delinquent in establishing that entity."[38] The DOD did not constitute the Panel until September 1991. Consequently, the Panel began its work nine months behind schedule.

Fortunately, the DOD appointed a distinguished thirteen-member panel, headed by Rear Admiral William L. Vincent, who was then Commandant of the Defense Systems Management College. Seven of the members were from the public sector, including Army

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[33] *Id.* at 194.

[34] Pub. L. No. 510, *supra* note 26, § 800(a).

[35] *Id.*

[36] *Id.* § 800(d).

[37] *Nominations Before the Senate Comm. on Armed Services, 102d* Cong., 1st Sess. 151 (1991).

[38] *Id.*

Deputy General Counsel Tony Gamboa, who is well-known to The Judge Advocate General's School as an expert on procurement law. In addition, six of the appointed individuals were from the private sector, including leaders of academia and the bar—such as Tom Madden, who will be speaking to you this afternoon. Bill Vincent also assembled an outstanding support staff from the Defense Systems Management College and the military departments. The Panel's efforts were aided immeasurably by the analytical work that Colleen Preston had initiated in her capacity as General Counsel of the House Armed Services Committee.

Once established, the Panel approached its task with diligence and enthusiasm. To underscore the continuing congressional interest and support for the Panel's work, the Defense Industry and Technology Subcommittee held an oversight hearing in June 1992, during which we received testimony from members of the Panel on the status of their efforts.[39]

The Panel faced an enormous challenge—to conduct an in-depth analysis of the entire body of acquisition laws and propose a new set of laws—all within a year's time. They more than met that challenge by producing an 1800-page report that reviewed more than 600 procurement laws and made specific proposals to amend or repeal nearly 300 laws.[40]

Regardless of whether one agrees with each of the Panel's recommendations, I believe there is general recognition that they fulfilled their primary role by setting forth the key issues for acquisition reform and providing a clear and comprehensive vehicle for legislative discussion and debate.

The statutory changes recommended by the Advisory Panel were detailed and complex. The underlying issues, however, involved the foundations of the acquisition process—auditing practices, oversight activities, competition in contracting, paperwork reduction, integration of the government and commercial sectors, and strengthening the technology and industrial base.

V. Activities During the First Session of the 103d Congress

The Armed Services Committee conducted a thorough review of the Panel's recommendations with a view toward a comprehen-

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[39] *Department of Defense Authorization for Appropriations for Fiscal Year 1992 and the Future Years Defense Program: Hearings on S. 3114 Before the Subcomm. on Defense Industry and Technology of the Senate Comm. on Armed Services*, 102d Cong., 2d *Sess.*, **pt. 5**, at 469-71, 519-29 (1992).

[40] DEP'T OF DEFENSE, STREAMLINING DEFENSE ACQUISITION LAW: REPORT OF THE ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION LAWS (Jan. 1993).

sive overhaul of the acquisition laws. We began this effort during the spring of 1993 with two hearings. At the first hearing, on March 10, 1993, the Panel provided the Committee with a detailed presentation of its recommendations. At our second hearing, on June 28, 1993, we received testimony on the DOD's acquisition reform agenda from Colleen Preston, who was appointed to the new position of Deputy Under Secretary of Defense for Acquisition Reform.

In addition, in other hearings before the Armed Services Committee, Secretary Aspin,[41] then-Deputy Secretary Perry,[42] and then-Under Secretary Deutch[43] consistently emphasized the high priority that the Clinton Administration had assigned to acquisition reform. The Administration's commitment was more than rhetorical. Steven Kelman, the new Administrator of the Office of Federal Procurement Policy, and Colleen Preston both gave priority attention to the development of comments and proposals on acquisition streamlining measures.

The Administration's commitment was essential. Enactment of a comprehensive acquisition reform bill required strong leadership from the White House to unify the Executive Branch and to address the diverse concerns that would be raised both among executive agencies and in the numerous congressional committees having an interest in acquisition policy.

The Section 800 Panel's Report engendered strong bipartisan support within the Armed Services Committee. Our Committee had concluded that the post-Cold War defense build-down presented particularly difficult challenges in terms of maintaining an adequate industrial and technology base. The Committee concluded that this challenge could best be met by minimizing the nation's dependence on defense-unique industries by encouraging the development and utilization of dual-use products and processes that both the government and commercial sectors can use.

