



GW Law Faculty Publications & Other Works

Faculty Scholarship

2001

Encroachment: Putting the 'Squeeze' on the Department of Defense (DoD)

Lisa M. Schenck

George Washington University Law School, lschenck@law.gwu.edu

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications



Part of the [Law Commons](#)

Recommended Citation

Lisa M. Schenck, Encroachment: Putting the 'Squeeze' on the Department of Defense (DoD), *Army Law.*, Dec. 2001 at 34.

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

Encroachment: Putting the "Squeeze" on the Department of Defense (DOD)

Over the past year, DOD and the armed services (Services) conducted a rigorous analysis of "encroachment" and impacts on military testing and training. From DOD's perspective, encroachment includes external influences, such as environmental laws and regulations, threatening or constraining testing and training activities on DOD ranges and facilities required for force readiness and weapons acquisition.⁴² Corresponding impacts involve restrictions on available locations, times, and duration, and reduced effectiveness, of testing and training activities.⁴³ Additional adverse impacts involve restrictions on weapons systems, equipment, and munitions used during testing and training.⁴⁴ The Department's interest in these restrictions on military training has been accompanied by increased congressional concern as exhibited by Senate Armed Services Committee (SASC), House Committee on Government Reform (HCGR), and House Armed Services Committee (HASC) formal hearings focused on this issue.⁴⁵

Within DOD, the Senior Readiness Oversight Council (SROC), chaired by the Deputy Secretary of Defense, first addressed encroachment issues affecting test and training ranges in June 2000. At that session, the Service Chiefs of Staff briefed the SROC regarding constraints on their respective ranges, and how those constraints affect the conduct and character of training.⁴⁶ Although direct effects of any specific limitation vary by range and activity, DOD is concerned with a number of issues.⁴⁷ In November 2000, the SROC's initial

review focused on the following nine range-related issues and action plans to address the encroachment of environmental requirements affecting DOD: Endangered Species Act and Critical Habitat (Marine Corps lead), Unexploded Ordnance and Munitions (Army lead, Office of the Deputy Chief of Staff for Operations (Training)), Bandwidth and Frequency Encroachment (Office of the Secretary of Defense lead), Maritime Sustainability (Navy lead), National Airspace System (Air Force lead), Air Quality (Navy lead), Airborne Noise (Air Force lead), Urban Growth (Marine Corps lead), and an Outreach Plan (DOD Defense Test and Training Steering Group lead).⁴⁸ The Services continue to refine those action plans, and look toward the future to address overseas ranges, space, air-space restrictions, water use, cultural resources, ecosystem and biodiversity, and land use.

The Army, like other services, has found itself struggling to reconcile environmental compliance requirements with the need for realistic training.⁴⁹ To ensure that the Army is ready to accomplish its primary mission of fighting and winning in armed conflict, soldiers, leaders, and units must receive proper training.⁵⁰ Effective training must provide soldiers with opportunities to develop and improve proficiency, competence, and confidence in the use of sophisticated weapons systems under combat-like conditions.⁵¹ Those conditions must be realistic and physically and mentally challenging.⁵²

Environmental encroachment limits the Army's ability to conduct realistic training and adequate testing activities.⁵³ "The Army's primary encroachment concerns are urban sprawl,

42. *Constraints and Challenges Facing Military Test and Training Ranges: Hearing Before the Military Readiness Subcomm. of the House Armed Servs. Comm.*, 107th Cong. (2001) (statement of Major General Robert L. Van Antwerp, Assistant Chief of Staff for Installation Mgmt., at 5) [hereinafter Van Antwerp Statement], available at <http://www.house.gov/hasc/openingstatementsandpressreleases/107thcongress/01-05-22vanantwerp.html>.

43. *Fiscal Year 2002 Army Budget: Hearing Before the Defense Subcomm. of the Senate Appropriations Comm.*, 107th Cong. (2001) (written responses to questions by General Eric K. Shinseki).

44. *Id.* at 1.

45. See *Challenges to Nat'l Security: Constraints on Military Training: Hearing Before the House Comm. on Gov't Reform*, 107th Cong. (2001), available at www.house.gov/reform/military/index.htm; *Constraints and Challenges Facing Military Test and Training Ranges: Hearing Before the Military Readiness Subcomm. of the House Armed Servs. Comm.*, 107th Cong. (2001), available at http://commdocs.house.gov/committees/security/has142030.000/has142030_0x.htm; *Range Encroachment Hearing Before the Readiness and Mgmt. Support Subcomm. of the Senate Armed Servs. Comm.*, 107th Cong. (2001), available at http://www.senate.gov/~armed_services/hearings/2001/r010320.htm.

