



Office of Command Counsel Newsletter

October 2001, Volume 2001-5

Changed Utterly

As the men and women who have fought America's wars, you-more than all others-understand what the September 11th attack on freedom and democracy means for the days ahead. More than simple acts of terrorism by radical or unbalanced individuals, this was an attack on our way of life, our country, our home.

In a recent message to U.S. armed forces here and abroad, I spoke of the memorable moments that have marked all great crises throughout our history, images that live forever in our hearts and in our minds.

Not surprisingly, we've seen many such moments during this crisis as well-moments of remarkable courage and selflessness; moments of fierce patriotism and pride: Policemen and firefighters working night and day, with no thought for themselves; men, women and children giving blood until the banks are overflowing; businesses and corporations donating coffee, food and water to sustain those who would not stop working; chaplains counseling distraught

families; friends and total strangers reaching out in loving gestures of human support. And everywhere-the American flag, on buses and taxicabs, in windows and over doorways, as armbands, on jackets and hats, and most especially, waving in glorious defiance above the smoking and twisted wreckage our enemies have wrought.

One such flag, unfurled by firefighters, proudly hangs huge and proud near the gash in the Pentagon wall. While the immediate task of vanquishing freedom's enemies will fall to our military men and women, all of us-particularly those like you who understand the price of freedom-will be called upon to strengthen our national resolve.

And so, as we ask God's tender mercies on all those who have fallen, we ask also for His guidance and protection for all of us who remain to finish the task now before us. I thank the same God for America's veterans-those of you who made us free and kept us free.

I thank God for all you have done, and for all I know you will do again, to support peace and final victory. God bless you, and God bless America.

(Full text at Enclosure 1)

Donald H. Rumsfeld

Changed Utterly-from Easter 1916: WB Yeats (Encl 2)

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Ernie Willcher Killed in Pentagon Attack -- Retired from DA OGC as Senior Employment Counsel

Ernest M. Willcher, 62, of North Potomac, retired in April after 25 years as a civilian employee at the Pentagon.

In May, he took a job with consultants Booz, Allen & Hamilton in McLean because they were on the top of his list, said Shirely Willcher, his wife of 23 years. "He was very, very pleased with the choice that he made."

Willcher and two other company employees were caught in the terrorist attack on the Pentagon while briefing LTG Timothy J. Maude, the Army's Deputy Chief of Staff for Personnel, on an improved system for survivor benefits for military employees.

"It's just so difficult to believe," she said. "The irony is that he didn't have to be there every day anymore. He was there for a meeting."

Willcher, who was born in the District and grew up in Montgomery County, received an undergraduate degree in business from the University of Maryland and a law degree from American University, which he earned at night

while working for the Army. He served in the Army for four years and spent 36 years as a civilian employee in various posts.

He was assigned to the U.S. Army Map Service, Walter Reed Army Medical Center, Fort Detrick and then to the Army general counsel's office in the Pentagon.

"He was self-motivated and determined," said his wife. He returned to work after retirement, she said, to help ensure that his children — Benjamin, 20, and Joel, 17 — "could go as far as they wanted in school."

Their devoted father never missed a baseball game for one son or a theatrical performance for the other, she said. And he never had doubts, she said, about working for the military: "He always said he was working for the right client — the citizens of the country."

— **Sandra Fleishman**

From the Washington Post, Friday Sept 14, 2001

Newsletter Details

Staff

Command Counsel
Edward J. Korte

Editor

Stephen A. Klatsky

Layout & Design

Holly Saunders

Webmaster

Joshua Kranzberg

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Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

Miscellaneous Thoughts and Comments

Sacrifice:

“Dear Lord, Lest I continue my complacent way, help me to remember, somewhere out there a man died for me today. As long as there be war, I must ask and answer—am I worth dying for?”

Eleanor Roosevelt

“I am always amazed at how these men walk into fires when the rest of us run from them.”

Rudy Giuliani

“The living that throng Broadway care little perhaps for the dead at Antietam, but we fancy they would jostle less carelessly down the great thoroughfare, saunter less at their ease, were a few dripping bodies, fresh from the field, laid along, the pavement. As it is, the dead of the battlefield come up to us very rarely, even in dreams. We see the list in the morning paper at breakfast, but dismiss its recollection with the coffee. There is a confused mass of names, but they are all strangers; we forget the horrible significance that dwells amid the jumble of type...it is

a thunderbolt that will crash into some brain—a dull, dead, remorseless weight that will fall upon some heart, straining it to the breaking. There is nothing very terrible to us, however, in the list, though our sensations might be different if the newspaper carrier left the names on the battlefield and the bodies at our doors instead.”

