THE TWENTY-EIGHTH ANNUAL GILBERT A. CUNEO LECTURE IN GOVERNMENT CONTRACT LAW[1]

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[*] This is an edited transcript of a lecture delivered by Professor Ralph C. Nash, Jr., to members of the staff and faculty, their distinguished guests, and officers attending the 60th Judge Advocate Officer Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia, on November 18, 2011.

Professor Emeritus of Law of The George Washington University, Washington, D.C., from which he retired in 1993. The lecturer founded the Government Contracts Program of the university's National Law Center in 1960, was the Director of the Program from 1960 to 1966 and from 1979 to 1984, and continues to be actively involved in the Program. He was Associate Dean for Graduate Studies, Research and Projects, of the Law Center from 1966 to 1972.

Professor Nash has specialized in the area of Government Procurement Law. He worked for the Navy Department as a contract negotiator from 1953 to 1959, and for the American Machines and Foundry Company as Assistant Manager of Contracts and Counsel during 1959 and 1960.

He graduated *magma cum laude* with an A.B. degree from Princeton University in 1953, and earned his Juris Doctor degree from the George Washington University Law School in 1957. He is a member of Phi Beta Kappa, Phi Alpha Delta, and the Order of the Coif.

Professor Nash is active as a consultant for government agencies, private corporations, and law firms on government contract matters. In recent years, he has served widely as neutral advisor or mediator and arbitrator in alternate dispute resolution proceedings. He is active in the Public Contracts Section of the American Bar Association, is a member of the Procurement Round Table, and is a Fellow and serves on the Board of Advisors of the National Contract Management Association.

During the 1990s, Professor Nash was active in the field of acquisition reform. He served on the "Section 800 Panel" that recommended revisions to all laws affecting Department of Defense procurement, the Defense Science Board Task Force on Defense Acquisition Reform, and the Blue Ribbon Panel of the Federal Aviation Administration.

He is the co-author of a casebook, *Federal Procurement Law* (3d ed. 1977 (Vol. I) and 1980 (Vol. II)) with John Cibinic, Jr. He and Professor Cibnic also co-authored five textbooks: *Formation of Government Contracts* (4th ed. 2011) (with Chris Yukins), *Administration of Government* (4th ed. 2006) (with James Nagle), *Cost Reimbursement Contracting* (3d ed. 2004), *Government Contract Claims* (1981) and *Competitive Negotiation: The Source Selection Process* (3d ed. 2011) (with Karen O'Brien-DeBakey), co-author with Leonard Rawicz of the textbook *Patents and Technical Data* (1983), the three volume compendium, *Intellectual Property in Government Contracts* (5th ed. 2011), and the two-volume, *Intellectual Property in Government Contracts* (6th ed. 2008); co-author with seven other authors of the textbook *Construction Contracting* (1991), co-author with Steven Feldman of *Government Contract Changes* (3d ed. 2007), and co-author with Steven L. Schooner, Karen O'Brien and Vernon Edwards of *The Government Contracts Reference Book* (3d ed. 2007). He has written several monographs for The George Washington University Government Contracts Program monograph series, and has published articles in various law reviews and journals. Since 1987 he has been co-author of a monthly analytical report on government contract issues, *The Nash & Cibinic Report*.

PROFESSOR RALPH C. NASH, JR.*

That's the third edition of formation. The fourth edition just came out. Steve is teaching using it this fall, and when he got his copy, the first thing he said to me was, my main issue in using your book this semester is to not drop it on my foot, because it's so fat.

Gil Cuneo was a fabulous guy. He actually, in my view, is the one who professionalized government contracting. When Gil came into the business out of the government, the practice of government contract law was there, but it was a pretty unsophisticated practice. This is a long time ago. And Gil began turning out really high quality documents; I think really the first person that did that.

When I set up the program in 1960 and began to give a—I started out with a two-week course in '61. I had five outsiders and, of course, Gil was one of those five. One of the great things that happened to me at the end of his life was that he and I were down here together. If he died in '76, it must've been '74 or 5, somewhere along in there. I don't know how many of you remember, but by that time, he was in a wheelchair. He was having a hard time getting around. But we did get a chance to go to dinner that night and it was a wonderful way—of course, I didn't know he was going to die in the next year or two—but it was a wonderful way

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[1] The Gilbert A. Cuneo Chair of Government Contract Law was dedicated on January 9, 1984. Gilbert A. Cuneo attended St. Vincent College, Latrobe, Pennsylvania, and Harvard Law School. He received an honorary LL.D. from St. Vincent College in 1973.

After graduating from Harvard Law School in 1937, he was engaged in the private practice of law in New York City until entering military service in October 1942. From August 1944 to March 1946, he was a member of the faculty of The Judge Advocate General's School, where he taught the legal and accounting phase of government contract negotiation, termination, and renegotiation, and wrote a substantial part of the text entitled *Government Contracts and Readjustment*, published by The Judge Advocate General's School.

Mr. Cuneo served as an administrative judge with the War Department Board of Contract Appeals and its successor, the Armed Services Board of Contract Appeals, from 1946 to 1958, at which time he entered private practice in Washington, D.C.. He served as Chairman of the Section of Public Contract Law of the American Bar Association in 1968–1969. Mr. Cuneo was an Honorary Life Member of the National Board of Advisors, and a recipient of numerous MCMA awards and citations. A pioneer in his field, Mr. Cuneo wrote and lectured extensively on all aspects of government contract law for thirty years. As a commentator on developments in the field of government contract law and as a premier litigator, he shaped much of the present law of government contracts and was considered the "dean" of the Government Contract Bar until his death in April 1978.

for me to celebrate the life of a great person, a person who did an awful lot for our community.

