

**THE TWENTIETH CHARLES L. DECKER LECTURE IN
ADMINISTRATIVE AND CIVIL LAW¹**

JANICE R. LACHANCE²

It is a true pleasure for me to be here for the Twentieth Annual Charles Decker Lecture.³ I have to admit, one of the reasons I decided to accept the invitation to be here today was the intriguing write-up I received on JAG. It said: "The combination of mystery, courtroom drama, and men and women in uniform keeps viewers coming back for a taste of the excitement. The military spin makes for some intriguing situations in what could

1. This article is an edited transcript of a lecture delivered on 17 November 1999 by Ms. Janice R. Lachance to member of the staff and faculty, distinguished guests, and officers attending the 48th Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia. The lecture is named in honor of Major General Charles L. Decker, the founder and first Commandant of The Judge Advocate General's School, United States Army, in Charlottesville and the 25th Judge Advocate General of the Army. Every year, The Judge Advocate General invites a distinguished speaker to present the Charles L. Decker Lecture in Administrative and Civil Law.

2. Janice R. Lachance is the Director of the U.S. Office of Personnel Management (OPM). She was sworn in as Director by Vice President Al Gore on 10 December 1997, after a unanimous confirmation by the U.S. Senate on 9 November. At the swearing-in ceremony, the Vice President called Ms. Lachance "the voice of fairness for Federal employees and for excellence in government, and a champion of working people everywhere." Additionally, Ms. Lachance is the Chair of the National Partnership Council and the President's Task Force on Federal Training Technology. She is a member of the President's Management Council, the President's Commission on White House Fellows, the Presidential Task Force on Employment of Adults With Disabilities, the President's Interagency Council on Women, the Planning Committee Forum for Health Care Quality Measurement and Reporting, the Inter-Departmental Council for Hispanic Educational Improvement, and the Advisory Committee on Veteran's Employment and Training. Before becoming the agency's Director, Ms. Lachance held the following positions in OPM: Deputy Director (appointed by President Clinton in August 1997); Chief of Staff (1996-1997); Director of Communications and Policy (1994 to 1996); Director of Communications (1993-1994). Ms. Lachance's education includes: B.A., Manhattanville College, Purchase, New York; J.D., Tulane University School of Law, New Orleans, Louisiana.

3. I would like to thank Commandant Lederer and General Romig for their hospitality. Also attending the lecture were two people from OPM, who I would like to recognize as well. The first is my senior policy advisor, Mark Hunker. The second is a neighbor of the JAG school. As one of her duties, Barbara Garvin Kester is the director of OPM's Federal Executive Institute (FEI). The FEI is the highly regarded proving ground for top civilian federal employees.

otherwise be just another show about lawyers . . .”⁴ Oh wait, that was the write up for JAG the TV series!

Seriously, The Judge Advocate General’s Regiment (JAG) and the U.S. Office of Personnel Management⁵ (OPM) are actually very similar in some ways. Just as JAG officers serve as a liaison between the military community and its real world legal needs, the OPM serves as the bridge between the federal workforce and its real world human resources needs. At the center of both of these relationships is the critical element of public trust.

With that in mind, I would like to start my discussion with you today by looking a little more closely at how the OPM came to inherit this trust. You all probably know the story of how the U.S. Civil Service Commission, which later became the OPM, was created in 1883 as a response to widespread political corruption and favoritism. When President James A. Garfield was shot and killed in 1881 by an angry office seeker, an enormous outpouring of public anger from the American people prompted Congress to pass the Civil Service Act of 1883.⁶ The bill was introduced by a Democratic senator and signed into law by a Republican President—an indication of just how strong the bipartisan support was for this measure. If you follow Washington politics at all, you know how hard it is for

4. *JAG* (CBS television broadcast series, 1999).

5. The U.S. Office of Personnel Management is the federal government’s human resources agency. While daily providing the American public with up-to-date employment information, OPM ensures that the nation’s civil service remains free of political influence and that federal employees are selected and treated fairly and on the basis of merit. OPM supports agencies with personnel services and policy leadership including staffing tools, guidance on labor-management relations, preparation of government’s future leaders, compensation policy development, and programs to improve workforce performance. The agency manages the federal retirement system, as well as the world’s largest employer-sponsored health insurance program serving more than nine million federal employees, retirees and their families. In addition, the agency oversees the Combined Federal Campaign (CFC) through which 4.2 million federal civilian employees and military personnel raise millions of dollars for thousands of charities every year.

