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Lecture

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PREVENTING PROTEST PURGATORY: PROVIDING CLARITY BY PLACING PROTOTYPE OTHER TRANSACTION JURISDICTION WITH THE COURT OF FEDERAL CLAIMS

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> *[The Senate Armed Services C]ommittee remains frustrated by an ongoing lack of awareness and education regarding other transactions, particularly among . . . lawyers. This lack of knowledge leads to an overly narrow interpretation of when [other transaction authorities (OTAs)] may be used, narrow delegations of authority to make use of OTAs, a belief that OTAs are options of last resort for when Federal Acquisition Regulation (FAR) based alternatives have been exhausted, and restrictive, risk averse interpretations of how OTAs may be used.*[1]

I. Introduction

Since the 2017 Senate Armed Services Committee (SASC) report bemoaning the lack of other transaction authority (OTA) employment and

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[1] S. REP. NO. 115-125, at 189 (2017).

understanding by the Department of Defense (DoD), their use has increased in quantity and value. In the Army alone, obligations for other transactions (OTs)[2] for prototypes increased from $1.59 billion in fiscal year (FY) 2017, to $2.98 billion in FY 2018, to $4.80 billion in FY 2019.[3] With Congress encouraging the use of OTs, and DoD answering that call, DoD attorneys must understand the benefits and risks associated with using OTs so they can best advise commanders and acquisition professionals on legal issues associated with this acquisition tool.

The strict rule-based framework of traditional FAR-based Government contracts often impedes the Government's ability to engage with industry. Exempt from many of these constraints, OTs provide the DoD greater flexibility to articulate its objectives and potentially obtain its desired product or service more efficiently.[4] Thus, OTs can ameliorate several of the barriers preventing nontraditional defense contractors (NDCs) from working with the Government.[5] Reducing these barriers is important because NDCs offer the DoD new technologies, unique solutions, and a diversified supply chain that can get cutting-edge equipment and capabilities to warfighters faster.[6]

Although OTs provide agencies with more freedom to engage with both NDCs and the traditional defense industry, their flexibility comes with uncertainty over how OTs should be used. This uncertainty is compounded by the fact that no single court or dispute resolution forum definitively exercises jurisdiction over complaints regarding OT solicitations and awards. Such complaints, called protests, have been raised in three different

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[2] Confusion exists around the terms and abbreviations associated with other transactions (OTs) and other transaction authorities (OTAs). Some commentators use "OTA" to mean "other transaction agreement." *See, e.g.*, Scott Amey, *Other Transactions: Do the Rewards Outweigh the Risks?* PROJECT ON GOV'T OVERSIGHT (Mar. 15, 2019), https://www.pogo.org/report/2019/03/other-transactions-do-the-rewards-outweigh-the-risks. This article will refer to OTs as the actual agreements and OTAs as the authority to enter into such agreements.

[3] U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-8, ARMY MODERNIZATION: ARMY SHOULD IMPROVE USE OF ALTERNATIVE AGREEMENTS AND APPROACHES BY ENHANCING OVERSIGHT AND COMMUNICATION OF LESSONS LEARNED 10 (2020).

[4] *See* discussion *infra* Section II.B.1.

[5] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-644, MILITARY ACQUISITIONS: DOD IS TAKING STEPS TO ADDRESS CHALLENGES FACED BY CERTAIN COMPANIES 8–9 (2017) (detailing challenges inhibiting companies' pursuit of Government contracts, including the complexity of the DoD's acquisition process, lengthy contracting timeline, Government-specific contract terms, and intellectual property rights concerns).

[6] *See* discussion *infra* Section II.B.2.

fora: the Government Accountability Office (GAO),[7] the Court of Federal Claims (COFC), and federal district court. Two recent cases, *Space Exploration Technologies Corp. v. United States*[8] (*SpaceX*) in the COFC and *MD Helicopters Inc. v. United States*[9] in the District Court of Arizona reached seemingly contradictory results, with each court holding it did not have jurisdiction over the specific OT challenge before it. This has created an OT protest jurisdictional morass, with potential for multiple rounds of litigation in multiple courts, different rules in different circuits, and ultimately significant delay in the DoD receiving its desired product or service.

To resolve this ambiguity and provide clarity for all parties, Congress should enact legislation to amend the DoD's prototype and follow-on production OTA statute[10] or the Tucker Act[11] to confer on the COFC exclusive federal court bid protest jurisdiction over DoD prototype and production OTs. Such a reform would ensure private industry can still dispute perceived flaws in the OT award process but make that dispute process more predictable and efficient. As it is already the exclusive judicial venue for FAR-based bid protests,[12] the COFC could create a uniform body of prototype OT law that incorporates its principles of Government contract jurisprudence while acknowledging and applying the fewer regulatory restrictions governing OTs.

Part II of this article provides background on bid protests and OTAs, examining the different fora for bid protests, the policy rationale underpinning the bid protest system, and the increasing use of OTAs in the DoD. Part III analyzes the OT jurisdictional confusion created by *SpaceX*

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[7] The GAO is a legislative federal agency led by the Comptroller General of the United States with authority to resolve protests involving procurement contracts. *See* 31 U.S.C. § 3553; U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-510SP, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 4–5 (10th ed. 2018).

[8] Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433 (2019).

[9] MD Helicopters Inc. v. United States, 435 F. Supp. 3d 1003 (D. Ariz. 2020).

[10] 10 U.S.C. § 4022. 10 U.S.C. § 4022 was previously found at 10 U.S.C. § 2371b but was renumbered by the FY 2022 National Defense Authorization Act. *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 1701, 135 Stat. 1541, 2151 (2021).

[11] 28 U.S.C. § 1491.

[12] *See id.* § 1491(b)(1).

and *MD Helicopters*. Part IV introduces the proposed solution to this problem and explains how it can help OTAs better achieve their potential.[13]

II. A Background on Bid Protests and Other Transactions

A. Bid Protests

1. What They Are and Where They Are Litigated

A foundational understanding of bid protests and OTs is necessary to grasp the challenges created by the current legal regime and the impact this has on both Government contractors and federal agencies. A bid protest is a written objection by an interested party to a solicitation or other request for a contract with a federal agency or to an award or proposed award of a contract.[14] Simply put, it is a potential Government contractor's lawsuit against a Federal Government agency based on an alleged defect in the contracting process. Common reasons a potential contractor protests a contract solicitation or award include allegations of the agency's improper evaluation of competing contract proposals, inadequate documentation of the Government's contract file, and a flaw in the contract award decision.[15]

For FAR-based procurement contracts, bid protests can be filed with the contracting federal agency, the GAO, or the COFC.[16] The GAO's jurisdiction over bid protests stems from the Competition in Contracting

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[13] This article does not examine jurisdiction of OT performance disputes or claims (e.g., Contract Disputes Act litigation before the Armed Services Board of Contract Appeals or the COFC). Likewise, by focusing on subject matter jurisdiction, this article does not address 28 U.S.C. § 1491(b)(1)'s "standing" requirement of who is eligible to bring a protest. However, "interested party" standing status is a separate requirement for COFC jurisdiction and provides a greater constraint on who can raise bid protests than under the Administrative Procedure Act. *See* Banknote Corp. of Am., Inc. v. United States, 365 F.3d 1345, 1351–52 (Fed. Cir. 2004). Thus, the current legal framework may allow for a wider range of parties to bring OT protests in federal district courts than can raise procurement protests in the COFC, which may discourage agencies' use of OTs.

[14] *See* 31 U.S.C. § 3551(1).

[15] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-220SP, GAO BID PROTEST ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2019, at 2 (2019).

[16] *See* MARK V. ARENA ET AL., RAND CORP., ASSESSING BID PROTESTS OF U.S. DEPARTMENT OF DEFENSE PROCUREMENTS 7–9 (2018). At the formal bid protest level (i.e., outside of agency-level protests), the vast majority are filed at the GAO. *Id.* at xv (finding 11,459 bid protests filed at the GAO between fiscal years (FYs) 2008 and 2016, compared with 475 filed at the COFC between calendar years 2008 and 2016).

Act (CICA)[17] and the GAO's implementing regulations.[18] In contrast, the COFC's bid protest jurisdiction derives from the Tucker Act, as amended by the Administrative Disputes Resolution Act (ADRA).[19] This congressional grant of jurisdiction is necessary because of the "fundamental precept that federal courts are courts of limited jurisdiction"[20] and the doctrine of sovereign immunity.[21] The Tucker Act both affords subject matter jurisdiction for the COFC to decide bid protests and constitutes a limited waiver of sovereign immunity.[22] Thus, the COFC is the only judicial forum available at which parties can protest a Federal Government

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[17] 31 U.S.C. §§ 3551–3557.

[18] 4 C.F.R. § 21 (2019). The GAO is a legislative branch agency rather than a federal court, and its bid protest decisions are framed as non-legally binding "recommendations" for the procuring agency, though in practice executive agencies almost always implement those recommendations. *See* DAVID H. CARPENTER, CONG. RSCH. SERV., R45080, GOVERNMENT CONTRACT BID PROTESTS: ANALYSIS OF LEGAL PROCESSES AND RECENT DEVELOPMENTS 7 (2018). Furthermore, the COFC and the Federal Circuit consider GAO protest decisions as "expert opinions" and afford them significant deference. *See* Thompson v. Cherokee Nation of Okla., 334 F.3d 1075, 1084 (Fed. Cir. 2003), *aff'd sub nom.*, Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631 (2005); Glenn Def. Marine (Asia), PTE Ltd. v. United States, 97 Fed. Cl. 568, 577 n.17 (2011).

[19] 28 U.S.C. § 1491. Specifically, the COFC has jurisdiction over challenges to "a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." *Id.* § 1491(b)(1). Prior to the passage of the Administrative Disputes Resolution Act (ADRA) in 1996, district courts and the Court of Claims (the COFC's predecessor) possessed concurrent jurisdiction over bid protests. *See* Scanwell Lab'ys, Inc. v. Shaffer, 424 F.2d 859, 868–69 (D.C. Cir. 1970); Jordan Hess, *All's* Well *That Ends* Well*:* Scanwell *Jurisdiction in the Twenty-First Century*, 46 PUB. CONT. L.J. 409, 414 (2017). The ADRA initially provided for continued concurrent jurisdiction of bid protests but included a sunset provision that ended district courts' jurisdiction on 1 January 2001, leaving the COFC as the sole judicial body for bid protest actions. *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874–76 (amending 28 U.S.C. § 1491).

[20] Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978).

[21] *See* United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."). Under the doctrine of sovereign immunity, the United States may not be sued unless it consents. *See id.*

[22] *Id.* ("[B]y giving the Court of Claims jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims." (citation omitted)).

procurement solicitation or contract, or any dispute "in connection with a procurement" with the Federal Government.[23]

The COFC's bid protest jurisdiction under 28 U.S.C. § 1491(b)(1) can be classified into three categories: (1) a pre-award protest of a solicitation for a proposed contract or award, (2) a post-award protest of a contract, or (3) an alleged violation of statute or regulation in connection with a procurement.[24] The definition and limits of "procurement" and "in connection with a procurement" play a key role in the current OT protest landscape.[25] Although the word "procurement" is only used after the third category of cases listed in the statute, the Federal Circuit has held that 28 U.S.C. § 1491(b)(1) "in its entirety is exclusively concerned with procurement solicitations and contracts."[26] In other words, all three categories must involve *procurement* solicitations or contracts, not *any* type of solicitation or contract with the Federal Government.[27] Thus, based on this Federal Circuit precedent, the COFC's Tucker Act jurisdiction is limited to pre-award procurement solicitations or contracts, post-award procurement contracts, and violations "of statute or regulation in connection with a procurement or proposed procurement."[28]

Case law provides a broad interpretation of the phrase "in connection with a procurement" for purposes of category three jurisdiction.[29] Despite

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[23] 28 U.S.C. § 1491(b)(1). Although the ADRA initially gave concurrent jurisdiction to both the COFC and federal district courts, the district courts' jurisdiction over bid protests terminated on 1 January 2001. § 12(d), 110 Stat. at 3875.

[24] *See* OTI Am., Inc. v. United States, 68 Fed. Cl. 108, 113 (2005).

[25] *See* discussion *infra* Part III.

[26] Res. Conservation Grp., LLC v. United States, 597 F.3d 1238, 1245 (Fed. Cir. 2010).

[27] See 31 U.S.C. §§ 6301–6305, for examples of non-procurement agreements with the Federal Government. Those provisions distinguish between procurement contracts, grant agreements, and cooperative agreements, and they explain when each should be used. *Id.* The Tucker Act does not define the word "procurement," but 41 U.S.C. § 111 does: "[T]he term 'procurement' includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." 41 U.S.C. § 111. The Federal Circuit has adopted this definition. *See* AgustaWestland N. Am., Inc. v. United States, 880 F.3d 1326, 1330 (Fed. Cir. 2018).

[28] 28 U.S.C. § 1491(b)(1).

[29] *See* Ramcor Servs. Grp., Inc. v. United States, 185 F.3d 1286, 1289 (Fed. Cir. 1999) ("The operative phrase 'in connection with' is very sweeping in scope. As long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction."). Thus, the following were held "in connection with a procurement": an agency's statutory and FAR interpretation rendering the protestor ineligible for potential future solicitations, Acetris Health, LLC v. United States, 949 F.3d 719, 726–27 (Fed. Cir. 2020); an agency's

this sweeping scope, the Federal Circuit and the COFC have found no jurisdiction in several cases that had some relation to the overall procurement system.[30] The result is a complicated body of jurisdictional jurisprudence for cases not clearly involving procurement contracts but with some relation to Government contracts.

Outside of the COFC's limited bid protest jurisdiction, private parties can sue federal agencies in federal district court under the Administrative Procedure Act (APA), which provides a separate waiver of sovereign immunity.[31] Under the APA, district courts shall "hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[32] The APA provides a broad right of redress for anyone allegedly injured by a federal agency.[33] The Tucker Act provides for the same standard of judicial review as the APA (i.e., the COFC shall overturn agency action that is arbitrary, capricious, or an abuse of discretion).[34] However, as the United States Court of Appeals for the Federal Circuit has exclusive appellate jurisdiction for COFC cases,[35] litigants may face different legal standards and precedents depending on whether their case is at the COFC under the Tucker Act or at the numerous federal district courts under the APA.[36]

The scope of Tucker Act jurisdiction lies at the heart of the OT bid protest thicket, with courts, agencies, and litigants forced to consider how

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Competition in Contracting Act (CICA) stay override, *Ramcor Servs. Grp., Inc.*, 185 F.3d at 1289–90; and an agency's elimination of a previous awardee from consideration for a subsequent phase of the acquisition, *OTI Am., Inc.*, 68 Fed. Cl. at 116.

[30] For example, courts held Tucker Act jurisdiction did not extend to the following: an Army execution order implementing a new training helicopter in the Army but not directing or discussing the procurement of new helicopters, *AgustaWestland N. Am., Inc.*, 880 F.3d at 1330–31; an agency's revocation of a company's Service-Disabled Veteran-Owned Small Business designation where the company was not bidding on a specific procurement, Geiler/Schrudde & Zimmerman v. United States, 743 F. App'x 974, 976–77 (Fed. Cir. 2018); and a Small Business Innovation Research Phase II award for research and development, resulting in a deliverable prototype, despite the potential to lead to production of goods or services in Phase III, R&D Dynamics Corp. v. United States, 80 Fed. Cl. 715, 722 (2007).

[31] *See* 5 U.S.C. § 702.

[32] *Id.* § 706.

[33] Under the Administrative Procedure Act, parties can bring suit against a federal agency to challenge any rulemaking or adjudication action taken by the agency, such as the Department E ordering a waste facility to correct its practices. *See* JARED P. COLE, CONG. RSCH. SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 22 (2016).

[34] *See* 28 U.S.C. § 1491(b)(4).

[35] *See id.* § 1295(a)(3).

[36] *See* discussion *infra* Section IV.C.

related an OT is to a procurement.[37] Many OTs, especially research OTs, do not involve acquiring goods or services, placing them in a jurisdictional gray zone under the Tucker Act. Explanation of the broader rationale underpinning the protest system will inform analysis of bid protests' application to OTs and supports the need for a single clear forum of review, especially since one alternative to the current state is to insulate OTs from protest in any forum.[38]

2. Purposes and Perceptions of the Protest System

Experts have cited various benefits in support of an effective bid protest system for public contracts.[39] Such a system provides transparency and fairness to potential contractors and the public, promoting compliance with federal procurement rules and supporting equitable competition.[40] Bid protests provide a mechanism to hold Government officials accountable to use public funds responsibly.[41] The Federal Government's waiver of sovereign immunity for bid protests incentivizes potential contractors' initial entry into the Government contracts marketplace by providing them an accessible, fair, and predictable forum to litigate their grievances with the public procurement process.[42]

However, perceptions vary as to how successfully the bid protest system meets these goals. Private industry appears to largely agree the bid protest system fulfills its aims, holding the Government accountable when it errs and providing transparency into the procurement process that would not otherwise be available.[43] Conversely, DoD contracting officers sometimes express frustration with the bid protest system, citing unsuccessful offerors' ability to use the system to delay award and commencement of contract performance,[44] lengthen the procurement process timeline, and force the

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[37] *See* discussion *infra* Part III.

[38] *But see* discussion *infra* Section IV.B (arguing in favor of a protest system for OTs).

[39] *See generally* Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 103, 106 n.16 (2002) (describing how protest procedures can benefit both the parties involved and the procurement system in general).

[40] *See* ARENA ET AL., *supra* note 16, at 11–12.

[41] *See id.* at 12.

[42] *See id.*

[43] *See id.* at 19–21.

[44] Timely protest to the GAO triggers an automatic stay that prevents contract award or performance, absent specific limited circumstances. *See* 31 U.S.C. § 3553. Although no

Government to respond to all allegations of governmental error, however frivolous.[45] Despite these differing perspectives, the bid protest system is familiar to Federal Government acquisition personnel, private contractors, and counsel for both, at least in the context of traditional FAR-based procurement contracts.

B. Other Transaction Authorities: An Overview

Distinct from traditional procurement contracts, OTs are a separate form of Government contract. Since OTs are not subject to the FAR's more formulaic contracting approach, they provide the DoD with a flexible and potentially faster path to work with NDCs and collaborate with industry in innovative ways.[46] The DoD has statutory authority for three types of OTs: research,[47] prototype,[48] and follow-on production of a successful prototype

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similar automatic stay provision exists in COFC cases, protestors can seek a preliminary injunction to accomplish the same effect and the agency may voluntarily stay contract award or performance. *See* CARPENTER, *supra* note 18, at 9.

[45] *See id.* at 16–18. *See generally* Timothy G. Hawkins et al., *Federal Bid Protests: Is the Tail Wagging the Dog?*, 16 J. PUB. PROCUREMENT 152 (2016) (finding consensus in a survey of 350 contracting personnel that fear of protests increases agency costs, adds to the procurement lead time, and decreases contracting officer authority and performance).

[46] *See* U.S. DEP'T OF DEF., OTHER TRANSACTIONS GUIDE 4 (2018) [hereinafter DOD OTA GUIDE]; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-84, DEFENSE ACQUISITIONS: DOD'S USE OF OTHER TRANSACTIONS FOR PROTOTYPE PROJECTS HAS INCREASED 2 (2019) [hereinafter GAO OTA REPORT] ("This flexibility [of OTs] can also help DOD address non-traditional companies' concerns about establishing a government-unique cost accounting system or intellectual property rights, among other concerns.").

[47] 10 U.S.C. § 4021. Research OTs allow the Federal Government to provide funding for private entities' basic, applied, and advanced research programs. *See* DOD OTA GUIDE, *supra* note 46, at 7, 36. Research OTs typically focus on "increasing knowledge and understanding in science and engineering" and finding practical applications for that knowledge and understanding, but without a specific product, process, or requirement in mind. 32 C.F.R. § 22.105 (2020).

[48] 10 U.S.C. § 4022. For purposes of the DoD prototype OTA, the DoD defines a prototype project as a project "address[ing] a proof of concept, model, reverse engineering to address obsolescence, pilot, novel application of commercial technologies for defense purposes, agile development activity, creation, design, development, demonstration of technical or operational utility, or combinations of the foregoing," as well as a process. DOD OTA GUIDE, *supra* note 46, at 31. Thus, in contrast with research OTs, prototype OTs seek a deliverable product, service, or process to meet a specific requirement.

project.[49] Because OTs have no prescribed format or statutory definition, they are often defined in terms of what they are not (e.g., OTs are not FAR-based procurement contracts, grants, cooperative agreements, or cooperative research and development agreements).[50] Other transaction authority has existed in the Federal Government since 1958 (first being granted to NASA) and in the DoD since 1989.[51] Eleven federal agencies now have some manner of statutory OTA, though only the DoD, NASA, and the National Institutes of Health had OTA before 1996.[52] The scope and purpose of each agency's OTA varies, but they all provide for exemption from the FAR and other procurement contract requirements.[53] Other transaction authorities' use in the DoD (both in number and value) has increased significantly in recent years.[54]

Simultaneous with the growth of OTs, the DoD's focus has shifted from counterterrorism and counterinsurgency to great power competition.[55]

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[49] 10 U.S.C. § 4022(f). Production OTs are permitted as a follow-on to prototype OTs that were competitively awarded and successfully completed. *See id.* See DOD OTA GUIDE, *supra* note 46, at 7, for further explanation of the differences between the three types of OTs.

[50] *See id.* at 5.

[51] *See* HEIDI M. PETERS, CONG. RSCH. SERV., R45521, DEPARTMENT OF DEFENSE USE OF OTHER TRANSACTION AUTHORITY: BACKGROUND ANALYSIS, AND ISSUES FOR CONGRESS 1–2, 21–35 (2019) (explaining the history and evolution of OTAs in NASA and the DoD).

[52] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-209, FEDERAL ACQUISITIONS: USE OF 'OTHER TRANSACTION' AGREEMENTS LIMITED AND MOSTLY FOR RESEARCH AND DEVELOPMENT ACTIVITIES 35 (2016). The eleven agencies with OTAs are the DoD, NASA, the National Institutes of Health, the Department of Energy, the Advanced Research Projects Agency—Energy, the Department of Health and Human Services, the Department of Homeland Security, the Domestic Nuclear Detection Office, the Transportation Security Administration, the Department of Transportation), and the Federal Aviation Administration. *See id.*

[53] *Compare* 49 U.S.C. § 5312 (providing the Department of Transportation with OTA to "advance public transportation research and development"), *and* 51 U.S.C. § 20113(e) (providing NASA with OTA "as may be necessary in the conduct of its work and on such terms as it may deem appropriate"), *with* 10 U.S.C. § 4022 (providing the DoD with OTA to "carry out prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel" and supporting systems).

[54] In FY 2016, the DoD awarded 34 new prototype OTs and took 214 actions, including modifications and orders, related to prototype OTs, with total obligations of $1.4 billion. GAO OTA REPORT, *supra* note 46, at 9. In FY 2018, the DoD awarded 173 new prototype OTs and took 445 other actions related to prototype OTs, with total obligations of $3.7 billion. *Id.* Thus, prototype OT awards increased 500% and obligations increased 260% in the span of 3 years.

[55] *See* U.S. DEP'T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 1 (2018) [hereinafter 2018 NDS] ("Inter-state strategic competition, not terrorism, is now the primary concern in U.S. national security.").

Prioritizing near-peer nation-states (i.e., China and Russia) as the greatest threats to U.S. national security requires ensuring the DoD has the tools and weapon systems to match these competitors' investment in and commitment to technological advancements.[56] For example, China has adopted a whole-of-nation regime dubbed "military-civil fusion" that applies commercial and academic developments to military uses.[57] To ensure the United States does not lose ground in this battle for technological superiority, the 2018 *National Defense Strategy* directs DoD members to "deliver performance at the speed of relevance" and "organize for innovation."[58] Because OTs are not subject to many of the laws governing procurement contracts, they provide an innovative pathway to acquire new and unique technologies and quickly adapt them for military use.