I decided for my talk today to use the article -- the article that I wrote in the GW Law Review,[2] the origin of that article—I quit writing law review articles before most of you were born. You know, I did my four or five—I forget how many, when I was a young professor, and it occurred to me that nobody was reading them. So I decided not to write any more, and switched to books, which nobody reads, probably, either. But I was asked by the federal circuit bar people in their annual meeting, one-day meeting, to critique the government contracts decisions of the court. And they knew I was a critic, of course, they read the *Nash & Cibinic Report* and it was very kind of them to ask me, I guess.

Part of that job was to write a law review article, so that's what happened. So I took what I put together for the speech and turned out this article. And what it does, it compares the court—the current Federal Circuit to the Court of Claims which was the predecessor court. This—we're coming up on the 30th anniversary next year and 1982 was the transition.

We're coming up on the 30th anniversary of the killing of one of the great courts of the United States. It was killed by the patent bar. In retrospect, I probably have to be careful how I say that. You'll have to take it humorously: if everybody in the room went out and shot a patent lawyer, we'd be better off. [**Laughter**.] Don't take that literally.

I don't think we realized what had happened to us, but the patent bar was disturbed by the fact that of course patent litigation goes to District Court, private patent litigation goes through district courts and then appeals were going to all the various circuits, around the United States. And the Patent Bar was disturbed by the fact that they were getting a great diversity of decisions from the circuits, so they came up with this ingenious idea that maybe they could get all of the patent appeals from district courts to go to a single court. And they decided to take the Court of Customs and Patent Appeals, which heard agency appeals, but not district court appeals, and the Court of Claims, which heard government contracts patent cases and merge those two into a single circuit court called the Federal Circuit. And then take the Trial Division of the Court

[2] Ralph C. Nash, Jr., *The Government Contract Decisions of the Federal Circuit*, 78 GEO. WASH. L. REV. 586 (2010).

of Claims and make that an Article I Court called the Court of Federal Claims, and that's what they did.

They were successful in persuading Congress to do that. It didn't seem to us at the time that it made a whole lot of difference. We had the Court of Claims and we had the Trial Division and we had the Court. It was kind of an unwieldy operation. You sort of got an automatic appeal when you filed a case there, but what we saw happening was that they separated that into two different courts; didn't look like it was very significant. It turned out to be highly significant and that's—I started out the article by trying to describe what happened there. What happened was a change in attitude.

The Court of Claims was only a court of claims against the United States. Well, that was its function. It was set up in the late 1850s, turned into an Article III court under President Lincoln. And it basically was set up to get rid of congressional complaints because up to then, there'd been no waiver of sovereign immunity, so everything had to go through Congress. And they got sick of that, so they set up a court. The court perceived itself as being this sort of the guardian of the conscience of the nation. And I quote Marion Bennett who wrote a history of the court in the article where he talks about that and how important it is for the government to lose cases when government should be held accountable for the actions that it takes in order to persuade the citizenry that the government is a fair organization; treats people fairly.[3] And the Court of Claims really believed that.

It was fascinating to watch their decisions because they were fun to watch and we criticized them sometimes because they'd make a little new law or they'd bend some old law to arrive at what they perceived to be fair outcome. But I think they had that attitude because all they saw was claims against government. When that became the Federal Circuit, the Federal Circuit ended up with a huge amount of patent litigation. So if you look at their docket now, about a third of their caseload is private lawsuits: infringers against patent owners or patent owners against infringers. So they're no longer a court of claims against the United States Government. They perceive themselves as just another court.

And since we're, I think, 6 percent of their docket now, and patent

[3] *Id.* at 587 & n.2, *quoting* MARION T. BENNETT ET AL., THE UNITED STATES COURT OF CLAIMS: A HISTORY, PART II, at 170 (1978).

is—I don't know—thirty-five percent, forty percent, something like that way over not only that, but the patent cases. After quite a long period of time, the Supreme Court didn't take any patent cases. But in the last five or six years, the Supreme Court has taken six or eight patent cases, and the Federal Circuit has been reversed on over half of their cases. And of course that gets the attention of the judges when they get reversed.

So they're really interested in patent law, and that means a couple of things. Number one, it means from the operation of the court that there are no judges on the Federal Circuit who have any background experience in government contracting. Zero. And they will openly tell you that.

Number two, they don't hire law clerks who have any experience in government contracting. So the court is basically devoid of any experience in our area. And we've had two judges at the Nash and Cibinic roundtable over the last three or four years. The first one was Judge Bryson, and he said you have to understand—because we were talking about cases that I'm going to talk about in a minute that didn't—I didn't think the outcome was exactly right. And he said you have to understand that we don't know anything about government contracts. And his perception was that the lawyers practicing in that court weren't helping the judges understand government contracts. What he said to our audience was when you submit a brief, what you're focusing in on the very narrow point in your case, but you're not giving us any context of why is this case important. How does it fit in the big picture? And we don't know, and so if we do decide the case on a narrow point, it's your fault, not ours. He didn't say it that way, but basically, that's what he was saying. I don't know if that's good advice or not. That was his perception. But the key thing is they don't have any experience.