As Director, Ms. Lachance oversees the agency’s work force of 3700 employees and has an annual budgetary authority of approximately \$27 billion composed of discretionary and mandatory requirements. She also has responsibility for the administration of the federal retirement, health, and insurance programs that total about \$488 billion.

6. Civil Service Act, 22 Stat. 403 (1883) (codified as amended at 5 U.S.C. § 632 (1966)).

the two major political parties to agree on anything, which was just as true 115 years ago.

This law's basic principles—which have not changed in more than a century—have stood the test of time, and the transition from a rural, pioneer society to one of the most complex industrial societies in the world. Since that time, federal jobs are offered and filled based on *what* you know, not *who* you know.

By 1978, changes were needed if the merit system was to remain effective. As a result, the Civil Service Reform Act of 1978⁷ abolished the Civil Service Commission and divided its functions and missions among three new organizations: the Merit Systems Protection Board; the Office of Special Counsel; and my personal favorite, the OPM. As the human resources agency for the federal government, the OPM takes its responsibility for administering the merit system very seriously. We know that the American people are relying upon us to make sure our federal employment system *is* fair and *stays* fair.

However, more than just merit is at stake here. We also have an obligation to build a workforce that is competitive in the next century. Thus, for me and for the federal government, it means we continue to take great care to select and develop employees who have the skills and expertise to lead our government into the changing world of the new millennium. People talk all the time about the impact of this change on our workforce and our society. I am here to tell you that the impact is already being felt—it is real, it is significant, and for those caught unaware, it will be catastrophic.

Lately, I have been talking about something that I call the “Dinosaur Killer”—and no I am not talking about some giant asteroid striking the planet, as recent movies have suggested. Instead, I am talking about an overwhelming, unavoidable force of nature that is changing the climate of the world's workforce and ushering in a new age—this time we are calling the Dinosaur Killer by the name of “The Information Revolution.”

More and more information is becoming available to an ever-expanding number of people around the world at an ever increasing pace. New technologies, new work environments, new needs for skills and learning, all these changes are having a deep impact, at work and at home, in soci-

7. Civil Service Reform Act, Pub. L. No. 95-454, 1, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5, 10, 15, 28, 31, 39 & 42 U.S.C. (1994)).

eties around the globe. Rest assured, the demands of the Information Revolution will kill our twentieth century dinosaurs—those organizations that *cannot, or will not*, adapt to the new global realities of the next millennium.

At OPM, we have been working hard to fight off the Dinosaur Killer by anticipating the specific nature of work and the workforce of the twenty-first century, and by seeing what OPM can do now to create and sustain learning environments. We already see the trends for the next millennium—the theme is: “Adapt or be pushed aside.”

Organizations are already learning that they must adapt to changing missions and become more diverse and more flexible. In the years ahead, organizations will no longer have a permanent workforce, or even a temporary workforce, instead they will have what I call a “situational workforce.” Needed work will be done by a blend of core employees in cross-functional teams and by temporary employees, consultants, and contractors, when necessary.

Full-time, lifelong jobs and job descriptions are already disappearing, and instead, employees are increasingly being called upon to be generalists—omnivores in the new world order, with the tools to survive and flourish at many different tasks and in many different environments. Fewer jobs will fit into a neat job description, and our core government employees will be called upon to perform one role today and another tomorrow.

Obviously, this has significant implications for how skills are valued, how salaries are set, how performance is evaluated, and how learning needs are assessed and met. Organizations will have to look at the bottom line and weigh the cost of investing in specialists who can only do one thing very well, versus the benefit of using generalists who can perform multiple tasks and who are adaptable to changing organizational needs. The way work is organized is also being affected by the speed of change. Work processes are increasingly driven by what employees know—that is to say, how well the work is done is increasingly dependent upon the level of knowledge the employee brings to the job. The more knowledgeable an employee is across disciplines, the better job he can do, and the more valuable he becomes.

The result of this trend is that the distinction between working and learning is becoming blurred—so that part of every employee’s job will be to keep learning about the ever-changing work to be performed. The Clin-

ton/Gore Administration realizes this, and has made lifelong learning a priority in its efforts to improve the federal workplace.⁸

Another trend we see is that federal government operations and decision-making authority will continue to be decentralized. For example, we are working to promote partnership and empower front-line employees to give them a greater say in problem-solving and workforce improvements. We must find ways to promote the *potential of our employees*—making them more knowledgeable, more adaptable, and better able to meet changing needs. The OPM remains committed to developing the full potential of our current workforce. It is good for the employees, good for morale, and good for the bottom line.