Our Committee recognized that the interest in acquisition policy in Congress extended beyond the Armed Services Committee, and that we would need to develop broad, bipartisan support before we could obtain congressional approval for comprehensive reform. We determined that we should enlist the participation of our sister committees in the acquisition arena—Governmental Affairs and Small Business—in the process. We then would develop a bill, pro-

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[41] *E.g.*, *Department of Defense Authorization for Appropriations for Fiscal Year 1994 and the Future Years Defense Program: Hearings on S. 1298 Before the Senate Comm. on Armed Services*, 103d Cong., 1st Sess., pt. 1, at 36 (1993).

[42] *E.g.*, *id.* at 782-84.

[43] *E.g.*, *id.*, pt. 5, at 68-70.

vide ample opportunity for the public to review the bill, and conduct detailed hearings prior to marking up legislation in committee.

A number of Senators participated actively in this effort, including Senators Nunn and Thurmond as Chairman and Ranking Minority Member of the Armed Services Committee, and myself and Senator Smith, as Chairman and Ranking Minority Member of the Defense Industry and Technology Subcommittee. We had the support of Chairman Glenn of the Governmental Affairs Committee, and his Ranking Republican Member Senator Roth, as well as Senator Levin of the Government Management Subcommittee and his Ranking Republican Member, Senator Cohen. From the Small Business Committee, Chairman Bumpers and the Ranking Republican Member, Senator Pressler, also participated.

These Senators established a staff working group, which undertook a detailed line-by-line review of the Section 800 Report during the spring and summer of 1993. There was even a connection with The Judge Advocate General's School. Andy Effron, who represented the Armed Services Committee on the working group along with Jon Etherton, and Greg Scott of the Legislative Counsel's office, who undertook the arduous task of drafting the bill, were both introduced to defense procurement law as members of the 80th Basic Class, and both received advanced course degrees from the School.

During the staff review, there was constant interchange between the staff and the Senators as we sought to develop a bill that could serve as a vehicle for enactment of a comprehensive reform of the acquisition laws. The result was a draft that formed the basis for Senate Bill 1587, which was introduced on October 26, 1993.

In a parallel development, the Clinton Administration was reviewing many of the same issues as part of Vice President Gore's National Performance Review—popularly known as "Reinventing Government." The Vice President's report endorsed many of the Section 800 reforms.

At a White House ceremony on October 26, 1993, the President and Vice President specifically endorsed our bill as the vehicle for their reform efforts. One of the key results of the Administration's strong commitment was an equally strong commitment by the leadership of the House Armed Services and Government Operations Committee to join in the reform effort.

By the end of the first session of the 103d Congress, we had established a solid foundation, but we still needed to complete the challenging task of persuading the Congress as a whole—through

hearings and debates—that we should enact a major acquisition reform bill.

VI. Activities in the Second Session of the 103d Congress

At the February 2, 1994, hearing on William Perry's nomination to be Secretary of Defense, Senator Nunn announced that our Committee would begin joint hearings with the Governmental Affairs Committee, and that we anticipated action on an acquisition reform bill during the spring. There were parallel efforts in the House, which gave some cause for optimism.

The Governmental Affairs and Armed Services Committees held three joint hearings in the spring of 1994, during which we received testimony from representatives of the Administration, the oversight community, and diverse segments of the private sector, including major contractors, commercial companies, and small businesses.[44]

The Governmental Affairs and Armed Services Committees each marked up the bill on April 26, 1994. The Governmental Affairs Committee reported its bill to the Senate on May 11,[45] and the Armed Services Committee submitted its report on May 12.[46] On June 8, the Senate passed Senate Bill 1587 with relatively few amendments, and the House passed a companion bill on June 27.[47] Although the general philosophy of both bills was compatible, numerous differences arose that had to be resolved in conference. With strong bipartisan support for the basic philosophy of the bill, the differences were overcome. A conference report was filed,[48] approved by both Houses,[49] and signed into law by the President on October 13, 1994.[50]

The relatively smooth progress of the bill through committee markups, floor debates, and conference was the result of a very intense effort on the part of members and staff to address issues

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[44] *Federal Acquisition Streamlining Act of 1993: Joint Hearings on S. 1587 Before the Senate Comm. on Governmental Affairs and the Senate Comm. on Armed Services,* 103d Cong., 2d Sess. (1994).

[45] S. REP. No. 258, 103d Cong., 2d Sess. (1994).

[46] S. REP. No. 259, 103d Cong., 2d Sess. (1994).

[47] H.R. 2238, 103d Cong., 2d Sess. (1994). *See* H.R. REP. *No.* 545, 103d Cong., 2d Sess., pts. 1, 2 (1994).