1. What Laws Apply to Other Transactions?

Procurement-specific statutes and regulations generally do not apply to OTs.[59] Most significantly, this includes the FAR and its supplements.[60] Additionally, OTs are presumably exempt from procurement-specific

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[56] *See id.* at 3 ("New technologies include advanced computing, 'big data' analytics, artificial intelligence, autonomy, robotics, directed energy, hypersonics, and biotechnology—the very technologies that ensure we will be able to fight and win the wars of the future.").
[57] *See Military-Civil Fusion and the People's Republic of China*, U.S. DEP'T OF STATE, https://www.state.gov/wp-content/uploads/2020/05/What-is-MCF-One-Pager.pdf (last visited Aug. 24, 2022); *see also* DANIEL KLIMAN ET AL., CTR. FOR A NEW AM. SEC., FORGING AN ALLIANCE INNOVATION BASE 7 (2020) (contrasting China's mandatory collaboration between its commercial and national defense sectors with the U.S. technology industry's reluctance to engage with the DoD in part due to the speed and difficulty of Government contracting).
[58] 2018 NDS, *supra* note 55, at 10.
[59] *See* 32 C.F.R. § 3.2 (2020) ("'Other transactions' are generally not subject to the Federal laws and regulations limited in applicability to contracts, grants or cooperative agreements.").
[60] *Id.* The FAR, codified at 48 C.F.R. Parts 1 through 53, is a 1,992-page federal regulation (plus agency supplements) that provides guidance to federal agencies on every stage of the acquisition process, including contract solicitation, award, and performance. *See* ERIKA K. LUNDER ET AL., CONG. RSCH. SERV., R42826, THE FEDERAL ACQUISITION REGULATION (FAR): ANSWERS TO FREQUENTLY ASKED QUESTIONS 7 (2015).

statutes, including the CICA,[61] Truth in Negotiations Act,[62] Cost Accounting Standards,[63] Contract Disputes Act,[64] and the Bayh-Dole Act.[65] However, DoD OTA statutes do not explicitly enumerate what laws are inapplicable to OTs, creating ambiguity and forcing practitioners to conduct close reviews of OTs' specific terms to determine which laws apply, a threshold question not typically at issue in procurement contract protests and disputes.[66]

Furthermore, GAO bid protest review is generally unavailable for OTs, with a limited exception that allows narrow review of an agency's decision to use an OTA where the protestor alleges the federal agency is improperly using the applicable authority.[67] Thus, the GAO will not examine an OT's solicitation terms, proposal evaluations, or award decisions.[68] This

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[61] Competition in Contracting Act of 1984, Pub. L. No. 98-369, §§ 2701–2753, 98 Stat. 494, 1175–1203 (codified as amended in various sections of 10 U.S.C. and 41 U.S.C., among others). The CICA prescribes a statutory default for full and open competition for procurements of property or services. *See* 10 U.S.C. § 3201(a)(1); 41 U.S.C. § 3301(a).

[62] 10 U.S.C. §§ 3701–3708. The Truth in Negotiations Act requires current and prospective contractors to give the Government cost or pricing data related to their contracts in specific circumstances. *See id.*

[63] 41 U.S.C. §§ 1501–1506; FAR pt. 30 (2019). Cost accounting standards are rules relating to measuring and allocating costs in Government contracts. *See* NICHOLAS SANDERS, ACCOUNTING FOR GOVERNMENT CONTRACTS: COST ACCOUNTING STANDARDS § 3.03 (2020).

[64] 41 U.S.C. §§ 7101–7109. The Contract Disputes Act establishes the COFC as the sole judicial body to hear cases involving claims against the government related to contract performance. *See id.* § 7104.

[65] 35 U.S.C. §§ 200–212. This act provides rules on ownership rights in federally funded inventions. *See* Bd. of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 563 U.S. 776, 782–83 (2011).

[66] *See* PETERS, *supra* note 51, at 4–5. The 2002 version of the *DoD OTA Guide* listed twenty-one statutes inapplicable to OTs. *See* U.S. DEP'T OF DEF., "OTHER TRANSACTIONS" (OT) GUIDE FOR PROTOTYPE PROJECTS 41–42 (2002). The current DoD OTA Guide omits any such enumerated list. *See* DOD OTA GUIDE, *supra* note 46, at 38–39 ("Generally, the statutes and regulations applicable to acquisition and assistance do not apply to OTs. . . . Laws and regulations that are unrelated to the acquisition or assistance process will still apply to OTs.").

[67] *See* Oracle Am., Inc., B-416061, 2018 CPD ¶ 180, at 11 (Comp. Gen. Dec. May 31, 2018); *see also* Rocketplane Kistler, B-310741, 2008 CPD ¶ 22, at 3 (Comp. Gen. Dec. Jan. 28, 2008) ("We will review . . . a timely protest that an agency is improperly using a non-procurement instrument . . . where a procurement contract is required . . . ."). See generally Major William T. Wicks, *Looking into the Crystal Ball: Examining GAO's* Oracle America *Ruling*, ARMY LAW., no. 1, 2020, at 59, for an in-depth discussion of GAO jurisdiction over OTAs.

[68] *See* MD Helicopters, Inc., B-417379, 2019 CPD ¶ 120 (Comp. Gen. Dec. Apr. 4, 2019).

forecloses the GAO's review of OTs for the most common bases for procurement protests.[69]

Other non-procurement-specific laws do apply to OTs. These include the Trade Secrets Act,[70] Economic Espionage Act,[71] and Antideficiency Act.[72] The DoD OTA statutes expressly apply two laws to OTs: the Freedom of Information Act[73] and the Procurement Integrity Act.[74] Although many procurement-specific laws do not apply to OTs, they are binding legal contracts between the Federal Government and non-federal entities,[75] which suggests that some forum should exist to adjudicate disputes and issues that arise relating to OTs in this ambiguous legal framework. Other transactions' insulation from most procurement statutes and regulations, as well as the uncertainty created by the applicability of other laws to them, confers them with both advantages and risks.

2. Other Transactions: Advantages and Risks

As demonstrated by the significant increase in the DoD's use of OTAs, many DoD officials—and private companies—are sanguine about their utility, citing several advantages over FAR-based contracts.[76] First, OTs allow for flexibility in their structure, giving the DoD and the other party

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[69] *See supra* note 15 and accompanying text.

[70] 18 U.S.C. § 1905. The Trade Secrets Act criminalizes a Federal Government employee's disclosure of trade secrets (i.e., confidential or proprietary information of private parties) obtained during the course of federal employment. *See id.*

[71] *Id.* §§ 1831–1839. The Economic Espionage Act criminalizes anyone's theft of trade secrets. *See id.*

[72] 31 U.S.C. § 1341. The Antideficiency Act prohibits federal employees and agencies from obligating federal funds in excess of or in advance of an appropriation. *See id.*

[73] 5 U.S.C. § 552. However, certain information is expressly exempt from Freedom of Information Act release for five years. *See* 10 U.S.C. § 4021(i).

[74] 41 U.S.C. §§ 2101–2107. As its name implies, the Procurement Integrity Act is a procurement-specific statute that prohibits disclosing or obtaining contractor bid or proposal information. *See id.* However, the DoD prototype OTA specifically treats prototype OTs as procurement contracts for purposes of the Procurement Integrity Act. *See* 10 U.S.C. § 4022(h).

[75] *See* DOD OTA GUIDE, *supra* note 46, at 38.

[76] In 2018 testimony to Congress, the Assistant Secretaries for Acquisition for the Army, Navy, and Air Force each praised their respective service's increasing employment of OTAs. *See Assessing Military Service Acquisition Reform: Hearing Before the H. Comm. on Armed Servs.*, 115th Cong. 30–32, 60, 68, 78 (2018).

freedom to negotiate specific terms that the FAR would preclude.[77] Second, proponents contend that OTAs lead to more DoD agreements with NDCs (e.g., small-business startup companies).[78] These NDCs are often involved in niche emerging technologies with dual use by both the DoD and commercial industry, incentivizing innovation and increasing the DoD's pool of suppliers.[79] Finally, OTAs may accelerate the overall acquisition process, getting needed supplies and improvements to the warfighter sooner.[80]

Conversely, there are several risks associated with OTs. Because they are exempt from procurement laws intended to provide oversight and protect taxpayer interests, OTs are less transparent and potentially more susceptible to fraud, waste, and abuse.[81] Additionally, the flexibility to negotiate OTs gives contractors the ability to obtain more favorable terms than would be available under the FAR, such as by limiting the Government's data rights or more broadly defining reimbursable costs.[82] This all frustrates an agency's ability to accurately assess the reasonableness of a potential

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[77] *See* PETERS, *supra* note 51, at 3; DOD OTA GUIDE, *supra* note 46, at 2 ("The OT authorities were created to give DoD the flexibility necessary to adopt and incorporate business practices that reflect commercial industry standards and best practices into its award instruments."). Example terms that could be freely negotiated in an OT include cost sharing, intellectual property, data rights, and payments.

[78] *See* PETERS, *supra* note 51, at 6, 12–13. The DoD prototype OTA statute requires that one of four conditions be met: (1) at least one NDC or nonprofit research institution participates to a significant extent; (2) all significant participants are small businesses or NDCs;(3) at least one-third of the project is paid by a source other than the Federal Government; or (4) the agency's senior procurement executive determines exceptional circumstances exist. 10 U.S.C. § 4022(d)(1). The data corroborates success in this regard: 88% of the 1,250 new prototype OTA awards between FYs 2016 and 2018 had at least one NDC or non-profit research institution participating to a significant extent. GAO OTA REPORT, *supra* note 46, at 11–12.

[79] *See* PETERS, *supra* note 51, at 6, 12–13. Congress explicitly endorsed this goal for OTAs when making them a permanent DoD authority in the FY 2016 National Defense Authorization Act. *See* H.R. REP. NO. 114-270, at 703 (2015) (Conf. Rep.) ("The conferees believe that expanded use of OTAs will support Department of Defense efforts to access new source[s] of technical innovation, such as Silicon Valley startup companies and small commercial firms.").

[80] *See* PETERS, *supra* note 51, at 16. Other transactions could be faster to execute than traditional contracts because they are subject to fewer statutory and regulatory requirements, but they could also take longer because all terms are negotiable, allowing for a more protracted negotiation process. *See id.* A lack of comprehensive data to compare timelines prevents accurate empirical assessment of these competing hypotheses at this time. *See id.*

[81] *See* Amey, *supra* note 2.

[82] *See id.*

contractor's OT price/costs, for example, or to evaluate which of competing proposals best meets the agency's needs. Furthermore, OTs are not subject to the socioeconomic policies applicable to FAR-based contracts, such as supporting U.S. and small businesses, designed to promote desirable public policies.[83] Finally, the exemption of OTs from the CICA means they may feature less competition, potentially increasing the Government's price and providing another potential source of fraud or waste.[84] These risks support the premise that a specialized judicial forum well-versed in Government contract law—but able to assess the differences between FAR-based contracting and OT contracting—should have jurisdiction to consider and resolve concerns stemming from OT solicitations and awards.

Bid protests alleviate many of these concerns in the traditional Government procurement process by holding agencies accountable for flaws in their solicitation, proposal evaluation, and award process. Because bid protests provide a forum for potential or unsuccessful contractors to present these concerns to a neutral arbiter, the Government knows it must comply with applicable rules, contractors can trust those rules will be enforced, and the public is assured of a watchdog function over these contracts totaling billions of dollars of taxpayer funds annually. However, bid protests' current ability to serve these functions in the OT realm is diminished due to ambiguity over the appropriate forum to hear such challenges.

III. Current State of Other Transaction Authority Judicial Protest Law

Despite their growing use and value, protests of OTs in federal courts have been rare. The current lack of OT bid protests in federal court may be a function of the uncertainty related to the correct bid protest forum, rather than contractors' lack of desire to protest the billions of OT dollars awarded annually by the DoD. The COFC appears to have only considered two cases

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[83] *See* PETERS, *supra* note 51, at 9.

[84] *See id.* at 15–16. However, the Congressional Research Service did find that 89% of new prototype OTs between FY 2013 and FY 2017 were "competed in some fashion." *Id.* at 16. Although exempt from CICA, prototype OTs require "competitive procedures" be used "[t]o the maximum extent practicable," though the statute does not define "competitive procedures." 10 U.S.C. § 4022(b)(2). Also, follow-on production OTs may be awarded without using competitive procedures if the original prototype OT involved competitive procedures. *See* 10 U.S.C. § 4022(f)(2).

involving an OTA: *SpaceX*[85] and *Kinemetrics, Inc. v. United States*.[86] In *SpaceX*, the COFC found that it did not have jurisdiction over the case because the OT at issue was not "in connection with a procurement or a proposed procurement," resulting in that case's transfer to federal district court.[87] Conversely, the COFC determined in *Kinemetrics* that it did have jurisdiction because the OT solicitation there used the authority of 10 U.S.C. § 2371 but included a FAR-based delivery order and resulted in a standard indefinite delivery, indefinite quantity contract, so it was "in connection with" a procurement.[88] Meanwhile, in *MD Helicopters Inc. v. United States*, the District Court for the District of Arizona determined that the OT in that case *was* "in connection with a procurement or a proposed procurement," meaning it lacked jurisdiction under the Tucker Act, and dismissed the case.[89]

The result of these three cases is that the COFC has jurisdiction over challenges that are "in connection with a procurement" or that involve a procurement solicitation or award.[90] If not, the complainant must turn to federal district court under the APA.[91] However, a closer read of *SpaceX* and *MD Helicopters* leaves confusing guidance on when an OT is "in connection with a procurement" for Tucker Act jurisdiction to attach.[92] This article will first analyze how COFC found no "connection with a procurement" in *SpaceX*, then turn to how the Arizona district court reached an apparently contradictory result in *MD Helicopters*.[93]

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[85] Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433 (2019).
[86] Kinemetrics, Inc. v. United States, 155 Fed. Cl. 777 (2021).
[87] *See Space Expl. Techs. Corp.*, 144 Fed. Cl. at 446.
[88] *See Kinemetrics, Inc.*, 155 Fed. Cl. at 784–85.
[89] *See* MD Helicopters Inc. v. United States, 435 F. Supp. 3d 1003 (D. Ariz. 2020).
[90] 28 U.S.C. § 1491(b)(1).
[91] *See* discussion *infra* Section III.A.1.b.
[92] 28 U.S.C. § 1491(b)(1).
[93] Since no party contested jurisdiction in *Kinemetrics, Inc.* and the OT solicitation in that case explicitly expected to result in a FAR-based procurement contract, it provides a situation with a clear "connection with a procurement" and thus does not warrant deeper analysis. *See Kinemetrics, Inc.*, 155 Fed. Cl. at 784–85. Such a clear jurisdictional result is unlikely to occur with many OTs, however, as evidenced by the more ambiguous solicitations and results in *SpaceX* and *MD Helicopters*.

A. *SpaceX*: An Other Transaction for Launch Service Agreements

The OT solicitation in *SpaceX* involved a multi-phase Air Force Space and Missile Systems Center (SMC) program for launch service agreements (LSAs) as part of the National Security Space Launch (NSSL) Program.[94] Phase One was a competitive OTA award to develop space launch vehicle prototypes under 10 U.S.C. § 2371b,[95] and Phase Two was a follow-on FAR-based requirements contract for launch services that was open to all interested offerors.[96] Simply put, the NSSL Program sought to develop domestic rocket manufacturers that would launch U.S. satellites and spacecraft into space. After bidding on (but not receiving) a Phase One award, SpaceX filed a post-award bid protest in the COFC.[97]

1. Court of Federal Claims: Launch Service Agreements Are Other Transactions Not Subject to the Tucker Act

The COFC first held that the LSAs themselves were not procurements.[98] Neither SpaceX nor the Government argued that the LSAs themselves were procurement contracts, so the COFC reached this conclusion with minimal analysis, emphasizing that the LSAs were entered into pursuant to the DoD's OTA, and the LSAs were not subject to federal procurement laws and regulations.[99] Though it left open the possibility other OTs could constitute procurements for Tucker Act purposes, the COFC provided no guidance on when that may be the case.[100]

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[94] *See* Evolved Expendable Launch Vehicle (EELV) Launch Service Agreement (LSA): Request for Proposals Under Other Transaction (OT) Agreement, Solicitation No. FA8811-17-9-0001 (Oct. 5, 2017), https://sam.gov/api/prod/opps/v3/opportunities/resources/files/e2c583b4a02911ba7f59eff384b38664/download.

[95] The DoD OTA prototype statute at the time, now located at 10 U.S.C. § 4022. *See supra* note 10.

[96] Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 436–38 (2019).

[97] *Id.* at 438.

[98] *See id.* at 442.

[99] *See id.* at 441–42.

[100] *See id.* at 442 n.4 ("The Court does not reach the issue of whether other transactions generally fall beyond the Court's bid protest jurisdiction under the Tucker Act."). However, all DoD OTs will have the non-procurement characteristics referenced by the court: authority from the DoD OT authorizing statutes (10 U.S.C. § 4021 or § 4022) and exemption from procurement-specific laws.

The court then explained although the Phase One LSAs were "related to" a procurement, they were not "in connection with a procurement," foreclosing Tucker Act jurisdiction.[101] While part of the same multi-phase NSSL Program, Phase One and Phase Two involved separate solicitations, different acquisition strategies, and distinct goals.[102] Furthermore, a likely dispositive fact from *SpaceX* was that disappointed offerors that did not win a Phase One OT could still compete—and be awarded—procurement contracts in Phase Two.[103] Finally, the Phase One LSA competition "did not involve the procurement of any goods or services by the Air Force," but instead provided funding for prototype vehicles that the Air Force was not purchasing or owning.[104]

As a result of this conclusion (i.e., Phase One LSAs were not *in connection with* a procurement contract), the COFC dismissed the case from for lack of jurisdiction. At the same time, the court transferred the case to the District Court for the Central District of California, [105] as SpaceX alleged non-frivolous claims regarding the Air Force's award decisions that, if true, could be unreasonable and in violation of federal law under an APA review.[106]

2. District Court: Air Force's Actions Were Not Arbitrary, Capricious, or an Abuse of Discretion

After transfer from the COFC, the district court ruled on the merits, denying SpaceX's complaint. [107] The court considered SpaceX's

[101] *See id.* at 443.
[102] *See id.* at 443–44 (stating the goal of Phase One was to increase the available pool of launch vehicles, whereas the goal of Phase Two was to procure launch services).
[103] *See id.* In fact, the Air Force Space and Missile Systems Center ultimately awarded one of two Phase Two contracts to SpaceX on 7 August 2020 while the Phase One litigation was still pending in district court. *See Space Force Awards National Security Space Launch Phase 2 Launch Service Contracts to United Launch Alliance, LLC (ULA) and Space Exploration Technologies Corporation (SpaceX)*, U.S. SPACE FORCE (Aug. 7, 2020), https://www.spaceforce.mil/News/Article/2305278/space-force-awards-national-security-space-launch-phase-2-launch-service-contra.
[104] Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 445 (2019).
[105] Both SpaceX's principal place of business and the Air Force Space and Missile Systems Center are located within the Central District of California. *Id.* at 445.
[106] *See id.* at 446.
[107] *See* Judgment, Space Expl. Techs. Corp. v. United States, No. 2:19-cv-07927-ODW (C.D. Cal. Oct. 2, 2020); Order Denying Plaintiff's Motion for Judgment on the Certified

allegations under the APA's deferential standard, which requires a reviewing court to uphold agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[108] Although the LSA competition was not a procurement, or "in connection with" a procurement, the court devoted twenty-six of its thirty-six-page order analyzing the LSA request for proposals and SMC's cost evaluations and risk assessments in determining whether SMC complied with the APA, ultimately finding that it did.[109] Thus, the court's reasoning is rooted in analysis remarkably similar to what the COFC ordinarily conducts in its bid protest cases (i.e., reviewing an agency's proposal evaluation and contract award decision). For example, the court rejected SpaceX's arguments that SMC improperly evaluated the Phase One proposals and relied on evaluation criteria that were unstated in the request for proposals,[110] both common bases for procurement bid protests.[111] The desire to confer such Government contract-specific analysis to a specialized court (i.e., the COFC), was the exact impetus behind the ADRA's sunset of concurrent district court-COFC bid protest jurisdiction.[112]

The *SpaceX* district court had the benefit of the COFC's decision, in which the COFC agreed the district court had jurisdiction.[113] In contrast, in *MD Helicopters*,[114] the District Court for the District of Arizona considered its jurisdiction of an OT post-award protest without the benefit of a prior jurisdictional ruling from the COFC.

B. *MD Helicopters*: An Other Transaction Not Subject to District Court Jurisdiction

The district court in *MD Helicopters* concluded it lacked jurisdiction and dismissed the case because, in the court's assessment, the OT at issue

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Administrative Record at 35–36, Space Expl. Techs. Corp. v. United States, No. 2:19-cv-07927-ODW, 2020 WL 7344615, at *19 (C.D. Cal. Sept. 24, 2020) [hereinafter SpaceX Order].

[108] 5 U.S.C. § 706(2)(A).

[109] *See* SpaceX Order, *supra* note 107, at 8–34.

[110] *See id.* at 10–17.

[111] *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 15.

[112] *See* discussion *infra* Section IV.C.

[113] *See* Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 446 (2019).

[114] MD Helicopters Inc. v. United States, 435 F. Supp. 3d 1003 (D. Ariz. 2020).

was "in connection with a procurement."[115] Because this decision came after the COFC's in *SpaceX*, the Arizona court was able to distinguish the LSAs in *SpaceX* from the OT in *MD Helicopters*, which involved the Army's Future Attack Reconnaissance Aircraft Competitive Prototype (FARA CP) Program.

As the Army's program for a new attack helicopter, the FARA CP Program is a multi-phased prototype OT, using the DoD's prototype OTA, previously at 10 U.S.C. § 2371b.[116] The multi-phased approach allowed the Army to award multiple OTs for preliminary designs, with down-selection of awardees in subsequent phases for actual prototypes and later potential for follow-on production OTs.[117] MD Helicopters submitted a proposal for Phase One of the FARA CP Program but was not selected for award, prompting it to file a protest at the GAO.[118] After the GAO dismissed its bid protest for lack of jurisdiction, MD Helicopters filed suit in federal district court under the APA, alleging that the Army acted arbitrarily and capriciously in not selecting MD Helicopters.[119]

Before considering the merits of the protest, the district court examined its jurisdiction to hear the case.[120] The court concluded the FARA CP solicitation was "in connection with a procurement" and therefore outside its jurisdiction per the Tucker Act, citing several reasons this solicitation differed from the LSAs.[121] First, the FARA CP solicitation stated the Army had a present need for a suitable aircraft, which to the court meant it related more directly to a procurement than the *SpaceX* Phase One solicitation, the primary purpose of which was to develop suitable commercial technology for future use.[122] Also, the FARA CP Program involved down-selection at

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[115] *See id.* at 1013–14.
[116] *See id.* at 1006, 1013; 10 U.S.C. § 4022.
[117] *See MD Helicopters Inc.*, 435 F. Supp. 3d at 1006.
[118] *See* MD Helicopters, Inc., B-417379, 2019 CPD ¶ 120 (Comp. Gen. Dec. Apr. 4, 2019) (holding that the GAO lacked jurisdiction over the OT award at issue because the MD Helicopters protest concerned the Army's proposal evaluations and OT award decisions, not improper use of its OTA). *See generally supra* note 67 (discussing the GAO's OT protest jurisdiction).
[119] *See MD Helicopters Inc.*, 435 F. Supp. 3d at 1005.
[120] *See id.* at 1007. Although neither MD Helicopters nor the United States challenged the district court's jurisdiction, the intervenors (i.e., the successful awardees) asserted a lack of subject-matter jurisdiction in federal district court, and the court acknowledged that an inquiry into jurisdiction was its first duty in any case regardless of the parties' agreement on the question. *See id.*
[121] *See id.* at 1013.
[122] *See id.*

each subsequent stage, so only awardees at the initial solicitation stage could be eligible for the potential follow-on procurement anticipated by the Army.[123] Finally, *SpaceX* involved two distinct solicitations—Phase One for investing in industry to develop their capabilities and Phase Two for actual launch services—whereas FARA CP was a single multi-phased solicitation.[124] Thus, the court concluded the FARA CP solicitation, unlike the LSAs, *was* in connection with a procurement.

C. The Problem: Whither Does a Protestor Go?

As a result of the disparate jurisdictional holdings between the COFC in *SpaceX* and the District Court of Arizona in *MD Helicopters*, Government agencies and contractors face a preliminary question in resolving challenges involving OTA solicitations and awards: Which federal court is the correct forum with jurisdiction to hear these cases? Per the COFC in *SpaceX*, the answer is the district court.[125] Per the district court in *MD Helicopters*, the answer is the COFC.[126] Both cases involved time, labor, and expense by the Government, protestors, and intervenors (almost two-fold in the case of *SpaceX* as a result of having to litigate in both the COFC and district court) that could have been mitigated with a clearer jurisdictional framework.[127]

Reconciling these two cases' holdings, a multi-step jurisdictional test appears to have emerged for OT protests. For pre-award protests, the court must consider whether the solicitation is for a procurement contract, notwithstanding the solicitation's characterization and use of an OTA. For post-award protests, the court must consider whether the actual OT is a procurement contract, again notwithstanding the terms and authority cited. If the answer is "yes" to the appropriate question above, the COFC has jurisdiction and the analysis ends. If the answer is "no," the court must then consider whether the OT or proposed OT is "in connection with a

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[123] *See id.*; *cf.* Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 438 (2019) ("The Phase 2 Procurement is open to all interested offerors.").
[124] *See MD Helicopters Inc.*, 435 F. Supp. 3d at 1013.
[125] *See Space Expl. Techs. Corp.*, 144 Fed. Cl. at 446.
[126] *See MD Helicopters Inc.*, 435 F. Supp. 3d at 1014.
[127] Although the jurisdictional answer was relatively easy in *Kinemetrics* because of the explicit reference to a FAR-based delivery order in that OT solicitation, Kinemetrics, Inc. v. United States, 155 Fed. Cl. 777, 784–85 (2021), such a scenario is likely to be the exception rather than the norm with OTs, as the agency may not want to get forced into a particular future acquisition strategy at the OT solicitation phase.

procurement" for purposes of the Tucker Act.[128] If so, the COFC has jurisdiction; if not, it lacks jurisdiction, and the protestor's only recourse is federal district court. This multi-step test requires a careful, fact-specific analysis of the solicitation and OT. The more an OT *looks like* or is *related to* a contract for the acquisition of a good or service, the more likely it will be "in connection with" a procurement and subject to the COFC's jurisdiction.