46. See DEP'T OF DEFENSE MONTHLY READINESS REPORT TO CONGRESS 2 (Dec. 2000) [hereinafter DOD READINESS REPORT].

47. *Id.* at 2; *Constraints and Challenges Facing Military Test and Training Ranges: Hearing Before the Military Readiness Subcomm. of the House Armed Servs. Comm.*, 107th Cong. (2001) (statement of Mr. Joseph J. Angello, Jr., Acting Deputy Under Sec'y of Defense for Readiness, at 6) [hereinafter Angello Statement], available at <http://www.house.gov/hasc/openingstatementsandpressreleases/107thcongress/01-05-22angello.html>.

48. DOD READINESS REPORT, *supra* note 46, at 2-3.

49. See generally *Challenges to Nat'l Security: Constraints on Military Training: Hearing Before the House Comm. on Gov't Reform*, 107th Cong. (2001) (statement of Lieutenant General Larry R. Ellis) [hereinafter Ellis Statement], available at www.house.gov/reform/hearings/05.09.01/ellis.htm.

50. *Id.* at 2.

51. *Id.*

52. *Id.*; see also Van Antwerp Statement, *supra* note 42, at 3.

threatened and endangered species, and restrictions that impact munitions use."⁵⁴ Until the last thirty years, Army training lands had been remote areas with little residential or commercial development. Public awareness of live training activities was minimal.⁵⁵ Population and economic growth around installations have caused ranges and training lands to become "islands of biodiversity," thereby increasing their value as natural resources.⁵⁶ Additionally, the Army has created environmental concerns by using a variety of weapons on its ranges and training lands for many years. The Army leadership has called for a more balanced approach that would ensure that environmental statutes and regulator decisions consider the importance of our national defense mission and recognize readiness as a positive societal good and a legal mandate.⁵⁷ In testimony to Congress, the Army expressed a desire to work with other federal agencies, Congress, and the Administration to reduce uncertainty and increase flexibility in laws and regulations to ensure a balance between national security and environmental needs.⁵⁸

When Congress conducted formal hearings and asked the military services about encroachment and its impacts on training and readiness, the Army staff leadership presented its concerns. On 20 March 2001, the Army's Assistant Chief of Staff for Installation Management (ACSIM) and other service representatives testified at the SASC Subcommittee on Readiness and Management encroachment hearings.⁵⁹ The ACSIM, other service representatives, and the Acting Deputy Under Secretary of Defense for Readiness testified at the 22 May 2001 HASC, Subcommittee on Military Readiness encroachment hearing, "Constraints and Challenges Facing Military Test and Training Ranges."⁶⁰

The HCGR visited Fort Hood, Texas, in April 2000. On 9 May 2001, the Army's Deputy Chief of Staff for Operations and Plans and the Commanding General, III Corps and Fort Hood, testified at the Committee's hearing, "Challenges to National Security: Constraints on Military Training," regarding encroachment impacts on readiness and training.⁶¹ The HCGR requested that the U.S. General Accounting Office (GAO) review the limitations placed on the military's use of U.S. ranges. Accordingly, on 2 May 2001, the GAO wrote to the Secretary of Defense indicating that it will review training limitations and increased costs for alternative training arrangements due to environmental encroachment and other constraints.⁶² The GAO also announced that, at the SASC Readiness Subcommittee's request, the GAO is reviewing limitations on the ability of U.S. forces to train overseas.⁶³

Since the service representatives testified at the congressional encroachment hearings, correspondence continues to illustrate the hotly contested nature of this issue. On 24 May 2001, the Chairmen of the HCGR and the House Committee on Resources, as well as fourteen other members of Congress, wrote to President Bush urging him to initiate government reforms that address encroachment impacts because "these problems are affecting the ability of our forces to fight."⁶⁴ They stressed that the central question is how to cooperatively balance the important national interests of readiness, environment, development, and commercial aviation. Their letter enclosed a tape of the HCGR hearing and a copy of the witnesses' testimony.⁶⁵ On 31 May 2001, twenty-nine state attorneys general signed a letter from the National Association of Attorneys General (NAAG) to the SASC, HASC, Senate Environment and Public Works Committee, and House Committee on Energy

53. Van Antwerp Statement, *supra* note 42, at 5.

54. *Id.* at 6.

55. Ellis Statement, *supra* note 49, at 4.

56. *Id.* at 5; Angello Statement, *supra* note 47, at 5.

57. Ellis Statement, *supra* note 49, at 4.

58. Van Antwerp Statement, *supra* note 42, at 11.

59. See *Range Encroachment Hearing Before the Readiness and Mgmt. Support Subcomm. of the Senate Armed Servs. Comm.*, 107th Cong. (2001), available at http://www.senate.gov/~armed_services/hearings/2001/r010320.htm.

