based procedural requirements on commercial item contracts. If the intent of "commercial item" contracting is to simplify procedures to accord with commercial practices, that intent should be reflected in the disputes process as well. For example, the CDA certification of claims requirement could be eliminated because the commercial arena has no similar counterpart. Such a step could not be accomplished by regulation, however; it would require an amendment to the CDA. However, the commercial item terms and conditions, at a minimum, could specify a preference for the use of alternative dispute resolution techniques such as mediation, arbitration, or minitrials. Use of these techniques is a growing trend in the commercial arena, and ADR is both authorized under the CDA and consistent with current Government policy initiatives.

Conclusion—The proposed commercial item regulations differ from traditional Government contract requirements and procedures in a number of key respects. Those regulations, however, still carry a heavy dose of standard Government contract terms and raise significant issues relating to the Government's attempt to do business like a commercial customer. The contractors most likely to be affected are the very ones that have stayed out of the Government contracts business and are, therefore, least familiar with the peculiar rules of that business. Contractors need to be alert to the fact that, under the proposed regulations, "commercial item" contracting is not just "like doing business in the commercial marketplace."

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Federal Circuit Reverses ASBCA's *Bill Strong* Decision—Rejects "Bright-Line" CDA "Claim" Test For Consultant Cost Allowability

The U.S. Court of Appeals for the Federal Circuit has reversed a split decision by the Armed Services Board of Contract Appeals, ruling that the word "claim" is a "term of art" that has the same meaning for purposes of establishing jurisdiction under the Contract Disputes Act and for purposes of the cost principle provisions prohibiting reimbursement of consultant costs incurred by a contractor in prosecuting a claim against the Government, **Bill Strong Enterprises, Inc. v. John Shannon, Acting Secretary of the Army, No. 94-1013 (Fed. Cir. Mar. 2, 1995), 14 FPD ¶ 18.**

The Court, however, declined to adopt the contractor's proposed "bright-line" test for consultant cost allowability—i.e., if the elements defining a "claim" are not met, consulting costs are *automatically* allowable under former Federal Acquisition Regulation 31.205-33. The Court instead held that in classifying a particular cost as either an allowable contract administration cost or an unallowable cost incidental to the prosecution of a claim, Contracting Officers, the boards of contract appeals, and the courts should examine "the objective reason why the contractor incurred the cost." If a contractor incurred the cost for the genuine purpose of materially furthering the negotiation process, such cost normally should be an allowable contract administration cost, even if negotiation eventually fails and a CDA claim is submitted later. On the other hand, if a contractor's underlying purpose for incurring a cost is to promote prosecution of a CDA claim against the Government, then the cost is unallowable under FAR 31.205-33. Based on the foregoing conclusions, the Federal Circuit reversed the ASBCA's decision (ASBCA 42946 et al., 93-3 BCA ¶ 25961, 35 GC ¶ 540) and remanded the case to the Board for determinations regarding the reasonableness and allocability of the costs.

Prior Litigation—The events underlying this litigation involved a Request for Equitable Adjustment submitted by Bill Strong Enterprises, Inc. (BSE) under a fixed-price contract for renovation of family housing units at a National Guard base. Before the contract was completed, BSE in May 1989 submitted to the CO (for "final decision") what purported to be a "claim," certified in accordance with the CDA, seeking to recover (1) $520,000 for the Government's alleged delay in making the units available to BSE, and (2) $52,000 for providing the units out of the sequence specified in the contract schedule. The sum sought was based on estimates prepared using a so-called "regression analysis"

rather than on actual costs. Upon receiving this request, the CO asked the Defense Contract Audit Agency to perform an audit verifying the labor costs involved and (among other things) determining the basis for BSE's computation of the out-of-sequence claim as 10% of its $520,000 claim for delayed release of the units.

DCAA asked BSE to provide specific cost data and additional information "in appropriate form." BSE thereupon hired a consulting firm that specialized in cost submittals for contract adjustments to assist it in redefining and reorganizing its data for resubmission to the CO.

Based on the consultant's work (which involved creating a data base from employee time card records and then developing a modified "total cost" claim), BSE in November 1989 submitted a revised claim to the CO in the total amount of $995,000, a sum that included an amount for the costs BSE had incurred to retain the consultant.