No clear line exists to delineate when an OT is "in connection with" a procurement in any given case, nor can such a line exist. In some cases, such as *Kinemetrics*,[129] the answer may be relatively easy because the agency in its OT solicitation explicitly states a FAR-based contract is expected to result from the initial OT. In many cases, however, such as both *SpaceX* and *MD Helicopters*, no clear answer is readily discernable, potentially leading to the protestor having to make its best guess, litigation on jurisdiction before any discussion of the actual merits, dismissal of the case from the original forum, and in the case of *SpaceX*, litigation in both the COFC and federal district court prior to a decision on the merits. Against this backdrop, the actual requiring activity at the DoD agency is left in limbo, either because of a preliminary injunction or because the agency voluntarily halted OT award and performance so it could more easily start over if the protest were sustained in whatever judicial forum ultimately had jurisdiction.

Congress has expressed an intent that the DoD make greater use of its OTAs.[130] As clarity and predictability is a hallmark of any effective procurement system, the current legal morass regarding OT protest jurisdiction gives both the Government and contractors reason to pause before engaging in OTs. Government agencies may fear delays in OT award and performance, as well as a lack of clear standards.[131] Contractors fear expending time and money bidding on OTs, then expending additional time and money if they perceive errors in the award process, only to be told they have to start over in another court, if they have a legal remedy at all.[132]

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[128] *See* 28 U.S.C. § 1491(b)(1).
[129] *Kinemetrics, Inc.*, 155 Fed. Cl. 777.
[130] *See supra* note 1 and accompanying text.
[131] *See, e.g.*, John Krieger & Richard Fowler, *Aesop's Guide to Litigating Under Other Transactions*, DEF. ACQUISITION, May–June 2020, at 38.
[132] *See, e.g.*, Fernand A. Lavalee, *OT Protesters Looking for a Place to Land*, JONES DAY, https://www.jonesday.com/en/insights/2020/02/ot-protesters-looking-for-a-place-to-land (last visited Aug. 24, 2022) ("Protesters may want to plan for a multiphased approach in which they first attempt to gain jurisdiction at GAO, then COFC, then, as a last resort, seek transfer to a federal district court.").

Rather than counsel and courts having to conduct complicated, fact-specific jurisdictional analysis in every OT solicitation or award dispute—under penalty of the parties having to start over and re-litigate in a different court if they get the analysis wrong—legislation providing a clear answer to this problem will best allow OTs to achieve their full potential.

IV. Providing Clarity: Give the Court of Federal Claims Exclusive Jurisdiction over DoD Prototype and Production Other Transactions

New statutory language in 10 U.S.C. § 4022 conferring on the COFC exclusive jurisdiction over protests involving DoD prototype and production OTs would best resolve the current district court versus COFC OT protest jurisdictional quagmire. This change will limit the COFC's clear OT jurisdiction to the OTs that are most connected to and most closely resemble a procurement contract, while leaving the door open for other OTs (e.g., research OTs) that are frequently better suited for federal district court under the APA because they are not "in connection with" a procurement. After explaining the DoD's unique OT landscape, this section addresses why OTs should not simply be exempt from judicial review and then explains why the COFC is the best forum to conduct that review.

A. Focus on DoD Prototype and Production Other Transactions

The statutory change this article proposes—to confer on the COFC bid protest jurisdiction over certain DoD OTs—should be limited to the DoD's prototype and production OTs under 10 U.S.C. § 4022. Most prototype and production OTs seek the DoD's acquisition of a good or service; even if not, they are the most likely to be related to, if not "in connection with," a procurement.[133] They are not grants, cooperative agreements, cooperative research and development agreements, or research OTs, none of which primarily seek to provide the Federal Government with a specific product or service.[134] Prototype OTs typically contemplate some kind of proof of

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[133] *See supra* note 48.

[134] *See supra* note 47. Grant agreements are used when the principal purpose is to assist a recipient "to carry out a public purpose of support or stimulation" rather than the U.S. Government acquiring property or services for its direct benefit or use, and substantial involvement by the executive agency using the grant is *not* expected. 31 U.S.C. § 6304.

concept or model output that can then be leveraged into a production OT or FAR-based procurement contract.[135] In contrast, research OTs typically involve investment in novel technologies, but the only outputs are reports or studies rather than an actual prototype that the DoD can use.[136] Thus, because their desired end is typically some kind of concrete product, prototype and production OTs are more likely to look like a procurement and involve protest-like challenges compared to research or other OTs. Jurisdiction of research and other OTs can appropriately be left to district court review under the APA, like grants and cooperative agreements, because they do not have the similar goals or structure of procurement contracts. Altering only 10 U.S.C. § 4022 to mandate COFC jurisdiction would provide a clear protest path for only the most procurement-like OTs—prototypes and follow-on productions.

Although other agencies have OTAs,[137] the DoD's use is the most significant and in need of immediate clarity. As DoD leadership has recognized,[138] OTs are a critical tool for flexible, agile acquisition, enabling the DoD to "deliver performance at the speed of relevance"[139] and keep pace with the advances made by near-peer competitors.[140] Although the FAR makes some accommodation for this, such as with the unusual and compelling urgency and national security exceptions to full and open competition,[141] FAR-based contracting still imposes rigid constraints, such as those involving solicitation publication timelines,[142] data rights,[143] and cost accounting standards.[144] Although not a panacea for all issues related

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Cooperative agreements are used in the same situations as grant agreements, except that substantial involvement between the executive agency and the recipient *is* expected. *Id.* § 6305.

[135] *See* DOD OTA GUIDE, *supra* note 46, at 8, 31 (discussing how the DoD awarded a prototype OT for a proof of concept software application for scheduling air refueling operations, and then awarded a follow-on production OT for that software after successful completion of the prototype).

[136] *See OTA Today – Research Other Transactions*, DEF. ACQUISITION UNIV. (Mar. 18, 2021), https://media.dau.edu/media/OTA+Today+-+Research+Other+Transactions/1_zyfb5212.

[137] *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 52 (finding that eleven total federal agencies have OTAs).

[138] *See supra* note 76.

[139] *See* 2018 NDS, *supra* note 55, at 10.

[140] *See* discussion *supra* Section II.B.2.

[141] *See* 10 U.S.C. § 3204(a); FAR 6.302 (2019).

[142] *See* FAR 5.203.

[143] *See id.* 27.4.

[144] *See id.* pt. 30.

to Government acquisition,[145] OTs' flexibility in enabling Government agencies to determine and negotiate the specific terms of their agreement with private contractors has led to the rapid growth of OT use in the DoD. As the DoD becomes more comfortable with using OTs, and consequently uses them more frequently, a single forum to address alleged legal errors in the OT solicitation and award process—especially those seeking a specific end product for the DoD's use as in prototype and product OTs—becomes increasingly important.

Furthermore, contract litigation involving the DoD frequently consumes more time, effort, and docket space than contract litigation with all other federal agencies combined. For example, protests against the DoD at the COFC typically outnumber protests against all other Government agencies combined.[146] At the GAO, DoD-related protests outnumbered non-DoD protests every year between 2008 and 2016, sometimes by hundreds of protests in a given year.[147] Providing a specific forum for DoD production and prototype OT protests can provide speedy resolution and prevent lengthy jurisdictional battles from playing out in multiple fora while no OT actually gets awarded or performed for the innovative work initially sought under the OT.

Thus, DoD OTs are arguably the most urgent type of OT and the most likely to need a forum to resolve complaints, due to their potential impact to national security and their increasing employment and value.[148]

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[145] *See supra* Section II.B.2 (discussing OTs' pros and cons).

[146] *See* ARENA ET AL., *supra* note 16, at 44 (finding more DoD protests than non-DoD COFC protests in five of nine years between 2008 and 2016).

[147] *Id.* at 25.

[148] As a practical matter, Congress has previously shown a willingness to enact DoD-specific protest changes as pilot programs. *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 827, 131 Stat. 1283, 1467 (2017) (initiating a pilot program for the DoD to recoup protest-related costs from unsuccessful protestors at the GAO). Congress could similarly implement the proposed change here (temporarily or permanently) in a National Defense Authorization Act as a test case to assess the resulting impact to the COFC, Department of Justice, and the DoD before potentially expanding to other agencies' OTAs.

B. Minimize the Risks: The Need for Protests in Other Transactions[149]

Although making OTs completely protest-proof might maximize their speed and provide Government personnel the greatest freedom of maneuver, judicial review of OT solicitations and awards will help ensure OTAs are utilized properly. Other transactions' exemption from most procurement laws already provides a greater risk for fraud, waste, and abuse than do FAR-based contracts.[150] The best way to mitigate this risk is to allow potential OT bidders to serve a watchdog function and complain to an independent body when they identify an alleged flaw in the solicitation or award process. Protests serve an important role in holding agencies accountable for complying with procurement laws, conforming to the terms of their solicitations, and accurately evaluating proposals.

For OTs, where fewer laws apply and DoD acquisition professionals may have less experience, a neutral arbiter of the DoD's OTA usage serves as an important check on this powerful acquisition authority tool. The GAO has already indicated that it lacks jurisdiction to weigh in on most issues involving OTs, other than verifying that the agency properly used the authority.[151] Although Congress could amend the GAO's purview to include substantive protest review of OTAs,[152] such a change could potentially make OT protests too easy and frequent for parties with tenuous legal claims. For example, GAO protestors can file their protest pro se, and there is no specific form or format for filing a protest.[153] In contrast, the COFC prescribes specific standards, forms, formats, and

[149] This article proposes conferring on the COFC blanket DoD prototype and production OT protest jurisdiction. However, one possible alteration to this proposal is to set a minimum dollar threshold for COFC OT protest jurisdiction to attach; OTs below that threshold would be protest-proof. A minimum dollar threshold could help to prevent lengthy, costly protests of relatively low-value OTs. This alteration recognizes the competing interests of providing a forum for judicial review of OTs, and ensuring OTs can achieve their goal of enabling the DoD's ability to innovate at the speed necessary for great power competition. An analogous contract type where Congress has already enacted minimum dollar thresholds are for GAO bid protest review of task and delivery orders. 10 U.S.C. § 3406(f) ($25 million for DoD task or delivery orders); 41 U.S.C. § 4106(f) ($10 million for non-DoD task or delivery orders).
[150] *See* discussion *supra* Section II.B.2.
[151] *See* Oracle Am., Inc., B-416061, 2018 CPD ¶ 180, at 11 (Comp. Gen. Dec. May 31, 2018); Rocketplane Kistler, B-310741, 2008 CPD ¶ 22, at 3 (Comp. Gen. Dec. Jan. 28, 2008).
[152] Gabby Sprio, *A Careful Balance: Creating Jurisdiction Without Hindering the Effectiveness of Other Transaction Agreements*, 72 ALA. L. REV. 959, 971 (arguing for full GAO jurisdiction of OT protests as the fastest, least expensive forum to resolve bid protests).
[153] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 7, at 6–8.

methods for protests before its court,[154] and those filings and other appearances before the court must be performed by an attorney specifically admitted to practice before the COFC.[155] While a forum should exist to serve as a check against federal agency fraud, waste, abuse, or overreach in the realm of OTs, this must be balanced against the risk of protests becoming a tool for dissatisfied private parties to inhibit the speed OTs were designed to possess.[156] This balance is best struck by maintaining the status quo for GAO OT protest jurisdiction (i.e., the limited ability to determine whether an agency improperly used its OTA in lieu of a procurement contract) while requiring a more thorough, considered weighing of the equities before a company can protest the actual terms or rationale behind a prototype or production OT solicitation or award.

Congress's intent has long been to provide for judicial review of federal agency error in its contracting decisions.[157] The COFC has served as the forum of review for standard procurement contracts for years, and its expertise is now needed in the developing law of OTs.

C. Avoid Confusion: A Single Body of Law from the Most Experienced Court on the Subject

Although forum certainty could also be established by conferring exclusive jurisdiction on district courts, the COFC's expertise makes it the appropriate judicial body to handle prototype and production OT protests. Congress has already made the COFC the sole judicial forum for procurement bid protests[158] and contract performance claims.[159]

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[154] *See* U.S. FED. CL. Rs. 3–16.
[155] *See id.* R. 83.1.
[156] *See, e.g.*, Jason Miller, *2-Year Suspension for Serial Protestor After Continued 'Incoherent, Irrelevant, Derogatory and Abusive' Filings*, FED. NEWS NETWORK (Dec. 4, 2017, 4:36 AM), https://federalnewsnetwork.com/reporters-notebook-jason-miller/2017/12/two-year-suspension-for-serial-protester-after-continued-incoherent-irrelevant-derogatory-and-abusive-filings (detailing how one company, Latvian Connection, filed so many frivolous bid protests that the GAO took the unusual step of suspending it from filing further protests for two years).
[157] *See* S. REP. NO. 95-1118, at 12 (1978) ("The rationale of the Tucker Act, which greatly limited the doctrine of sovereign immunity, was that the Government subjects itself to judicial scrutiny when it enters the marketplace, and should not be the judge of its own mistakes nor adjust with finality any disputes to which it is a party.").
[158] *See* 28 U.S.C. § 1491(b)(1).
[159] *See* 41 U.S.C. § 7104(b)(1).

Consequently, the COFC has become the court with the most Government contracts experience.[160] Conferring on the COFC exclusive jurisdiction of the DoD's prototype and follow-on production OTs will allow that court to use its Government contracts jurisprudence to inform its decisions in those OT protest cases while remaining mindful of the procurement-specific laws that do not apply to OTs. For example, the COFC could analyze whether the DoD had sufficiently employed "competitive procedures"[161] by analogizing to (without being strictly constrained by) the FAR's competition requirements.[162] By contemplating the acquisition or development of some product or service, prototype and production OTs have similarities with the federal procurement system, unlike other OTs (e.g., research OTs). For this reason, the COFC's experience in procurement protests and cases will be directly relevant in properly adjudicating questions for these kinds of OTs. Furthermore, as OTs become more complex and contain multiple phases, an individual OT may have elements or phases that are "in connection with" a procurement, and other elements or phases that are merely "related to" a procurement. Having all of these issues heard in one court promotes judicial economy, as opposed to having different aspects of a single OT protested in different fora.

Consolidation of prototype and production OT protests in a single court will create a uniform, predictable body of OT protest law, providing both jurisdictional and precedential clarity in this complicated, growing area of the law. Maintaining the status quo or enacting legislation that clearly confers on district courts OT protest jurisdiction risks forum shopping, different legal standards in different circuits, and inefficiency in having to rely on district court judges less experienced with Government contracting's unique rules and principles. This is the exact situation Congress sought to avoid when it eliminated district courts' procurement bid protest jurisdiction in the 1996 ADRA amendments to the Tucker Act: "Providing district courts with jurisdiction to hear bid protest claims has led to forum shopping and the fragmentation of Government contract law."[163] Instead,

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[160] *See* 142 Cong. Rec. S6156 (daily ed. June 12, 1996) [hereinafter ADRA Debate] (statement of Sen. William Cohen) (citing the COFC's "substantial experience and expertise . . . in the Government contracting area" as reasons to remove district court bid protest jurisdiction in the 1996 ADRA amendments to the Tucker Act); S. REP. NO. 95-1118, at 10 ("[The COFC] historically has been the court of greatest expertise in Government contract claims.").

[161] 10 U.S.C. § 4022(b)(2), (f)(2)(A).

[162] *See* FAR pt. 6 (2019).

[163] ADRA Debate, *supra* note 160, at S6156 (statement of Sen. William Cohen).

just as Congress gave the COFC and its appellate court, the Federal Circuit, exclusive jurisdiction of bid protests to create a uniform national law for FAR-based contracts, a similar result will emerge from this proposed change.[164] Protestors will have a better understanding of whether they have a colorable legal theory to challenge a prototype or production OT in the first place, and agency counsel can more accurately conduct risk assessments by focusing on COFC and Federal Circuit jurisprudence. A single controlling body of law from the COFC will prevent protestors from seeking the friendliest district court and prevent different interpretations of OT terms and clauses in different parts of the country.

V. Conclusion

Other transaction authorities are a useful tool in the DoD acquisition professional's toolbox. By removing the voluminous requirements and mandatory clauses of the FAR and statutes governing federal procurements, OTs provide a powerful opportunity to work with NDCs that may lack the resources and experience to comply with those myriad procurement laws, or who might feel handcuffed by provisions mandated by the FAR. At a time when the DoD is increasing its use of OTs, challenges regarding the DoD's proper use, evaluation, and interpretation of OT solicitations, proposals, and awards is likely to increase.

Bid protests serve an important oversight role in the federal procurement system generally, ensuring federal agencies are transparent, accountable, and efficient in their use of public funds. Current case law leaves no clear venue for who provides that oversight role for OTs. Statutory reform vesting the COFC with exclusive jurisdiction over protests of DoD prototype and production OTs will provided needed clarity to the DoD and its contractors. This will lead to a clearer set of rules surrounding OTs, in turn enabling agreements that get more emerging technologies from innovative nontraditional defense contractors to the warfighter faster.

President Biden's *Interim National Security Strategic Guidance* states, "We will streamline the processes for developing, testing, acquiring, deploying, and securing [cutting-edge] technologies."[165] Air Force Chief

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[164] *See id.* ("Consolidation of jurisdiction in [the COFC] is necessary to develop a uniform national law on bid protest issues and end the wasteful practice of shopping for the most hospitable forum.").

[165] WHITE HOUSE, INTERIM NATIONAL SECURITY STRATEGIC GUIDANCE 14 (2021).

of Staff General Charles Q. Brown, Jr. constantly emphasizes the need to "accelerate change or lose" in modernizing and adapting to twenty-first century great power competition.[166] Modernization by acquiring weapons systems that are more agile, lethal, resilient, and sustainable is one of the Army's four lines of effort in *The Army Strategy*.[167] Other transactions provide one vehicle for accelerating that needed change and acquiring cutting-edge technologies by enabling partnerships with innovative NDCs who are put off by the FAR's strict, costly requirements. The DoD recognizes the utility in OTs and has increasingly turned to them for prototype and production contracts. With this increased use comes the increased potential for misuse of these authorities as well as grievances by private companies who want to work with the DoD but perceive a flaw in the OT solicitation or award process.

Other transactions are already protestable in federal court. The problem is that the law currently requires a fact-specific, ad hoc analysis to determine the correct protest forum for each and every OT. Congress's explicit conferral of exclusive jurisdiction of DoD prototype and production OTs on the COFC would resolve the current ambiguous jurisdictional landscape and allow the judicial body with the greatest experience in Government contracts to establish a uniform, predictable jurisprudence for these increasingly utilized authorities.

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[166] GENERAL CHARLES Q. BROWN, JR., ACCELERATE CHANGE OR LOSE (2020).
[167] GENERAL MARK A. MILLEY & MARK T. ESPER, THE ARMY STRATEGY 2, 6–8 (2018).

THE MODERN-DAY SCARLET LETTER: CHALLENGING THE APPLICATION OF MANDATORY SEX OFFENDER REGISTRATION AND ITS COLLATERAL DESIGNATION ON MEMBERS OF THE ARMED FORCES

MAJOR ALEX ALTIMAS*

I. Introduction

"Guilty." The only word that you hear over the racing of your heart. The only word that your twenty-year-old brain can process. Behind you, your mother is crying. To your right, your defense counsel is in disbelief. In your lap, your hands are shaking. You half listen to your attorney explain what sentencing is and what she plans to present on your behalf. She seems confident that she can convince the panel members to sentence you to only a brief period of confinement, despite the maximum penalty of thirty years.[1] "A brief period? In jail?" you wonder. *Any* period feels too long. It was a drunken night, and you should have known better. You should have known she was also too drunk. You should have been better. You will be better in the future—if only you have the chance.

In your frantic attempt to grasp what is happening, you remember the ten-page handout that outlined requirements for sex offender registry that

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[1] The maximum punishment for a penetrative sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), includes thirty years confinement and a dismissal or dishonorable discharge, depending on the rank of the accused. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 60d(1)–(2) (2019) [hereinafter MCM].

your attorney mentioned months ago.[2] She told you that a conviction for violating Article 120, Uniform Code of Military Justice (UCMJ), would require you to register as a sex offender.[3] While she told you that she cannot advise you on each individual state's requirements, you remember her explaining that because the offense with which you were charged includes penetration, conviction would most likely make you a Tier III sex offender—for life.[4] During sentencing, the panel members will be able to consider your whole life, your family support system, your work performance, and your character. Yet the panel will hear next to nothing about your *lifetime* sex offender registration because it is considered "collateral" to your conviction. You guess "collateral" means that it is not important enough for the panel members to know and consider in determining your sentence. How is that fact not important? It is your life, your future.

Twelve months pass. Your future after confinement leads you back to your hometown. You live with your parents because no landlord will rent to you. You cannot find a job because no company will hire you. You complete your mandatory offender registration with the local police department and are warned that failure to update your information every three months will land you back in jail for longer than your original sentence.[5] Falling asleep is difficult; staying asleep is impossible. You are restless at night worried that you will never marry, never have children, and never live on your own. You fear that someone will find your photograph online and kill you because you have heard that has happened.[6] You served your sentence, but your punishment is just beginning.

The current application of sex offender laws in the United States is inflexible. It discriminates against non-violent offenders and those unlikely to reoffend. In particular, the mandatory three-tier classification unfairly and disproportionally affects the military community because offender

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[2] U.S. DEP'T OF DEF., INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY encl. 2 (11 Mar. 2013) (C4, 19 Aug. 2020) [hereinafter DoDI 1325.07].

[3] *Id.* app. 4.

[4] 34 U.S.C. § 20911(4).

[5] *Id.* § 16913(e).

[6] "Registered sex offenders face ostracism, job loss, eviction or expulsion from their homes, and the dissolution of personal relationships. They confront harassment, threats, and property damage. Some have endured vigilantism and violence. A few have been killed. Many experience 'despair and hopelessness;' some have committed suicide." HUM. RTS. WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 78–79 (2007) (citations omitted).

demographics significantly distinguish the military offender from the typical civilian offender. To redress these inequities, sex offender registration must be designated in courts-martial as mitigation evidence, as it is logically relevant for the sentencing authority to consider during deliberations.

This article begins with an overview of the Sex Offender Registration and Notification Act (SORNA), how it evolved, and how it applies to the military. It next explores the offense based, tiered classification system SORNA mandates and the reasons this system might be unnecessary for the small population of sex offenders in the military whose offenses were non-violent and involved adult victims.[7] This article then proposes that the designation of sex offender registration as an inconsequential collateral consequence for panels is unjust and that the President must amend the Rules for Courts-Martial (RCMs) to afford the defense the opportunity to present evidence on the effect sex offender registration has on the convicted, including registration duration and recidivism rates. Finally, this article addresses the morality of sentencing and how the change to individualized sentencing in the Military Justice Act of 2016 (MJA 16) supports a case-by-case analysis for each individual's registration.[8]

II. From Wetterling to Walsh: The Evolution of Sex Offender Registration in the United States

During the last three decades, the reformation of sex offender registration laws and requirements rapidly expanded from state discretion to the creation of a national registry and mandatory duration minimums for the convicted.[9] This expansion steadily increased after a handful of horrific sex crimes were committed across the country, mostly against children. With each crime, state and federal legislators took a progressively harsher stance on crime, operating under the belief that convicted sex offenders have

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[7] Because the focus of this article is adult-victim offenses, discussion of Service members convicted of sex offenses against minors is purposely absent.

[8] UCMJ art. 56(c)(2) (2017).

[9] California enacted the country's first state-wide sex offender registration in 1947; by 1989, only eleven additional states had sex offender registration laws. WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA ch. 3 (2009).

disproportionally high recidivism rates and that child and adult victim sex crimes should be impacted by the same by legislation.[10]

A. The Wetterling Act

One October 1989 night in St. Joseph, Minnesota, a masked gunman confronted eleven-year-old Jacob Wetterling, his ten-year-old brother, and his eleven-year-old friend while they were riding bicycles.[11] The gunman, later identified as Danny Heinrich, forced the boys off of their bicycles and ordered Jacob's brother and friend to run away, threatening to shoot them if they looked back.[12] The boys complied, leaving Jacob alone with the armed Heinrich, who sexually assaulted Jacob before shooting him twice in the head and burying him in a shallow grave.[13]

In response to this heinous offense, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration (Wetterling Act), which required states to create offender registries for individuals convicted of sexually violent offenses or offenses against children.[14] The Wetterling Act's recommendations included a broad list of crimes requiring offender registration, the duration of their registration, how frequent the offenders were required to verify their addresses, and the option of community notification.[15]

The Wetterling Act was the first of many congressionally mandated statutes that required state compliance in furtherance of a national effort to prevent sex offenses. States could be subjected to a ten percent reduction in federal funding if they failed to comply within three years.[16] While the

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[10] MARIEL ALPER & MATTHEW R. DUROSE, U.S. DEP'T OF JUST., NCJ 251773, RECIDIVISM OF SEX OFFENDERS RELEASED FROM STATE PRISON: A 9-YEAR FOLLOW-UP (2005–14) (2019). The Adam Walsh Child Protection and Safety Act of 2006 (AWA) subjects all offenders to the same tier classification and registration requirements, regardless of the age of the victim. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 111, 120 Stat. 587, 591–93.