“*The Dead at Antietam*”,
NY Times, 1862.

“No matter how long it may take us to overcome this premeditated invasion, the American people in their righteous might will win through to absolute victory. I believe I interpret the will of the Congress and of the people when I assert that we will not only defend ourselves to the uttermost, but will make very certain that this form of treachery shall never endanger us again.”

FDR on after Pearl Harbor in his “Day of infamy speech.”

“We shape our buildings; thereafter they shape us.”

Sir Winston Churchill

The Lover Tells Of The Rose In His Heart

ALL things uncomely and broken, all things worn out and old,

The cry of a child by the roadway, the creak of a lumbering cart,

The heavy steps of the ploughman, splashing the wintry mould,

Are wronging your image that blossoms a rose in the deeps of my heart.

The wrong of unshapely things is a wrong too great to be told;

I hunger to build them anew and sit on a green knoll apart,

With the earth and the sky and the water, re-made, like a casket of gold

For my dreams of your image that blossoms a rose in the deeps of my heart.

William Butler Yeats

Message from the Secretary of the Army

My fellow field soldiers all over the Army, from Kosovo to Korea, wherever you may be happening to pull your duty: As you all know by now, our nation, this department and the United States Army was attacked 11 September.

I want you to know that we have survived that attack. That attack has made us stronger and we are now engaged in what our president has called the first war of the 21st century. We will win that war.

Now the war is not going to won in a single day, or a single raid or a single event. We are engaged in a campaign against a cowardly enemy. And it will take us a while to root him out. But let there be no question about our resolve, our discipline, our professionalism, our tenacity; and in the end, the result of that war.

It started at a point of time dictated by the enemy.

It will end in a point of time — as the president has said — of our choosing.

It won't be easy. But few things that are truly worth doing ever are. This is our challenge: to preserve the freedoms that make America what Abraham Lincoln called the "last best hope on earth." And I can assure that the civilized people in countries of the world have united in support of our cause.

You and I, the American soldier and the veteran, now carry the hopes of the American people on our shoulders. I know that you will do your duty. I have every confidence in that as does the Secretary (of Defense), the Chief, and the President of the United States.

America expects no less of you and I and we can do no more. And always know that wherever you are, your nation stands behind you with absolutely solid support.

The Chief, General Shinseki and I, extend our condolences, and ask God's tender mercies on our foreign comrades and their loved ones. We have 74 people unaccounted for in our headquarters. We will mourn them and we will shed our tears. They are part of our family. But once that's finished, we will go forward, with anger and with purpose in our hearts, to see this campaign through to the end.

Tuesday, Sept. 11 has already been described as the darkest day in American history. I say to our adversaries, be very, very careful, for you are going to experience the finest hours of the United States Army as we prosecute this campaign against you.

God bless you, God bless the Army. God bless our great nation.

Thomas E. White
Secretary of the Army

Role of SSA in the A-76 Process

As an A-76 study, which uses “best value” procedures, approaches the cost comparison stage, it is important to consider the role of the Source Selection Authority (SSA) after the selection of the successful private sector offeror and prior to the cost comparison between the successful private sector offeror and the Government’s in-house offer.

Specifically, recent rulings by the General Accounting Office (GAO) and the United States Court of Federal Claims have focused on the importance of the analysis the SSA must conduct in order to determine whether the “level of performance and performance quality” outlined in the private sector proposal equates to that of the in-house offer.

There have been two recent decisions, one by the GAO and one by the United States Court of Federal Claims that provide additional guidance and clarification as to the role of the SSA and the SSEB in this regard.

In Rust Constructors, Inc. v. The United States, decided 31 May 2001, the United States Court of Federal Claims made it absolutely clear that the “level of performance” review is completely distinct from the source selection evaluation that had been conducted between the private sector competitors. In that case, the Court rejected an unsuccessful private sector argument that in conducting an A-76 study the Government had “erred by failing to conduct a “best value analysis” when it compared its proposal to the government’s MEO.”