Before this critique that I gave, I was asked by Judge Michel to come over and have lunch. And we chatted at lunch about why the government contracts bar was unhappy with their decisions. And we sort of concluded that, well, maybe it would help if we got somebody on the court, some judge with government contracts experience. And I thought that was kind of encouraging. At the conference afterwards, he was asked a question of what are your priorities for new judges. And his answer was first priority, I want a district judge who's handled patent cases. Second priority, I'd like another patent lawyer. Third priority, I forget what. And we were fourth on his priority list. Now, of course, he has no control over who Congress appoints, but I was a little taken

aback. Here I thought we made a point at lunch, and all of a sudden I end up at the bottom of the pile again, which seems to me to be appropriate.

I went over to that conference that day at nine in the morning and I listened to—I was one of the final panel. I listen to them talk about patent law for five hours and forty-eight minutes. I got the last twelve minutes. And that's where we stand, folks, in that court. That's their perception of our importance in life. It's a tough place to be.

Now, what I did in the article was to take seven issues that seemed to me were important where they had arrived at or had moved away from the old Court of Claims logic. The Federal Circuit, when they were formed, adopted a rule that they were bound by Court of Claims precedent, and the only way they could overturn precedent was by an en banc decision. Of course, there are very few en bancs. One of the suggestions that Judge Michel made a year or so ago—I forget whether it was at last year's roundtable or the year before—but he suggested we ought to ask for more en banc decisions when the panel issues a decision we don't think is a good one, which is a great idea, except they never grant en banc. You know, so you can try, but they're going to turn you down. But anyway, the rule is that they can only overturn Court of Claims precedent by en banc. But that doesn't keep panels from making different law. They just either don't mention the Court of Claims decisions, or they distinguish them on the facts. They rarely overturn one, hardly ever, but they come out with new results.

So let's just run through the seven areas, and I think you have the article, so I'm going to go through them fairly quickly so that you can see the details.

The one that I think is probably the most interesting in some ways is the contract interpretation issue. Some of you may remember, if you can remember first year contracts and if your professor talked about this, that there were two great professors of contract law; not government contracts, but contract law: Williston and Corbin. And they both wrote these huge treatises. They're still there, obviously not by the same professors. And they disagreed on a number of things. One of the things they disagreed on was contract interpretation. Williston was a sort of literalist. and he believed that the words of the contract were what really mattered. And Corbin argued that you also had to look at the context and that meant that you should look at extrinsic evidence of course of dealing or maybe up front of how they arrived at the words, and you should look

at all of those things when you're trying to figure out what a contract said. What do the words mean? And how they should be interpreted?

Corbin won that argument, at least in two places. He won it in the drafting of the Second Restatement of Contracts, which picked up his reasoning. I put some of that in the article. And he also won at the Court of Claims. He didn't everywhere because there's always been a dispute on that issue and actually that dispute has been around the English-speaking world. Apparently in England, the Williston view won. And there's a great article a couple of years ago by a New Zealand law professor describing the fact that Australian—New Zealand law adopted the Willistonian rule, and it wasn't getting—judges were not happy with it, and they seemed to be moving towards the Corbin view.

Meanwhile, we're going the other way. We're moving from Corbin to Williston and the Federal Circuit has taken the jump pretty far saying that the plain meaning rule is what is predominant in government contracting. The way I understand the court—and I'm not sure that this is the rule; though I cite an en banc decision,[4] which is the Coast Federal case, which happens to be a *Winstar* case, not a procurement contract. But they do recite very straightforwardly the plain meaning rule in *Winstar* cases.[5] So if I understand the rule structure that they're putting out, they're saying when you get into court, or presumably before the board, the first trick is to figure out what is the plain meaning of the language of the contract. If the judge sees a plain meaning from the words, that ends the case. If the judge sees ambiguous words, then you can look at extrinsic evidence to figure out if there is a single reasonable meaning, in which case there is no ambiguity. In other words, you can use extrinsic evidence to resolve an ambiguity and then if you can't resolve the ambiguity, after that, you go to what we call risk allocation rules, which is contra proferentem, the duty to seek clarification, and reliance. I put that in the article, but that's how I teach it. And that's how the books are written.

What they've done is they've taken the extrinsic evidence and they've moved it from the initial consideration of "what do the words mean?" back behind an ambiguity. So if you can't prove an ambiguity by the plain meaning, then you can't ever get the extrinsic evidence. You're not supposed look at it now. How the case actually gets tried is a

[4] Coast Federal Bank, FSB v. United States, 323 F.3d 1035, 1040-41 (Fed. Cir. 2003).
[5] United States v. Winstar Corp., 518 U.S. 839, 911 (1996).

puzzlement to me, and I put that on the roundtable next month.

We're going to talk about that and see if we can figure out exactly what that means to the trial of these cases. But the way I analyze it in the article—what it does is it substitutes factual evidence in terms of determining what the meaning of the words is and says what we rather have is legal argument as to the meaning of the words. In other words, instead of bringing in the facts—and I can understand—it would be reluctance to hear some of the facts.

We mentioned the *McDonnell Douglas* case on A-12. If the facts are witness testimony about what happened twenty years ago—all you trial lawyers in the room prepare your witnesses and surprisingly they tend to remember your side of the case. I mean, nobody actually remembers what happened twenty years ago, so you're trying to resurrect memory, and I think we probably might all agree that that's a pretty tricky thing when you're looking back a long number of years. And so if I'm a judge on the court, I would be somewhat hesitant to base my decision on that kind of recollection. And I can understand that. But I don't understand why that means you should also throw out contemporaneous documents. I mean, one of the horrible things about trying cases is that you're stuck with documents and you're not allowed to throw them away. That's a no-no. So but for some reason, the court is throwing the whole thing out, and it's kind of interesting.