[11] *Minnesota Man Describes Killing 11-Year-Old Jacob Wetterling in Chilling Detail*, GUARDIAN (Sept. 6, 2016, 3:01 PM), https://www.theguardian.com/us-news/2016/sep/06/jacob-wetterling-killing-minnesota-danny-heinrich-admits.

[12] *Id.*

[13] *Id.*

[14] 42 U.S.C. § 14071(b)(1) (repealed 2006). In 2005, Congress created a national sex offender registry, which it later named the "Dru Sjodin National Sex Offender Public Website" with the signing of the AWA. Adam Walsh Child Protection and Safety Act of 2006 § 118.

[15] 42 U.S.C. § 14071 (repealed 2006).

[16] *Id.* § 14071(g)(2).

Wetterling Act was a federal initiative, it left most of the discretion to the states to determine who should register and the duration of such registration.[17]

B. Megan's Law

In 1994, Jesse Timmendequas lured his neighbor, seven-year-old Megan Kanka from her house in Hamilton Township, New Jersey.[18] Timmendequas took Megan to his home where he raped and murdered her before dumping her body in a nearby park.[19] This heinous adult on child crime caused outrage and congressional action. Timmendequas was not a first-time sex offender; he had two prior convictions for sexually assaulting minor girls.[20] While local police knew of his status and past, the families in the neighborhood had no idea that they were living near a convicted sex offender.[21] The public was outraged by the possibility they, too, could be living next to sexual predators without their knowledge, spurring Congress to amend the Wetterling Act to include Megan's Law, which required mandatory community notification.[22]

C. Dru Sjodin National Sex Offender Public Registry

In November 2003, Dru Sjodin, a twenty-two-year-old college student, was walking to her car at the Columbia Mall in Grand Forks, North Dakota, when Alfonso Rodriguez, Jr. abducted her.[23] Five months later, Dru's body was found in a ravine partially nude, beaten, stabbed, and sexually

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[17] Prior to the AWA's enactment, states had discretion to determine the level of risk a convicted sex offender posed to the public based on the offender rather than the crime. Suzanna Hartzell-Baird, *When Sex Doesn't Sell: Mitigating the Damaging Effect of Megan's Law on Property Values*, 35 REAL EST. L.J. 353, 355–56 (2006).

[18] William Glaberson, *Man at Heart of Megan's Law Convicted of Her Grisly Murder*, N.Y. TIMES, May 31, 1997, at A1.

[19] *Id.*

[20] *Repeat Sex Offender Guilty in 'Megan's Law' Case*, CNN (May 30, 1997, 6:54 PM), http://www.cnn.com/US/9705/30/megan.kanka/.

[21] *Id.*

[22] Megan's Law required that law enforcement officials make information about registered sex offenders available to the public. 42 U.S.C. § 14071(e)(2) (repealed 2006).

[23] *Renewed Calls for Tough Sex Offender Laws*, N.Y. TIMES (Nov. 22, 2008), https://www.nytimes.com/2008/11/23/us/23dakota.html.

assaulted.[24] Six months prior to Dru's abduction, Rodriguez had been released from a Minnesota prison after serving a twenty-three year sentence for the kidnapping, rape, and aggravated assault of a woman in 1976.[25] Rodriguez, which Minnesota designated a level III offender, actively refused any sex offender treatment while in prison.[26] Because Rodriguez served his full sentence, he was under no state restrictions or monitoring following his release from prison.[27] In response to Dru's murder by an unmonitored, twice-convicted sex offender, the Department of Justice implemented a National Sex Offender Registry (NSOR), which granted instant access to anyone with an internet connection an offender's name, address, photograph, and category of offense.[28]

D. Adam Walsh Act

On 27 July 1981, while shopping with his mother in Hollywood, Florida, six-year-old Adam Walsh was abducted.[29] Two weeks later, Adam's severed head was found in a drainage canal in Vero Beach, Florida.[30] The rest of Adam's body was never discovered, and his murderer was never arrested.[31] Since Adam's murder, his parents have

[24] Dave Kolpack, *Sjodin Trial Opening Statements Made*, BISMARCK TRIB. (Aug. 14, 2006), https://bismarcktribune.com/news/state-and-regional/sjodin-trial-opening-statements-made/article_4bd1dc50-3501-5a36-a899-ca8553bed211.html.

[25] In 1979, Alfonso Rodriguez pled guilty to aggravated rape and attempted aggravated rape, resulting in his incarceration for twenty-three years. Rachael Bell, *The Murder of Dru Sjodin*, CRIME LIBR., http://www.crimelibrary.org/notorious_murders/classics/dru_sjodin/3.html (last visited Aug. 29, 2022).

[26] During this time, Minnesota labeled those offenders with the "highest likelihood" of reoffending as Level III sex offenders. *Id.*

[27] *Renewed Calls for Tough Sex Offender Laws*, *supra* note 23.

[28] In honor of Dru, the national registry was later renamed the "Dru Sjodin National Sex Offender Public Registry." Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §§ 118–120, 120 Stat. 587, 596–97.

[29] Dan Harris & Claire Pedersen, *Adam Walsh Murder: John and Reve Walsh Re-Live the Investigation*, ABC NEWS (Mar. 2, 2011; 12:00 PM), https://abcnews.go.com/US/adam-walsh-murder-john-reve-walsh-live-investigation/story?id=13037931.

[30] *Id.*

[31] It has never been determined if Adam was sexually assaulted by his murderer because his body has never been found. In 2008, police officially closed the case, concluding that Ottis E. Toole was likely the murderer. Yolanne Almanzar, *27 Years Later, Case Is Closed in Slaying of Abducted Child*, N.Y. TIMES (Dec. 16, 2008), https://www.nytimes.com/2008/12/17/us/17adam.html.

been a driving force behind the reformation of sex offender punishment and registration in the United States.[32]

In 2006, President George W. Bush signed into law the Adam Walsh Child Protection and Safety Act (AWA), which mandated that all states immediately comply with the requirements of the National Sex Offender Public Registry and created three tiers of registrants based on offense gravity.[33] Title I of the AWA enacted SORNA, which was a complete overhaul of the national standards for sex offender registration.[34] This enactment expanded the definition of a what constitutes a sex offense,[35] required registration for both non-violent and violent sex offenses,[36] and created a tier classification based on the offense committed,[37] thereby

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[32] *Id.* In an effort to bring closure to the families of other unsolved abductions and murders, John Walsh hosted the television show *America's Most Wanted* from 1998 to 2012. *Id.*

[33] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 118, 120 Stat. 587, 596. Prior to 2006, States had the individual discretion to determine the level of risk a convicted sex offender posed to the public, with a focus on the offender not offense. Hartzell-Baird, *supra* note 17, at 355–56.

[34] 28 C.F.R. pt. 72 (2021).

[35] The Sex Offender Registration and Notification Act defines a sex offender as an "individual who was convicted of a sex offense." 34 U.S.C. § 20911(1). A "sex offense" is defined as:

> (i) a criminal offense that has an element involving a sexual act or sexual contact with another;
> (ii) a criminal offense that is a specified offense against a minor;
> (iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18;
> (iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105–119 (10 U.S.C. 951 note); or
> (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

Id. § 20911(5)(A).

[36] *Id.* § 20911(5)(A)(i).

[37] *See id.* § 20911(2)–(4). The AWA divides sex offender registration into three separate tiers, with Tier III being the most severe and Tier I being the least severe. *Compare id.* § 20911(4) ("The term 'tier III sex offender' means a sex offender whose offense is punishable by imprisonment for more than 1 year and (A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense: (i) aggravated sexual abuse or sexual abuse . . . ; or (ii) abusive sexual contact . . . against a minor who has not attained the age of 13 years; (B) involves kidnapping of a minor (unless committed by a parent or guardian); or (C) occurs after the offender became a tier II sex offender."), *with id.* § 20911(3) ("The term 'tier II sex offender' means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and (A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor: (i) sex trafficking . . . ; (ii) coercion

removing most state discretion to determine who must register and for how long.[38]

E. Department of Defense Instruction 1325.07

The AWA's enactment expanded the definition of "sex offense" to include certain UCMJ articles.[39] In order to fully comply with SORNA, the Department of Defense (DoD) published Department of Defense Instruction (DoDI) 1325.07, which contains the full list of UCMJ articles for which a conviction requires registration in an appendix.[40] In accordance with Army Regulation (AR) 27-10, all offenses listed in appendix 4 to enclosure 2 of DoDI 1325.07 and in 34 U.S.C. § 20901 are considered "'covered offenses' and 'sexually violent offenses.'"[41]

Pursuant to Army policy and regulation, Soldiers convicted of a sexual offense (as defined by both SORNA and DoDI 1325.07) are required to register within three days of release from confinement or, if confinement was not adjudged, within three days of conviction.[42] In 2015, lawmakers amended SORNA to require the DoD to submit to the NSOR the information of Service members convicted of sex offenses.[43]

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and enticement . . . ; (iii) transportation with intent to engage in criminal sexual activity . . . ; (iv) abusive sexual contact . . . ; (B) involves (i) use of a minor in a sexual performance; (ii) solicitation of a minor to practice prostitution; or (iii) production or distribution of child pornography; or (C) occurs after the offender becomes a tier I sex offender."), *and id.* § 20911(2) ("Tier I sex offenders are convicted of a sex offense not included either tier II or tier III.").

[38] Federal law requires registration minimums based on tier classification. Tier III offenders must register for life, tier II offenders for twenty-five years, and tier I offenders for fifteen years. *Id.* § 20911(1)–(3).

[39] *Id.* § 20911(5)(A)(iv).

[40] DODI 1325.07, *supra* note 2, app. 4.

[41] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 24-2(a) (20 Nov. 2020).

[42] *Id.* para. 24-2(b).

[43] Congress requires the Secretary of Defense to report certain information about those persons that were (1) released from military correction facilities, (2) convicted of a sex offense (regardless of confinement), or (3) required to register on the sex offender registry. 34 U.S.C. § 20931.

III. The Sex Offender and Mandated Tier Classification

A. Who Are the Convicted?

1. United States Civilian Sex Offenders

The Department of Justice's National Crime Victimization Survey recorded 5,813,410 reports of violent crimes in the United States between 2015 and 2019.[44] In this survey, "violent crime" included rape, sexual assault, robbery, assault, and any threat or attempt to commit these crimes.[45] The survey found that of the nearly 6 million violent crimes, approximately 459,310, or 12 percent, were either rape or sexual assault.[46]

As seen through the cases of Jacob Wetterling, Megan Kanka, and Dru Sjodin, sex offenders can have criminal histories and prior convictions. In 2009, the Bureau of Justice Statistics survey of felony defendants in large urban counties found an estimated thirty-seven percent of those defendants arrested for rape or sexual assault had at least one prior felony conviction.[47] Through its research into mandatory minimum penalties for federal sex offenses, the United States Sentencing Commission found that the average age of persons arrested for allegations of rape or sexual assault was thirty-seven years old.[48]

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[44] RACHEL E. MORGAN & JENNIFER L. TRUMAN, U.S. DEP'T OF JUST., NCJ 255113, NATIONAL CRIME VICTIMIZATION SURVEY 3 (2020). Violent crime, excluding simple assault, "declined 15% in 2019 (to 7.3 per 1,000) . . . . This decrease was driven partly by a decline in rape or sexual assault victimizations, which declined from 2.7 per 1,000 . . . in 2018 to 1.7 per 1,000 in 2019." *Id.*

[45] *Id.*

[46] The survey uses the following definitions for sexual offenses in their surveys:

> Rape. Coerced or forced sexual intercourse. Forced sexual intercourse means vaginal, anal, or oral penetration by the offender(s). . . .
> Sexual assault. A wide range of victimizations, separate from rape, attempted rape, or threatened rape. These crimes include attacks or threatened attacks involving unwanted sexual contact between the victim and offender. Sexual assaults may or may not involve force and include such things as grabbing or fondling.

Id. at 35.

[47] BRIAN A. REAVES, U.S. DEP'T OF JUST., NCJ 243777, FEDERAL DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 12 tbl.10 (2013). The study found that forty-three percent of *all* arrested defendants had at least one prior felony conviction. *Id.*

[48] U.S. SENTENCING COMM'N, QUICK FACTS: MANDATORY MINIMUM PENALTIES 5 (2020).

2. Military Sex Offenders

The active duty population is composed of six armed services: Army, Navy, Marine Corps, Air Force, Coast Guard, and the recently established Space Force. In 2017, there were roughly 1.3 million active duty personnel serving within the armed forces, commonly identified as "less than one-half of one percent of the U.S. population."[49] The active duty population is comprised of eighty-two percent enlisted personnel and eighteen percent officers.[50] Of the roughly one million enlisted personnel, around fifty percent are twenty-five years old or younger, and twenty percent are between twenty-six and thirty years old.[51]

In November 2019, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) published its *Court-Martial Adjudication Data Report*, which reviewed 574 court-martial records relating to adult-victim sexual assault offenses from fiscal year 2018.[52] The data showed that the accused was almost always male and was enlisted in 529 of the cases.[53] The report analyzed case disposition of penetrative and contact offenses at all levels of court-martial by the pay grade of the offender.[54] Of the enlisted cases,

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[49] *Demographics of the U.S. Military*, COUNCIL ON FOREIGN AFFS., https://www.cfr.org/backgrounder/demographics-us-military (July 13, 2020, 9:00 AM).

[50] U.S. DEP'T OF DEF., 2017 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY, at iii (2017).

[51] *Id.*

[52] In 2014, Congress directed the establishment of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD). The committee is required to analyze sexual assault cases within the Armed Forces annually. Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 546(c), 128 Stat. 3292, 3375 (2014). Data obtained from court records, case documents, and publicly available resources produced statistics regarding military case characteristics, such as offender demographics, offense prevalence, and case adjudication. *See generally* DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, & DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, COURT-MARTIAL ADJUDICATION DATA REPORT (2019) [hereinafter DAC-IPAD REPORT]. The DAC-IPAD defines sexual assault as "include[ing] the following offenses under the Uniform Code of Military Justice: rape (Article 120(a)), sexual assault (Article 120(b)), aggravated sexual contact (Article 120(c)), abusive sexual contact (Article 120(d)), forcible sodomy (Article 125), and attempts to commit these offenses (Article 80)." *Id.* at 1 n.3.

[53] Specifically, seventy-seven percent were in the pay grade of E-4 and below. *Id.* at 8–9.

[54] Ninety-five percent of penetrative offenses were referred to a general court-martial, while contact offenses were referred evenly between general court-martial (forty-three percent) and special court-martial (forty-two percent). *Id.* at 21.

seventy-three were convicted of a penetrative offense.[55] In addition to analyzing the offender, the report examined the characteristics of the offense(s) charged. In 2018, 431 of the preferred cases contained a penetrative offense, compared to 143 which contained a contact offense.[56]

Unlike the civilian convicted population, convicted Service members generally do not have prior felony convictions unless a waiver was granted in truly meritorious circumstances.[57] Specifically, the DoD established the basic eligibility criteria for all enlisted and officer applicants, which expressly prohibits any applicant who has a conviction for a sex offense that requires sex offender registration from joining any military service, and waivers for such are not permitted.[58]

3. Comparison of the Civilian Sex Offender and the Military Sex Offender

In comparing the demographics of civilian sex offenders and military sex offenders, a number of staggering differences are apparent. First, the average age of the civilian accused of a sex offense has been reported as thirty-seven years, while the average age of those accused of a sexual offense in the military is younger than twenty-five years.[59] This age gap is important, as the brains of men younger than twenty-five years are

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[55] *Id.* at 23.

[56] *Id.* at 14–15. Penetrative offenses are defined as "rape, aggravated sexual assault, sexual assault, forcible sodomy, and attempts to commit these offenses, whereas contact offenses are defined as "aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit these offenses." *Id.* at 4.

[57] U.S. DEP'T OF DEF., INSTR. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION (23 Mar. 2015) (C3, 26 Oct. 2018) [hereinafter DoDI 1304.26]. In the Army, the approval of waivers for major misconduct offenses, like felony convictions, is withheld to the Director of Military Personnel Management. U.S. DEP'T OF ARMY, DIR. 2020-09, APPOINTMENT AND ENLISTMENT WAIVERS para. 5(a) (20 Aug. 2020).

[58] The DoD'sconduct eligibility standards is:

> to minimize entrance of persons who are likely to become disciplinary cases, security risks, or who are likely to disrupt good order, morale, and discipline. The Military Services are responsible for the defense of the Nation and should not be viewed as a source of rehabilitation for those who have not subscribed to the legal and moral standards of society-at-large.

DoDI 1304.26, *supra* note 57, at 9.

[59] U.S. DEP'T OF DEF., *supra* note 50, at iv; REAVES, *supra* note 47.

still developing.[60] Prevailing scientific studies demonstrate that the adolescent brain—particularly the prefrontal cortex, which regulates executive functions such as planning, working memory, and impulse control—are the last areas of the brain to mature and may not be fully developed until roughly twenty-five years of age.[61] In *Miller v. Alabama*, the Supreme Court held that younger offenders have "diminished culpability and greater prospects for reform" as compared to adults.[62] Because adolescents are more likely to be reckless or impulsive and more vulnerable to negative influences, they are promising candidates for rehabilitation as the hallmarks of youth subside.[63] However, a thirty-seven-year-old is an adult well beyond the "quintessential" college years who has likely gained all of the mental and emotional maturity they will ever have.

Second, thirty-seven percent of the civilian population accused of a sex offense has a prior felony conviction.[64] This is not the case for the typical military accused. As previously discussed, DoDI 1304.26 forbids any person with a significant criminal record or a conviction of an offense requiring sex offender registration from serving in the military.[65] The majority of Service members have clean criminal records and are thus not repeat offenders or classified as offenders with a higher likelihood to reoffend.[66] While the average civilian sex offender is different than the average military sex offender, SORNA does not differentiate between offenders, but only offenses.

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[60] A National Institute of Mental Health study that tracked the brain development of more than five thousand children revealed that "brains were not fully mature until 25 years of age." Nico U. F. Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI. 1358, 1358–59 (2010). Further, in *Miller v. Alabama*, the Supreme Court found that the lack of brain development in juveniles causes "transient rashness, proclivity for risk, and inability to assess consequences." 567 U.S. 460, 472 (2012) (citing Graham v. Florida, 560 U.S. 48, 68 (2010)).

[61] *E.g.*, Dosenbach et al., *supra* note 60.

[62] *See Miller*, 567 U.S. at 471.

[63] *Id.*

[64] REAVES, *supra* note 47.

[65] While conduct waivers are available in meritorious cases, those involving a sex offense conviction requiring registration are categorically ineligible for such relief. DODI 1304.26, *supra* note 57, at 9.

[66] In a nine-year follow-up, researchers found that "[a]bout 3 in 10 (29%) sex offenders released in 2005 were arrested during their first year after release . . . . About 1 in 5 (20%) were arrested during their fifth year after release, and nearly 1 in 6 (16%) were arrested during their ninth year." ALPER & DUROSE, *supra* note 10, at 1.

B. Effect of SORNA's Three-Tiered Sex Offender Classification on Military Sex Offenders

As previously discussed, SORNA instituted a mandatory, tiered registration for those convicted of sex offenses in both state and federal courts, to include courts-martial.[67] This tier structure mandates registration of offenders based only on their offense, with Tier III signifying the most severe offenses,[68] including those punishable by more than one year in jail. While civilian crimes codified in the U.S. Code such as aggravated sexual abuse[69] or sexual abuse[70] fall into this category, penetrative offenses under the UCMJ fall between federal offenses because they are not directly analogous.[71] The DAC-IPAD's *Court-Martial Adjudication Data Report* found that more than seventy-five percent of the sexual offenses reported in 2018 involved a penetrative offense.[72] Tier III sex offenders are required to register on the NSOR for the duration of their life.[73] Therefore, based on this mandated classification, all seventy-three of the enlisted personnel who were convicted at a court-martial for a penetrative offense are now, and forever will be, registered sex offenders.[74]

Regardless of classification, SORNA requires every registered sex offender to provide the following information to the appropriate official: name, social security number, address of residence, address of employment, address of school (if enrolled), license plate number, and vehicle

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[67] 34 U.S.C. § 20911(2)–(4). The AWA divides sex offender registration into three separate tiers, with Tier III being the most severe and Tier I being the least.

[68] *See id*. § 20911(4).

[69] 18 U.S.C. § 2241.

[70] *Id.* § 2242.

[71] MCM, *supra* note 1, pt. IV, ¶ 60(c). "Sexual act" is defined as

> (A) the penetration, however slight, of the penis into the vulva or anus or mouth; (B) contact between the mouth and the penis, vulva, scrotum, or anus; or (C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

Id. ¶ 60a(g)(1).

[72] DAC-IPAD REPORT, *supra* note 52, at 14–15.

[73] 34 U.S.C. § 20915(a)(3).

[74] DAC-IPAD REPORT, *supra* note 52, at 23. Registered sex offenders can have the mandated registration periods reduced if they maintain a clean record for a prescribed period. 34 U.S.C. § 20915(b). This option is not available to adult Tier III offenders. *See generally id.*

description.[75] Law enforcement keep this information in the database and ensure it is accessible to not only law enforcement but also members of the public through the click of a mouse.[76] Registration impacts the offender's entire life from privacy concerns to residency restrictions. Approximately thirty percent of states prevent any sex offender, regardless of tier classification, from living within a certain distance of a school or child-care facility, even if they have never committed a crime against a child.[77] Even though future effects of sex offender registration are often unduly harsh, military courts have designated the requirement as collateral, preventing convicted Service members from presenting this relevant and mitigating information to the sentencing authority.[78]

IV. Sex Offender Registration: Collateral Consequence or Mandated Punishment?

A. Improper Designation of Sex Offender Registration as a Collateral Consequence

1. Sex Offender Registration Is Punishment as Mandated by Law, Not a Collateral Consequence

In the military justice system, sex offender registration is considered a collateral consequence of a sex offense conviction.[79] A collateral consequence is a "penalty for committing a crime, in addition to the

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[75] 34 U.S.C § 20914(a)–(b). In addition to the offender's mandatory disclosures, the jurisdiction in which the offender registers must provide certain information about the offender to the registry, to include a physical description, a current photograph, and a DNA sample. *Id.*

[76] *Id.* § 20911.

[77] The residency restrictions vary by state, ranging from the most restrictive distance of 300 feet to the least of 3,000 feet. Joanne Savage & Casey Windsor, *Sex Offender Residence Restrictions and Sex Crimes Against Children: A Comprehensive Review*, 43 AGGRESSIVE & VIOLENT BEHAV. 13, 14–15 (2018).

[78] United States v. Talkington, 73 M.J. 212, 213 (C.A.A.F. 2014).

[79] *Id.* Additionally, the Supreme Court has held that sex offender registration is a collateral consequence. Chaidez v. United States, 568 U.S. 342, 349 (2013) (citing Padilla v. Kentucky, 559 U.S. 356, 365–66 (2010)). *But see* United States v. Riley, 72 M.J. 115, 121 (C.A.A.F. 2013) ("[I]n the context of a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea.").

penalties included in the criminal sentence."[80] Military courts have held that collateral consequences generally should not be considered by the fact-finder in assessing an appropriate sentence.[81] However, this is not a "bright-line rule" because the fact-finder often hears (or inherently knows) about other collateral consequences of the conviction.[82] For example, military panels hear evidence about the collateral consequences of a punitive discharge on retirement benefits and the effect that confinement of more than six months will have on the accused's pay.[83]

While collateral consequences are considered inappropriate for courts-martial to consider when determining a sentence, RCM 1001(d)(1)(B) allows the defense to offer evidence in mitigation "to lessen the punishment to be adjudged by the court-martial."[84] This evidence normally focuses on the accused's characteristics and can be presented in many ways, to include through the accused's sworn or unsworn statement.[85] In determining what evidence is permissible as mitigation, the court must find that it is logically relevant.[86] Evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[87]

The Service member should be able to present evidence mitigating the mandated lifetime sex offender registration after the court's finding of guilt. This evidence could include expert opinion on the accused's likelihood of reoffending or lay testimony concerning the effects that registration will have on the accused's ability to attend activities with children, limitations on places of residence, and what employment possibilities exist. After a sex offense conviction, the accused is subjected to mandatory federal

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[80] United States v. Miller, 63 M.J. 452, 457 (C.A.A.F. 2006) (citing United States v. Prater, 32 M.J. 433, 436 (C.M.A. 1991)).