The GAO case is BAE Systems, B-287189.2, May 14, 2001. A thorough analysis of what appears to be required SSA is the crux of the narrative,

CECOM Counsel **James Scuro**, DSN 992-9801, provides an outstanding paper on this burgeoning subject (Encl 3).

List of Enclosures

1. Message from Secretary of Defense
2. Easter 1916-- William Butler Yeats
3. Role of Source Selection Authority in the A-76 Process
4. Personal Services Contracts in the A-76 Process
5. Contract Litigation--Not Quite Gone and Shouldn't Be Forgotten
6. DOD Labor Relations Guidance--National Emergency
7. Supreme Court Docket--
8. Deployment of Civilian Personnel
9. Exemptions/Waivers in Major Environmental Statutes
10. August 2001 ELD Bulletin
11. Damage to Rental Cars while on TDY
12. Lexis Corner

Protest Filings--Stats & Trends

HQ AMC-Level Protests

FY 96--42

FY 97--57

FY 98--32

FY 99--23

FY 00--28

Fy 01 42

GAO Protests

FY 96--101

FY 97--120

FY 98--70

FY 99--73

FY 00--75

FY 01--88

Personal Services Contracts & the A-76 Process

The Office of Management and Budget (OMB) Circular No. A-76, dated 4 August 1983, established Federal policy regarding the performance of commercial activities.

The Circular provides that the Federal Government is to rely on commercially available sources to provide commercial products and services if it is determined, after a cost comparison of the cost of contracting and the cost of in-house performance, that the product or service can be procured more economically from a commercial source.

FAR 37.104(b), however, prohibits Government agencies from awarding personal

services contracts unless specifically authorized by statute to do so such as contracts for architect-engineer services authorized by 40 U.S.C. 541-544.

The question that arises is whether the policy set forth in OMB Circular A-76 is consistent with the prohibition against contracts for personal services at FAR 37.104(b).

The enclosed paper addresses several important aspects of this issue, citing statutes, regulations, Army Pamphlets and applicable GAO decisions.

Another excellent article by CECOM Counsel **James Scuro**, DSN 992-9801. (Enclosure 4)

Contract Litigation--Not Quite Gone, and Shouldn't be Forgotten

CECOM Counsel **Cruz Febres-Ferrer**, DSN 992-9807, provides an excellent synopsis of contract litigation, including the role of installation attorney, case

preparation--The Rule 4 File, relationship with the Contract Litigation Division and the Department of Justice (Enclosure 5).

Employment Law Focus

National Emergency & Labor Relations

On September 14, 2001, President Bush issued Proclamation 7463, Declaration of National Emergency by Reason of Certain Terrorists Attacks.

This proclamation states that "a national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States."

The President declared that the national emergency has existed since September 11, 2001, and has exercised authorities under various statutes.

Questions have been raised concerning what impact Proclamation 7463 has on our statutory obligations under 5 USC Chapter 71, the Federal Service Labor-Management Relations Statute.

DAPE's **David Helmer** provides a Q and A on this issue. One of the issues addressed at length is whether management can terminate alternative or compressed work schedules pursuant to the Proclamation (Encl 6).

Eleven Employment Law Cases on Supreme Court Docket

Leave Request Form Changed

The US Supreme Court convened its session Monday, October 1.

Eleven employment law cases are already on the docket, and six of them are scheduled for oral argument. More cases may be added soon.

Enclosure 8 contains short summaries of 11 cases.

For more information, including links to the decisions below:

- <http://www.lawmemo.com/emp/sum/courts/supreme/>.

Calendar of oral arguments:

- <http://www.lawmemo.com/emp/sum/courts/supreme/schedule.htm>.

Please re-distribute this email to anyone who is interested.

(Enclosure 7)

Following is a notice that went to MACOM POCs regarding the termination of the SF-71, Application for Leave. Army's policy is to adopt the OPM 71 as the Leave Request form.

As the notice states, please complete your labor relations obligations, if appropriate, prior to use of the OPM 71 for bargaining unit members. A copy of the OPM form is available at http://www.opm.gov/forms/pdf_fill/opm71.pdf

SOELR

This year's session will be in Albuquerque, New Mexico, during the week of March 12, 2002.

This is a preeminent program for the labor practitioner.