So now, if I understand what the court is saying, we say to the lawyers, you go to your dictionaries and your thesauruses and come up with a meaning of the words that supports your side. And so we substitute ingenious legal argument for facts or semi-facts which I think is a bad trade-off myself. The one thing that I've learned out of what's happened in the Federal Circuit is when I teach contract administration or government contracts, in general, I have to try and take these cases and turn them into advice for people at the working level. How did you respond to this case law?

And here, what I've been teaching is okay. Maybe the court thinks they're going to make better contracting people out of us. Okay.

Gil was one of the people, one of my first of my five people to help me teach it. Another one was a guy named EK Gubin. And EK was a sole practitioner, and he won almost every case. He had a big sign behind his desk that said, "When all else fails, read the contract."

In 1960, that was good advice. In 2011, that's bad advice. You better read the contract before you sign it. That's, I think, the message the court is giving us. And you have to read the contract from the point of view of somebody who doesn't know anything about government contract law. Okay. Doesn't know anything about the government contracting process? So what I've been telling people on both the government side and the industry side is look, if these are the rules we're stuck with, we've got to do a better job up front. I know that's hard because the process of contract formation is the world's most incoherent process. But I think I'm at the point where I'm saying to companies and government agencies, maybe you better get your legal people involved. Maybe they better read section C; maybe they better read the work statement; and just give a good bunch of advice on does this make common sense? Will somebody read these words in a way that it's going to hurt us? And if the court's successful—of course, we're all understaffed—nobody can do all that—but maybe at least the court is giving a signal that we need to move in that direction if we can. Okay. Let's move on to the second issue.

This one is one, I think, that may have changed things more than any other. That's the *Winter vs. Cath-dr/Balti* case.[6] It's an authority case. Again, we've known what the authority rules are. There's no such thing as apparent authority blah, blah, blah. That's what *Federal Crop Insurance* tells us.[7] And so the boards of contract appeals and the old Court of Claims took that logic and said, okay, there's no such thing as apparent authority, but there are implied delegations of authority. And I can remember students saying, "What's the difference between implied authority and apparent authority?" And I'd said, "The words." The words are different. *Federal Crop* stands for the proposition that you never use the word "apparent authority" in a decision. It's just implied.

Okay. Now, why did the boards take that trip? Because they saw cases—and the Court of Claims went along with this—they saw cases where the contracting officer had basically either expressly delegated authority, sent somebody out to solve a problem, or had stood by and watched it happening and had not intervened, and they felt—and the government got exactly what it wanted. I can remember one case where on the witness stand, the contractor's lawyer said to the contracting officer, "Okay, let's assume that the system had worked correctly. Let's

[6] Winter v. Cath-dr/Balti, 497 F.3d 1339 (Fed. Cir. 2007).
[7] Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947).

assume that when your technical person and the contractor's technical person made a deal, the contractor's technical person went to their business person. Their business person came to you and said, we need you to put your signature on this deal. What would you have done?" And the CO gave an honest answer. He said, "I would have gone to my technical person and asked if that was the deal they needed to have me make." And then the question was, "Well, if they said yes, what would you have done?" "Well, I would have told them to send me a procurement request for some money, and I would have entered into a mod or I would have issued a change order, whatever the appropriate action was." And so the contractor's lawyer said, "Well, then all you're arguing—you're not arguing about whether the government got what it wanted. What you're arguing about is whether the proper procedure was followed. Was there some slip in the procedure?" And, of course, in that case they found authority.

Now, that's not to say they found implied authority in all cases because they didn't. If you look in our books, they come out about half and half.

In the *Winter* case—and Winter is, of course, the Secretary of the Navy—in the *Winter* case the facts were these: It's a NAVFAC case and at the preconstruction meeting which the contracting officer is supposed to chair, the contracting officer doesn't show up. Another guy shows up, and he comes in and he says, look, this is going to be the perfectly administered contract and here's how we're going to do it. I'm going to be here all the time. I'm going to be available to you on a regular basis, and I am everything. I got all the authority. I'm the construction manager. I'm the COR. I'm the engineer. And I'm also the inspector. He says, I'm everybody, and whenever you have a problem, you will send me an RFI, a request for information, I'll look at it. I'll analyze it, and I'll tell you what to do and you'll do it. At the end of the contract, you gather up all your RFI's, and you will submit them to the contracting officers if you think you're entitled to an equitable adjustment. And then you can work it out with the CO.

Now, the contract contains three clauses that say COR's have no authority. And apparently this contractor's smart enough to understand what he just heard doesn't seem to match his contract. So he sends an e-mail to the contracting officer. And he says to the contracting officer, who is this guy? Who is this guy? And I put in the article the response he got from the contracting officer. Contracting officer basically said he

is—I'll just read you a couple of the phrases—he says responsible for construction management and contract administration on assign projects while providing quality assurance and technical engineering construction advice. Provides technical and administrative direction to resolve problems encountered during construction. A project manager analyzes and interprets contract drawings and specifications to determine the extent of contractors' responsibility. Prepares—and notice how the verbs change on us—prepares and/or coordinates correspondences, submittal reviews, estimates and contract mods. Doesn't say signs contract mods; just says prepares. Okay.

So he gives you all of this advice, tells you how to solve problems, and then he prepares mods. But obviously a CO's got to sign them because people who aren't COs can't sign mods; right? That's the essential thing a CO can do and nobody else can do.