[81] Generally, "courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the [sentence]." United States v. Griffin, 25 M.J. 423, 424 (C.M.A. 1988) (first alteration in original) (quoting United States v. Quesinberry, 31 C.M.R. 195, 198 (C.M.A. 1962)).

[82] United States v. Duncan, 53 M.J. 494, 499 (C.A.A.F. 2000). The Court of Military Appeals has "recognize[d] that administrative consequences of a sentence are not *per se* collateral . . . ." United States v. Henderson, 29 M.J. 221, 223 (C.M.A. 1989).

[83] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-6-10 (29 Feb. 2020) [hereinafter DA PAM. 27-9].

[84] MCM, *supra* note 1, R.C.M. 1001(d)(1)(B).

[85] *Id.* R.C.M. 1001(d)(2)(C).

[86] *Id.* M.R.E. 401.

[87] *Id.*

registration requirements for a predetermined amount of time.[88] Sex offender registration is more than identification on a list that simply hangs in the local police station. This list is accessible instantaneously by anyone running a search on the internet. The consequences of the registry and notification statutes are all-encompassing—restrictions on housing and employment, negative public perception, isolation, loss of relationships, and mental health issues.[89] The sentencing authority should know the actual effects of sex offender registration, as it may "lessen the [other] punishment the accused receives," if any.[90]

Instead, the Court of Military Appeals found that collateral consequences of a court-martial do not constitute RCM 1001 material[91] and are not relevant to sentence determination.[92] In *Quesinberry*, the court defended its decision by highlighting the need to prevent "the waters of the military sentencing process from being muddied by an unending catalogue of administrative information."[93] The Court of Appeals for the Armed Forces took this analysis one step further in *Datavs* by finding that sex offender registration was exactly the "administrative information" that the *Quesinberry* court directed courts-martial avoid, as sex offender registration has the potential to cause significant "muddied waters" because the registration requirements are not exact and often vary from state to state.[94]

This is simply not the case. With SORNA's enactment and the mandatory compliance required by the military, in many cases no discretion remains in determining who is required to register, in what tier they are classified, or the duration for which they must remain on the registry.[95] Of the seventy-three enlisted Service members convicted of a penetrative sex offense in 2018, *all* are classified as a Tier III sex offender and are, therefore, automatically mandated to register for the rest of their lives,

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[88] 34 U.S.C. § 20911(5)(A).
[89] Erika Davis Frenzel et al., *Understanding Collateral Consequences of Registry Laws: An Examination of the Perceptions of Sex Offender Registrants*, 11 JUST. POL'Y J. 1, 4–5 (2014).
[90] "[W]e note that a military accused has a *broad* right to present mitigation evidence to a court-martial on sentencing." United States v. Becker, 46 M.J. 141, 143 (C.A.A.F. 1997) (emphasis added) (citing United States v. Combs, 20 M.J. 441, 442 (C.M.A. 1985)).
[91] MCM, *supra* note 1, R.C.M. 1001.
[92] United States v. Rosato, 32 M.J. 93, 96 (C.M.A. 1991).
[93] United States v. Quesinberry, 31 C.M.R. 195, 198 (C.M.A. 1962).
[94] *E.g.*, Savage & Windsor, *supra* note 77.
[95] 42 U.S.C. § 20911(5)(A)(iv) (2006); DODI 1325.07, *supra* note 2, at 1.

often without the eligibility for removal.[96] With the over-inclusive evolution of sex offender registration requirements, no ambiguity remains among the states as each is required to confirm and comply with the NSOR.[97]

Military judges are charged with closely monitoring the accused's unsworn statement to ensure the panel is able to "put the information in proper context by effectively advising the members to ignore it."[98] The *Military Judges' Benchbook* (*Benchbook*) provides judges with a panel instruction for use if the accused elicits any prohibited information during an unsworn statement. In paragraph 2-5-23, following the note entitled, "Scope of Accused's Unsworn Statement," the instruction states the following:

> Under DOD Instructions, when convicted of certain offenses, including the offense(s) here, the accused must register as a sex offender with the appropriate authorities in the jurisdiction in which he resides, works, or goes to school. Such registration is required in all 50 states; though requirements may differ between jurisdictions.[99]

This instruction recognizes that the accused *must* register as a sex offender in all fifty states based solely on the conviction and therefore encourages military judges to alert the panel to the same. While courts have deemed sex offender registration to be a collateral consequence that should never be raised, the *Benchbook* has provided an instruction that can be read but not discussed. By providing judges this instruction, the *Benchbook* highlights the importance sex offender registration has on an accused, similar to the loss of a retirement, and the requirement for the panel to be educated on the consequence and any potential effect that it may have on the adjudged sentence.

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[96] 42 U.S.C. § 20915(b)–(c). Currently, seventeen states require *all* offenders to register for life, including even the most minor offenders. *50-State Comparison: Relief from Sex Offender Registration Obligations*, RESTORATION OF RTS. PROJECT, https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations (last visited Aug. 29, 2022).

[97] The registry requirements of the AWA are the minimum required, and states have discretion to enact stricter requirements. HUM. RTS. WATCH, *supra* note 6, at 42.

[98] United States v. Talkington, 73 M.J. 212, 215 (C.A.A.F. 2014) (citing United States v. Barrier, 61 M.J. 482, 486 (C.A.A.F. 2005)).

[99] DA PAM 27-9, *supra* note 83, para. 2-5-23.

2. Sex Offender Registration Is Analogous to the Two Other Mandatory Minimums Prescribed Within the UCMJ

The UMCJ only requires mandatory sentencing minimums for three offenses: murder,[100] rape,[101] and sexual assault.[102] An accused convicted of premeditated or felony murder is subjected to a mandatory minimum sentence of imprisonment for life with the eligibility for parole.[103] Therefore, if the Government does not seek the death penalty, the only confinement the fact-finder may adjudge is life, either with or without parole.[104] Where an accused is convicted of a penetrative sexual act, the sentence must include a dismissal or dishonorable discharge.[105]

In both instances, the panel is informed of the mandatory minimum requirement in more than one way, to include a potential instruction by the military judge, arguments made by counsel, or the sentencing worksheet provided before deliberation. First, if a dismissal or dishonorable discharge is mandated by the guilty charge, the judge will provide the panel with an instruction highlighting the potential collateral consequences a punitive separation can have on a person, to include "employment opportunities, economic opportunities, and social acceptability."[106] Second, if life or life without parole is mandated by the murder conviction, the panel is informed of this on the sentencing worksheet that is provided to them prior to sentencing deliberations and through the trial and defense counsel's respective arguments for either the minimum or maximum confinement applicable.[107]

In *US v. Talkington*, CAAF reviewed a scenario in which the defense counsel attempted to prevent the trial judge from giving an instruction to the panel concerning the accused's mention of his looming sex offender registration requirement during his unsworn statement.[108] The judge denied the request and instructed the panel to ignore the accused's statements regarding his pending sex offender registration requirement.[109]

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[100] MCM, *supra* note 1, pt. IV, ¶ 56d(1), (4).
[101] *Id.* ¶ 60d(1).
[102] *Id.* ¶ 60d(2).
[103] UCMJ art. 118 (2016); MCM, *supra* note 1, pt. IV, ¶ 56d.
[104] MCM, *supra* note 1, pt. IV, ¶ 56d.
[105] UCMJ art. 120 (2017); MCM, *supra* note 1, pt. IV, ¶ 60d.
[106] DA PAM. 27-9, *supra* note 83, para. 2-6-10.
[107] *Id.* app. D.
[108] United States v. Talkington, 73 M.J. 212, 214 (C.A.A.F. 2014).
[109] *Id.*

Military courts now rely on *Talkington* to prohibit the accused from presenting evidence, even in an unsworn statement,[110] of sex offender registration.[111] However, if the defense were permitted to present the mandatory registration requirements as mitigation evidence, as is the case with other mandatory minimum punishments, such presentation could impact military offenders' sentences.

Congress created the United States Sentencing Commission in 1984, charging it with establishing sentencing guidelines in an effort to alleviate sentencing disparities within the federal court system.[112] The resulting *Federal Sentencing Guidelines* (*Guidelines*) are non-binding rules established to provide Article III courts, juries, and judges with a uniform sentencing policy.[113] The "Sentencing Table," created through the *Guidelines*, highlights the intersection of the conduct of the offense and the offender's criminal history, creating a specific sentencing range to which the court *may* sentence the accused.[114] Some offenses, such as those involving drugs, firearms, and sexual activity, require automatic, minimum prison terms.[115] Sex offenses are divided into two types: sexual abuse offenses (regardless of the victim's age) and child pornography offenses.[116]

Unlike Article III courts, courts-martial are classified as Article I legislative courts and are thus not required to consider the *Guidelines*.[117] Therefore, the punishment that a court-martial can impose on an accused is arguably unlimited, so long as it does not exceed the *Manual for Courts-Martial*'s presidentially prescribed limits. These limits have created

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[110] While the accused is allowed to reference sex offender registration during the unsworn statement, the judge has the discretion to instruct the panel that it should not consider the accused's mention of sex offender registration during deliberations. *See* United States v. Barrier, 61 M.J. 482, 485–86 (C.A.A.F. 2005).

[111] *Talkington*, 73 M.J. at 217.

[112] Sentencing Reform Act of 1984, sec. 217(a), § 991(a)(1), 98 Stat. 1987, 2017–18 (codified at 28 U.S.C. § 994(a)(1)).

[113] U.S. SENTENCING COMM'N, GUIDELINES MANUAL pt. A (2018) [hereinafter GUIDELINES MANUAL]. The *Guidelines* are used to create honest, fair sentencing throughout the federal justice system by establishing uniformity and proportionality in sentencing. With the *Guidelines*, sentences are determined by examining both the offender and the offense. *Id.*

[114] *Id.* ch. 5.

[115] U.S. SENTENCING COMM'N, *supra* note 48.

[116] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES FOR SEX OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 8 (2019).

[117] The Constitution gives Congress the power to "make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14. Congress has utilized this power to authorize courts-martial to punish crimes within the military. *Id.*

sentencing ceilings but no sentencing floor (except for the UCMJ's mandatory minimums described above).[118]

Similar to the two sentencing minimums, sex offender registration is mandated by law, yet it is treated wholly different by courts-martial.[119] In a court-martial with one of the recognized mandatory minimum sentences, the defense is able to highlight the negative effects this mandated sentence will have on the accused's life, perhaps rendering any additional sentence unnecessary.[120] Unlike with those mandatory minimums, however, the panel is never informed of sex offender registration by either the judge or counsel.[121] Like a punitive discharge or mandatory life incarceration (with or without parole), sex offender registration is an important fact of consequence for the panel to hear and consider in determining an appropriate sentence. Even though sex offender registration is considered a consequence rather than a punishment, the military judge or panel have, by the verdict alone, sentenced an accused to a lifetime registration for a crime they likely committed in their early twenties.

B. Challenging SORNA

In recent years, state and federal courts have seen an influx of court cases regarding the constitutionality of SORNA, to include potential violations of the First Amendment, the Commerce Clause, Ex Post Facto Clause, and the Due Process Clause.[122] Labeling a twenty-year-old as sexually dangerous for his entire life without allowing him to challenge the label is a due process violation.

In 2017, a Pennsylvania jury convicted George Torsilieri of a non-consensual sex offense.[123] Based on this conviction, Torsilieri became a Tier III sex offender under SORNA which required registration for the rest of his life.[124] At the time of his conviction and sentencing, Torsilieri was twenty-five years old. Through his attorneys, Torsilieri filed a motion to stop

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[118] *See supra* note 1.
[119] 34 U.S.C. § 20911.
[120] DA PAM. 27-9, *supra* note 83, para. 2-6-10, app. D.
[121] *See supra* note 110.
[122] *See generally* Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. LEGIS. 46 (2009).
[123] Commonwealth v. Torsilieri, 232 A.3d 567, 572 (Pa. 2020).
[124] *Id.* at 573.

his mandatory sex offender registration requirement, asserting eight reasons that SORNA was unconstitutional, many of which relied on the common belief and underlying premise of the AWA that "all sexual offenders are dangerous and pose a high risk of recidivation, necessitating registration and notification procedures to protect the public from recidivist sexual offenders."[125] Torsilieri presented evidence to refute the belief that all sex offenders are the same, including unchallenged expert opinions by three leading SORNA experts who declared legislation both "overbroad and ineffective."[126] Through the use of the experts' affidavits, Torsilieri provided unrefuted evidence that "not all people convicted of sexual crimes are alike, and that many pose no more risk to the community of committing another sexual offense than people convicted of any other crime, from drug possession to theft."[127] Among many things, the court held that Torsilieri's due process rights were, in fact, violated by allowing "the imposition of enhanced punishment based on an irrebuttable presumption of future dangerousness that is neither determined by the finder of fact nor premised upon proof beyond a reasonable doubt."[128]

In June 2020, the Supreme Court of Pennsylvania remanded the case, requiring the parties to "present additional argument and evidence to address whether a scientific consensus has developed" in regard to adult sex offenders' rate of recidivism and potential of future dangerousness.[129] Torsilieri had done the impossible: he successfully challenged the long held, yet unsupported, assumption that sex offenders have a "frightening and high" rate of recidivism and therefore must be shunned from society for

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[125] *Id.*

[126] *Id.* at 574. The experts highlighted the fact that contrary to public opinion and some politicians' tough-on-crime stance, sex offenders have a low likelihood of reoffending, rendering the mandated tier classification overly strict.

[127] Aaron J. Marcus, *PA High Court Will Again Review Sex Offender Registration*, COLLATERAL CONSEQUENCES RES. CTR. (Apr. 9, 2019), https://ccresourcecenter.org/2019/04/09/pa-high-court-will-again-review-sex-offender-registration. The Commonwealth stipulated to the content of the experts' affidavits but not their validity or relevance. The Commonwealth offered no evidence in rebuttal until the case reached the Pennsylvania Supreme Court. *Torsilieri*, 232 A.3d at 596.

[128] *Torsilieri*, 232 A.3d at 575.

[129] *Id.* at 587–88. "Sexual violence is a serious problem, and any recidivism rate is too high. But recidivism rates for sex offenders are not as high as politicians have quoted in their attempts to justify the need for overly harsh sex offender laws." HUM. RTS. WATCH, *supra* note 6, at 21 (quoting Jill Levenson).

decades, if not life.[130] This case highlights the necessity of individualized sentencing to include not only confinement and fines, but also registration and classification, as automatic lifetime registration is arbitrary and the ability to argue collateral consequences is important to the sentencing authority.

V. Morality of Sentencing

"Ignorant or misinformed juries cannot be expected to do their duty and decide the case before them without a proper understanding and appreciation of the facts in a particular case."[131] Under MJA 16, military judges would be the default sentencing authority to implement the President's segmented sentencing parameters and to ensure fair and proportional sentences across the services.[132] With the creation of sentencing parameters, courts-martial will be one step closer to conforming to federal civilian courts.

As military judges become the default sentencing authority with sentencing principles and discretion to tailor sentences, they would certainly be able to determine what aspect of collateral consequences they should consider. In *US v. Griffin*, the Court of Military Appeals maintained the standard collateral consequence ruling that courts-martial are to "concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration."[133] Yet, in the same breath, the *Griffin* court highlighted the discretion trial judges have to consider or allow the consideration of collateral consequences.[134] This "discretion" was in response to the judge's ability to answer the panel's questions on the effect a punitive discharge (a collateral consequence) would have on the accused's retirement benefits.[135]

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[130] In 2002, Justice Anthony Kennedy, with only a single citation in support, exaggeratedly declared that sex offenders have "a frightening and high risk of recidivism." McKune v. Lile, 536 U.S. 24, 34 (2002). This language has been cited in more than ninety judicial briefs and used repeatedly to support the overly harsh increase in sex offender registration laws. Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495 (2015).

[131] United States v. Perry, 48 M.J. 197, 201 (C.A.A.F. 1998).

[132] UCMJ art. 53(b)(1)(A) (2019).

[133] United States v. Griffin, 25 M.J. 423, 424 (C.M.A. 1988) (quoting United States v. Quesinberry, 31 C.M.R. 195 198 (C.M.A. 1962)).

[134] With the permission of the defense counsel. *Id.*

[135] *Id.*

Without providing the sentencing authority all relevant information regarding the accused's punishment, individualized sentencing can never truly happen. As the Court of Military Appeals found almost sixty years ago, "evidence in a particular case might make it arguable that the court-martial needs information on the special effects of a specific sentence, if it is intelligently to determine a punishment appropriate to the accused before it."[136] The amount of information the sentencing authority is allowed to consider, from both the trial and defense counsel, prior to making a sentencing determination, is extensive.[137] Sentencing rules in courts-martial give wide latitude to the Service member to present a myriad of evidence in extenuation and mitigation. It logically follows that the goal of the UCMJ and the RCM is for the sentencing authority to have a substantial amount of information when determining a sentence. This should include sex offender registration.

VI. Proposed Modifications to Sex Offender Registration Within the Military

This article proposes a modification to how sex offender registration is used in military courts to designate sex offender registration as mitigation evidence and to expand the *Benchbook* Instruction 2-5-23 to include information on SORNA's tier classification.

A. Mitigation Designation of Sex Offender Registration

Sex offender registration should be specifically included in the RCM as relevant and admissible mitigation evidence, and it is no different from other mandatory minimums within the military justice system.[138] Like a dishonorable discharge, sex offender registration will have an impact on the sentence as mitigation evidence. "Mitigation" is defined more than once in RCM 1001 as a matter "introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency."[139] Given the rigid, lifelong requirements of sex offender

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[136] United States v. Turner, 34 C.M.R. 215, 218 (C.M.A. 1964).
[137] MCM, *supra* note 1, R.C.M. 1001.
[138] 34 U.S.C. § 20911.
[139] MCM, *supra* note 1, R.C.M. 1001(d)(1)(B).

registration, it is a matter in mitigation because it is a matter that an accused should be allowed to introduce in an effort to potentially lessen his sentence.

There are some military defense counsel that have represented a Service member who has been convicted of a sex offense and subjected to a mandatory dishonorable discharge with little or no additional punishment. In those cases, counsel was allowed to present evidence and argue about the negative effects the discharge would have on the convicted Service member's life, future, and family. Because sex offender registration is nationally enforced, there is virtually no escaping the negative impact it has on every aspect of the convicted Service member's life, to include housing, employment, personal safety, and public perception. Providing the sentencing authority with such evidence, will give practical meaning and effect to the sentence they adjudge, as well as allowing a convicted Service member to present a full mitigation case.

B. Expansion of *Benchbook* Instruction 2-5-23

As discussed above, the *Benchbook* provides military judges an instruction to assist panels when evidence of sex offender registration is raised. The current instruction highlights general registration requirements to which the accused will be subjected due to conviction. The instruction should be updated to include the most applicable tier classification and duration, as defined by SORNA, based on the most serious conviction. For example, under this proposal, a military judge would inform a panel that the accused's conviction of a penetrative offense requires the accused's classification as a Tier III sex offender with registration for life. This provides the defense with the ability to present evidence on the effect life registration will have on the average military convicted and why additional punishment is not necessary to satisfy the sentencing principles.

C. Extension of Article 56(c)(2), UCMJ

The ultimate solution to the rigid application of sex offender registration and tier classification to the military sex offender population is to extend Article 56(c)(2), UCMJ, to require segmented sentencing for punishments

specific to Article 120, UCMJ.[140] Currently, segmented sentences are authorized only for confinement and/or fines in judge-alone sentencing.[141] Through the proposed extension, any conviction of an Article 120, UCMJ, offense would require the military judge to also specify the tier classification, if any, for each offense. This expansion would shift tier classification from an offense-driven analysis to one that is case-specific, in which the military judge has the discretion to determine if the mandated tier classification and subsequent registration duration is necessary given the facts of the offense and characteristics of the offender.[142]

VII. Conclusion

As they have for the last three decades, legislators will likely continue to take a tough-on-crime stance against sex offenders, which manifests in the form of increasingly harsh registration requirements. Congress enacted a series of increasingly stringent requirements based on violent crimes committed against children by previously convicted sex offenders who typically had a high rate of recidivism—the worst of the worst.

The military sex offender is typically not the worst of the worst and likely not the intended target of these laws.[143] Instead, the average military sex offender is a young, immature first-time offender. After conviction, the Service member is saddled with a lifelong sentence that was never mitigated, often for a crime the sentencing authority determined was worth mere months in confinement. The Service member will be required to register as a sex offender for life, regardless of post-conviction behavior.

The current application of sex offender laws in this country is too rigid and as a result discriminates against non-violent offenders and those unlikely to reoffend. In particular, the mandatory three-tier classification unfairly and disproportionally affects the military community because of offender demographics that significantly distinguishes the military offender from the typical civilian offender. To repair these inequities, sex offender

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[140] In judge-alone sentencing, the judge shall, "with respect to each offense of which the accused is found guilty, specify the term of confinement, if any, and the amount of the fine, if any." UCMJ art. 56(c)(2) (2019).

[141] *Id.*

[142] Even in cases before a panel, the default sentencing forum is the military judge. *Id.* art. 53(b)(1)(A).

[143] *See supra* notes 64-66.

registration must be designated as mitigation evidence as it is logically relevant for the sentencing authority to consider during deliberations.

Those who do not view sex offender registration as punishment may believe that most sex offenders have a high recidivism rate and, if given the opportunity, will reoffend.[144] This incorrect, uninformed assumption may be shared by the sentencing authority. The sentencing authority must have the opportunity to appreciate not only the registration requirements but also the secondary and tertiary effects of registration. It is likely that most panel members have some vague knowledge that sex crimes carry registration requirements. However, with a defense counsel precluded from presenting relevant mitigation, panel members are left with an incomplete understanding of the conviction's full spectrum of consequences and with their own speculation about whether the accused will re-offend. Until the sentencing authority is allowed to fully and properly consider sex offender registration in its sentencing deliberations, it is disenfranchised to render a just sentence. The convicted Service member is left with nothing but a scarlet letter.

[144] *E.g.*, HUM. RTS. WATCH, *supra* note 6, at 4 (quoting Patty Wetterling) ("I based my support of broad-based community notification laws on my assumption that sex offenders have the highest recidivism rates of any criminal. But the high recidivism rates I assumed to be true do not exist. It has made me rethink the value of broad-based community notification laws, which operate on the assumption that most sex offenders are high-risk dangers to the community they are released into.").

PROCUREMENT FRAUD REMEDIES: ACHIEVING MEANINGFUL RESTITUTION

MAJOR JOSEPH D. LEVIN*

> *[W]aste, fraud, abuse, and mismanagement are not victimless activities. Resources are not unlimited, and when they are diverted for inappropriate, illegal, inefficient, or ineffective purposes, both taxpayers and legitimate program beneficiaries are cheated. Both the Administration and the Congress have an obligation to safeguard benefits for those that deserve them and avoid abuse of taxpayer funds by preventing such diversions.*[1]

I. Introduction

In November 2018, a major defense contractor agreed to reimburse the Government more than $27 million for fraudulently overbilling service hours on Air Force contracts between 2010 and 2013.[2] In this case, and many similar cases, even though the Government recovered stolen money, the victimized unit will never get to spend it. Instead of the unit getting the

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[1] *Waste, Fraud, and Abuse in Federal Mandatory Programs: Hearing Before the H. Comm. on the Budget*, 108th Cong. 13 (2003) [hereinafter *Budget Committee Hearing*] (statement of David M. Walker, U.S. Comptroller Gen.).

[2] *Northrop Grumman Systems Corporation to Pay $27.45 Million to Settle False Claims Act Allegations*, U.S. DEP'T OF JUST., https://www.justice.gov/opa/pr/northrop-grumman-systems-corporation-pay-2745-million-settle-false-claims-act-allegations (Nov. 2, 2018).

money back, the Government deposited the money into the Treasury fund as a miscellaneous receipt, money which the unit could not access.[3]

Annually, Congress allocates a fixed sum of money to the Department of Defense (DoD) with guidance on how it will be spent; the DoD then allocates that money to subordinate agencies and units for mission accomplishment.[4] Every year, the DoD loses approximately 5% of this money to procurement fraud.[5] In theory, when the Government recovers defrauded money and the account is still open, it can be transferred as a refund to the original appropriation account that the unit may be able to utilize.[6] In practice, however, if the fund has expired, the Government may no longer obligate the money to new purchases, severely limiting its usefulness to the victimized unit.[7] If the Government recovers money after the account is closed, the Miscellaneous Receipts Act (MRA) requires its deposit in the general Treasury fund.[8] Though the Government as a whole recovers some money, the victimized unit sees none of it. As discussed in Part IV, cases in which recovered money must be deposited as a miscellaneous receipt are common because recovery efforts often continue for years beyond fund expiration.