After reviewing the revised claim, DCAA found no basis for taking exception to the actual labor costs or labor supervision costs but did question $530,000 of BSE's claimed costs (although not the amount claimed for the consultant). Following negotiations, the parties in October 1990 reached a settlement under which the Government agreed to pay BSE $290,000 on the merits of its underlying claim and issue a final appealable decision denying the claim for the consultant costs. The CO's final decision denied recovery of BSE's consultant cost claim on the ground that the claim preparation activities were performed after completion of the contract work and, consequently, were "not incurred in connection with the actual performance of the work."

ASBCA Decision—A majority of the ASBCA affirmed the CO's final decision over a vigorous dissent by two judges. In considering BSE's appeal, the ASBCA noted that the contract contained a "Pricing of Adjustments" clause stating that, when costs are a factor in determining a contract price adjustment pursuant to any contract clause, those costs would be determined in accordance with FAR Part 31. The version of FAR 31.205-33(d) in effect on the date of the contract stated that costs incurred in the "prosecution of claims or appeals against the Government (see 33.201) are unallowable." FAR 33.201 (a) defined a claim as a written demand or assertion seeking (among other things), as a matter of right, the payment of money in a sum certain, but (b) excluded from that definition a "routine request for payment that is not in dispute when submitted."

The ASBCA ruled that BSE's November 1989 submission was a valid claim because, at that time, the Government disputed a substantial part of the amount BSE was seeking. Although not itself determinative, the conclusion that the amount of the claim was disputed was supported by the fact that the settlement agreement provided BSE with an amount substantially less than it had initially sought. Consequently, the ASBCA ruled that under the principles of *Dawco Const., Inc. v. U.S.*, 930 F.2d 872 (Fed. Cir. 1991), 10 FPD ¶ 40, 33 GC ¶ 136, it had jurisdiction to consider BSE's claim under the CDA. And, because BSE's claim preparation costs were incurred after contract completion and in connection with the November 1989 claim, they were incurred in the "prosecution of a claim against the Government" and were unallowable under FAR 31.205-33.

Alternatively, the ASBCA held that those costs would be unallowable even if (for the sake of argument) the November 1989 claim did not satisfy all the requirements of the CDA (e.g., because there was no dispute when it was submitted). FAR 31.205-33 predated the *Dawco* decision. Moreover, *Dawco's* narrow holding was limited to the meaning of the word "claim" for CDA purposes (such as requiring the issuance of a CO decision or starting the running of interest). To make the allowability of postperformance costs depend on whether a contractor met all CDA requirements before incurring the costs would improperly reward a contractor for failing to touch all of the CDA bases, the majority reasoned.

Because the ASBCA found it clear that (1) the consultant costs were incurred to aid BSE's "written demand or written assertion seeking, as a matter of right, the payment of a sum certain" (within the meaning of FAR 33.201), and (2) the November 1989 claim was not a routine request for payment, those consultant costs were incurred in connection with the prosecution of a claim (within the meaning of FAR 31.205-33) even if there was no preexisting dispute at that time.

Two members of the Board's five-member panel dissented. FAR 31.205-33(d) provided that, unless a cost was incurred in connection with a

"claim" as that term was defined in FAR 33.201, it was not an unallowable consultant service cost. In *Dawco*, FAR 33.201 was interpreted as making the existence of a "claim" dependent on the existence of a dispute. Moreover, in the dissenting judges' view, the history of these regulations made it clear that they were designed to disallow costs incurred to support genuinely disputed demands rather than those incurred to aid fact-finding and negotiation. Finding that the parties had not reached the dispute stage under *Dawco* and *Transamerica Ins. Corp. v. U.S.*, 973 F.2d 1572 (Fed. Cir. 1992), 11 FPD ¶ 117, 36 GC ¶ 493, the dissenting judges would have held that the costs BSE incurred to prepare its REA were not incurred in connection with the prosecution of a claim and, therefore, were allowable to the extent that they were reasonable.

Arguments on Appeal—BSE urged the Federal Circuit to adopt a "bright-line" test for consultant cost allowability based on the existence or nonexistence of a CDA "claim." BSE argued that it never satisfied the definition of a "claim" because it was never in dispute with the Government and, instead, had remained in a "pre-dispute, negotiation posture."