So he believes that the CO has endorsed this procedure. So he does it. And it looks like one of the best administered contract he's ever seen. He submits his RFI's, he gets told what to do, he does it, and job gets done. He gathers up roughly thirty RFI's as he was told, takes them to the CO. The CO does exactly what this guy told him was going to happen. He analyzes them all, and he writes a letter and saying you're entitled to equitable adjustment on twelve of them, I think, and go back and negotiate the equitable adjustment with the same guy. So everything is going great for the contractor. He goes back, and nobody will talk to him. That's the end.

So he files a claim. When he files the claim, the CO withdraws his letter. That fascinates me. I love the idea. I mean, if you're going to—my suggestion to you is if you think you might withdraw a letter, write it in disappearing ink the first time. I don't know what withdraw means. Can you make something go away? I mean, I suggest you make patent lawyers go away, but that's a different technique.

I don't know. Anyway, he withdraws the letter. The appeal goes to the ASBCA. The ASBCA sees no authority issue here. I mean, the CO has sat there and watched this happen. He didn't chair the meeting; right? He obviously must have known because he participated in the process. So the board just goes ahead and takes it on the merits, rules on the merits. And the government loses a relatively minor—we're not talking a whole lot of money, relatively minor amount of money. It goes on appeal to the circuit and the circuit says there's no expressed authority here and

there's no implied authority. They basically say and they read the DFARS as saying—and you can read it this way—it's saying that you cannot delegate contracting officer authority to a COR. You cannot. So they reverse.

Now, that changes the law of government contracts. That basically destroys the concept of implied authority. That doesn't change the teaching very much because we've always said that you've got to take these issues to the CO; right? You can't bypass contracting officers if you expect to get equitable adjustment. But we've always noted—but if you do slip up there's a loophole. There's a way out. There's an escape hatch. I've been watching the decision since *Winter*. This is four years now and we haven't had an implied authority decision since then.

The court says there's still an existing line of authority under a case called *Landau*.[8] And this is authority for people operating in an environment where there are no COs like border patrol agents or people, state department people setting up exhibits after all kinds of fricky-fracky little fact situations where there fundamentally is no CO. It's not a procurement in the normal sense. And apparently that's still good law according to court. I have no idea why. But in our procurement, in our standard procurement contract area, the court seems to be saying that there is no such thing as implied authority.

Now, so what do you teach? You teach contractors you can't do anything without telling the CO about it. You must take everything that happens out there that could possibly end up in a request for equitable adjustment. You must take that to the CO and you must get the CO to do something about it. And that's a very unrealistic thing to have to teach because the COs are not at the site in most cases; these are mostly construction contracts. The construction contractor needs advice in most cases. They can't actually stop the work and wait. What's the CO going to do? CO can't say go ahead and do it because the CO doesn't have any money either; right? A CO's got to go get money from somebody. So it's a tough rule.

The only answer is pepper the CO with everything that happens at the operating level. And then I don't think that's a satisfactory answer because you got to tell them—in a lot of cases, the deal made at the working level, when they make the deal, they think it isn't going to cost

[8] H. Landau & Co. v. United States, 886 F.2d 322, 324 (Fed. Cir. 1989).

money. It's only later they learn that it did have a financial impact. So now you've got to say, you've got to look and see if there's any possibility it can cost money. You've got to tell the CO about it. Okay. That's the second area.

Third area—those are the two big ones I think. The third area is a case called *Am-Pro*,[9] and I don't think this is a problem. I'm not sure. It sent a few dozen practicing attorneys' kids to college with legal fees, but other than that, I don't think it's had a big significance. *Am-Pro* is a weird case. The issue is bad faith. And bad faith has been a part of government contract law for a long time in the termination for convenience area—some of you may recognize that—it's always been a way to get around the termination. Of course, a contractor's trying to get around a T4C in order to get anticipated profits. And the Court of Claims ruled many years ago that bad faith, if you could prove bad faith, then you could get around the termination for convenience. And the court said that to prove it, you had to have: irrefragable evidence.

I always liked that. That's such a nice word. I don't know that anybody knows what it means, but it has a really good sound to it: irrefragable. I mean, just the very, the consonants in the word sort of indicate very hard, really tough: "irrefragable."

Well, for some reason in 2002, a panel of the circuit decided that they wanted to get rid of the word irrefragable. Now, they didn't have a T4C case. They had an economic duress case. So they said the way you prove economic duress is through bad faith, which nobody ever said before. They invented that. That just came out of nowhere. And the subsequent economic duress case that we had by another panel didn't even pay any attention to it. But anyway, they said you've got to prove bad faith, and they said and the way you prove bad faith is through clear and convincing evidence, not irrefragable. But they said clear and convincing evidence of specific intent to harm the contractor.

Specific intent to harm, which, you know, is almost impossible to prove. So it's probably the same as irrefragable, maybe, who knows.

The problem there, I think, is that immediately the Department of Justice began arguing, well, if you need to prove bad faith for economic duress, you also need to prove bad faith for violation of the duty of good

[9] Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234 (Fed. Cir. 2002).

faith and fair dealing. And part of the duty at good faith and fair dealing is the duty to cooperate, the duty not to hinder. And they also argued that you've got to prove it in the superior knowledge cases, failure to disclose vital information. So we've got a line of arguments. It's has not gone to the Federal Circuit yet, but the Federal Circuit decision, I think, created this line of arguments, and we've got a bunch of different decisions from judges on the Court of Federal Claims on the question of, particularly, the duty to cooperate. Do you have to have specific intent to harm in order to win a case on duty to cooperate?