This lost money most directly and acutely affects the individual victim-unit. Merely punishing bad actors does not return the victimized unit to the state in which it would otherwise be. While a private citizen can seek compensation for wrongs, the rules limiting how federal agencies can spend recovered money thwart any opportunity to restore the victimized unit to its original financial position. This article proposes a legislative solution that would allow the Government to return recovered funds directly to the victim-unit for the original intended purpose. Congress should create a statutory exception to the MRA for procurement fraud recoveries that allows the Government to refund recovered money to the same fund in the current year's appropriated fund. This is necessary for restitution to become meaningful to the victim, achieve congressional intent, and better align fraud-fighting incentives down to the local level, which will increase local unit participation in detecting and prosecuting fraud cases.

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[3] 31 U.S.C. § 1552(b).
[4] *See, e.g.*, National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019).
[5] *See, e.g.*, U.S. DEP'T OF NAVY, 2017 ANNUAL CRIME REPORT 7 (2018).
[6] Appropriation Acct.—Refunds & Uncollectables, B-257905, 96-1 CPD ¶ 130 (Comp. Gen. Dec. 26, 1995).
[7] 31 U.S.C. § 1553(a).
[8] *Id.* § 3302(b).

Part II begins by describing procurement fraud's impact on the DoD. Part III describes how procurement fraud is addressed and the types of remedies available to the Government. Part IV addresses what happens to recovered money and the limits placed on appropriated funds. Part V surveys existing statutory exceptions to the MRA and identifies common features. Part VI proposes a statutory exception to the MRA for procurement fraud cases. Finally, Part VII addresses policy implications of the proposal, contrasts the proposal to other possible solutions, and discusses potential impacts.

II. Procurement Fraud's Impact on the Department of Defense

The Appropriations Clause of the Constitution established that federal agencies need statutory authority to spend money.[9] Each year, Congress passes appropriation and authorization acts that specify how much money is divided into each fund (sometimes called "pots of money") and how that money may be used.[10] This money, subject to express limits described, is apportioned to each federal agency in the designated amounts by the Office of Management and Budget.[11] Agency heads may further divide the funding to subordinate sections in formal divisions, which are then divided further through informal subdivisions.[12]

Spending in excess of a formal subdivision violates the Antideficiency Act.[13] If a unit spends more than its informal subdivision of funds, it will likely run afoul of agency and internal regulations.[14] This limited funding is what each unit must use to accomplish its mission. Five percent of the DoD's annual appropriated dollars are lost to fraud, leaving victimized units with even less money than Congress intended for them to have to accomplish their missions.[15]

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[9] U.S. CONST. art. I, § 9, cl. 7.
[10] *See* 31 U.S.C. § 1301.
[11] U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-464SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 2, sec. B.5.a (4th ed. 2016); 31 U.S.C. § 1512.
[12] 31 U.S.C. §§ 1513, 1514.
[13] *Id.* §§ 1341(a)(1)(A), 1517(a)(2).
[14] This could potentially violate the Antideficiency Act if the spending also exceeds the formal subdivision.
[15] *See, e.g.*, U.S. DEP'T OF NAVY, *supra* note 5; ASS'N OF CERTIFIED FRAUD EXAM'RS, REPORT TO THE NATIONS: 2020 GLOBAL STUDY ON OCCUPATIONAL FRAUD AND ABUSE 4, 9 (2020), (estimating that organizations across the world lose 5% of their annual revenue to fraud).

Only a small portion of procurement fraud is detected and prosecuted.[16] In fraud-related actions from fiscal years (FYs) 2013 to 2017, the Government collected over $792 million combined in criminal cases (including restitution, fines and penalties, and through forfeiture of property) as well as $5.9 billion in civil judgments and settlements.[17] Those recoveries, combined across the entire Federal Government in five years, amount to less than 20% of what the DoD is expected to lose to fraud in FY 22.[18]

The direct victim of procurement fraud is the military unit for whom the goods or services were intended. Despite the unit not receiving the benefit of the goods or services for which it paid with its limited funds, it still needs to accomplish its mission. Since the unit still needs the goods or services for which it contracted, it will cost additional money from its already-strained budget to re-procure what it did not receive. That harm is exacerbated by the secondary effects, including the steps necessary to mitigate the damage such as stopping payments and halting performance.[19] This is also a drain on the unit's supporting contracting office, which must duplicate efforts to re-procure the goods. The new tasks the unit and contracting personnel will incur in support of investigation and litigation (e.g., preserving evidence, providing statements) raise the burden imposed on the unit and compete for time with the performance of normal duties.

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[16] *See* Jonathan C. Martin, *Reviving the Program Fraud Civil Remedies Act: Encouraging Widespread Utilization Through Financial Incentives and a Centralized Administrative Tribunal*, 46 PUB. CONT. L.J. 913 (2017) (discussing the lack of prosecution of small- and mid-dollar procurement fraud cases and the under-utilization of administrative remedies nominally available to agencies).

[17] OFF. OF THE UNDER SEC'Y OF DEF. FOR ACQ. & SUST., REPORT TO CONGRESS: SECTION 889 OF THE FY 2018 NDAA REPORT ON DEFENSE CONTRACTING FRAUD 2 (2018) [hereinafter FY2018 NDAA REPORT].

[18] This value is based on the $738 billion FY 2020 defense budget described in the House Armed Services Committee's summary of the fiscal year 2020 National Defense Authorization Act, *see FY20 NDAA Summary*, HOUSE ARMED SERVS. COMM., https://armedservices.house.gov/_cache/files/f/5/f50b2a93-79aa-42a0-a1aa-d1c490011bae/3552B8ED0CB74FB28CC88F434EFB306A.fy20-ndaa-conference-summary-final.pdf (last visited Aug. 31, 2022), with the assumption that 5% of this budget ($36.9 billion) will be lost to procurement fraud.

[19] *See* FAR 32.006-4(a); 10 U.S.C. § 2307(i).

III. Procurement Fraud Response and Remedies

As of March 2020, 23% of the Office of the Inspector General's Defense Criminal Investigative Service's ongoing investigations involved procurement fraud allegations.[20] When units report suspected procurement fraud, they trigger a complex series of events involving a collaborative effort between multiple offices within the DoD and Department of Justice (DoJ).[21] As cases move from investigation to litigation, DoJ's Criminal Division is the lead agency, and non-criminal remedies must be coordinated through it.[22] The DoJ encourages its attorneys to collaboratively consider all available criminal, civil, administrative, and contractual remedies in procurement fraud cases, but they are limited by practical considerations such as grand jury secrecy.[23]

Various criminal statutes are applicable in procurement fraud cases. Several procurement fraud-specific statutes, such as the Procurement Integrity Act, carry both criminal and civil penalty options.[24] Along with criminal fines, the Procurement Integrity Act allows civil penalties of up to twice the amount fraudulently received plus a $50,000 fine per violation for individuals and a $500,000 fine per incident for organizations.[25]

Accompanying the fines is restitution. Criminal restitution is defined as the "full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation."[26] Unlike the punitive measures described above, the purpose of restitution is to restore the victim to *status quo ante* or to "make the victim whole again."[27]

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[20] INSPECTOR GEN., U.S. DEP'T OF DEF., SEMIANNUAL REPORT TO THE CONGRESS: OCTOBER 1, 2019 THROUGH MARCH 31, 2020, at 43 (2020).

[21] U.S. DEP'T OF DEF., INSTR. 5525.07, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF JUSTICE AND DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES 18–20 (5 Mar. 2020) [hereinafter DODI 5525.07].

[22] U.S. DEP'T OF DEF., INSTR. 7050.05, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES para. 3(c) (12 May 2014) (C1, 7 July 2020) [hereinafter DODI 7050.05].

[23] U.S. Dep't of Just., Just. Manual § 1-12.000 (2018).

[24] 41 U.S.C. §§ 2101–2107.

[25] *Id.* § 2105(b).

[26] *Restitution*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[27] CHARLES DOYLE, CONG. RSCH. SERV., RL34138, RESTITUTION IN FEDERAL CRIMINAL CASES 2 (2019) (citing Firefighters v. Stotts, 467 U.S. 561, 582, n.l5 (1984)).

Justice Department attorneys must weigh the viability of alternative remedies in lieu of prosecution, where issues such as proving intent and the higher burden of proof may not be feasible.[28] Whenever appropriate, the DoD expects the DoJ to pursue civil remedies to recover lost money.[29] Unlike criminal cases, civil suits cannot result in conviction or incarceration but do enable full monetary recovery, punitive fines, and enhanced damages. The Civil False Claims Act[30] (False Claims Act) has proven one of the most powerful tools in pursuing monetary recovery, resulting in nearly eight times as much monetary collection in fraud cases compared to criminal cases from FYs 2013 to 2017.[31] The False Claims Act permits recovering money fraudulently obtained, up to treble damages, civil fines up to $10,000 (adjusted for inflation), and even recovering legal fees.[32]

One important tool in the False Claims Act is the *qui tam* provision, which allows third-party whistleblowers to sue private companies for fraud on behalf of the Government.[33] As an incentive to reward whistleblowers under this law, they are entitled to keep between 15% and 30% of any money recovered against the bad actor.[34] From 2017 to 2019, the DoJ's Civil Division reported recovering over $579 million in *qui tam* and non-*qui tam* fraud cases where the DoD was the primary victim agency.[35]

Administrative and contractual remedies may be used in conjunction with criminal or civil remedies or as a standalone course of action. The DoD's administrative remedies focus on ensuring that the bad actor is no longer permitted to do business with (or be employed by) the Government. This includes suspending and debarring contractors, suspending security clearances, and imposing disciplinary measures up to terminating Government employees involved in fraud.[36] When bad actors voluntarily provide restitution, debarring officials consider it to be a mitigating

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[28] U.S. Dep't of Just., *supra* note 23.
[29] DODI 5525.07, *supra* note 21, at 7, fig.1, para. E(2).
[30] 31 U.S.C. §§ 3729–3733.
[31] FY2018 NDAA REPORT, *supra* note 17.
[32] 31 U.S.C. § 3729(a)(1)(G), (a)(2)–(3); *id.* § 3730(d), (g).
[33] *Id.* § 3730.
[34] *Id.* § 3730(d).
[35] This does not account for matters delegated to regional U.S. Attorneys' Offices. *Fraud Statistics–Overview*, U.S. DEP'T OF JUST. 8, https://www.justice.gov/opa/press-release/file/1233201/download (last visited Aug. 31, 2022).
[36] *See generally* FAR subpts. 9.4, 3.1.

factor in debarment determinations,[37] but the DoD's administrative remedies currently do not have viable avenues to affirmatively pursue restitution unless the DoJ will litigate the case.[38]

Contractual remedies are those a contracting officer takes within the confines of a contract. These remedies are contained in contract clauses, as dictated by various sections of the *Federal Acquisition Regulations* (FAR).[39] There are a variety of FAR-based actions that the contracting officer can take against the contract, such as withholding payments, denying claims, and pursuing counter-claims against the contractor.[40] Some contractual remedies, such as halting future payments, may happen while the investigation or litigation are pending. However, they must occur in coordination with the investigating agencies and the DoJ once it is determined that they will not interfere with criminal and civil proceedings.[41] These remedies, having lower burdens of proof and fewer procedural hurdles, are easier to pursue and may prevent the Government from losing more money to the fraudulent contractor. However, they offer few options for recovering money already disbursed that do not require outside agencies to get involved in lengthy and resource-intensive litigation.

IV. What Happens to Recovered Money

The MRA requires that any money received by an agent of the United States, including money recovered through criminal or civil remedies in fraud cases, be deposited into the general Department of Treasury (Treasury) fund unless an exception exists.[42] Generally, exceptions to the MRA require an express, specific statutory exception granting certain federal agencies the authority to deposit and use collected money

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[37] *Id.* 9.406(a)(5).
[38] Notably, the Procurement Fraud Civil Remedies Act of 1986 (PFCRA), 31 U.S.C. §§ 3801–3812, allows agencies to pursue fraud claims valued up to $150,000, but the Department of Defense (DoD) does not utilize this statute because of its administrative burdens and lack of a Miscellaneous Receipts Act (MRA) exception for money recovered. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-275R, PROGRAM FRAUD CIVIL REMEDIES ACT: OBSERVATIONS ON IMPLEMENTATION 12 (2012) [hereinafter GAO-12-275R]. See discussion *infra* Part VI.B, for a discussion of the PFCRA, its limitations, and challenges implementing its use.
[39] *See, e.g.*, FAR 52.212-4(d).
[40] *See id.* 33.210(b), 32.006; 41 U.S.C. § 7103(c)(2).
[41] DODI 7050.05, *supra* note 22.
[42] 31 U.S.C. § 3302(b).

differently.[43] One of the most widely utilized MRA exceptions is refunds, which is one of two types of recognized "repayments" (the other being reimbursements).[44] Refunds are amounts collected from outside sources for "payments made in error, overpayment, or adjustments for previous amounts disbursed."[45] Refunds are "to be credited to the appropriation or fund account charged with the original obligation . . . ."[46] This means that agencies can spend refunded money the same as any other money in the account—the only exception to the MRA that does not require specific statutory authority.[47] Refunds are an important tool for correcting errors and resolving discrepancies without an agency routinely losing that money to the MRA.[48] Without this exception, overpayments caused by even minor clerical errors would be lost from the unit's funds even if promptly remedied.

A. Limitations Based on Time

As mentioned above, the same rules control refunds as well as other money in the account, including limits on when appropriated funds may be spent.[49] By default, appropriated funds remain available for one year unless expressly stated otherwise.[50] One year is the standard period of availability for Operations and Maintenance funds, while military construction funds are among the longer-lasting types, typically approved for five years.[51] Once an appropriation's period of availability expires, funds from that

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[43] Off. of the Comptroller of the Currency—Disposition of Amounts Received Through Its Lease of Off. Space, B-324857, 2015 WL 4647959 (Comp. Gen. Aug. 6, 2015).
[44] *See infra* notes 67–69 and accompanying text.
[45] 2 U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 6, sec. E.2.a.2 (3d ed. 2006) [hereinafter RED BOOK VOLUME 2].
[46] U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION vol. 3, ch. 15, para. 3.5.1.2 (Feb. 2022); *see* 1 U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 5, sec. D.7.a (3d ed. 2004) [hereinafter RED BOOK VOLUME 1].
[47] RED BOOK VOLUME 2, *supra* note 45.
[48] *Id.*
[49] 31 U.S.C. § 1502.
[50] *Id.* § 1301(c); *see, e.g.*, Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, § 8003, 132 Stat. 2981, 2998 (2018).
[51] U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION vol. 3, ch. 13, para. 3.2.1.1.2 (Feb. 2022) [hereinafter DOD FMR].

appropriation may no longer be obligated for new procurements.[52] The expired account remains open for five years but may only be used to make adjustments to existing contracts or to liquidate obligations.[53] For example, settlement of a claim submitted in FY 2020 that originated in FY 2018 could be paid with FY 2018 funds, even if the fund has expired. The appropriation is permanently closed five years after it expires, and any remaining money in the account is returned to the Treasury fund.[54]

If the refund is collected after the appropriation has expired, but before it is closed, it gets deposited into the expired appropriation account and is "available for recording or adjusting obligations properly incurred before the appropriation expired."[55] Although a refund returned to an expired account may be used for adjustments, it may not be applied to new obligations.[56] If the refund is collected after the appropriated account has closed, the money must be deposited into the general Treasury fund, meaning the unit loses it completely.[57]

Units may treat money recovered in fraud cases, including criminal restitution or through civil suits, as a refund to the original account.[58] The amount recovered that may be treated as a refund is limited to actual damages, including the costs incurred investigating the fraud.[59] Amounts exceeding the refund (e.g., interest and penalty charges collected) must be deposited in Treasury as miscellaneous receipts.[60] Thus, if a procurement fraud case is resolved before the appropriation expires, the unit can receive meaningful restitution. If the account is expired but not closed, the unit may get the money redeposited into the same account but cannot actually use it to make new purchases, limited only to using it for adjustments to old purchases, if any should arise. Once the fund is closed, any recoveries made afterward will go to the Treasury fund and be completely inaccessible to the victim-unit.

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[52] 31 U.S.C. § 1553(a).
[53] *Id.*
[54] *Id.* § 1552(a).
[55] Appropriation Acct.—Refunds & Uncollectables, B-257905, 96-1 CPD ¶ 130 (Comp. Gen. Dec. 26, 1995).
[56] RED BOOK VOLUME 2, *supra* note 45.
[57] 31 U.S.C. § 1552(b); RED BOOK VOLUME 1, *supra* note 46.
[58] *See Appropriation Acct.—Refunds & Uncollectables*, B-257905.
[59] Tenn. Valley Auth.—False Claims Act Recoveries File, B-281064, 2000 CPD ¶ 41 (Comp. Gen. Feb. 14, 2000).
[60] RED BOOK VOLUME 2, *supra* note 45.

For this reason, once the appropriation has expired or closed, efforts by the victim-unit to support the procurement fraud recovery and enforcement actions are an additional burden without the hope of meaningful recovery for the unit. Thus, continued effort in procurement fraud actions from the unit's perspective violates the sunk cost fallacy of economic theory.[61] This fallacy occurs when an individual continues to pursue actions whose costs outweigh the benefits because the individual has already invested something that he or she does not want to lose.[62] If the resolution of procurement fraud cases takes so long that the unit loses hope of recovery, the unit is incentivized to avoid becoming further entangled in such cases so as to avoid devoting time and resources to a sunk cost. This is important because, under the current structure, the incentive structure for local units is not fully aligned with the Government's broader interest in aggressively identifying and prosecuting procurement fraud.

B. Why Does Recovering Stolen Money Take So Long?

The process of litigating procurement fraud cases typically takes several years and often endures beyond the expiration of most appropriated funds. Every stage of the process favors a slow, methodical approach that is at odds with timely restitution to the victim.

The statute of limitations to file a False Claims Act case is six years, but can be extended up to ten years under certain circumstances.[63] Once a False Claims Act case is initiated, the DoJ has a period of sixty days (subject to extensions) in which the case remains sealed until the DoJ decides whether to intervene in the action.[64] In 2008, *The Washington Post* reported a backlog of over 900 False Claims Act *qui tam* cases and that whistleblowers "routinely wait 14 months or longer just to learn whether the [DoJ] will get involved."[65] A 2006 Government Accountability Office (GAO) study of False Claims Act cases in which the DoJ intervened reported a median

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[61] *See* DANIEL KAHNEMAN, THINKING FAST AND SLOW 342–52 (2013), for further discussion of the sunk cost theory.
[62] *Id.*
[63] 31 U.S.C. § 3731(b).
[64] *Id.* § 3730(b).
[65] Carrie Johnson, *A Backlog of Cases Alleging Fraud*, WASH. POST (July 2, 2008), https://www.washingtonpost.com/wp-dyn/content/article/2008/07/01/AR2008070103071.html.

duration of 38 months to resolution after DoJ intervention, with the range being from 4 to 178 months.[66]

More recent cases show this has not improved. The DoD Office of the Inspector General recently announced a settlement with a biotech company for fraudulent billing practices and violations of anti-kickback statutes.[67] The settlement was reached in September 2020, despite the misconduct's occurrence from 2009 to 2012.[68] In its semi-annual report to Congress, the DoD Office of the Inspector General cited over a dozen cases that were resolved in the six-month period ending on 31 March 2020.[69] Of those cases, the earliest misconduct for which a date was provided began in 2003 and the most recent began in 2016 and concluded in 2018.[70] While this report does not expressly describe the type of appropriated fund used in each case, given the nature of the procurements and the normal period for which fund types remain current, it is reasonable to conclude that the appropriated funds expired in the vast majority, if not all, of the cases described in the report before the parties reached settlement. In many cases, the expired funds have closed completely by the time the parties setttled.

Once a fraud case is completed, collecting restitution takes additional time. In a 2018 study, the GAO found that $34 billion in restitution was adjudged in federal criminal cases between 2014 and 2016 and that $2.95 billion in restitution was collected during that same period.[71] Of the $2.95 billion collected, $1.5 billion was from judgments ordered between 2014 and 2016, while the remaining $1.45 billion was from cases dating between 1988 and 2014.[72] This shows that a substantial portion of restitution is collected years, perhaps decades, after the enforcement action concludes.

As with other forms of white-collar crime, procurement fraud is complex. The number of agencies required to investigate, the multiple forums potentially required to adjudicate, and the volume of documentation

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[66] U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-320R, INFORMATION ON FALSE CLAIMS ACT LITIGATION 12 (2006).

[67] Acting Manhattan U.S. Attorney Announces $11.5 Million Settlement with Biotech Testing Company for Fraudulent Billing and Kickback Practices, U.S. DEP'T OF JUST. (Sept. 22, 2020), https://www.justice.gov/usao-sdny/pr/acting-manhattan-us-attorney-announces-115-million-settlement-biotech-testing-company.

[68] *Id.*

[69] INSPECTOR GEN., *supra* note 20, at 43–50.

[70] *Id.*

[71] U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-203, FEDERAL CRIMINAL RESTITUTION: MOST DEBT IS OUTSTANDING AND OVERSIGHT OF COLLECTIONS COULD BE IMPROVED 23 (2018).

[72] *Id.*

necessary to resolve a case requires a slow approach. Timely resolution might be at odds with other priorities in the case and with methodically pursuing justice. Put simply, it might not be in the Government's broader interests to rush these cases. Given the default period of availability of one year for most funds, it is easy to see how this process routinely goes well past this time, and often even beyond when the appropriation closes completely.[73]

V. Confronting the Issue: Getting Recovered Money Back to the Victim

The problem this article addresses is that victim-units cannot obligate money recovered after the appropriation has expired, and they cannot use it at all if it is recovered after the fund has closed, defeating the restitutional purpose of recovery. While the MRA and the prohibition against augmenting funds is fundamental to ensuring balance between the branches of Government through the power of the purse, many exceptions already exist. These exceptions are scattered throughout federal law, empowering various agencies to credit recovered money to their own funds and spend it alongside other appropriated money. Each of these statutory exceptions reflects a congressional recognition that unique circumstances of an agency's activity result in collected money that should be deposited directly to the agency's funds and spent by the agency without requiring new action by Congress.

A. Survey of Statutory Exceptions

Statutory exceptions to the MRA permit designated federal agencies to deposit money into their own funds to cover the costs of actions taken by the agency or be compensated for damages from third-party actors. The diverse statutes reflect the unique circumstances and types of recoveries the agency is expected to encounter.

Some of these exceptions are for reimbursements, which are either sums of money collected in compensation for the good or service purchased using that account or business-like transactions conducted by the Government.[74] An example would be the fee to visit a national park, which

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[73] *See supra* notes 50–51 (discussing default periods of fund availability).

[74] U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-463SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 1, sec. A.4 (4th ed. 2016) [hereinafter RED BOOK CHAPTER 1].

the National Park Service can spend on land management without additional authorization from the Government.[75] Unlike refunds, reimbursements require specific statutory authority to be deposited into an agency's appropriated fund.[76]

1. Exceptions Applying to the Department of Defense

The following examples of MRA exceptions impact a broad range of DoD activities. Recently, the FY 2020 National Defense Authorization Act created a new law related to refunds for DoD personnel travel expenses,[77] permitting the DoD to deposit refunded money from travel expenses into the unit's Operations and Maintenance fund or its Research, Development, Test, and Evaluation fund.[78] This new authority expressly directs that the unit deposit refunded money into the current year's account when it is collected and that the unit may use the money only for official travel or efforts to improve efficiency of financial management of official travel.[79]

Congress authorized the Federal Emergency Management Agency to reimburse other federal agencies, including the DoD, for the support provided to activities under the Stafford Act.[80] Such reimbursements are credited to the appropriation(s) currently available for the same services or supplies.[81] Similarly, amounts paid by other U.S. Government agencies (or the United Nations)[82] to the DoD for expenses related to covered categories of foreign assistance are credited to the current applicable appropriation account.[83]

The DoD is authorized to sell lost, abandoned, or unclaimed personal property in its possession.[84] The proceeds of such sales may be credited to the local military installation's Operations and Maintenance fund to reimburse the cost of collecting, storing, and selling the property.[85]

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[75] 16 U.S.C. § 6806.
[76] DoD FMR, *supra* note 51, vol. 3, ch. 15, para. 3.5.1.1.
[77] National Defense Authorization Act for Fiscal Year 2020, § 606, Pub. L. No. 116-92, 133 Stat. 1198, 1424 (2019).
[78] 37 U.S.C. § 456(a).
[79] *Id.* § 456(a)–(b).
[80] 42 U.S.C. § 5147.
[81] *Id.*
[82] 10 U.S.C. § 2211.
[83] 22 U.S.C. § 2392(d).
[84] 10 U.S.C. § 2575(a).
[85] *Id.* § 2575(b)(1)(A).

