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MILITARY LAW REVIEW

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TRANSFORMING MILITARY JUSTICE: THE 2022 AND 2023 NATIONAL DEFENSE AUTHORIZATION ACTS

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I. Introduction

For the past decade there have been numerous and significant changes to the Uniform Code of Military Justice (UCMJ), the statutory basis for the military justice system. [1]

Although the Military Justice Act of 2016 made major changes to the UCMJ,[2] the calls for change continued. One of the most-often heard calls for reform over the last decade has suggested removing commanders from the military justice system.[3] Some have argued that a command-centric military justice system was outdated, and it was time to make the

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[1] Congress made a number of significant changes to the UCMJ in the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996), the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1631 (2013), the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013), and the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014). Congress also made sweeping changes to the UCMJ in the 2016 Military Justice Act, Pub. L. No. 114-328, sec. 5001, 130 Stat. 2000, 2894. Congress made additional amendments to the UCMJ in the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 and in the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (2018). Congress made further changes in the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019), and in the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub L. No. 116-283, 134 Stat. 3388.

[2] *See, e.g.*, sec. 5542, 130 Stat. at 2935; *see generally* David Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY'S L.J. 1 (2017) (discussing 2016 changes to the UCMJ).

[3] For example, in 2013, Senator Kirsten Gillibrand sponsored the Military Justice Improvement Act (MJIA), which proposed that commanders would no longer have jurisdiction over specified offenses and the commander's power to grant post-trial clemency would be limited. Military Justice Improvement Act of 2013, S. 1752, 113th Cong. (2014). That proposal failed in the Senate by a close vote, despite bipartisan support. *See Actions Overview: S.1752—113th Congress (2013-2014)*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/senate-bill/1752/actions (last visited Aug. 9, 2023). For another example of a modern call to decrease the commander's role in the military justice system, see Eugene Fidell, *What Is to Be Done? Herewith a Proposed Ansell-Hodson Military Justice Reform Act of 2014*, GLOB. MIL. J. REFORM (May 13, 2014), http://globalmjreform.blogspot.com/2014/05/what-is-to-be-done-herewith-proposed.html (proposing "Ansell-Hodson Military Justice Reform Act of 2014").

system look more like the federal criminal procedure system.[4] Other critics have advocated for a military justice system that looks more like those of our allied nations.[5]

In large part, those calls for reform were driven by the seemingly intractable problem of sexual assaults in the military.[6] While there were other proposed changes to the UCMJ, calls for reducing the role of the commander took the lead.[7]

On 27 December 2021, the President signed the National Defense Authorization Act for Fiscal Year 2022 (2022 NDAA).[8] The 2022 NDAA effected a number of significant changes to the UCMJ. In October 2022, the Department of Defense (DoD) published proposed changes to the Manual for Courts-Martial (MCM), which are intended to

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[4] *See, e.g.*, Heidi L. Brady, *Justice Is No Longer Blind: How the Effort to Eradicate Sexual Assault in the Military Unbalanced the Military Justice System*, 2016 UNIV. ILL. L. REV. 193 (2016) (proposing use of independent prosecutors); Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129 (2014) (proposing that military lawyers have prosecutorial discretion over disposition of offenses); Letter from Heidi Boghosian, Exec. Dir., Nat'l Laws. Guild, to Mr. Paul S. Koffsky, Deputy Gen. Coun., Dep't of Def. (June 30, 2014) (recommending that prosecutorial discretion be placed in hands of independent prosecutors).

[5] *See, e.g.*, Lindsy Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMP. & INT'L L. 169 (2006) (comparing the American military system with those of Canada and Israel); Eugene Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. REV. 195 (2000) (noting that other countries are changing how military cases are prosecuted and that American military justice pays little attention to those developments); Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398, 1400 (1973) (noting that other countries' approaches are "especially relevant").

[6] Meghann Myers, *The Military's Sexual Assault Problem Is Only Getting Worse*, MIL. TIMES (Sept. 1, 2022), https://www.militarytimes.com/news/your-military/2022/09/01/the-militarys-sexual-assault-problem-is-only-getting-worse.

[7] Jennifer Steinhauer, *Deal to Change How Military Handles Sexual Assault Cases*, N.Y. TIMES, Dec. 8, 2021, at A15.

[8] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021) (effective Dec. 2023). Though the effective date of the National Defense Authorization Act for Fiscal Year 2022 (2022 NDAA) is December 2023, some provisions became effective earlier and others become effective on later dates. *See, e.g.*, *id.* sec. 539E(e).

implement those required changes to the UCMJ.[9] A few months later, in the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (2023 NDAA), Congress enacted additional changes to the UCMJ, which will further impact the changes brought by the 2022 NDAA.[10] On 28 July 2023, the President signed Executive Order 14103, which amends the MCM.[11] While some of those amendments are effective immediately, some of them become effective on the same date as the 2022 NDAA, December 2023.[12] This article addresses those changes and suggests that certain issues, not addressed in the 2022 NDAA, will continue to present challenges to those charged with administering military justice procedures.[13]

Part II addresses the changes made to the role of the commander, which in effect create a bifurcated system of military justice. In the 2022 NDAA, Congress created the Office of Special Trial Counsel which will have, *inter alia*, the exclusive authority to refer certain "covered offense[s]," as well as other "[k]nown and related offenses… alleged to have been committed by a person alleged to have committed the covered offense"[14] to court-martial. All other offenses will continue to be processed in the manner in which they have been handled since the adoption of the UCMJ in 1950.

