1994

Policy Guidance for the Transfer of DOD Installations to the Government of Panama

Jeffrey F. Addicott
St. Mary's University School of Law, jaddicott@stmarytx.edu

reports to the Acquisition Reform Senior Steering Group, who will monitor overall implementation progress.

Management Commitment

This Process Action Team tackled one of the most difficult issues we will face in reforming the acquisition process. I would like to commend the team, composed of representatives from all of the Military Departments and appropriate Defense Agencies, and its leader, Mr. Darold Griffin, for a job well done. In addition, I would like to thank the Army, and in particular, Army Materiel Command, for its administrative support of the team.

The Process Action Team's report and the policies contained in this memorandum are not a total solution to the problems inherent in the use of military specifications and standards; however, they are a solid beginning that will increase the use of performance and commercial specifications and standards. Your leadership and good judgment will be critical to successful implementation of this reform. I encourage you and your leadership teams to be active participants in establishing the environment essential for implementing this cultural change.

This memorandum is intended only to improve the internal management of the Department of Defense and does not create any right or benefit, substantial or procedural, enforceable at law or equity by a party against the Department of Defense or its officers and employees.

/ signed /
WILLIAM J. PERRY

International and Operational Law Notes

Policy Guidance for the Transfer of DOD Installations to the Government of Panama

Under the provisions of the 1977 Panama Canal Treaty,[84] all United States military forces[85] will be withdrawn from, and all United States military installations and other facilities will be turned over to, the Government of Panama (GOP) by noon, Panama time, 31 December 1999.[86] By this date, all "title and interest the United States of America may have with respect to real property, including non-removable improvements thereon" will have transferred, without charge, to the Government of Panama.[87] Currently, the United States still controls over 77,000 acres of land and 4290 buildings in Panama.

In 1988, the Secretary of the Army was designated as the Executive Agent for all joint fiscal and logistical aspects of the turnover of the Canal. As the Executive Agent, the Secretary of the Army is responsible for effecting the release of United States property under the control of the Commander in Chief, United States Southern Command, to the GOP. The Panama Canal Treaty Implementation Plan Agency (TIPA) is the agency through which the Army executes Executive Agent responsibilities.

Inherent in the turnover of defense sites to the GOP are the difficult issues of environmental clean-up, residual value of facilities, reduction in the local civilian work force, and the unilateral right of the United States to vacate property. On 3 February 1992, the Panama Canal Treaty Implementation Plan (PCTIP) was signed by the Secretary of Defense to provide conceptual guidance and direction to all DOD agencies on implementation procedures for the turnover.

To better accomplish the transfer of DOD installations to the GOP, on 23 August 1994, the TIPA released a comprehensive policy guidance document (PGD) entitled, "Policy Guidance for the Transfer of DOD Installations to the Government of Panama." Army lawyers have been instrumental in helping draft this document. The four major legal issues associated with the PGD are as follows:

Unilateral Right to Transfer

On 10 January 1994, the International and Operational Law Division, OTJAG, issued a legal opinion concerning the unilateral right of the United States to transfer an installation to the GOP and thereby terminate its liability for the same.[88] This opinion has been incorporated into the PGD at paragraph 5A, "In those exceptional cases when agreement cannot be reached with the GOP, the United States Forces, in keeping with the intent of the treaty, may unilaterally transfer areas or installations which are no longer required."

Residual Value

The issue of residual value proved to be difficult, because of an apparent conflict between the language found in Article XIII of the Panama Canal Treaty and Article IV of the Agreement in Implementation of Article IV of the Panama Canal Treaty, as follows:

> (1) Article XIII of the Panama Canal Treaty (entitled Property Transfer and Economic Participation by the Republic of Panama) stipulates that the United States will transfer

[84] 33 U.S.T. 307. On September 7, 1977, President Carter and Panama Chief of Government General Omar Torrijos signed the Panama Canal Treaty.

[85] There are currently about 10,000 United States personnel in Panama; this figure will be reduced to approximately 6000 by the end of 1995.

[86] Panama is located in the southernmost end of the Central American isthmus. In 1903, Panama was a part of Colombia. When Colombia rejected United States overtures to build a canal, the province of Panama revolted and formed a newly independent State. A treaty between the United States and Panama was immediately negotiated which gave the United States the power to exercise, in perpetuity, sovereign rights over a large section of Panamanian territory adjacent to the canal—the Canal Zone.