Any proceeds from the sale exceeding actual costs incurred must be placed into a Morale, Welfare, and Recreation fund.[86]

Recoveries from affirmative claims against third-party tortfeasors for a Service member's medical bills are credited to the installation hospital's Operation and Maintenance fund and may be spent accordingly.[87] Money recovered in affirmative claims for damage to real property owned by military installations has a flawed statutory exception; it exempts the money from being deposited into the MRA, but the statute does not expressly authorize the recovered money to be spent by the unit, thus making this a flawed MRA exception.[88]

2. Exceptions Applicable to Other Federal Agencies

The examples below examples demonstrate MRA exceptions applicable to other federal agencies. The Department of State has multiple exceptions relating to funds collected from foreign governments. Regarding any sales under Title 22, Subchapter 1 (International Development), when funds are returned to the United States due to a contract's failure to conform to applicable statutes (deemed "illegal transactions"), the funds "shall revert to the respective appropriation, fund, or account used to finance such transaction or to the appropriation, fund, or account currently available for the same general purpose."[89]

When the Department of State receives money from foreign governments to be placed in trust for U.S. citizens pursuant to 22 U.S.C. § 2668a, that money is deposited into the Treasury fund, with appropriation authority to make payments to beneficiaries.[90] However, when the trust exceeds $100,000 in value, the Department of State may deposit between 1% and 1.5% of its funds into the International Litigation fund to cover the legal fees for asserting such claims.[91]

The U.S. Forest Service is authorized to reimburse itself for the cost of repairing damage to land under its management with money recovered from bonds forfeited under timber sales contracts, judgments, and claims

[86] *Id.* § 2575(b)(1)(B).
[87] *Id.* § 1095(g).
[88] *Id.* § 2782.
[89] 22 U.S.C. § 2355(c).
[90] *Id.* § 2710.
[91] *Id.* § 2710(e).

settlements from the incident that caused the damage.[92] This exception expressly states that any money collected exceeding actual costs is not exempt from the MRA.[93] Similarly, the DoJ may sell forfeited personal property under the Racketeer Influenced and Corrupt Organizations Act and use proceeds from the sale to cover costs of the forfeiture and sale, with excess proceeds deposited into the Treasury fund.[94]

B. Common Characteristics Among the Exceptions to the Miscellaneous Receipt Act

These listed exceptions are a sampling of those that exist.[95] Most exceptions are narrow and provide express guidance on the limits of the authority, including the appropriating language. Three relevant takeaways exist in these exceptions.

The first observation is the use of recovered funds to make the agency whole again. This places the agency in the position of having the same amount of appropriated dollars (in the same fund) as Congress intended in its original appropriation and authorization legislation. It further remedies the impact of the tortious or criminal behavior by returning the same amount of money as was spent addressing the incident.

The second is that Congress wrote statutes so that the agency will not receive a recovery windfall; excess funds beyond the actual damages and costs are not exempt from the MRA.[96] This ensures that the agency does not have the opportunity to obligate funds exceeding the amount Congress intended. This protects the policy objective of the prohibition against augmenting funds because it prevents these exceptions from expanding into alternative sources of revenue for the agency.

The third observation is that several of these statutes authorize the Government to place the recovered funds into the appropriation for the current FY at the time of recovery. In general, any federal agency may receive refunds under GAO guidance, but those refunds can only be placed

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[92] 16 U.S.C. § 579c.
[93] *Id.*
[94] 18 U.S.C. § 1963(f).
[95] See RED BOOK VOLUME 2, *supra* note 45, ch. 6, sec. E.2, for further discussion on exceptions to the MRA.
[96] One exception to this is 10 U.S.C. § 2575, which allows excess recovery to be deposited into the installation's Morale, Welfare, and Recreation fund. *See supra* notes 84–86 and accompanying text.

into the original year's appropriation (if it is still open).[97] As discussed above, the refunded money is subjected to the same temporal limitations as other money in the fund. Several of these statutory exceptions, however, bypass this limitation and expressly authorize collected money to be placed into the current year's fund.

VI. A Statutory Exception for Money Recovered in Procurement Fraud Cases

Congress should create a statutory exception to the time requirement allow the Government to return money recovered in procurement fraud cases to the victim-unit's current-year fund account of the same type as the one from which it was originally obligated. The statutory exception should always place the recovered funds into the current-year account, even if the original account is still open but expired. This is because an expired account cannot be used for new obligations,[98] and placing the money into an account with such limited functionality will not return the unit to its original position, nor will it empower the unit to obligate the money as Congress intended.

The proposed statute will require language expressly authorizing the victim unit to spend the funds.[99] As in similar statutory authority, the unit should be permitted only to deposit and spend the same amount of funds it can claim as damages: money actually disbursed but not refunded, as well as expenses incurred from remediating the fraudulent conduct (e.g., costs associated with disposing of nonconforming products). These costs would not include as damages any costs which are paid for through other appropriations.

A. Drafting the Procurement Fraud Exception

One of the challenges in creating a procurement fraud exception to the MRA is that there are so many statutory sources from which money may be

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[97] Appropriation Acct.—Refunds & Uncollectables, B-257905, 96-1 CPD ¶ 130 (Comp. Gen. Dec. 26, 1995).
[98] 31 U.S.C. § 1553(a); *see supra* note 52 and accompanying text.
[99] An MRA exception that does not also authorize the unit to expressly spend the funds is flawed and could result in an Antideficiency Act violation were the deposited money to be obligated. *See* 31 U.S.C. § 1341.

recovered. It would be impractical to separately draft statutory exceptions to all of the various criminal and civil statutes used in these cases. If an exception only included some statutes, it would undermine the use of the excluded statutes. Similarly, it would be unhelpful to draft a statute that enumerates only certain types of appropriated funds to the exclusion of others (i.e., a fund that only allows recovered money to be returned to an agency's procurement fund but not its construction fund). Rather, one centralized exception should exist that is broad enough to allow the Government to return recovered funds to the victim-unit in the appropriate fund type, regardless of the mechanism used to recover the funds. While the exception should broadly account for the types of money eligible to be counted as a refund, it must provide sufficient specificity as to which account is being credited.[100]

As in the exceptions cited above, the funds returned to the agency should be limited to those that directly reimburse the agency for actual expenses resulting from the fraudulent actions. These would include actual funds taken from the account as well as reimbursable expenses, such as for the storing and disposal of nonconforming products. Relying on the statutory language from the numerous examples cited, a proposed legislative solution could be as follows:

> With respect to matters of fraud involving obligated funds of the Department of Defense, any moneys recovered by the United States as a result of a judgment, compromise, or settlement of any claim, are hereby appropriated and made available to the account currently available for the same general purpose. Funds placed into this account shall not exceed (1) the amount that were disbursed but which the United States did not receive the goods or services contracted for as a result of the fraudulent conduct; and (2) the unreimbursed costs of any expenses incurred for repair or remediation, storage and disposal of abandoned goods, or that are a direct or proximate harm resulting from the fraudulent activity. Amounts so credited shall be available for use for the same purposes and under the same circumstances as other funds in the account. Provided, that any portion of the moneys so received in

[100] 31 U.S.C. § 1301(d).

> excess of the amounts described in (1) and (2) above shall be transferred to miscellaneous receipts.

VII. Policy Considerations About a Procurement Fraud Exception

It is important to consider and address the policy implications of the proposed statute. First is the question of whether this proposed exception is consistent with the constitutional principle allowing Congress to maintain control of how executive branch agencies spend funds. Second is the concern of procurement fraud recoveries becoming a source of revenue for the agency outside of the normal appropriations and budgeting process. Third is whether this proposal is effective at properly aligning fraud-fighting incentives at the local unit level to remedy the sunk cost dilemma.

A. The Legislative Proposal Is Consistent with Congressional Intent

The Constitution vested in Congress the "power of the purse" to keep the spending authority in the hands of elected representatives and as a check on power against the other governmental branches.[101] The MRA is foundational to Congress's power of the purse and the separation of powers.[102] The proposed statutory exception to the MRA is consistent with this power and achieves congressional intent with how and when funds may be spent. When Congress appropriates funds, it determines how much money each federal agency needs to accomplish its mission. It also sets time limits for when the funds can be spent.[103] Defrauded dollars cause the agency (and individual units) to have less money available to obligate than what Congress intended. Allowing the victim-unit to obligate recovered money as was originally intended is consistent with well-established precedent that money recovered in fraud actions is a form of refund.[104]

This proposal is not unique and does not change current practices, but rather it treats recovered money consistently regardless of how long the recovery process takes. Indeed, this proposal can best be described

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[101] RED BOOK CHAPTER 1, *supra* note 74, ch. 1, sec. A (citing THE FEDERALIST NO. 58 (James Hamilton)).
[102] *Id.*
[103] 31 U.S.C. § 1502.
[104] *See, e.g.*, Appropriation Acct.—Refunds & Uncollectables, B-257905, 96-1 CPD ¶ 130 (Comp. Gen. Dec. 26, 1995).

as achieving restitutional intent because the victim can use the recovered money as intended.[105] This prevents the unit from being penalized because of a lengthy recovery process, while also alleviating the DoJ and investigative organizations from any time-based pressure to rush to closure of a case.

This statutory proposal is analogous to the litigation exception to a fund's period of availability[106] and for using funds after resolving a bid protest.[107] The litigation exception utilizes a court's equitable authority to order that certain funds remain available while litigation is pending because the fund's closure would render the lawsuit moot.[108] The litigation exception recognizes the realistic and lengthy amount of time that it takes to resolve such disputes and accounts for it with a statutory exception anchored in principles of equity. Likewise, the amount of time it takes to resolve procurement fraud litigation is due to no fault of the victimized unit.

Notably, the litigation exception only keeps the funds available for the specific purpose that is contemplated in the litigation, whereas this article's proposal would keep the funds available for any use by the unit consistent with the purpose of the fund source. Both exceptions are analogous in their recognition that when the money can be spent is beyond the unit's control and is fully controlled by the litigation process. Unlike the litigation exception under which the funds are held for that purpose, funds in procurement fraud cases will likely be recovered long after the unit has already re-procured the good or service, because to do otherwise would seriously harm mission accomplishment. Thus, the procurement fraud exception must allow broader use of recovered funds to remain effective.

This statutory proposal is also analogous to the replacement contract exception, a well-established exception to time-based spending limits.[109] When a contractor is terminated for default but the need for the generally same service or good still exists, the originally obligated funds remain available for obligation for re-procurement, even if the fund has expired, so long as the re-procurement is completed without delay.[110] If the cost of re-procurement exceeds the original cost, additional funds from the otherwise-

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[105] See *supra* notes 26–27, for further discussion of restitutional intent.
[106] 31 U.S.C. § 1502(b); *see* RED BOOK VOLUME 1, *supra* note 46, ch. 5, sec. E.
[107] 31 U.S.C. § 1558.
[108] RED BOOK VOLUME 1, *supra* note 46, ch. 5, sec. E.
[109] *See* Lawrence W. Rosine Co., 55 Comp. Gen. 1351 (1976).
[110] *Id.*; *see* DoD FMR, *supra* note 51, vol. 3, ch.8, para. 3.5.3.

expired account may be obligated towards the re-procurement.[111] Money recovered from the contractor for whom the previous contract was terminated (such as from bonds) may be treated as a refund and utilized for the replacement contract as well.[112] In the GAO decision B-185405, the GAO deemed this practice the appropriate remedy because not allowing the agency to spend the recovered money accordingly would leave it "paying twice for the same thing . . . with the result in many cases that much if not all of the original expenditure would be wasted."[113]

The current limitations on returning refunds to the appropriated account after it has closed (and the similar limits to its use when it is expired but not closed) effectively thwart congressional intent for that money. These exceptions to the general rules show the historical importance placed on returning the victim-unit to its original position. Thus, this proposal is consistent with general congressional intent, preserving the power of the purse, and specifically with congressional intent as to time limits on use of funds.

B. The Legislative Proposal Is Limited to Traditional Restitutional Objectives

The second concern also relates to the importance of congressional control over the purse. Congress has a strong interest in maintaining control over the appropriations process and units' budgets. Procurement fraud recoveries should be a path toward neither the DoD having another revenue source outside of congressional control nor units augmenting their appropriated funds. An unlimited exception to MRA would be just that: a way for the DoD to augment its funds without Antideficiency Act concerns or congressional oversight. The proposed legislative solution is designed consistently with traditional principles of restitution: returning the victim to its original, pre-crime status without undermining Congress's distinct interest in controlling appropriated funding.[114] The amount of money returned to the victim-unit would match the amount historically returned in

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[111] DOD FMR, *supra* note 51, vol. 3, ch. 10, para. 3.8.
[112] Army Corps of Eng'rs—Disposition of Funds Collected in Settlement of Faulty Design Dispute, 65 Comp. Gen. 838 (1986).
[113] *Id.*
[114] *See* RED BOOK VOLUME 2, *supra* note 45 ("The rationale for crediting refunds to an appropriation account is to enable the account to be made whole for the overpayment that gave rise to the refund.").

similar instances for refunding erroneously disbursed funds and reimbursing expenses. Any excess money recovered, such as through fines or treble damages, would still be deposited into the Treasury fund as miscellaneous receipts. Thus, the victim-unit would not receive a windfall or be able to create an additional source of revenue through the affirmative pursuit of procurement fraud actions. However, as would be discussed in the next section, this restitution would create an incentive to support procurement fraud enforcement actions even beyond the expiration and closure of the appropriated funds because the victim-unit would still have the opportunity to receive restitution.

C. This Proposal Is the Best Method to Align Interests and Achieve Comprehensive Reform

Third, the proposed legislation would more fully align objectives of the victim-unit and the local contracting office with the broader interest of the Government in detecting, reporting, and prosecuting bad actors who commit fraud. As previously mentioned, for a unit to initiate a procurement fraud investigation is to take a course of action that would require follow-on effort to continue to support investigation and litigation long after the victim-unit's hope of recovering funds has passed.

Currently, the victim-unit's incentives best align with the course of action of treating these matters as errors rather than fraud and pursuing remedies within the contract without alleging fraud, even though those remedies may prove limited.[115] Contractual remedies may fix the immediate defect and possibly recover some money for the organization without the effort of investigations or supporting complex litigation. However, contractual remedies preclude punitive action against the bad actor and make it less likely that the bad actor will be held fully accountable. Without holding these bad actors accountable, their fraud will go unpunished, allowing them to do it again on other Government contracts.

Growing focus on this problem has led to multiple recent proposals. While these proposed solutions offer important contributions to the conversation, none offer a comprehensive solution comparable to the legislative proposal contained in this article. One proposed solution, raised in a 2011 paper, is to increase the use of alternative administrative remedies at the agency level, such as through the Procurement Fraud Civil Remedies

[115] See, e.g., GAO-12-275R, *supra* note 38, at 24–25, for further discussion.

Act (PFCRA).[116] The PFCRA[117] allows federal agencies, after coordination with the DoJ, to litigate low-dollar-value contract fraud cases against contractors before administrative law judges, similar to False Claims Act litigation.[118] Addressing a matter through alternative dispute resolution or lower-level administrative hearings is potentially faster than criminal and civil remedies, but the DoD does not currently use the PFCRA because it is procedurally burdensome, requires the use of administrative law judges that the DoD does not have, and does not contain an MRA exception.[119] The PFCRA is also jurisdictionally limited to cases of $150,000 or less, making it difficult to identify cases where the dollar value would justify the costs of litigation, especially since the agency will bear the costs but will not receive the recovered money.[120] Since its creation, only three federal agencies have used the PFCRA with any significant frequency.[121]

The 2011 paper's proposal would streamline PFCRA usage, increase the jurisdictional ceiling to either $500,000 or $1 million, and allow a small portion of PFCRA recoveries to be placed into a revolving fund to cover enforcement and litigation costs.[122] The recommendation did not include allowing units to keep any of the recovered money for restitution. Thus, victim-units would get more involved in fraud enforcement, theoretically addressing an enforcement gap,[123] but would not be any closer to remedying the fraud's impact on the unit. This is not an adequate solution to the problems identified because the cost of litigation alone may be sufficient incentive for the DoJ, which has the primary purpose of enforcement actions; it would not be enough reason for DoD units to get more involved

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[116] Lieutenant Colonel Charles Kirchmaier, *Treating the Symptoms but Not the Disease: A Call to Reform False Claims Act Enforcement*, 209 MIL. L. REV. 186, 219 (2011).
[117] 31 U.S.C. §§ 3801–3812.
[118] *Id.* § 3803.
[119] Kirchmaier, *supra* note 116, at 219–24; 31 U.S.C. § 3806(g)(1); *see also* Trevor B. A. Nelson, *A Restitution Alternative for Department of Defense Agencies to Combat Program Fraud Civil Remedies Act-Level Cases Under Far 9.4*, 44 PUB. CONT. L.J. 469, 480–85 (2015).
[120] 31 U.S.C. § 3803(c)(1).
[121] Martin, *supra* note 16, at 924. Perhaps it is not a coincidence that two of these three agencies that most often use the PFCRA have a statutory exception to the MRA written into the PFCRA, permitting money recovered in PFCRA actions to be deposited in the agencies' respective funds instead of being returned to the Treasury fund. *See* 31 U.S.C. § 3806(g)(2).
[122] Kirchmaier, *supra* note 116, at 219–20.
[123] Studies estimate that the DoJ refuses to accept approximately 60% of False Claims Act cases because the dollar value is too low. *See* Nelson, *supra* note 119, at 470; *see also* Martin, *supra* note 16.

in litigating fraud enforcement, where it would distract from their key military missions while offering very little in new benefits.

The suggestions in the 2011 paper were addressed in a 2017 paper that recommended that money recovered by agencies in PFCRA actions be entirely exempt from MRA, with funds first going to refund the agency and the remainder funding future investigations and litigation.[124] The 2017 paper also recommended fixing administrative hurdles to effective PFCRA use, such as streamlining the referral process by removing the DoJ approval requirement, and allowing an existing forum, such as the Armed Service Board of Contract Appeals rather than administrative law judges, to handle cases.[125]

There are two problems with implementing the 2017 paper's recommendations. First, it is limited to the PFCRA, instead of implementing a solution with broader applicability to all fraud cases. Even if the PFCRA's dollar limit were raised, it would still only incentivize units to pursue fraud cases within that dollar value window. It would not resolve the sunk cost fallacy as it applies to larger dollar value cases. This would have the unfortunate result that victim-units may be interested in pursuing small dollar cases unilaterally, but they would not be incentivized in supporting the DoJ in the largest fraud cases that may reach the millions or billions of dollars in stolen funds. Second, this solution would not differentiate money recovered that compensates for actual damages from that money which exceeds the harm inflicted (such as money recovered where treble damages or other fines are permitted). For that reason, this solution could actually create a stream of revenue for the DoD that falls outside of congressional control, thus violating the concerns over power of the purse discussed previously.

These papers' suggestions have merit and could go a long way toward increasing procurement fraud enforcement of small-dollar-value actions. The success of medical affirmative claims lends credibility to these solutions. After an exception to the MRA was passed for money recovered by the DoD in medical affirmative claims[126] and resources were put into place empowering installations to pursue these claims by local agencies, the amount of money recovered increased over seventeen-fold (from $1.5

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[124] Martin, *supra* note 16, at 914.
[125] *Id.* at 922–26.
[126] *See supra* note 87 and accompanying text.

million to $26 million) in twelve years.[127] However, those proposals would require wholesale statutory restructuring of the PFCRA procedures, a statutory exception to the MRA that is not currently in place, and building the infrastructure into the DoD to pursue such cases. Such recoveries would also still be limited by the PFCRA's statutory ceiling of cases valued $150,000 or lower, unless the cap is raised.

In comparison, implementing this article's proposed MRA exception would go beyond the limited application of the recommendations of how to fix the PFCRA and would achieve faster results. Amending the PFCRA would still require implementing infrastructure to enforce the violations before the first money would be recovered—a process that could take years without the guarantee of substantial monetary recovery. This article's proposed MRA exemption would have immediate results because it would apply to any monetary recovery including cases being actively litigated. Further, while the changes to the PFCRA are limited to the value ceiling contained in the statute (or as amended according to the above recommendations), this article proposes a solution across the spectrum of procurement fraud cases without regard to dollar value of the case—including PFCRA cases. Thus, while the proposed changes to the PFCRA only address the sunk cost dilemma for small-dollar cases, this article proposes a way to align the incentives of fighting procurement fraud in all cases regardless of dollar value.

Recognizing the difficulty in securing statutory changes to the PFCRA, a 2015 paper proposed a different solution utilizing purely contractual remedies.[128] This paper suggested interpreting FAR 9.406-1(a)(5) as empowering an agency to accept restitution as an equitable remedy during suspension and debarment proceedings and to directly deposit the recovered money in the victim-unit's fund as a refund.[129] This restitution would then be considered as a mitigating factor in the contracting officer's responsibility determination as well as in any suspension and debarment determinations.[130]

This proposal is unlikely to succeed because it is difficult to see the upside to the contractor agreeing to provide restitution under these circumstances. As discussed, there is an enforcement gap in low-dollar-

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[127] Major Mary N. Milne, *Staking a Claim: A Guide for Establishing a Government Property Affirmative Claims Program*, ARMY LAW., Aug. 2012, at 17, 19.
[128] Nelson, *supra* note 119, at 489–90.
[129] *Id.* at 491–92.
[130] *Id.*

value fraud due to the DoJ's disinterest in prosecuting such cases and the lack of alternative remedies available to the agency.[131] If the contractor agrees to pay restitution, this would be a tacit admission of fraud they otherwise would not need to make. Even if not suspended or debarred, such admission would need to be included in the Contractor Performance Assessment Reporting System report [132] and would appear in the contractor's performance evaluations when competing for future contracts. This may not be as serious as debarment, but it certainly will damage the contractor's ability to compete for future contracts.

Acknowledging culpability may also open the contractor or individual employees to additional consequences, as a confession makes a case much easier for the DoJ to prosecute.[133] Thus, such a confession and voluntary restitution payment—weighed against the alternative consequences—may not result in many contractors agreeing to these terms.

After reviewing these alternative options, the proposed legislative solution of an MRA exception for procurement fraud recoveries is the only option that will fully align the interests of victimized units and enforcement efforts by removing the sunk cost fallacy. The statutory change proposed could provide the impetus for implementing other solutions; particularly recommendations for improving the PFCRA, as these other papers suggested.

VIII. Conclusion

Prosecuting and deterring procurement fraud are important objectives. An equally important objective is empowering units to achieve their mission objectives by making sure that they have the amount of funding that Congress intended. Congress should create a statutory exception to the MRA for procurement fraud recoveries allowing the Government to refund recovered money to the same fund from the current year's account. The proposed solution is a viable way to address the problem defined in this article. It would support the basic criminal justice principle of making the actual victim whole and would better align incentives towards the policy goal of increasing the detection and prosecution of procurement fraud

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[131] *See supra* note 118 and accompanying text.

[132] *See* FAR 42.1501(a)(6).

[133] This assumes that such a negotiated remedy between the contractor and contracting officer does not include a promise of immunity from the DoJ, where the admission and restitutional payment will not be used as evidence against the contractor in any future enforcement actions.

down to the local unit level. It will accomplish this while abiding by the prohibition against augmenting funds and respecting Congress's power of the purse.

By allowing the victimized unit to be compensated from recovered funds, it will incentivize taking a larger, more proactive role in the procurement fraud process. Such increased incentive could be the impetus for the DoD to find more opportunities to improve procurement fraud response processes. As the Comptroller General stated in his testimony before the Budget Committee in 1993, fraud against the Government is not a victimless crime, and preventing it is a worthy cause to protect the taxpayers as well as the legitimate program beneficiaries.[134]

[134] *Budget Committee Hearing*, *supra* note 1.

SECOND THOMAS J. ROMIG LECTURE IN PRINCIPLED LEGAL PRACTICE:

PRINCIPLED LEGAL PRACTICE BY JUSTICE ROBERT H. JACKSON AT NUREMBERG*

JOHN Q. BARRETT†

Introduction

It is truly an honor for me to be invited to give this lecture. I will discuss the work of Justice Robert Houghwout Jackson, the United States Supreme Court justice who seemed, if I may, AWOL from 1945 to 1946. He was serving by appointment of President Harry Truman as the U.S. Chief of Counsel at Nuremberg, prosecuting Nazi war criminals. I will discuss how Jackson's work at Nuremberg fits the lecture, the model, and the inspiring professional legacy of principled legal practice.

I will approach this subject in four parts. First, I will briefly set the Nuremberg landscape. Second, I will orient you to Jackson. Third, I will traverse the chronology of the international Nuremberg trial, which was Jackson's trial. And fourth, I will discuss a number of episodes that I think illuminate this theme of principled legal practice.

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I. The Nuremberg Trials

Justice Robert Jackson served on the Supreme Court from 1941 until his death in October 1954. For him, those thirteen terms of the Court amounted to only twelve years of domestic judicial service because he missed an entire term of the Court spanning from 1945 to 1946 to serve as the U.S. Chief of Counsel at what became the Nuremberg trials.

As U.S. Chief of Counsel, Jackson was a hands-on, responsible point man for the United States. In many ways, that is not a bad working definition for what it means to perform principled legal practice. Jackson served full-time for more than fifteen months as the U.S. Chief of Counsel creating, at the time, the one and only International Military Tribunal. There were ideas of subsequent international Nuremberg trials, but by fall 1946, the alliance that had won the war had fractured into the early days of the Cold War, and the Western interest—principally U.S. and British—in doing additional international trials had ended.