Another change we will see is that federal agencies will shift from the hierarchical, Industrial Era structures that we are familiar with to “internetworked” structures that improve and integrate service delivery and improve the design of government. We are moving from the ponderous organizational dinosaurs of the twentieth century to the fleet and nimble gazelles of the twenty-first. In the military, this is being seen not only in a new emphasis on more mobile fighting forces and “Rapid Deployment Forces,” but also in leaner organizational structures and simplified lines of communication.

Where and when work is accomplished will increasingly be driven by customer and employee needs. The growth in telecommuting and working from home will continue. As well as expanding traditional work hours to meet the needs of our customers—customers who have their own work schedule and family obligations. As Department of Defense employees, this is not news to you—DOD is always ready, twenty-four hours a day. Now the rest of us are learning what it’s like to be on call 24-7!

Middle management will continue to experience shrinking ranks and changing roles. The manager’s role will become more that of a leader, a coach, an enabler, and a teacher rather than a giver of assignments and

8. Susan B. Rosenblum, *Retooling the Workforce: Poverty Reduction Must be Central*, NLC President Tells National Audience, NATION’S CITIES WEEKLY, Jan. 18, 1999, at 1 (discussing the Clinton Administration’s education initiatives to include those in the federal government).

evaluator of performance. In other words, we either grow the wings we need to survive, *or we will become extinct*.

Through all of this, we must ensure that, as an organization, we never lose sight of the people involved. The business of government is still the business of people helping people, after all. With that said, let me offer some words of caution. We have to guard against work being divided into smart jobs and dumb jobs, thus dividing the workforce and society into “haves” and “have nots.” We will have to cope with skill obsolescence that leads to job displacement and organizational restructuring. Our increased capability to monitor employees by computer may erode their rights to privacy. In addition, information technology also provides an example of a workforce learning need. Technology literacy is required in almost all occupations, and this constitutes a special challenge for us in keeping employees up-to-date on current applications. In fact, for the individual, survival and success in the distributed, high tech workplace depends on his ability to learn, unlearn, and relearn. That, in and of itself, is quite different from past workplace learning and development challenges.

Workers’ values are also changing in America. Workers may be loyal to their profession, but as their employers become less loyal to them, they are also becoming far less loyal to the organizations they worked for than a generation ago.

One element of this phenomena is that workers have come to expect that their employer should address their learning needs. They will choose those employers that provide them with the most educational opportunities. Learning has become an economic and pocketbook issue for employees, and unions are increasingly interested in the training needs of employees.

As these trends become clearer, OPM is responding with new tools and strategies to provide agency managers with greater flexibilities for recruiting, managing, and retaining the workforce of the twenty-first century. We have already introduced many changes that have made a real difference in federal human resources management, these include: the delegation of examining to agencies, an automated database of all government jobs that is open around the clock, and a flexible framework for performance management that supports individual and team performance.

But, our job is not done. We need more human resources tools and strategies that meet the challenges of managing tomorrow's workforce.

At the beginning of this year, Vice President Gore announced his commitment to civil service improvements at the Global Forum on Reinventing Government.⁹ The essential components of these improvements are twofold. First, we must have flexible performance and pay systems that support high performance, and encourage employees to do their best. Second, we have to create flexible recruitment and hiring systems that permit alternative selection procedures, authorize agencies to make direct job offers in critical areas—like information technology—and permit use of non-permanent employees, with appropriate benefits, to expedite adapting to workload and mission shifts. We must do these things without losing sight of our merit principles and our commitment to our nation's veterans.

For the most part, these improvements are offered as options to agencies. Working with their employees, agencies can choose which new tools and strategies best fit their needs. Of course, each new tool or strategy is designed to work in the context of our merit principles, so that agencies can continue to ensure that the very best workers are hired, rewarded, and retained.

Along with these proposed flexibilities for managers to select and manage the high quality, diverse workforce they need, we are also introducing real accountability. This accountability translates into more emphasis on performance measurement, and ultimately, it also translates to improved recognition and rewards. Let me be frank. All stakeholders have an equal share in embracing these changes in the civil service. I can assure you that the merit system will remain the basis of all our improvements, but we cannot be afraid to try new things and experiment with new processes.