Civilian Deployment

Civilian employees have always accompanied the force during operations and today they perform many of the duties formerly performed by soldiers. Although this is well known, there may not be the same emphasis on preparing civilians for deployment as there has been for preparing military personnel. Emergency Essential (EE) personnel notified of deployment, as well as their families, are eligible for legal assistance on deployment related matters as determined by the supervising attorney.

Just as soldiers may need wills, powers of attorney, family care plans, so do civilian employees. Army legal assistance attorneys should be prepared to advise and assist deploying civilians and their families in their preparation for deployment.

A good source of information on civilian personnel supporting military operations is the Operation Law Handbook published by the International and Operational Law Department, The Judge Advocate General's School which can be accessed through JAGNET at www.jagc.net.army.mil.

CECOM Counsel **Kim Sawicki**, DSN 992-1146 prepared a point paper for the CECOM Commander outlining the basic rules regarding the Army and AMC deployment of civilian status. (Enclosure 8)

This issue is likely to become more important and even more relevant in the months to follow.

At HQ AMC, **Steve Klatsky** has the lead on policy issues supported by **Sam Shelton**.

We have received several preliminary inquiries on deployment issues that leads to the conclusion that each AMC legal office should review their library of materials to ensure they have the most complete and up-to-date materials.

Waiver of Bi-Weekly Aggregate

Waiver of Limitation on Biweekly Civilian Pay Effective 11 Sept 01. The Under Secretary of Defense (Personnel and Readiness) determined that work related to the attacks on the World Trade Center and the Pentagon or their aftermath meet the emergency criteria within the meaning of title 5, United States Code, Section 5547(b). Employees who are performing such work therefore are not subject to the limitation on aggregate bi-weekly pay for the duration of the emergency or until otherwise discontinued.

They are subject, however, to the annual limitation: their aggregate basic and premium pay cannot in any calendar year exceed the maximum rate payable for GS-15 step 10 in effect at the end of the year in their pay locality.

Higher HQ have taken an open stance on the scope of work covered by the waiver rather than their earliest guidance that implied only direct recovery, support, and response work. The waiver does not affect activity funding levels.

Environmental Law Focus

Environmental Emergency Provisions

As a result of the World Trade Center and the Pentagon attacks, many AMC installations are facing Force Protection and other mission requirements that may be impacted by environmental statutes and regulations.

In the vast majority of cases, we should be able to simultaneously meet these new mission requirements and comply with applicable environmental regulations.

However, it should be noted that most of the major environmental laws have emergency provisions. Of course, these provisions require extraordinary circumstances to justify requesting an emergency exemption.

The attached information paper was prepared by the Air Force Environmental Law community and outlines these various emergency provisions.

If you have any questions, please contact **Stan Citron**, DSN 767-8043 (Enclosure 9).

USAEC Guidance Documents

Below is a partial list of USAEC-developed guidance/training packages for the field. If you see something you would like to see, AEC will be glad to provide it to you. You could also visit the AEC Website at www.aec.army.mil and click on "publications". This would provide you many more examples—but not all were developed by AEC.

Restoration:

--U.S. Environmental Restoration Guidance Library (on CD May 2001).

Compliance:

--Closure/Post Closure Guidance for RCRA Open Burning and Open Detonation Units (CD March 2001)

--NEPA Manuals (CD Feb 2000)

Conservation:

--Army Alternate Procedures to Section 106 of Historic Preservation Act (Fed Reg July 2001)

Pollution Prevention:

--NEPA Manual for Material Acquisition (Notebook Nov 2000)

EPA Reuse Assessment Guide

The reasonably anticipated future land use is a critical part of the CERCLA cleanup process.

The reasonably anticipated future land use assumptions play a critical role in developing the baseline risk assessment and selection of the appropriate response action.

The EPA has developed which conveys a concise and practical approach to addressing future land use issues.

You are encouraged to share this information with you local Installation Restoration Program manager.

The EPA Reuse Assessment Guide is available at <http://www.epa.gov/superfund/resources/reusefinal.pdf>.

ELD Bulletin

ELD Bulletin for August 2001 is enclosed for you. (Enclosure 10)

To All AMC Ethic Counsel: The Newsletter Needs Your Assistance

Bob Garfield is the new AMC Ethics Team Leader. He is settling in as we go to press and actually will have a working computer soon.

Bob will continue the active use of the Ethics Counsel joint e-mail list to provide timely information to you.