The Government contended that the presence of a CDA "claim" is irrelevant to the allowability of consultant costs under FAR 31.205-33. Such costs are allowable, the Government contended, only if the costs benefit performance of the contract. Alternatively, the Government asserted that the costs would be unallowable even under BSE's "bright-line" test because a dispute existed between the parties at the time the consultant costs were incurred, satisfying the definition of a "claim."

The Federal Circuit concluded that each party was "partly right and partly wrong." BSE was right in that the meaning of the word "claim" in FAR 31.205-33(d) is the same as the meaning of the word "claim" in FAR 33.201 (relating to CDA jurisdiction). BSE also correctly asserted that no CDA "claim" existed when the consulting services were performed. But the Court found BSE's "bright-line" allowability test to be flawed—consultant costs are not automatically allowable just because they are incurred before a CDA "claim" came into existence. The Court found equally flawed the Government's position that the existence of a CDA claim is irrelevant to the allowability of consulting costs. But, the Court agreed that the Government must receive some benefit from the services of a contractor's consultant for the associated costs to be allowable.

Meaning of the Cost Principle—In reaching its decision, the Court performed a two-part analysis. First, it examined in detail the administrative history of FAR 31.205-33 and, in particular, the circumstances prompting the addition of the cross-reference to FAR 33.201 in the cost principle. Second, it construed the phrase "incurred in the prosecution of a [CDA] claim against the Government."

• *Administrative History*: The Court initially observed that before 1986, the ASBCA inconsistently interpreted the cost principles' language concerning the allowability of legal, accounting, and consultant costs, resulting in a "confused and unsettled" state of the law. It was within that context that Congress directed the Secretary of Defense to promulgate regulations clarifying the allowability of various categories of cost, including the costs of consulting and other professional services. The resulting amendments to the FAR cost principles included the addition of the cross-reference ("see 33.201") after the phrase "the prosecution of claims or appeals against the Government" in FAR 31.205-33.

The Court held that, by referring specifically to FAR 33.201, the amended cost principle recognized the word "claim" as a "term of art," the meaning of which was set forth in FAR 33.201. Thus, the Court continued, "the revised regulation provided a "specific, clear, bright-line test for unallowability: a legal, accounting, or consulting cost incurred in connection with the prosecution of a CDA claim or an appeal against the Government is *per se* unallowable." This interpretation of the term "claim" promotes uniformity and clarity, the Court reasoned, and is supported by the fact that the revisions to FAR 31.205-33 included, for the first time, costs incurred in connection with *appeals* against the Government, which can only be brought after a contractor has made a 33.201 "claim" against the Government. Accordingly, the Court concluded that the ASBCA's alternative holding that the requirements for a CDA "claim" and "prosecution of a claim" under FAR 31.205-33 were different was an incorrect interpretation of the regulations.

• *"Prosecution of a Claim"*: The Court next construed the cost principle's phrase "incurred in connection with the prosecution of a [CDA] claim against the Government." There are at least three distinct categories of legal, accounting, and consultant costs in the cost principles: (1) costs incurred in connection with *contract performance*, (2) costs incurred in connection with *contract administration*, and (3) costs incurred in connection with the *prosecution* of a *CDA claim*. Because Congress directed that the regulations specifically state which costs are unallowable, and because the regulations only make the third category of costs unallowable, costs included in the first two categories are "presumptively allowable," provided such costs benefit contract performance or administration and are otherwise reasonable, the Court stated.

The Federal Circuit conceded that the line between costs that are incidental to contract administration and costs that are incidental to the prosecution of contract claims "is rather indistinct." Although an "air of adversity" sometimes exists "in the relationship between the CO and the contractor," the parties usually attempt to resolve their differences amicably through negotiation and exchanges of information. The costs of these efforts are contract administration costs, the Court concluded, regardless of whether a settlement is reached or litigation eventually occurs. And, as a matter of policy, the recoverability of contract administration costs serves as an incentive to negotiate rather than to litigate.

In classifying a particular cost as incidental to contract administration or claim prosecution, the "objective reason why the contractor incurred the cost" must be examined. Thus, the Court held that costs incurred to further the negotiation process should normally be classified as allowable contract administration costs, whereas costs incurred to promote prosecution of a CDA claim against the Government are unallowable under FAR 31.205-33.

