Defense contractor hits back at use of courts to sabotage defense

by Leo Scanlon

The Northrop Corporation announced on Aug. 9 that a Los Angeles judge had dismissed a $3 million civil lawsuit brought by the government against the company for allegedly falsifying test data on MX missile-guidance equipment. A related suit, brought against Northrop and its MX program under the False Claims Act two years ago, was dismissed in April. Northrop now stands vindicated in its contention that the MX components "consistently met or bettered Air Force reliability requirements," and is looking for a favorable ruling on a pleading it has entered in the U.S. District Court for the Central District of California, which challenges the constitutionality of the False Claims Act itself.

The aggressive counterattack, prepared for the defense contractor by former Justice Department attorney Richard Sauber, marks the first attempt by the defense establishment to rid itself of the erosive tide of litigation against critical strategic defense systems.

The lawsuits brought under the False Claims Act, and legal actions inspired by the Justice Department's "Ill Wind" probe against Pentagon personnel and defense contractors, are soon to be joined by an array of "citizens actions" and *qui tam* lawsuits (lawsuits by citizens acting on behalf of the government), directed by the Environmental Protection Agency (EPA) against defense bases and manufacturing facilities, as the "Emergency Planning and Community Right to Know Act of 1986" begins to come into effect.

Northrop suit defends Constitution

The author of Northrop's pleading in California challenges the constitutionality of the False Claims Act, specifically the *qui tam* provisions which make that law unique. Sauber argues that these provisions are illegal on several grounds, the main one being that the act, "By conferring the President's prosecutorial discretion upon private individuals . . . has violated the separation of powers doctrine," since by enacting the *qui tam* provisions, "Congress has again ignored the constitutional requirement that it take no role in the enforcement of the laws. In bold terms, Congress has attempted to avoid the doctrine of separation of powers by delegating to private individuals law enforcement duties that Congress does not possess. . . . Congress did so because of its lack of respect for the constitutionally mandated role of a co-equal branch."

Sauber points out that the Founding Fathers well understood that "only a 'unitary Executive' can properly evaluate and balance the sometimes competing interests of law enforcement, national security, foreign affairs, and other spheres of Executive policymaking authority" which the False Claims Act relegates to the individuals and private law firms that are coordinating the legal attacks on top secret defense programs at Northrop, Lockheed, and numerous other corporations.

He adds: "The defendant in a *qui tam* action thus finds itself subject to the *public laws* as seen through the eyes of a congressionally deputized *private prosecutor,* who is motivated by the lure of substantial pecuniary gains . . . *qui tam* plaintiffs, unlike private attorneys general, are empowered to bind the United States under the doctrine of *res judicata*." And finally, "The *qui tam* provisions impermissibly concentrate executive power in Congress by permitting Congress to 'deputize' private individuals to do its will, thereby supplanting the discretion of the Executive in the enforcement of public laws on behalf of the government."

It is an equally significant point, that the act violates the Appointments Clause (Article II, Section 2 of the Constitution), which gives to the Executive branch the sole authority to initiate civil prosecutions, a responsibility which cannot be delegated to anyone not an appointed officer of the government.

Sauber shows that the *qui tam* provisions differ from other citizen suit statutes which have been constitutionally accepted, in which the plaintiff has a direct personal injury, or class action basis for his complaint, which establishes a legal cause of action. It is possible that this latter will be the problematic point in the courts, since the environmental laws which have been stretching this notion are numerous, and the courts have been inclined to accept the most nebulous concepts (such as "the right to good government") as the basis of all sorts of political fraud and conspiracy actions. The step to defining the "right" of a whistleblower to be "free of fraud in the workplace" or some such construction, is a small one.

An environmentalist gestapo

The point that Sauber makes about the priority of national security considerations is in fact applicable to economic policy considerations which are damaged by most "environmental" legislation. The Northrop suit's attempt to isolate *qui tam* provisions in the False Claims Act from the other environmental laws which utilize citizen suit statutes as an enforcement tool may be legally correct, but is running up against the strategy behind those other laws which flooded the Congress since 1982. The list cited by Sauber is illustrative: Endangered Species Act, Toxic Substances Control Act (1982), Surface Mining Control and Reclamation Act (1985), Clean Water Act (1982), Marine Protection, Research, and Sanctuaries Act (1982), Deepwater Ports Act (1982), Safe Water Drinking Act (1982), Noise Control Act (1982), Resource Conservation and Recovery Act (1982, 1985), and Clean Air Act (1982).