We ask that each AMC Ethics Counsel participate in sharing the information you provide to your clients and commanders--and to submit items to the bi-monthly Newsletter.

Thanks.

Damage to Rental Vehicles While on TDY

Pamela McArthur, DSN 992-4760, provides an excellent paper intended to educate clients and the workforce with respect to damage to rental vehicles while you are on TDY.

Hope this does not happen to you.

But, if it does this will tell you what to do. The paper is geared to the Ft. Monmouth community, but can be tailored for your installation and command. (Enclosure 11).

The Lexis Corner--October 2001

Enhancements to LexisNexis' @ www.lexis.com:

Powerful new enhancements have been added to lexis.com to eliminate steps in the research process, saving you time and increasing your productivity. These enhancements include:

Get a Document

Retrieve the right document by citation quickly and easily with one simple function. No need to choose between LEXSEE" and LEXSTAT". In addition, use "Citation Formats" to display a single list of acceptable citation formats for getting or Shepardizing' documents.

Tagged Documents

Document checkboxes are now available in ALL browse formats to mark documents for print/download/fax/email delivery. In addition to tagging for delivery, the tag feature can be used for FO-

CUS' searching as well. This enables you to utilize your answer set more effectively by eliminating the need to weed through documents you have already deemed irrelevant.

Document Page Count

New page count on the top right side of your screen estimates the number of pages in any document. This allows you to anticipate delivery volume before printing large documents. Lexis.com also gives you the ability to print pinpoint pages or a range of pages from a selected document.

Streamlined Document Delivery Options

The ability to select all delivery options from a single page makes it easier to locate the most frequently used options and provides flexibility in delivery. Documents can quickly be downloaded to Microsoft Word, WordPerfect, or Adobe PDF. Remember

that dual column print is available for case law.

Power Navigation Bar

Whether using Internet Explorer or Netscape, don't forget about the navigation bar located at the bottom of your browser screen. This includes:

Term Browse--Rapidly review documents by jumping to highlighted key search terms within the document.

Document Browse--Quickly move to a specific document by entering a document number.

Star Pagination--Review documents in the reporter pagination of choice by selecting a specific reporter and/or page numbers to navigate easily within the document.

Explore--Navigate through a document quickly by linking to a specific section (i.e., case summary, disposition, opinion, dissent, etc.) (Enclosure 12)

Faces In The Firm

Departures

HQ AMC

Bill Medsger has been appointed to the Senior Executive Service as a member of the Office of General Counsel, National Imaging and Mapping Agency,

AMCOM

Claudia Klus retired on 30 September 2001 after 38 years of government service. She was awarded the Department of the Army Superior Civilian Service Award at a luncheon given in her honor on 20 September 2001. Claudia has served in several positions in the Legal Office since she first joined the office as secretary to the Chief Counsel in 1972.

Births

AMCOM

Rachel Howard, Acquisition Law Division, and her husband have a new baby son. Griffin Matthew During was born on 2 August and joins two big sisters.

Promotions

AMCOM

Sharon R. Hill, has been promoted to Chief, General Law/Intellectual Property Law Division. This is the position that was formerly held by Robert H. Garfield, who recently transferred to Office of Command Counsel, AMC.

CCAD

O. Carlos Lovell was recently selected as the Depot Chief Counsel at Corpus Christi Army Depot.

50 Years of Government Service

Winslow L. Hill, AMCOM Patent Advisor, completed 50 years of government service on 26 August. At a ceremony chaired by the AMCOM CG Mr. Hill received a four-star note, and an AMC Commander's coin.

Reorganization

HQ AMC

Business Law Division

Business Law Branch Chief (Supervisory): **Dave Harrington**

Protest Law Branch Chief (Supervisory): **Vera Meza**

Information Technology/Intellectual Property Branch: **Lisa Simon**

Assistant Command Counsel for International Affairs and Acquisition: **Craig Hodge**

These leaders will report directly to the Deputy Command Counsel, **Nick Femino**.

ARL

Effective 1 October 2001, the ARL Office³ will consolidate two positions previously assigned to other ARL organizations. The first new member to the ARL Counsel "family" is **Mark H. Rutter**. He will stay stationed at ARL's Research Triangle Park (RTP) site. The second new member is **Tina L. Dempsey**. She will stay stationed at ARL's NASA-Langley site and continue her duties as Paralegal Specialist primarily carrying out patent functions.