[48] H.R. REP. No. 712, 103d Cong., 2d Sess. (1994).

[49] The Senate agreed to the conference report on August 23 and the House agreed to the conference report on September 23.

[50] The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994).

raised by numerous Senators and Representatives in a manner that responded positively to their concerns without undermining the essential streamlining features of the bill. Our efforts were aided immeasurably by the detailed information provided by Steve Kelman at the Office of Federal Procurement Policy and Colleen Preston at the DOD, and their staffs, often on very short notice.

VII. Key Features of the Federal Acquisition Streamlining Act of 1994

I know that you will be discussing the details of this legislation throughout your conference, so I will simply note four key highlights of the legislation at this time.

Streamlining: The Act reduces paperwork burdens through revision and consolidation of over **225** provisions of law to eliminate redundancy, provide consistency, and facilitate implementation.

Electronic Commerce Procedures: The Act requires the federal government to transform the acquisition system from a cumbersome process driven by paperwork to a computer-based system readily accessible to government and private sector users, including small businesses.

Simplified Acquisition Threshold: The Act establishes a "simplified acquisition threshold" of $100,000 to streamline the process of making small purchases and to reduce the amount of staff time needed for such purchases, resulting in substantial savings for the government.

Commercial Items: The Act facilitates the acquisition of commercial end-items and components—including commercial products that are modified to meet government needs.

The Act authorizes an implementation period of up to one year for most provisions. This affords you—the experts in acquisition policy—with a real opportunity to shape the details of the implementing rules. The implementation period is as important—if not more so—than the legislation itself. The bill is based on the philosophy that the content of the acquisition laws should be minimized, giving the Executive Branch substantial discretion in framing implementing rules. With few exceptions, those rules can be as detailed or as complex as the Executive Branch desires. By the end of the implementing period, we could have a new set of acquisition rules that significantly streamlines the acquisition process; or, we could find ourselves with rules that simply mirror the old, highly regulated system.

The choice is now up to those of you in the Executive Branch. Congress has voted for streamlining. I urge you to take maximum advantage of this extraordinary opportunity.

VIII. The Future

I know that many of you are interested in what the future holds. As a result of the November election, I will still have an opportunity to participate in the process, but the formal leadership will pass to the other side of the aisle. Fortunately, the issue of streamlining has enjoyed strong bipartisan support, and I am optimistic that my Republican colleagues will continue their commitment.

I see three areas of concern for the future. First, we have the unfinished agenda of the Section 800 Panel. Although we enacted most of the Panel's recommendations, a number of its recommendations on which we did not take significant action still exist. These include defense trade, procurement ethics, protest process reform, and computer acquisition policies. There were also a number of so-called socioeconomic laws which we did not include in the list of authorized waivers for commercial acquisitions and purchases below the simplified acquisition threshold.

Second, the Administration is likely to identify additional statutes that should be modified or repealed as a result of its ongoing acquisition reform and pilot program activities. In this regard, each of you has an important role to play. You are in the field and work with these statutes on a daily basis, so you are in the best position to identify and recommend statutory changes.

Finally, we will continue to face proposals to provide more rather than less regulation. The taxpayers want, and deserve, to have government funds spent wisely. While most government officials and contractors share that concern, there always will be exceptions. In some cases, additional legislation will be necessary. It is my hope, however, that the experience of the 1980s will caution us against applying a legislative or regulatory solution to every problem, and that we will limit additional requirements to those areas where a generalized problem truly exists.

IX. Lessons for the Future

Finally, I would like to make a few observations about the lessons that we might derive from this legislative history.

First, ideas matter. Thoughtful presentations such as Mr. Cavanagh's Cuneo Lecture can have a decided impact on policymakers both in the Legislative and Executive Branches. Conferences—such as this symposium—that encourage the development and exchange of new ideas are of critical importance to the continuous improvement of the law.

Second, details matter. By the late 1980s, we had no shortage of reports—such as the Packard Commission'sReport—recommending concepts such as legislative streamlining, simplified small purchases, and greater use of commercial items. What we lacked was a detailed set of legislative proposals to implement those objectives—a gap that the Section 800 Panel'sReport filled.

Third, analysis matters. Although there was strong support within the Armed Services Committee for streamlining, there was a great deal of skepticism among our sister committees. We could not rely simply on generalities—such as broad references to paperwork burdens—to support changing a wide variety of specific laws. We needed a detailed analysis of the history, purposes, and problems presented by specific statutes. Again, the Section 800 Panel's Report filled that need.