This broad targeting of basic national economic activity is capped by the Emergency Planning and Community Right to Know Act of 1986, which mandates the EPA to establish a list of process chemicals and the manufacturing facilities using or producing them, and make that list accessible, through computer and other means, to any person who wishes to undertake litigation to ban these chemicals. The list is developed using criteria for what the EPA calls "possible cancer-causing" and "probable cancer-causing" substances. Which is to say that no valid scientific demonstration of a real danger to human life need be established before the chemical is banned.

Once listed by the EPA, enforcement action against the chemical in question must begin within one year. Simultaneously, a myriad of organizations, typified by the Citizens Clearinghouse for Hazardous Wastes, Inc. (CCHW), receive the list, and begin local protests and lawsuits against the "toxic polluter."

The CCHW is presently coordinating lawsuits against military bases which routinely use solvents now listed by the EPA. The cleanup costs which will be imposed by these local lawsuits will exceed the amount the Defense Department has budgeted this year for the Strategic Defene Initiative (SDI), and military officials have been and will be prosecuted for violating these arbitrary rulings (see *EIR*, March 17, 1989, "DoJ in new assault on military science").

Moscow is delighted

The coordination of this assault wave occurs at the level of the interlocked law firms and environmental institutes which staff and run the EPA, such as the Environmental Defense Fund, the Natural Resources Defense Council, and the World Wildlife Foundation. The personnel of these quasi-governmental agencies are heavily engaged in back-channel diplomacy with the Soviet Union on both military and environmental policy.

The Natural Resources Defense Council, which develops targeting lists of toxic chemicals for the EPA, also runs a joint Energy Efficiency Project with the Soviet Union, and has sponsored tours of Soviet "Potemkin Village" defense sites by U.S. congressmen and scientists, who returned spouting the Soviet line against Pentagon defense programs, especially the SDI, and even denouncing Defense Department publications like *Soviet Military Power*.

This act was followed by the astounding proposal made by Soviet Marshal Sergei Akhromeyev, a top military adviser to Mikhail Gorbachov, during his command performance for the House Armed Services Committee in July. "I am not authorized, of course, to put forward any formal proposals on this score, I am just voicing my own opinion," Akhromeyev modestly explained. "But it seems to me the time has come for us to hold consultations between Soviet and American experts on the issue of possible agreements to limit or even reduce R&D work in the military field." The fact is, this *ukase* is being implemented, through the legal stratagems outlined above, in courtrooms across the United States, exactly as the sponsors of the False Claims Act and Operation Ill Wind intended.

The False Claims Act and environmental suits have targeted the full array of U.S. R&D programs: Northrop's MX and B-2 Stealth bomber programs, Lockheed's Skunkworks (Advanced Tactical Fighter research), producers of guidance systems for tactical missiles, the Aberdeen Chemical Weapons facility, and Electromagnetic Pulse (EMP) research facilities in Maryland. Federal officers have raided the company which procures Soviet equipment for secret testing by the Defense Department; Army and Navy counterterror specialists have been criminalized in the Alexandria federal court, and so on. Companies like Teledyne Systems have been hit with Ill Wind prosecutions followed by False Claims suits, which "jump start" further investigations in an endless cycle.

The law which Northrop is challenging was pushed through Congress by the staff of Sen. Charles Grassley (R-Iowa), some of whom are now building the "False Claims Bar" within the legal community. According to Ernest Fitzgerald (celebrated whistleblower in the DoD), Grassley's staff was intimately involved with the Ill Wind investigation from its inception, and was briefed on material which the Justice Department withheld from the President, the Secretary of Defense, and the Attorney General himself.

The above represents only an outline of a process which has been legitimized by the courts, the media, and most importantly, by bad legislation. The rallying cries of "corruption," "fraud," and "environmental protection" are little more than camouflage for the "restructuring" of the defense industrial base.

The hydra which Northrop has challenged is a manifest threat to the entire American System of government and economics. Unless many more such lawsuits are brought, the distorted policymaking process which has been created will seal the demise of our republic.