Jackson returned to the Supreme Court, but the Nuremberg trials continued. The city of Nuremberg was in the American sector of military occupation in what had been Nazi Germany until its surrender in May 1945. In 1946 and later, the United States continued to control Nuremberg and to hold trials there. A member of Jackson's staff was U.S. Army Brigadier General Telford Taylor, a significant member during the international trials and Jackson's successor as Chief of Counsel. Taylor presided over twelve subsequent Nuremberg trials—U.S.-only trials, tried before American-only judicial benches. These were called the Nuremberg Military Tribunals, or NMTs, in contrast to the International Military Tribunal, or IMT. The NMTs were sector cases that built on, and followed on, the international proceeding. You know some of the NMTs: the Medical Case (involving Nazi doctors and horrific human experiments), the Judges' Case (portrayed in the film *Judgment at Nuremberg*), the Industrialists' Case, the Hostage Case, the Einsatzgruppen Case, and so forth. These twelve subsequent Nuremberg trials began in the fall of 1946 and continued until the spring of 1949.

So the Nuremberg trial landscape is thirteen trials in less than four years: one international trial, which was the Jackson trial, and twelve American-only trials, which were the Taylor trials.

II. Robert H. Jackson

Jackson's life ran from 1892 to 1954. He was born in northwestern Pennsylvania. He first lived on a family farm, and then his family moved to New York State. He grew up in a little town called Frewsburg, where he graduated from high school in 1909 as the valedictorian of a small class. He then commuted up the valley to Jamestown, New York, for a second senior year of high school at a bigger school with better teachers.

That is where Jackson's general schooling ended; he never attended a day of college. Instead, he became an apprentice to two lawyers in Jamestown followed by some graduate school. Although he matriculated for one year at Albany Law School, to get some book learning, that year was bracketed by two apprenticeship years. Those were his three years of law preparation. So, high school, a little bit of extra high school, zero college, two law apprentice years, and one law classroom year made him a lawyer at age twenty-one—in 1913, as soon as he was old enough and eligible to take the New York bar examination, he did so and passed.

Jackson became a lawyer based first in Jamestown, then Buffalo, then back in Jamestown, of increasing stature in his communities, in those counties, across New York State, and then nationally. He did municipal, civil, criminal, trial, and appellate work, representing all types of persons and businesses. His oil and gas work in Pennsylvania connected him with Texas lawyers. He became, through work in various bar associations and sections, the head of the American Bar Association House of Delegates in 1933. So, in twenty years, Robert Jackson went from being a twenty-one-year-old nobody lawyer in the boondocks to a quite acclaimed, significant, and still very young American private practice lawyer.

Jackson also was a Democrat. And in the late 1920s, what was first an acquaintance became political support that ripened into a friendship with Franklin D. Roosevelt when he first ran for Governor of New York. From 1928 forward, this relationship became Jackson's path to public service, building on his private law career.

Jackson worked for the New Deal in 1934. He was nominated by President Roosevelt and confirmed by the Senate for a series of increasingly major jobs. The first was General Counsel of the Treasury Department's Bureau of Internal Revenue. Then he moved to Department of Justice as the Assistant Attorney General heading the Tax Division and then the Antitrust Division. Jackson then became the Solicitor General of the United States, arguing about forty cases before the Supreme Court and

cementing his reputation as a brilliant advocate. In 1940, Jackson became the Attorney General of the United States. In 1941, he was appointed an Associate Justice of the Supreme Court. He was only forty-nine years old.

If political paths had taken other turns, Robert Jackson might well have been President Roosevelt's successor, at least as the nominee of the Democratic Party in 1940. President Roosevelt was planning to head home after two terms. That would have triggered fierce political jockeying among Democrats, and Jackson was a leading prospect and interested. So if President Roosevelt had, in fact, retired and anointed Jackson, a Jackson presidency might well have happened. But of course it did not. Global events, Roosevelt's third term campaign, his re-election—all those things came instead.

In July 1941, President Roosevelt signed Jackson's commission as an Associate Justice of the Supreme Court. Notice that in 1941 although World War II had already begun, the United States had yet to enter the fray. Jackson went to the Supreme Court because, candidly, President Roosevelt told him in private that he wanted Jackson to become the Chief Justice when the position opened.

Less than six months later, Japan attacked Pearl Harbor, Nazi Germany declared war on the United States, and Justice Jackson felt that he was in backwater. Jackson told President Roosevelt that he would resign his seat so that somebody else could be appointed to the Court and Jackson could return to the administration to do something more useful. Roosevelt, almost patting him on the head metaphorically, told Jackson that he was not much of a warrior and that this was not a time that needed a lot of civilian legal brilliance, but that there might be things that he was uniquely suited to do after the war.

Roosevelt, of course, did not live to see the end of the war, much less the Nuremberg trial. But perhaps that pivot from war fighting, indeed war winning, to law-reestablishing, and Jackson being useful in that, is what the President meant by that comment.

III. The International Nuremberg Trial

In the same time period, the Nazis began to consolidate power. After the Reichstag Fire decree in 1933, Hitler became a unilateral and unrestricted chancellor. Concentration camps were developed, dispensing with the formalities of traditional legal procedure to concentrate, arrest, and detain people who were "enemies of the Reich." That meant communists,

labor leaders, homosexuals, Jehovah's Witnesses, and, in large numbers, Jews. Dachau, a former munitions plant south of Nuremberg, on the north side of Munich, was visible and open to the world, visited by the Red Cross, and depicted in newspaper photos. The idea of power and might solving social problems through this kind of containment was not anathema to the world's eyes. To many, it was one path to government stability and success at that very challenging time.

The Nuremberg rally in 1935 promulgated the Nuremberg Laws. But do not get the idea that this was actual legislative activity. The Reichstag had been reduced to a rubber-stamp legislature, so this was really a Fuehrer decree regarding who was considered a citizen and who no longer was. This put in place a "three grandparent rule": if the Nazis identified three of one's grandparents as a Jew, that meant that person was a Jew. It did not matter if one's grandparents considered themselves Catholic, Lutheran, atheist, agnostic, or any other faith. This was a Nazi bureaucratic determination that individuals should be categorized as Jews and that people who descend from them are Jews. The consequences of this decree were that one was no longer a citizen of the Reich, that one was barred from professions and occupations, that property was confiscated, that excessive taxation was levied, and that people were driven to emigration or worse as the state was consolidated.

By 1942, the U.S. had entered the war. Of Hitler's many mistakes, very high on the list was declaring war on the United States, which led President Roosevelt in one of his fireside chats, as early as October 1942, to refer obliquely to the barbed wire being strung around the neck of the people in Europe and suggesting that perpetrators would be held accountable. He, of course, was not using terms like "Nuremberg," "rule of law," "prosecution," or "international trial," but it was an early pronouncement of the path.

In November 1943, the United States and its allies signed the Moscow Declaration, an agreement that once the Allied Powers prevailed militarily, they would together hold the Nazi arch criminals accountable for starting this world war. The arch criminals were those whose crimes did not occur at a particular location, but instead encompassed the enormity of Nazi Germany's perpetration and aggression as the warmonger.

At Yalta in February 1945, when a haggard President Roosevelt had two months to live, the Allied leaders briefly reiterated this commitment, that together they would hold the arch criminals responsible.

On 12 April, Roosevelt passed away and Harry Truman inherited this enormous responsibility. Among the many commitments and things he really did not know much about was this "hold them accountable" commitment. What Truman concluded, advised by Secretary of War Henry Stimson, White House Counsel Sam Rosenman, Assistant Secretary of War John McCloy, and many others who were continuity from the Roosevelt administration, was that this project was a law project that needed America's best lawyer.

And so the same month, Truman reached out to the Supreme Court and asked Justice Robert Jackson if he would become the U.S. Chief of Counsel. At the time, it was believed that Hitler would soon be captured; in the private discussions, Truman was asking Jackson to be the prosecutor in the trial of Hitler and his immediate inner circle. Jackson agreed. The last days of April were spent negotiating details.

By the time Truman announced Jackson's appointment publicly on 2 May, Hitler was gone, as was much of his inner circle. All that Jackson had been told—an international agreement had been reached; that a collective plan was in place; that evidence had been gathered; that it was kind of a turnkey operation that he, a U.S. Supreme Court Justice, could do during the summer of 1945—turned out to be smoke and bologna. And Jackson was on the hook. Harry Truman had this off his desk. It was Robert Jackson's face, talent, credibility, and vision that took this project forward.

What Jackson had to do first was diplomacy. In Church House, Westminster Abbey, during summer 1945, Jackson and his Allied counterparts thrashed out how they were going to do this. The appointment of Jackson did cause each of the other Allied nations—the United Kingdom, the USSR, and France—to appoint jurists of stature and high ability. But working out their different legal systems and coming up with an agreement on how to proceed took many, many weeks around a four-sided table. On one side, you had Jackson and his deputy, Major General William J. ("Wild Bill") Donovan, who was an old friend from western New York and, showing the project's nonpartisan face, a Republican. The other three sides were British, French, and Russian teams.

Pretty quickly it was a two-perspective, hard negotiation. There was an Anglo-American alliance, naturally, and the French were largely comfortable with the plans and the due process model that the Americans and the British wanted. The Soviets had a high commitment to a trial, but of the type that they were familiar with from the 1930s forward: a trial

against those whom we have decided are criminals, at which we will explain what they have done, at which they will confess what they have done, on the way to executing them. In other words, the Soviet model of show trial viewed the Moscow Declaration as not just the start of a plan, but as a verdict, as a pre-commitment to a trial that would end in executions. That was the fundamental show trial versus due process trial dispute that carried on for weeks.

In the meantime, Germany had become sectors of occupation. Generally, there was an adjacency principle under which the sector closest to the USSR was the Soviet sector, the sector closest to Great Britain was the UK sector, the sector along the French border was the French sector, and the central sector was the American sector. The American Army proposed Nuremberg as the site for this trial. It was not clear that it would be a four-nation trial, but it would at least be an American-British-French trial. So in July 1945, Jackson invited his counterparts on a weekend flight to visit Nuremberg to inspect the site. No Soviets were interested in joining. What Jackson and his guests found was a city that had been bombed to smithereens. The bombings of 1944 and 1945, targeting industrial production in Nuremberg, had leveled the whole Old City. But on the outskirts of the Old City was a largely intact courthouse and prison structure: the Palace of Justice, fronting on the Fürther Straße, and behind it a wheel-and-spoke design prison. This facility could accommodate this trial and subsequent trials, be they four-nation, three-nation, or American-only.

Jackson and his colleagues inspected the sites and agreed that they would work, but they still did not have an agreement with the Russians. The Potsdam Conference happened just a week after this inspection trip. Some credit is due to Josef Stalin: in the discussions of what was happening at London, Truman (his team briefed by Jackson) understood that there was an impasse and told Jackson to do what he thought was right, to hold his ground and insist on due process, and Stalin (through Vyshinsky and underlings) instructed the Russians that they would stay in this alliance.

That meant on 8 August 1945, the London Agreement was signed, creating the International Military Tribunal (IMT), the world's first international criminal court. This was not a court-martial structure as you know it. It was called the International Military Tribunal because there was no Germany. That piece of terrain was under military occupation. A tribunal functioning there was going to be a military occupation tribunal.

What the London Agreement created was a four-nation court, with each nation appointing a principal judge and an alternate. It defined four crimes as being within the jurisdiction of this tribunal: the waging of aggressive war, the commission of war crimes, the commission of crimes against humanity, and conspiracy or common plan or agreement to accomplish the foregoing. It defined, in an annexed charter of the International Military Tribunal, procedures that would guide this proceeding: it would be public; the jurists would not be under (or working for) the prosecutor; the prosecutors would carry a burden of proof beyond a reasonable doubt; the rules of evidence would be liberal; each defendant would get the indictment in written form thirty days before the trial would begin; each defendant would also be able to employ, at Allied expense, counsel of choice; and there would be compulsory process and liberal discovery, to facilitate defense counsel effectiveness.

With that agreement in place, the Allies relocated to Nuremberg in September 1945. The Palace of Justice did have cosmetic problems, but it was repaired. An annex connected to the main courthouse contained Courtroom 600, located on what we would call the third floor, distinguished by its four large windows. In Courtroom 600 sat twenty-one defendants, their counsel of choice, judges, and teams of national prosecutors. The IMT president judge was Lord Geoffrey Lawrence of the United Kingdom. Next to him was former U.S. Attorney General Francis Biddle, who had been Solicitor General under Jackson. So there was a bit of a role reversal, if you will: in the Department of Justice, Jackson had been the principal and Biddle had been number two, and now Jackson was a prosecutor before Biddle as a judge. To Biddle's left sat the chief judge of the U.S. Court of Appeals for the Fourth Circuit, Judge John J. Parker, who, like Jackson, went AWOL from his federal court for a year in this form of national service. In total, there were eight judges. The Soviet judges wore military uniforms. No principal judge became ill or had to depart, so no alternate stepped up. They functioned as a court of eight. They all sat, they all participated in deliberations, and they all ultimately contributed to the judgment.

Jackson opened the case on 21 November 1945. This was amazingly swift, in hindsight, although the public at the time was quite impatient; from 8 May until only 21 November was the time it took to get this whole operation worked out and off the ground. Jackson's opening statement was an eloquent, renowned, powerful, and principled statement. The defendants were the surviving principal representatives of each sector of

Nazi perpetration. Defendant number one was Hermann Göring, the Reichsmarschall, Hitler's number two. Rudolf Hess, number three in his heyday, was next to him. The foreign minister, Joachim von Ribbentrop, sat next to him. General Wilhelm Keitel, the head of the Wehrmacht, was next to him, et cetera. These were not all the major war criminals. Had they lived, in addition to Hitler, Himmler and Goebbels would have been in the box. Had he been known to be alive and captured, Adolf Eichmann would have been another defendant. But many defendants were principal perpetrators. And they represented the sectors—military, civilian, governmental, and private—that were part of the rise to power, the consolidation, the oppression, and then the war-waging that was Nazi Germany. Almost every defendant was charged with each of the four crimes: conspiracy, waging aggressive war known as "crimes against peace" at the time, committing war crimes, and committing crimes against humanity.

The trial was principally about the crime of waging aggressive war which earned this moniker in 1949. Along the way, the prosecutors also began to comprehend, while prosecuting atrocities as dimensions of the war, what we know as the Holocaust. I put it that way because Nazi concentration camps were no secret—such camps, in the west, had been liberated in spring 1945 by American soldiers. But the vast architecture of Nazi extermination, including not only concentration camps but also slave labor camps and extermination camps in the east, which had been plowed under and liquidated by the Germans in 1944 and 1945, got discovered, proven, and somewhat understood by prosecutors during the trial.

The commandant of Auschwitz, Rudolf Höss, was a fugitive until his apprehension by the British in early 1946. The Allies gave notice of this to the defense attorneys and one of them, although the prosecution cases had closed, called Höss to Nuremberg to testify. He explained what Auschwitz was and what he had done as commandant. One of the perversities of the trial, among many, was that Höss, we now know from Holocaust historiography, exaggerated what he viewed as his accomplishments. He claimed that he had gassed over 2 million people during his years as the commandant of Auschwitz. If he had completed the job of exterminating the Jews of Europe, he might have reached that number. But we now understand that the fact was approximately 1.2 million.

Jackson finished the trial work in July 1946, after a full Supreme Court term had passed without him. The IMT rendered judgments on twenty-one

individuals: eighteen were convicted and three were acquitted. Of the eighteen who were convicted, eleven were sentenced to death and seven were sentenced to terms of confinement ranging from ten years to life. The three acquitted men were given safe passage from the courthouse that night. This was not a show trial. Although acquittals stung in the moment for Jackson as the prosecutor—he thought two were unjustified—he felt proud, after reflection, of the cases he "lost" because they were tangible proof that this had not been a rigged proceeding.

The Palace of Justice has largely been turned over to history. Today, it houses the Memorium, a museum and a teaching center in and around Courtroom 600.

IV. Principled Legal Practice

I now turn to the Nuremberg legacy that is international law in addition to evidence of Nazi criminality.

I spent a fair amount of time in preparation for this lecture trying to reflect on, understand, and get inside the idea of principled legal practice. It is an argument for the rule of law. What that contains, however, is often unstated. The rule of law at one level is just a look to the positive, pre-existing decrees of a system that one is under or a part of. The Nazis, in other words, had law. So did the Confederacy. So did any regime, any system of order, that one could point to. And if the idea of principled legal practice simply means sticking to the positive law that exists (i.e., do not make progress in law and do not apply *ex post facto* things that do not exist in law), we have a static situation that could well be illustrious or could well be immoral. I think what principled legal practice means is just that—sticking to the positive law that exists. Valuing the rule of law is about *when* it is to be valued and, indeed, only when it is to be valued. And the reasons for putting valuation on law is that it coincides with, it persuades us that it meets our senses of fairness and right.

In that framework, alternatively, sometimes it is better to break with the past because past law has bad content. I will give you two examples. One is what the London Agreement declared to be the principal crime. The sovereign prerogative seen across history of waging war was no longer an option of national sovereigns; it was a crime to breach the peace. It had been so declared by the nations after the Great War. The Kellogg-Briand Treaty of many nations and the bilateral treaties of Germany (among others) with various nations, foreswore war as an option of national

behavior. And the London Agreement said we were delivering on that commitment with enforcement. A second category of law that was better to break with as a matter of principle was the law of violating human rights. The Allies viewed the Nazis' Nuremberg Laws not as law, but as evil and as criminality. In those situations—those break situations; those progress situations; those choice situations (and 1945 was, of course, a hallmark year for all of that)—rule of law meant moving our legal institutions to recognize better content. Principled meant the values, the ends, and also, in making those moves and taking those steps, a kind of visible, accountable, personalized process of acting on principle.

I suggest humbly that that is what Justice Jackson did as the U.S. Chief of Counsel. I will illustrate this in ten aspects presented chronologically across the time period in which he was serving in that appointment.

First, at the beginning, in April 1945, I do think that Jackson accepting the job, and when he learned it was a bill of goods just weeks later, sticking with this commitment in May 1945, was an illustrative aspect of principled behavior. It had significance for his country and the world. It was a request from his President, a good man and a newcomer to an unsought office. It dealt with perhaps the greatest scourge that human history contains—war itself, waged by perpetrators, by aggressors, on innocents. And so Jackson's stepping up when he had the comfortable job of all comfortable jobs was, if I may, a form of principled legal practice. And he did not know that it was going to work.

Second: In June 1945, after a first survey trip to the European Theater, Jackson returned to Washington to prepare to pack up and relocate for good. He wrote a private report to President Truman (soon released publicly) that was a great state paper. It was a description of the plan and it was really an early articulation of the due process model of holding these arch criminals accountable. Jackson said that there were alternatives. We could finish them off by executive action. We have the power, we have total control, and they have surrendered unconditionally. We could just call it a victory and let them slink away. Historically, that was the way wars often ended, with the victor aggrandized and the defeated disappearing into the woods. But neither of those would sit well. Letting the Nazis slink away would not sit well with the American and Allied publics that had paid such a cost to defeat this aggressor. And finishing them off, firing squads, executive actions in whatever numbers, "would not set easily on the American conscience or be remembered by our children with pride." Between those two options, what we have is what we

know and what we have built over our centuries: due process, fairness, public accountability, and leadership. And that was what Jackson proposed to do, which was exactly what Truman appointed him to do.

Number three: In July 1945, the work in London, the holding of that ground by Jackson, empowered by Truman to go the Russian way or to possibly start the Cold War, was a complex tactical choice but ultimately a values choice. And although there would have been, I think, a lot of emotional satisfaction in the short term in a show trial that finished off every defendant quickly, history's children (and grandchildren) would not have looked on that with pride.

A fourth moment, August 1945, related to the London Agreement's declarative components. The London Agreement declared two things. It announced that these crimes violate the international legal order. Never in one place had there been a document pulling these all together and then creating a tribunal with jurisdiction to adjudicate them. This announcement drew on the Hague conventions and preexisting laws of war crimes. It drew on the treaties forswearing war. It developed, out of concepts and no formal agreements, the idea of crimes against humanity. And it took an Anglo-American concept, conspiracy, and tried to get civil law minds to understand why agreement itself is such a danger. It took this stand in public, announcing that this is where we already are and this is where we will be. Its other declaration was that following orders is no defense. It is often, I think, misremembered that the Nuremberg trials concluded that following orders was no defense. In fact, the Nuremberg plan and the London Agreement *declared* that for the trials (and henceforth), following orders was no defense. There used to be total impunity: the head of state was immune from legal liability for war because it was a prerogative of sovereignty, and underlings were immune because following orders was something that one had no choice to avoid. The London Agreement declared that both of those notions were off the table and said we have progressed to different views.

Number five, in October 1945, was the trial plan. This led to a break between Jackson and Donovan. Jackson decided that this would not be a cooperator-based case. It would not be a swearing contest between witnesses. It would not be based in plea bargaining and deals. Instead, the captured German documents—unambiguous, authentic, and incredibly damning—would be the backbone of the prosecution case. Jackson had headed the Antitrust Division in the U.S. Department of Justice and been a top government tax law enforcer, so the document-based methods of those

civil proceedings were familiar to him. Perhaps employing them consciously, he built the Nuremberg case on Nazi documents. This really irked the reporters, which you can see in the press conferences and the reporting day to day. They wanted action. They wanted showdowns. They wanted speed. They wanted courtroom drama. But, of course, the record, what Nuremberg shows, what the Third Reich was, came right out of those documents, which amply justified the defendants' criminal convictions.

Sixth was Jackson's decision to give the opening statement in November 1945. Putting his face, his eloquence, and his commitment behind the declaration "The evidence will show…." got the world's attention on the front end of the trial. That was Truman's reason for choosing him, and that was Jackson's courage in going to that podium, with the preparation of his vast team and the analysis of what the documents would show.

Number seven: Defending Nuremberg as it went forward. I will note that the military in the United States was no fan, generally, of aspects of the Nuremberg trial. The *Army and Navy Journal* published a lacerating editorial critique in December 1945, stating that prosecuting military officers for conducting military affairs in traditional men-in-arms ways was an irresponsible, rigged, disgraceful enterprise. Robert Jackson, who could have ignored that view or suffered under it, took it on directly. And, so, the public relations side of his work, if you will, included explaining why people like Wilhelm Keitel, Alfred Jodl, Erich Raeder, and Karl Dönitz were facing judgment—because of individual conduct in violation of laws of war.

The eighth aspect occurred in winter and spring of 1946, during which Jackson had continuing, hands-on responsibility for this project. Although a chief could have stayed in the office and let underlings catch a lot of the courtroom flack, Jackson made legal arguments in court throughout the trial, handled witness examinations throughout the trial (including multiple defendants), and paid a professional cost by being away from the Supreme Court, which got increasingly irked as eight justices were doing the work of nine. Jackson also was open to letting the case evolve as new evidence emerged. This caused tension among the nations who were the prosecutors. For example, in spring 1946, the secret provisions of the 1939 pact between the USSR and Nazi Germany, the Molotov-Ribbentrop pact, were introduced by Ribbentrop as part of his defense. The Russians wanted this kept out of the trial and suppressed. Jackson would not sign on.

Ninth was Jackson's closing statement in July 1946. It was more bombastic than his opening the previous November. Closings can be that way. He stressed the personal guilt of the defendants. He did not condemn the German people as a whole; although there was much to be criticized there as a political culture in support of Nazism. Jackson explained that what trial work is about is carrying a burden of proof as a prosecutor and about individuals in the dock.

And, finally, tenth, Jackson for the rest of his life, 1946 through 1954, explained, taught, defended, reflected on, and reassessed what Nuremberg was. He did not duck back into domestic life. Yes, he did his Supreme Court day job quite brilliantly, but in speeches and writings he dealt directly with the hard critiques of Nuremberg. Was this victor's justice? Was this *ex post facto* criminalization and prosecution? Was this making up something that was just another weapon to defeat Nazi Germany? Jackson, as he had argued in court, argued and taught the public, including lawyers and the legal community, that there were satisfactory, legal, and principled ways to understand Nuremberg. And then, stepping back, Jackson said, "One of the chief obstacles to this trial was the lack of a beaten path. A judgment such as has been rendered shifts the power of the precedent to the support of these rules of law. No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law—and law with a sanction."

And so, by each of those measures, at least as I operationalize it, Jackson at Nuremberg is a case study in principled legal practice--not perfection, but one lawyer's visible, accountable, value-based, forward-moving work.

Conclusion

The photograph of Jackson as he left Nuremberg for the last time in October 1946, right after the IMT judgment was rendered, shows what I believe is a bit of relief on the face of someone who had completed unprecedented work. It was hard work, and he did it with everything he had. He was later recognized and decorated with the Medal for Merit by Secretary of War Robert P. Patterson.

Jackson had a nice phrase—he said that the meaning of Nuremberg will become clear in the "century run." That meant one hundred years out, long after he would be around to explain or defend it. In other words, history

hands Nuremberg down to us. And what you do as judge advocates is work in and on that century run.

Nuremberg is now seventy-five years old, so it is getting up there. But it is still vibrant, still developing. And it is increasingly meaningful because of what we do with it, our inheritance.

Thank you very much for your attention. It has been a high honor to give this lecture.