Now, we've had a duty to cooperate cases going back right after the Civil War. We've got a ton of old Court of Claims cases on duty to cooperate and Supreme Court cases. There's never been a mention of motive in any of those decisions. Nobody's ever asked the question of what did the government intend when they breached the duty to cooperate. The question has always been, did the government have a duty, an implied duty, not expressed, and did they cooperate? So this idea of bringing specific intent to harm into all of those other issues was a fascinating idea. Obviously, it's a way to win cases. But it hasn't gone to the circuit yet, and in my view the decisions of the judges in the Court of Federal Claims on the side of not letting this duty migrate any further, or this concept of bad faith migrate any further are the better reasoned decisions. I put several of them in the article.

So I think maybe that's not an issue, maybe. Hopefully now, if it is an issue, if that does migrate into the normal kinds of breach or constructive change cases that we've seen over the years, that means you're taking a lot of equitable adjustments away from contractors. And then of course the question is, how would contractors respond to that? Would they put contingencies in their price? Exactly what would they do? And nobody knows the answer to that.

Okay. I put some issues on accounting disputes in here. The one that shocked us was *Rumsfeld vs. United Technologies*,[10] which is a pretty sophisticated accounting problem. It's a deal that Pratt & Whitney made with some of its major vendors, where they would share the risk of profit or loss on new engine development contracts; the commercial deal that moved over into government contracting. And they, Pratt & Whitney, argued that those were collaborative agreements with people, risk-sharing agreements and therefore, the prices they paid for those parts in

[10] Rumsfeld v. United Techs. Corp., 315 F.3d 1361 (Fed Cir. 2003).

the engine should not be considered to be material costs and put into the G&A base. DCAA went along with that for a couple of years and then saw that it was having an impact, so they went the other way, which is normal DCAA practice. And that went to the court, eventually.

First, it went to the ASBCA. There were six accounting witnesses. All the senior people who'd been in on writing the cost accounting standards and were very experienced in the area, the board judge ruled in favor of Pratt & Whitney, very close case, could have gone either way, I think. And the circuit reversed; again, not a big deal on the merits. What's fascinating is that the circuit said the big mistake the board judge made was hearing expert testimony. I mean, the words—the term of the contract is—the accounting term is material cost. Anybody can—any normal human being can figure out what material costs are. You just grab you the *Webster's* dictionary, you look up cost. Try it sometime. You'll see quite a few definitions, and you know what it means. So accounting testimony is improper when you're interpreting the cost accounting standards.

How many of you have read the cost accounting standards? Would anybody argue that the folks who wrote them were consulting Webster's dictionary when they wrote it? I mean, I've never heard such nonsense, right? It's written in accountingese. If you're not an accountant, you can't understand the fool things; right? And the idea that a judge knowing nothing about our world could just read the words and say, "I know what they mean," that's a crazy idea.

Now, I was at an ABA meeting, and one of my students had a little dinner party at the meeting. And the lawyer who lost that case was there. And at the end of the dinner party he said, I have a present I want to give the lawyer who lost the case, their next accounting expert, and he handed him a little pocket Webster's dictionary, which I thought was kind of cute.

Anyway, a goofy decision. Okay. On page 606, it's the fifth issue; unabsorbed overhead. Unabsorbed overhead is a bogus idea. It always had been. John and I wrote for years that this was a crazy idea. This is the idea that somebody has shut down for a while in a construction contract. They've somehow not been able to absorb their home office overhead, so the government will repay them; right? Now, what's actually happened is that if they shut you for—or you shut them down for six months, they do the work in another six-month period, and they

recover they—allocate their home office overhead on a different period later. But do they lose any money? Well, maybe they lose the interest or whatever. But, you know, it's one of those bogus concepts. But the court said many years ago, we don't want to use accounting to figure out home office overhead. We don't want to look at facts. We want a formula. And so they used the Eichleay formula, which the ASBCA invented before any of you were born.

Now, that became then the only way you could prove unabsorbed overhead. And finally in a case called *P.J. Dick*,[11] another panel of the circuit decided that they were sick of these cases. They were getting about one case a year. So they said, we're going to write a decision that lays out the rules of unabsorbed overhead. It is so clear that everybody understands, and so we'll never have another case. And it's worked. They've only had two since then. That's 2003. They've only had two cases—no, only one case in eight years. There's been some cases at the Court of Federal Claims.

The problem is that the rules they wrote are totally asinine. They have no connection to reality. The rule is they created this term that you've got to prove—the contractor has to prove that they were on standby, whatever that means. And on standby, they said to prove that—you've got to prove three things. The first thing you've got to prove is that the government caused delay was not only substantial, but of an indefinite duration. So if the CO says, I order you to stop work for six months, you're not on standby because it's not indefinite duration, and it makes no sense at all.

The second thing is, they said you got to prove that you're required to be ready to resume work at full speed, as well as immediately. So if the CO says, I order you to stop work, but when I lift the order, you can remobilize, you're not on standby no matter how long you're sitting there. Okay. What they've done is they've given the CO the ability to never have to pay unabsorbed overhead which is great for the big companies. What they've done is to take away some profit from the big company because this is all windfall. I had somebody from Bechtel in my classes a couple weeks ago, and I said to him, how many contracts do you have going at one time at Bechtel? Five hundred, maybe? If one of them gets delayed for six months, can you see the impact of that on your home office overhead? I mean, you couldn't see it in the third decimal

[11] P.J. Dick, Inc. v. Principi, 324 F.3d 1364 (Fed. Cir. 2003).

place. There is zero impact.