ASBCA Decision "Flawed"—Based on the foregoing reasoning, the Federal Circuit found the ASBCA's decision to be flawed in four respects.

First, the Board erred by holding that FAR 31.205-33 does not involve the same requirements for a "claim" under the CDA, as interpreted in *Dawco* and *Transamerica*.

Second, the majority erred in concluding that BSE had submitted a CDA claim. The parties remained in a state of negotiation and exchange of information until the settlement of the underlying merits of BSE's REA in October 1990 and a formal CDA claim concerning BSE's equitable adjustment claim never arose before BSE incurred the consultant costs.

Third, the ASBCA erroneously classified BSE's consultant costs as costs incurred in connection with the prosecution of a CDA claim. Because a CDA claim did not arise before the consultant costs were incurred, "there is a strong legal presumption that the costs incurred were not incurred in connection with the prosecution of such a claim against the Government."

Fourth, under the facts of this case, the Board majority erred in holding that the consulting costs were unallowable because they were incurred after contract performance was completed. In delay cases such as this, a contractor cannot calculate the additional expenses caused by the Government's delay until completion of the contract work. Thus, the calculations of BSE's consultant understandably awaited completion of the contract work. In addition, contract administration may continue after contract completion, as it did here.

The Federal Circuit was unable to merely reverse with instructions to award BSE the contested sum because neither the CO nor the ASBCA had made determinations regarding the reasonableness or the allocability of the consultant costs. Accordingly, the Court remanded with instructions that those determinations be made.

★ **Practitioner Comment**—As the Federal Circuit noted, the law regarding the allowability of legal and consulting fees in the preparation of REAs has been confused and unsettled for years. The ASBCA's three-member majority opinion and the vigorous dissent by Judges Moed and Burg did little to clarify the confusion or provide direction to contractors and COs wrestling with this difficult issue. The Court, therefore, is to be commended for attempting to bring clarity to the outcome of such cases.

Federal Circuit's Decision—The Federal Circuit's reversal of the ASBCA's decision in *Bill Strong* carries significant legal and practical rami-

fications for Government contractors. The Court was careful to point out that its opinion and decision bore only upon the 1987 version of the cost principle concerning the allowability of costs incurred in the prosecution of claims or appeals against the Government, then set forth at FAR 31.205-33(d). The Court emphasized that it expressed no opinion as to whether BSE's claim for reimbursement of its consultant costs would be allowable under the current regulations at FAR 31.205-47(f). It is difficult to see, however, how the Federal Circuit's opinion would not apply equally to the interpretation of the current regulation since the operative language in both regulations is the same.

The obvious implication of the Federal Circuit's decision is to link inextricably the allowability of costs incurred in connection with the preparation of an REA with the question of the existence of a CDA claim. Although the Court stopped short of adopting BSE's bright-line test by stating that "consultant costs are not automatically allowable just because those costs were incurred before a CDA 'claim' came into existence," the Court held that there is a "strong legal presumption that costs incurred before a CDA claim arises are "not incurred in connection with the prosecution of such a claim against the Government." Absent the Government's rebuttal of this legal presumption, allowability of such costs therefore turns on the contractor's ability to satisfy ordinary requirements of reasonableness and allocability. Query, though, whether regulators will shift the burden of proof through an amendment to the FAR much like the amendment to the reasonableness standard in the cost principles (see FAR 31.201-3(a)).

The Federal Circuit's statement that the meaning of "claim" under the cost principle is the same as under the CDA as set forth in the Court's prior decisions in *Dawco* and in *Transamerica* could be read as impliedly confirming the results in *Dawco*, despite the disfavor with which that decision has been widely viewed in the Government contractor community. In *Dawco*, the Court held that, for a claim to exist, there must be a dispute between the parties at the time the contractor submits its "claim" to the CO. Specifically, the Court held that a claim exists when "negotiations [have] clearly been abandoned, and the amount claimed [is] definitely in dispute." Additionally, the contractor must request a final decision from the CO, identify the submission as a "claim," and request a sum certain. In *Transamerica*, the Federal Circuit established a three-part test for the determination of the existence of a claim: (1) the contractor has asserted in writing and with sufficient specificity a right to additional compensation, (2) the Government has disputed that right, and (3) the contractor has communicated its desire to the Government for a CO's decision.