Thus, we must embrace increased labor-management partnership as a means of accomplishing these changes. With partnership comes more creativity and productivity, and ultimately, better service to the public. Our mission is too important, our opportunities too great, to accept anything less than full and constructive engagement and cooperation. In fact, in 1993, President Clinton issued an executive order to support the reinvention of government by improving federal labor-management relations.

9. Office of the Vice President, *Vice President Gore Hosts Global Forum on Reinventing Government*, U.S. NEWSWIRE, Jan. 14, 1999.

The President called for the creation of labor-management partnerships throughout the government and established the National Partnership Council specifically to promote cooperative efforts in the Executive Branch.

Six years later, we see the value of these efforts. Partnerships between labor and management have cut costs, enhanced productivity, and improved the delivery of service to the American people at agencies like the IRS, the Veterans Administration, the Social Security Administration, the Customs Service, and the Army.

Just last month, I was privileged to give the John Sturdivant National Partnership Award to managers and union leaders from around the country for the work they are doing in partnership to provide better service and real cost savings to the American taxpayer. One of the winners was the U.S. Mint, where a partnership with the American Federation of Government Employees has brought dramatic gains in customer service and over \$25 million dollars in annual cost savings. This is what can be accomplished when labor and management work together to solve the challenges that confront government today.

Both labor and management have a stake in making government work more effectively for citizens who demand and deserve more value for their tax dollars. That is why the President signed Executive Order 12,871¹⁰ in 1993. He believed then—and continues to believe today—that by working together, labor and management can bring real change to government, like it has in every successful private-sector corporation that has remained competitive over the last decade. But for all the success we have had, the President also recognized that partnerships are struggling in some agencies and have yet to get off the ground in others. The fact is our work is far from over, and this Administration can do more—and should do more—to build on the success we have had and help spread partnerships more widely across the government.

We also know that discussions between labor and management over how many employees are assigned to a job, how that job gets done, and what kind of technology is used to get the job done right are essential elements to any conversation about better, more effective government. As

10. Exec. Order No. 12,871, 58 Fed. Reg. 52,201 (1993).

lawyers, you will appreciate the fact that we refer to these fundamental issues as “(b)(1)” issues, named for their subsection in the U.S. Code.¹¹

The President has recently released a memo to all agencies urging them to redouble their efforts to negotiate (b)(1) subjects. He wants to stimulate the creation of true workplace partnerships where labor and management work together to solve the problems that are critical to building a revitalized and reinvented government. He wants agencies and unions to work together to develop a plan for achieving *all* the important objectives that he established in the executive order, including the requirement to bargain over the (b)(1) subjects.

At the same time, any such plan should be designed to help federal agencies and federal workers deliver the highest quality service to the American people. In other words, neither partnership nor (b)(1) bargaining are goals in and of themselves, but rather the vehicles by which labor and management can help build a government that works better and costs less. Agencies and unions are being asked to report specifically on how their partnerships are helping to improve the performance of government. This unmistakable emphasis on bottom-line results is the most critical component of our efforts, and the very heart of labor-management partnerships.

Speaking of partnerships, another way we are promoting them in the government is through the increased use of alternative dispute resolution (ADR). Let’s face it, in spite of the dramatic court room scenes on your TV series, our current formal administrative adjudicatory system in the federal government can be a very frustrating, very lengthy, very costly, and seemingly endless process for resolving issues.

Today, ADR offers us a better road—one that not only saves resources but also has the potential to lead to a more satisfied and productive workforce. One that might some day lead to my real dream—a television series called “OPM & ADR.” Actually, OPM has a long history of encouraging the increased use of ADR in the resolution of workplace disputes, and I intend to carry on that tradition.

One of the reasons that ADR works so well is that its impact is real and, in these times of the Government Performance and Results Act,¹² ADR results *can* be measured. Programs are taking advantage of this—

11. 5 U.S.C.S. § 7106 (LEXIS 2000).

more and more government agencies are now evaluating ADR's impact in terms of estimated cost avoidance. That is, the amount of money that would be saved by resolving a matter early without going through a formal process. One program estimated that, during a two-year pilot, it saved almost two million dollars on EEO and grievance cases! That same program resolved ninety-four percent of its cases using ADR within fifteen days as opposed to the more typical 180 days or more for the traditional processes. That is two weeks as opposed to five-and-a-half months!