Fourth, bipartisanship matters. When you undertake to change a large number of existing statutes, you are likely to face opposition from those who have supported those laws. In this circumstance, bipartisan support is crucial to overcome opposition—particularly in the Senate, where the rules provide great leverage to any determined minority. The strong bipartisan tradition of the Armed Services Committee established the foundation for success.

Finally, Administration support matters. At the outset of the process, there was a great deal of skepticism among our sister committees and in the House about the need to overhaul so many statutes. Although the Section 800 Panel's Report provided the intellectual and analytical framework for our legislation, it would have been a much more difficult process had we not had the active engagement of the Administration at the highest levels. The continuing support of President Clinton, and the active day-to-day involvement of Vice President Gore, was invaluable.

X. Conclusion

In closing, I would like to thank you again for the honor of allowing me to deliver the Cuneo Lecture. We on the Armed Services Committee are proud of the work of The Army Judge Advocate

General's School, as well as the other elements of our higher military education system, and I wish you the best for a successful symposium. In the time that remains, I would be please'd to address questions that you might have about the process that resulted in the Federal Acquisition Streamlining Act.

The Court concluded that these "guarantees" must be "drawn from the totality of the circumstances that surround the making of the statement." The Court specifically excluded consideration of independent evidence corroborating the statement from its definition of "circumstances" indicating trustworthiness.[12]

This view, the Court argued, was consistent with the philosophy underlying the hearsay rules. Relying on Professor Wigmore's commentaries, the Court stated that while hearsay generally is inadmissible because of its unreliability, in certain circumstances, out-of-court declarations are "free enough from inaccuracy and untrustworthiness" to be admissible. The "test" to determine the evidentiary accuracy of a particular out-of-court statement is whether the cross-examination of the declarant would have been useful in determining the statement's veracity.13

The Court concluded that the "trustworthiness" of the specific hearsay exceptions was derived solely from the circumstances surrounding the making of the hearsay statement, rather than corroborating evidence indicating its veracity. Therefore, the "particularized guarantees of trustworthiness" necessary for the admission of a residual hearsay statement under the Confrontation Clause should likewise be drawn only from facts and circumstances surrounding its utterance.[14]

Reviewing its previous Confrontation Clause decisions, the Court sought to distinguish favorable references to the use of corroboration as a factor in assessing "trustworthiness" contained in those cases. The Court concluded that *Dutton v. Evans*,[15] in which Justice Stewart specifically considered the collateral testimony of a witness in assessing the reliability of a hearsay statement, "more appropriately indicates that any error in admitting the statement might be harmless."[16] In response to the assertion in *Cruz v. New York*[17] that the "interlocking" nature of an accused's confession with a hearsay statement "pertains to its reliability" as a basis for determining its admission, the Court noted that *Cruz* is "silent" about whether such a hearsay statement actually would be admissible.[18] Finally, ignoring

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[12] *Id.* at 819-20.

[13] *Id.* (citing 5 J. WIGMORE, EVIDENCE, § 1420 (Chadbourn rev. ed. 1974)).

[14] *Id.* The Supreme Court specifically discussed the "excited utterance" exception (FRE 803(2)), the "dying declaration" exception (FRE 804(b)(2)), and the "medical treatment" exception (FRE 803(4)).

[15] 400 U.S. 74 (1970).

[16] *Wright*, 497 U.S. at 823.

[17] 481 U.S. 186 (1987).

[18] *Wright*, 497 U.S. at 823. In a footnote, the majority contends that the dissenters' reliance on the language in Cruz is taken out of context, because the Supreme

language contained in Justice Brennan's majority opinion in ***Lee v. Illinois***[19] (admitting into evidence a codefendant's interlocking hearsay statement when it is "thoroughly substantiated by the defendant's own statement"), the Court instead concluded that ***Lee*** totally rejected the "interlock" theory of determining reliability.20

III. Criticisms of *Idaho v. Wright*

The rationale behind ***Wright's*** exclusion of corroboration can be criticized in two respects. First, the ***Wright*** majority grafted a rejected interpretation of the residual hearsay exception onto Confrontation Clause analysis. Second, the ***Wright*** majority ignored the Supreme Court's movement toward a "reliability standard" in assessing the admissibility of hearsay statements under the Confrontation Clause, focusing instead on a mechanical application of a standard centered on the utility of cross-examination in examining the admissibility of a particular out-of-court statement.