[87] The Panama Canal Treaty of 1977 governs the operation, management, and defense of the Canal through this period and will terminate on 31 December 1999. However, the 1977 Treaty on the Permanent Neutrality and Operation of the Panama Canal (7 Sept. 1977, 33 U.S.T. 39) guarantees the permanent neutrality of the Canal indefinitely and commits the GOP and the United States to continue to defend the Canal and to ensure its permanent neutrality.

[88] Memorandum for MOTP (TIP) (on file at Office of The Judge Advocate General, International and Operational Law Division).

"without charge, to the Republic of Panama all right, title, and interest the United States of America may have with respect to all real property, including nonremovable improvements thereon."

(2) Article IV, Section 4 of the Agreement in Implementation of Article IV of the Panama Canal Treaty (entitled use of Defense Sites) states that "prior to the transfer of any installation, the two Governments will consult concerning: (a) its conditions, including removal of hazards to human life, health and safety; and (b) compensation of its residual value, if any exists."

The PGD takes the position that residual value will be negotiated based on the nonremovable "property or improvements on the installations transferred." The DOD and State Department support strongly this position. In the case of each transfer, the DOD will attempt to reach agreement with the GOP on its assessment figures, but will reserve the right to make the final determination. These values will be accumulated by the DOD until the end of the Treaty period, when they will be presented for final resolution by the two governments.

Removable Property

The PGD also addresses the issue of removable property. Article IV, Section 3 of the Agreement in Implementation of Article IV of the Panama Canal Treaty states that removable property left on the installation at transfer becomes the property of the GOP, unless agreed otherwise by the two governments. However, removable property can be transferred to the GOP unless permitted by applicable United States property disposal laws and regulations. The basis for calculating removable property is its fair market value.

Removal of Hazards to Human Life, Health, and Safety

Some work remains to be done on reaching consensus between the DOD and State Department concerning this issue. However, paragraph 5 of the PGD addresses removal of hazards to human life, health, and safety. In addressing this issue, the DOD will apply the policy it uses on a world-wide basis, to Panama. It will "eliminate known imminent and substantial hazards to human health and safety." This is in keeping with Article IV, Section 4 of the Agreement in Implementation of Article IV of the Panama Canal Treaty, which requires the DOD to identify known hazards to human life, health, and safety and to take "all measures insofar as may be practicable" to remove them. The central problem will be one of applying this Treaty language to the individual circumstances encountered at each installation. Because the Treaty appears to grant the United States a broad and somewhat subjective standard for compliance, much of the debate surrounding this issue, to date, has centered around policy concerns.

Although the National Environment Policy Act does not apply to the transfer of United States facilities in Panama, this PGD establishes measurable standards. We expect interest in environmental issues to increase as more property is turned over. Lieutenant Colonel Addicott, International and Operational Law Division, OTJAG.

Legal Assistance Items

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

Tax Note

1994 After-Action Report on Army Tax Assistance Services

Army lawyers who assist clients with their income taxes each year submit annual reports to the Legal Assistance Division, Office of The Judge Advocate General (OTJAG). Final reports submitted by Army legal offices in the United States were due at the Legal Assistance Division by 1 June; reports from legal offices outside the United States were due by 1 July. *Army Regulation 27-3 (AR 27-3)*[89] established these dates. The format for the report is established by message each year. The format has been the same since 1993, and the message for the 1995 tax season already has been released.[90]

After all the final reports are received, they are consolidated. The figures obtained are provided to the Internal Revenue Service (IRS), which uses these figures in evaluating its Volunteer Income Tax Assistance (VITA) Program. The Legal Assistance Division also uses the statistics and comments provided by each legal office for various purposes, to include discussions with the Army-Air Force Exchange Service (AAFES) about commercial tax preparers on Army installations.

The Legal Assistance Division compiled all the statistics from the after-action reports that Army legal offices submitted in 1994. These statistics are arranged by major command groupings as indicated: Training and Doctrine Command (TR); Forces Command (FR); United States Army Europe (EU); United States Forces Korea (FK); United States Army Pacific (PA); Army Materiel Command (AM); and all other major commands (OT).

The electronic filing figures for Forces Command reflect that state income tax returns were electronically filed by legal offices at Fort McCoy, Wisconsin, and Fort Riley, Kansas.

[89] DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM, para. 5-4 (30 Sept. 1992).

[90] Message, Headquarters, Dep't of Army, DAJA-LA subject: 1995 After-Action Report on Tax Assistance (060900Z Jun 94).