Contractors are advised to follow developments in *Reflectone Inc. v. Secretary of the Navy*, 34 F.3d 1031 (Fed. Cir. 1994), 13 FPD ¶ 76, 36 GC ¶ 493, however. (See also FEATURE COMMENT, 36 GC ¶ 567). On December 5, the Court granted a petition to rehear *in banc* that decision (see 36 GC ¶ 626). The Federal Circuit's December 29, 1994 briefing order directed the parties to address the question whether *Dawco* properly concluded that a CDA "claim" as defined in FAR 33.201 requires a preexisting dispute between a contractor and the Government when the claim is in the form of a "written assertion...seeking, as a matter of right, the payment of money in a sum certain" or other contract relief per the first sentence of the FAR definition, or whether the requirement only applies when the claim initially is in the form of a "routine request for payment." In predicting the allowability of costs incurred in the preparation of an REA for example, contractors nevertheless must be mindful of the tests established in *Dawco* and *Transamerica*, at least until the Federal Circuit rules in its *in banc* rehearing of the *Reflectone* decision.

Perhaps the most helpful discussion in the Federal Circuit's *Bill Strong* opinion is the Court's analysis of the distinction between costs that are incidental to contract administration and costs that are incidental to the prosecution of contract claims. The Federal Circuit found that costs incurred in the prosecution of a CDA claim or appeal against the Government are *"per se* unallowable." In discussing the distinction between costs incurred for these two purposes, the Court has set up a virtual road map for contractors to follow if they wish to avoid the proscription against the allowability of costs falling into the latter category. By following this road map, contractors can do

much to ensure the allowability of legal, accounting, and consulting costs incurred in the preparation of an REA and in addressing other contract performance and administration matters.

According to the Federal Circuit, the two factors to be examined are the process itself and the contractor's objective reasons for incurring the cost. As to the process, any indicia that the parties are involved in negotiations support a determination that the costs are contract administration-related costs. Thus, any efforts by the contractor and the CO to settle the problem and avoid litigation, as well as any indication of a mutual desire to achieve a result acceptable to both parties provides evidence that they are participating in the contract administration process. In the opinion of the Federal Circuit, this process includes preparing contractor responses to requests for information by the CO and Government auditors, even though there is "an air of adversity" in the relationship between the parties at the time.

As to the second factor to be considered, in the view of the Federal Circuit, if a contractor incurs costs for the genuine purpose of materially furthering the negotiation process, such costs normally should be allowable contract administration costs. If, however, a contractor's underlying purpose for incurring the cost is to promote the prosecution of a CDA claim against the Government, such costs are unallowable. This results even if negotiation eventually fails and the CDA claim is later submitted, and regardless of whether a settlement is finally reached or whether litigation eventually occurs. Looking to the underlying purpose of the cost, therefore, negates BSE's bright-line test, discussed above, and is consistent with the distinction between "negotiation mode" and "litigation mode" in previous law. The Federal Circuit's rationale also permits recovery of administration (i.e., negotiation) costs incurred *after* filing a CDA claim.

Guidelines for Contractors—As a practical matter, there are various steps a contractor can take to maximize allowability and, thus, recovery of professional services costs. *First*, the contractor's correspondence, meeting minutes, and phone conversations with Government representatives concerning a particular issue of entitlement should reflect the contractor's desire to negotiate a settlement of the matter. Words indicating the existence of a dispute that cannot be resolved through further negotiations or an intent to proceed to litigation on the claim should be avoided assuming that such a course of action is not the contractor's true, objective intent.

Second, the contractor should maintain detailed records about the work of its outside consultants and counsel, as well as any in-house professionals and clerical employees that devote a significant portion of their time to contract administration or claim preparation efforts. Outside consultants and counsel should provide sufficient description of tasks performed for a amounts billed to distinguish negotiation-related tasks from claim prosecution-related tasks. This is particularly important because the Federal Circuit's decision permits recovery of true contract administration costs even after a CDA claim is filed.

Third, a contractor should endeavor to raise issues of contract adjustment and cost reimbursement as they occur and, where possible, in advance of contract completion. Although the Federal Circuit in *Bill Strong* rejected the Board majority holding that consultant costs were unallowable simply because they were incurred after contract performance was completed, performing a sweep to identify all outstanding issues of cost reimbursement and commence preparation of an REA before contract completion is beneficial for other reasons. This approach maximizes settlement opportunities, avoids inadvertent release of claims in connection with contract close-outs, and helps to counter potential assertions by the Government that the contract was in a loss position.