What about the small company? What about the company who's used up all their bonding capacity on this contract? They're stuck. They're hurt. Now, what I'm telling your contracting officers is this: When it comes to big companies, use the rule. You shouldn't be paying them extra home office overhead, so don't. Use one of the two techniques, but don't use that technique with the small company because it does not benefit you to bankrupt your contractor, or to financially hurt them. So you should not use the rule in that case. That's my view.

And I don't know whether you give them the same advice. I hope you would because it's an unfair rule. What the rule should be is you should look at the impact on the company. If the impact on the company is that they cannot take more work, then you ought to pay some home office overhead. So my advice is, forget what the court said. They don't know diddly-squat about what they're saying. Although, you know, if your only goal in life is to win lawsuits, then fine. But otherwise, if your goal is to treat your contractors fairly, which I think your goal should be, then you shouldn't use it. Okay.

Now, I want to digress for a minute because I want—I'm running out of time. I'm going to steal some of Steve's time; it wouldn't be the first time. I want to talk a minute about the role of government lawyers. We had a faculty member many years ago. He was deeply involved in the activities of St. John's Church over on Lafayette Square, and they were running a luncheon program debating ethical issues and he asked me to go over and debate a Department of Justice lawyer on whether the ethical rules applied to government contract lawyers, government lawyers. And I said I'd love to do that. That's something I like to talk about.

So I went over there, and I said government lawyers, unlike private lawyers, has two ethics rules they got to abide by. One is zealous representation of the client and—and the other is proving to the world that the government has a fair organization who treats people fairly. The DOJ lawyer, they came in and said, "I couldn't disagree with you on anything more than that. Government lawyers have *no* obligation to show the citizenry that they treat people fairly."

When, right after John died, the Court of Federal Claims gave John and I the Golden Eagle award, and we went up to Philadelphia. We got the award. The judge, chief judge, said to—John was dead, his wife was

there—he said, would you like to say a few words. And I never turn that down, so I said sure. I got up, and I said it's a great honor to get this award because you're the successor of what I believe is one of the great courts and it was a court that believed that in many cases, the government won the case when the court ruled against them.

And my wife and I were walking out of the convention center there afterwards up in Philadelphia, and we happened to be walking behind the chief judge and the head of the trial Court of Claims Civil Division. I heard one of them say to the other, "I wonder what he meant by that?" And I thought, that's the problem. That's the problem. That we don't—we don't seem to have that vision of what the role of the government people, in particular lawyers, is. It's more important to show everybody that the government is fair than it is to win a case. And I have believed that for a long time.

Now, we have two decisions that are very disturbing, and I'll just give you a quick one. One is a case called *Moreland*,[12] which is a 2007 case. And that's a simple case where the contractor submitted an REA and then a claim and they went through negotiations. Contracting officer finally issued a decision for zero. On the witness stand, the contracting officer was asked: When you were analyzing the claim and negotiating, did you conclude that the contractor was entitled to $200,000? And he said yes, approximately 200,000 was my conclusion. And he said, well, then why did you write the decision for zero? And the answer was: My lawyer advised me to do that to use that as a bargaining chip in subsequent negotiations.

In the *Bell BCI* case,[13] which is about the same time, 2008, we had a withholding of liquidated damages. And on the witness stand, the contracting officer continued to withhold, then we went to appeal. On the witness stand, the contracting officer was asked, did you conclude that there were excusable delay for a third of the liquidated damages? And he said, yes. He said, then why did you continue to withhold liquidated damages in the face of excusable delays? And the horrible answer was, my lawyer advised me to do it. Twice in two years, we have government lawyers advising contracting officers to treat people unfairly. Now, we seem to have forgotten the rule that contracting officers are supposed to give fair decisions when a case goes into the appeals process. When you

[12] Moreland Corp. v. United States, 76 Fed. Cl. 286, 291 (2007).
[13] Bell BCI Co. v. United States, 570 F.3d 1337 (Fed. Cir. 2009).

get a request for final decision under the CDA, the contracting officer is supposed to switch heads, right?—some people say "hats" —and become a judge and give a fair decision. And the idea that it's Steve's fault because we teach professional—we think we teach professional ethics in law school. It's a mandatory course, professional responsibility. But here, we've got two lawyers giving, what I think, is terrible advice. So I wanted to just digress on that to push the view. And the introduction says that one of the reasons that Gil was so interested in the JAG school was to promote fairness between the parties, right?—which makes it a good part of this talk.

Okay. Back to the number six decision. The worst—well, Steve and I were talking before this. Six and seven are running a hot contest between which is the worst recent decision that I wrote about. I said this one; he said the other one. It's very close. It's probably a photo finish.

This is the case called *Richlin*,[14] and it's an interest case under the CDA. In Richlin, the lawyer's an old friend of ours, used to be a member of our faculty, Gil Ginsburg. Richlin is a wage case, back wages case. The contractor had been required to pay higher wages and the CO argued that the government was not obligated to pay him, So he appeals that, and he wins the appeal. Okay. So he's got a board decision that says that the government owes him the amount of the back wages that he hadn't yet paid his workers and the job's over. The CO says to him, I'm not going to pay you. I'm not going to issue a mod for that board decision because I don't think you're going to pay the workers. They're all gone.

Now, Gil's a problem-solving guy, Gil Ginsburg. Gil says, I can solve that problem. I'll set up an escrow account and issue a mod, pay the money to me, I'll pay the workers. And the CO apparently is happy with that. So he does it. The workers get paid. Then they file this claim for interest on the money under the CDA. And that ends up at the circuit, and the circuit says, you don't get any interest on the money because you never touched the money. The statute says interest on amounts found due contractors on claims shall be paid to the contractor; "amounts found due" contractors.