The success of ADR can be measured in other ways as well, by conducting surveys of those who use ADR—the employees, supervisors, and employee representatives in a specific program—to determine how satisfied they were with the process. One agency recently found that *ninety percent* of the users of their ADR program said they were satisfied with the mediation process and their mediators. When was the last time that ninety percent of federal supervisors, employees, and their representatives agreed on anything? This program's evaluation efforts also showed that in locations where ADR was available, the number of formal EEO complaints declined by as much as forty-five percent from the year before.

These are real numbers and, again, it is good for our government. I know many of you here today have been involved in this effort. This is an example of good government in action. Alternative dispute resolution works, and it is here to stay. As lawyers, as dispute arbitrators, and as keepers of the public trust, we all must take advantage of ADR in the years ahead.

On another critical issue, the OPM has been working hard to improve performance management in the federal government. By deregulating performance management, the OPM has put the agencies in the driver's seat as they endeavor to manage their own employees. Within broad parameters, agencies can now design and implement performance management systems that are suited to their mission and workforce, and provide them with maximum opportunity to deal effectively with poor performers.

Meanwhile, the OPM has also greatly enhanced the tools it offers to agencies and agency managers in support of their efforts to deal with poor performance. These tools include a CD ROM to provide an "easy read" for managers who want to understand the process of counseling, assisting

12. Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (codified at 5 U.S.C. § 306 & 31 U.S.C. §§ 1115-19, 9703, 9704 (1999)).

and possibly taking action based on unacceptable performance. It provides practical tips on counseling, sample letters, and checklists to help managers as they work with employees who are not performing acceptably.

Last year, OPM also took another look at the conventional wisdom that there are vast numbers of poor performers in the federal government. The resulting report, *Poor Performers in Government: A Quest for the True Story*,¹³ estimated that only 3.7% of the federal workforce can be termed “poor performers.” While there are no good benchmarks in the private sector for comparing this finding, it is lower than what conventional wisdom – or late night talk-show hosts–would lead us to believe. While no level of poor performance is entirely acceptable, there is no evidence to show that this problem is unique or goes beyond what might be found in other large organizations.

Our study showed that, as a whole, the supervisors of poor performers have not surrendered to cynicism and despair. Many report that they are actively pursuing a solution through formal and informal means. They also report, however, that supervisors who have pursued formal performance-based personnel actions describe the experience in intensely emotional terms. The effort they put forth to overcome real and perceived obstacles may be honestly characterized as “heroic.” Of particular concern is their frequent perception that top management did not welcome or support their efforts. This must change.

The legal protections available to employees in non-federal public and private organizations are often similar to the federal system, and the trend seems to be toward increasing these protections. Federal supervisors and managers may be yearning in vain for a dramatic easing of their burdens and responsibilities in this regard. Thus, I am extremely pleased to report that the federal work force is not a sanctuary for the chronically bad employee. In fact, my experiences with federal civil servants at all levels and across agency lines have reinforced the fact that they are conscientious, hard-working, and highly skilled. Without reservation, I can extol their virtues and am proud to do so.

At the same time, the federal government must maintain a policy of “zero tolerance” for poor performance. While the Administration has been a strong advocate of the proposition that federal employees know best how

13. OFFICE OF PERSONNEL MANAGEMENT, REPORT OF A SPECIAL STUDY, POOR PERFORMERS IN GOVERNMENT: A QUEST FOR THE TRUE STORY (1999).

to perform their jobs, we also believe taxpayers should not be shouldered with the costs of paying people who simply cannot or will not do their work at acceptable levels.

So, there it is. The future, as I see it. I realize that we cannot anticipate every change the future holds, but I also know that by emphasizing adaptability and innovation, we will be better able to adjust to any surprises the future may hold. At OPM, we are not afraid to try new things and experiment with new processes. I encourage you to do the same.

It's a new era. It's already begun. The Dinosaur Killer is upon us. I have one simple piece of advice for you: don't be an institutional dinosaur. Be nimble. Adapt. Don't be afraid to change. In the long-run, it is not only in the government's best interest, it is in *your* best interest.

I have enjoyed my time here and the opportunity to share ideas and innovations with you, as we each create a new, more global government—built on the lessons of the past, the innovations of the present, and the needs of the future—to help our nation move successfully into the twenty-first century.