The foregoing activities apply to the contractor desiring to maximize recovery of professional services and other associated costs. For the contractor that wishes to initiate the disputes process and maximize recovery of CDA interest, other steps are advisable. Such a contractor should identify its written submission as a claim under the CDA, avoid characterizing submissions as REAs, cite facts that demonstrate the existence of a dispute over the issue, submit the claim in a sum certain, certify the claim if it exceeds $50,000 ($100,000 under the Federal Acquisition Streamlining Act), and request a CO final decision pursuant to the CDA. In addition, unless the Federal Circuit overturns *Reflectone*, such contractors must pay heed to the ruling in *Reflectone* that, to

qualify as a CDA claim, a dispute as to both liability and amount must predate the contractor's submission.

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This Practitioner Comment was prepared for THE GOVERNMENT CONTRACTOR by* John G. Stafford, Jr. *and* Paul E. Pompeo, *attorneys resident, respectively, in the Dallas, Texas and Washington, DC offices of the law firm of McKenna & Cuneo. Messrs. Stafford and Pompeo co-authored "Costs of Prosecuting Claims—Bill Strong on Appeal," an article that analyzed the ASBCA's decision in Bill Strong and the state of the law after that decision was issued. See 94-6 GOVT. CONTRACT COSTS, PRICING & ACCOUNTING REP. 3 (June 1994).

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President Clinton's Striker Replacement Order Sets Off Furor In Congress

In part one of what will be a heated debate, President Clinton sided with organized labor and issued an Executive Order barring the Government from doing business with companies that hire permanent replacement workers during strikes (60 Fed. Reg. 13023, Mar. 10, 1995). The Order set off a wave of protests from the Republican-controlled Congress and from the U.S. Chamber of Commerce.

The Order and Its Rationale—E.O. 12954, issued March 8, states the Executive Branch's policy that contracting agencies shall not contract with employers that permanently replace lawfully striking employees. The Order charges the Secretary of the Department of Labor with administration and enforcement of the policy.

If the Secretary determines that a federal contractor has permanently replaced lawfully striking workers, the Order permits the Secretary to notify the agency involved and to direct the agency that it is appropriate to terminate the contract for convenience. The agency may decide not to take such action, but must set forth its reasons in writing to the Secretary. The termination for convenience provision applies only to situations where contractors permanently replace lawfully striking employees *after* the effective date of the Order (March 8, 1995).

The limitation against applying the new policy retroactively does not apply to the second prong of the Order. That prong entitles the Labor Secretary to debar from future contracts any contractor that has hired permanent striker replacements in the past, according to Labor Secretary Robert Reich. Agencies may not contract with the debarred contractor unless the agency head or designee determines that there is a compelling reason for entering into the contract. The scope of the debarment normally will be limited to those organizational units of the contractor that have permanently replaced lawfully striking workers. The debarment ends when the labor dispute precipitating the permanent replacement of lawfully striking workers has been resolved.

Order proponents believe that the use of replacement workers results in longer strikes and reduces economic productivity. It causes more contentious labor relations and means trading in experienced, skilled employees for inexperienced employees. According to White House Press Secretary Michael McMurry, "we don't want the industrial equivalent of minor leaguers and rookies making the tires for the next Desert Storm." (McMurry was referring to tiremaker Bridgestone-Firestone, Inc., which hired permanent workers to replace its striking employees.)

The Clinton Administration also defended its action by citing prior presidential use of executive orders in labor situations. For example, President Reagan ordered permanent replacements during the air traffic controller strike, and President Bush prohibited federal contractors from entering into "pre-hire agreements" (collective bargaining agreements that establish labor standards for construction work prior to hiring workers on federal construction contracts). President Bush also issued an executive order requiring Government contractors to post notices in workplaces informing nonunion employees of their right to object to use of union fees for purposes unrelated to collective bargaining, contract administration, or grievance adjustment (see 34 GC ¶ 212).

Republican Opposition—Republicans in Congress angrily denounced E.O. 12954, complaining that President Clinton did through executive order what Congress expressly chose not to accomplish through legislation. The Republicans re-