During the legislative process that resulted in the codification of the ***Federal*** *Rules* of ***Evidence,*** hearsay underwent a dramatic restriction. Initially, the advisory committee established by Congress to draft the rules suggested a broad hearsay exception.21 In later drafts, the committee transformed twenty-three proposed, nonexclusive "illustrations" into the specific codified "exceptions" now found in the rules. Not wishing to totally eliminate the judicial development of hearsay, Congress approved the residual exceptions.22

Court in that case was dealing with the validity of a limiting instruction in a joint trial involving the "interlocking" confessions of codefendants. Although *Cruz* did not specifically address the issue of whether an "interlocking" confession of a coconspirator would be admissible against the other had separate trials occurred, the opinion makes a clear distinction between the "harmfullness" of such evidence in joint trials, versus the "reliability" of that evidence for Confrontation Clause purposes. ***See id.*** at 832 (Kennedy, J. dissenting).

[19]476 U.S. 530 (1986). In his dissent in ***Wright,*** Justice Kennedy highlights the majority's misinterpretation of ***Lee*** by noting that, notwithstanding their differing conclusions, the majority of the Supreme Court agreed that corroboration was a legitimate factor in the analysis of that case. ***Wright's*** misinterpretation of these precedents forms the underlying rationale for dismissing its discussion of the continued viability of the "interlock" theory. ***See Wright,*** 497 U.S. at 831-32; ***see also id.*** at n.57-61 and accompanying text.

[20]***Wright,*** 497 U.S. at 824.

[21]The proposed rule stated: A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy. 46 F.R.D. 161 (1969).

[22]For excellent summaries of the legislative history of the creation of the FRE and the Residual Hearsay Exceptions, ***see*** Sonenshein, *The* ***Residual Exceptions*** *to* ***the Federal Hearsay Rule: Two Exceptions in Search*** *of* ***a Rule,*** *57* N.Y.U. L. REV. 867 (1982); Rand, *The* ***Residual Exceptions*** *to* ***the Federal Hearsay Rule: The Futile and Misguided Attempt*** *to* ***Restrain Judicial Discretion,*** 80 GEO. L. J. 873 (1992).

Some legal commentators, perceiving that an unrestrained development of the residual hearsay exceptions would lead to a "swallowing up" of the rule against hearsay, advocated a strict interpretation of the phrase "equivalent circumstantial guarantees of trustworthiness" found in the text of the rules. These commentators concluded that the "reliability" of the specific exceptions to hearsay was based on the facts and circumstances surrounding the making of the statement. Accordingly, "equivalency" required that the reliability of a statement offered under the residual hearsay exception be gleaned only from facts and circumstances surrounding its making. These commentators concluded that any assessment of corroborative evidence to establish the underlying truth of the statement, or the presence of the declarant at trial, was irrelevant for purposes of evaluating the statement when made, and therefore should not be a factor in determining admissibility.23

As ***Wright's*** reliance on Professor Wigmore suggests, this viewpoint defines the "reliability" of an out-of-court declaration solely by the utility of cross-examination in that particular circumstance. One would focus only on facts and circumstances surrounding the utterance of a statement, because cross-examination would occur at that time.

Notwithstanding the popularity of these limitations with legal commentators, the majority of federal courts, including the United States Court of Appeals for the Armed Forces (CAAF),[24] adopted a more flexible approach toward the residual hearsay exceptions that permitted an evaluation of corroboration in assessing a statement's "trustworthiness."[25]

Proponents of this more flexible approach argue that the trustworthiness of all out-of-court statements, even those admitted under "firmly rooted" exceptions, is weighed to some extent in the context of other evidence.26 They also question the weight and interpretation given to the word "equivalent" by the strict constructionists, contending that the specific exceptions are more a product of historical legal development than a representation of inherently

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[23] *See, e.g.*, Sonenschein, *supra* note 22, at 876-84; Jonakait, *The Subversion of the Hearsay Rub: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431 (1986).

[24] Formerly the United States Court of Military Appeals (COMA). Note that on October 5, 1994, the President signed into law Senate Bill 2182, Defense Authorization Act for Fiscal Year 1995, which redesignated the COMA as the United States Court of Appeals for the Armed Forces (CAAF). *See* Nat'l Def. Auth. Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2831 (to be codified at 10 U.S.C. § 941). This article will refer to the court by its new name.

[25] Rand, *supra* note 22, at 897.

[26] Hudson, *Using Residual Hearsay*, ARMY LAW., Nov. 1993, at 9.