The circuit decision never tries to analyze what "amounts found due" means. It seems pretty simple to me. You won the case. You got a board decision saying the government owes you this amount. They go to the

[14] Richlin Sec. Serv. Co. v. Chertoff, 437 F.3d 1296 (Fed. Cir. 2006).

legislative history. When I saw that, it blew my mind. When you're interpreting a contract, plain meaning governs. But here's a panel that says when you're interpreting the statute, plain meaning doesn't govern, use legislative history. Justice Scalia probably rolled over—well, he's not in his grave—rolled over somewhere. He probably doesn't know about the decision. But, I mean, that's—okay. Whatever. Whatever.

And finally, *Rick's Mushroom*,[15] which is the seventh. *Rick's Mushroom* is a cooperative agreement. Okay. Would you all agree that a cooperative agreement is a contract? Does it strike you that a cooperative agreement is not a contract? The Tucker Act says that the court has jurisdiction over contracts, expressed and implied; not implied in law, but implied in fact. Okay. And this is an express cooperative agreement. So the question is: does the court have jurisdiction?

Now, we've got a long line of cases saying outside of the contract—because the Tucker Act also says violations of regulations, violations of statutes, violations of the Constitution, all those are the kind of jurisdiction under the Tucker Act. And the Tucker Act—and the court has said for many, many years this old Court of Claims law that when you get into those other areas of jurisdiction, you've got to be able to cite the statutes you're talking about or the Constitution or wherever you find it. You've got to find an intent somewhere to pay the contractor money, right? But you don't have to find that in a contract. They never said you have to find that in the contract because contract law says if you breach your contract, you've got to pay money, right? That's just fundamental contract law.

The old Court of Claims found an exception to that rule, and it was some fricky-fracky promise of some prosecutor to pay some witness money. It was a criminal law kind of contract. It wasn't a procurement contract. It's a case called *Kania v. United States*.[16] And they said, well, the term "contract" in the Tucker Act can't cover this kind of thing here. If you're going to claim that some prosecutor made some deal with some witness, you got to prove—you got to find me a statute that says we should pay money. And you can't find that statute. And the circuit followed that with another case. Along comes *Rick's Mushroom*, and they use—although the language in those cases, in my view, is very clear that they're talking about some special kind of exception—*Rick's*

[15] Rick's Mushroom Serv., Inc. v. United States, 521 F.3d 1338, 1344 (Fed. Cir. 2008).
[16] Kania v. United States, 650 F.2d 264 (Ct. Cl. 1981).

Mushroom says the cooperative agreement, you've got to find some promise somewhere to pay money. Apply the law that applies to statutes to this kind of contract. You know, so I wrote it up. I said, well, they never say why cooperative agreements are like deals made in the criminal law field, which is what the exception seemed to be. They just sort of dump cooperative agreements in that other area, and I have no idea why. And of course, DOJ loves the case. They cite it pretty frequently. They tried to talk the court out of jurisdiction. They don't win very many, but it just stands there as a really, really reasoned—I hesitate to use that word—non-reasoned case is a better explanation. Okay.

Where are we? Well, the final case I cite is a case called *Bell BCI*.[17] That's a release case. And again, the Court of Federal Claims judge, experienced government contract guy who analyzes his own transactions—it's delay and disruption cost, cumulative cost. They signed a blanket release according to the government, and they've then had cumulative effects later because of more and more changes being piled on. And the judge awards them delay and disruption costs across the board and the court reverses that, sends it back and says no, no, no. The release reads on delay and disruption costs up to and through the big mods you signed where you had to release, they quit signing releases after that. And you've got to separate out how much delay and disruption was caused by the subsequent, say, different things that happened and the prior things. And I don't know how you do that. And the case hadn't reappeared. What it says is that, again, you can't look at the factual context of signing a release which we've looked at for years. You are to only read the words in the release.

And so what I have to tell people in class is: Never in the middle of a contract, never sign a blanket release. Never. Always reserve cumulative delay and disruption because you don't know what's going to happen in the future. Now, again, that's harmful to the process; right? Because it means that you can't fully resolve issues, but you've got to advise people that you've got to protect yourself.

What I teach now, a lot of, is what I call defensive contract administration. You've got to defend yourself against this court because they're squeezing down on the rules. Some of them hurt the government; most of them hurt contractors. Nobody knows what the outcome is going to be. Does that mean prices go up? Exactly what's going on? What we

[17] Bell BCI Co. v. United States, 570 F.3d 1337 (Fed. Cir. 2009).

do know is that they are a very literalist court. They like to read words. They don't like facts. And if they don't like the facts that the lower court says are the facts, they disregard them.

I put one of Pauline Newman's dissents in here where she, on the *Bell BCI* case, where she is highly critical of the court because they just flat out disregard all of the factual findings that the lower court makes. Now, two other articles since mine—Stan Johnson wrote one about Judge Newman's dissents.[18] She's the last vestige of the old Court of Claims who believes in a fair outcome, and she's written a ton of dissents. She'd go a whole article on her dissents in the Public Contract Law Journal. And then Steve Schooner has a very recent article[19] in the American University which is a really great article because he quotes me a lot.

Our part used up a lot of time, but I'd love to have some questions.

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[18] W. Stanfield Johnson, *The Federal Circuit's Great Dissenter and Her "National Policy of Fairness to Contractors"*, 40 PUB. CONTRACT L.J. 275 (2011).

[19] Steven L. Schooner, *A Random Walk: The Federal Circuit's 2010 Government Contracts Decisions*, 60 AM. U. L. REV. 1067 (2011).