60. See *Constraints and Challenges Facing Military Test and Training Ranges: Hearing Before the Military Readiness Subcomm. of the House Armed Servs. Comm.*, 107th Cong. (2001), available at http://commdocs.house.gov/committees/security/has142030.000/has142030_0x.htm.

61. See *Challenges to Nat'l Security: Constraints on Military Training: Hearing Before the House Comm. on Gov't Reform*, 107th Cong. (2001), available at www.house.gov/reform/military/index.htm.

62. Letter from Barry W. Holman, Director, Defense Capabilities and Mgmt., U.S. Gen'l Accounting Office, to Sec'y of Defense Donald H. Rumsfeld (May 2, 2001) (on file with author).

63. Letter from Neal P. Curtin, Director, Defense Capabilities and Mgmt., U.S. Gen'l Accounting Office, to Sec'y of Defense Donald H. Rumsfeld (May 17, 2001) (on file with author).

64. Letter from Representative Dan Burton and Representative James V. Hansen, House Comm. on Gov't Reform, to President George W. Bush (May 24, 2001) (on file with author).

and Commerce in response to the SASC 20 March 2001 encroachment hearing.⁶⁶ The NAAG members stressed "that federal agencies are not above the law" and that extensive consultation with the states and congressional hearings (with the opportunity for interested parties to present their views) should occur before considering any proposal to exempt or limit federal agency obligations under environmental laws.⁶⁷

For now, the encroachment issue remains contentious and highly divisive in Congress. In the DOD arena, the military services, with the DOD as the lead, will continue to analyze and develop responses to encroachment and the effects on testing and training activities. Lieutenant Colonel Schenck.

Procurement Fraud Division Note

It is widely known within the government contracting field that a suspended or debarred firm may continue, under certain conditions and types of contracts, to do business with the government even after being placed on the General Service Administration (GSA) *List of Parties Excluded From Federal Procurement and Nonprocurement Programs (List)*.⁶⁸ In particular, under indefinite delivery/indefinite quantity (IDIQ) contracts, the Federal Acquisition Regulation (FAR) permits contracting activities to place orders with a suspended or debarred contractor.⁶⁹ What may be less well known, however, is that for Department of Defense contracting activities, reliance on the FAR provision alone as authority for continued dealings with GSA-listed contractors could lead to the improper award of IDIQ contract delivery orders.

The effect of "listing" with the GSA is sweeping. Federal Acquisition Regulation section 9.405 states:

9.405 Effect of Listing

(a) Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not

solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head or a designee determines that there is a compelling reason for such action (see 9.405-2, 9.406-1(c), 9.407-1(d), and 23.506(e)). Contractors debarred, suspended or proposed for debarment are also excluded from conducting business with the Government as agents or representatives of other contractors.⁷⁰

The FAR, however, does not preclude the continuation of existing contracts with listed contractors. Rather, under FAR 9.405-1(a), "agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment unless the agency head or a designee directs otherwise."⁷¹ Specifically, FAR 9.405-1(b) sanctions the continued placement of "orders against existing contracts, including indefinite delivery contracts, in the absence of termination."⁷²

A contracting officer who reads no further than these provisions may conclude that he is free, without limitation, to place orders against existing IDIQ contracts. For contracting activities subject to the Defense Federal Acquisition Regulation Supplement (DFARS), however, further inquiry is necessary before issuing delivery orders under an existing IDIQ contract with a GSA-listed contractor.

Defense Federal Acquisition Regulation Supplement 209.405-1(b) states: "Unless the agency head makes a written determination that a compelling reason exists to do so, ordering activities shall not (i) [p]lace orders exceeding the guaranteed minimum under indefinite quantity contracts; or (ii) [w]hen the agency is an optional user, place orders against Federal Supply Schedule contracts."⁷³ Thus, for IDIQ contracts with a GSA-listed contractor, the contracting officer must know whether the guaranteed minimum order amount has been reached.⁷⁴ For Federal Supply Schedule (FSS) contracts, however, DFARS 209.405-1(b) completely negates the FAR exemption.⁷⁵

65. *Id.*

66. Letter from the Nat'l Ass'n of Att'ys Gen'l to the Senate Armed Servs. Comm., House Armed Servs. Comm., Senate Environment and Public Works Comm., and House Comm. on Energy and Commerce (May 31, 2001) (on file with author).

67. *Id.* at 1.

68. See Acquisition Reform Network, *List of Parties Excluded From Federal Procurement and Nonprocurement Programs*, Excluded Parties List System, at http://epls.amet.gov/epls_reports/EPLR_PN.LIS (last modified Dec. 12, 2001).

69. 48 C.F.R. § 9.405(a) (LEXIS 2001).

70. *Id.*

71. *Id.* § 9.405-1(a).

72. *Id.* § 9.405-1(b).

73. *Id.* § 209.405-1(b).