Part III addresses the second major area of reform, the sentencing portion of courts-martial. Congress adopted a proposal in the 2022

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[9] U.S. Dep't of Def., Annex to Manual for Courts-Martial; Proposed Amendments, 87 Fed. Reg. 63484 (Oct. 13, 2022), https://jsc.defense.gov/Portals/99/Annex%20to%20the%20draft%20E_O_.pdf.

[10] *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 541, 136 Stat. 2395, 2579 (2022).

[11] Exec. Order No. 14103, 88 Fed. Reg. 50535 (July 28, 2023).

[12] *See id.*

[13] For example, although the 2022 NDAA creates the position of special trial counsel, who will have exclusive authority in several areas of military justice, the Act does not change the role of the commander in a significant number of other areas (topics that we discuss below).

[14] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 531(a), § 824a(c)(2)(B), 135 Stat. 1541, 1692 (2021) (effective Dec. 2023).

NDAA that military judges conduct the sentencing in all courts-martial.[15] In addition, Congress mandated that the President adopt sentencing parameters and criteria.[16]

Part IV focuses on the provisions of the 2022 NDAA that expand victims' rights in the military justice system.

Part V addresses changes that the 2022 NDAA made to the punitive articles of the UCMJ.

In Part VI we address three changes that were made in the 2023 NDAA: requiring random selection of court members, expanding of the jurisdiction of the Service Courts of Criminal Appeals, and ensuring that the convening authority is not identified in the opening session of the court-martial.

Finally, in Part VII we offer some thoughts and recommendations on the potential impact of the 2022 and 2023 NDAAs on the American military justice system.

II. Reducing the Role of the Commander

A. An Overview of the Commander's Role in the Current System

Before discussing the 2022 NDAA changes to the military justice system, it is important to briefly review the current system of investigating and prosecuting Service members. Under the current system of military justice, commanders in an accused's chain of command[17] have very broad discretion in deciding how to dispose of

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[15] *See id.*, sec. 539E(a)(1), 135 Stat. 1541, 1700 (2021). Previously a Service member could "elect sentencing by [panel] members." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1002(b) (2019) [hereinafter MCM].

[16] *See* sec. 539E(e), 135 Stat. at 1700. In 2015, the Military Justice Review Group recommended "draw[ing] upon practice and experience in the civilian sector, including under the U.S. Sentencing Guidelines," so any similarity to the Federal system may not be coincidental. MIL. JUST. REV. GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 511 (2015) [hereinafter MJRG REPORT].

[17] It is important to note, as discussed below, reducing the commander's role in processing court-martial charges will impact multiple commanders in the accused's chain

alleged misconduct by Service members. Upon learning of a potential offense, unit commanders have the responsibility to ensure investigations into potential charges are conducted.[18]

If the commander[19] determines that a UCMJ violation has occurred, they have several disposition options, some of which may be used concurrently or consecutively. First, they may decide that counseling the Service member or issuing a reprimand is sufficient.[20] Second, the commander may decide to begin administrative proceedings to discharge the Service member.[21] Third, the commander may decide to impose nonjudicial punishment (NJP).[22] Under this third option, which is intended to be used for "minor" offenses,[23] the commander decides whether the Service member is guilty and, if so, adjudges the punishment. Finally, the commander may decide to formally prefer charges against the Service member.[24]

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of command who are currently involved in processing court-martial charges. For example, the immediate commander would prefer charges, but other commanders are involved in disposition for a case such as the summary court-martial convening authority (e.g., battalion commander), the special court-martial convening authority (e.g., brigade commander), and general court-martial convening authority (e.g., division commander) who all have important roles in the disposition process. So, in passing the 2022 and 2023 NDAAs, Congress, in effect, has removed multiple commanders from the military justice system for covered offenses.

[18] *See generally* MCM, *supra* note 15, R.C.M. 303 (providing that immediate commanders "make or cause to be made a preliminary inquiry"). Also, the Discussion to R.C.M. 303 acknowledges that law enforcement agencies will conduct investigations in serious or complex cases, including sexual assaults. *See id.* R.C.M. 303 discussion.

[19] Since 2012, "commander" has had a specific meaning when addressing those offenses that will be within the special trial counsel's purview. Memorandum from Sec'y of Def. to Sec'ies of Mil. Dep'ts, subject: Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (20 Apr. 2012); MCM, *supra* note 15, R.C.M. 306 (2019) (elevating disposition authority of cases including allegations of rape, sexual assault, and forcible sodomy or attempting to commit those offenses to special court-martial convening authorities, very senior leaders).

[20] *See* 1 DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 1-8(B), at 56 (10th ed. 2018).

[21] *See id.*

[22] *See* UCMJ art. 15 (2012) (setting out procedures for nonjudicial punishment).

[23] *Id.* art. 15(b).

[24] *See* UCMJ art. 30 (2016).

If charges are preferred, they are forwarded up the chain of command for recommendations and action. If the command believes that the charges are serious enough to warrant a general court-martial, roughly the equivalent to a civilian felony trial, the commander orders that an Article 32 preliminary hearing be held.[25] At that hearing, the accused is entitled to be present, to have the assistance of counsel, and to cross-examine witnesses that are produced to testify, if any.[26]

Then, in the case of a general court-martial, the convening authority reviews the report of the Article 32 hearing officer and pretrial advice from the staff judge advocate,[27] and if the convening authority believes that the charges warrant a court-martial, convenes a court-martial,[28] selects the members,[29] and refers the charges to that court-martial for a trial.[30]

During the pretrial processing of the case, and even after the charges are referred to a court-martial, commanders are involved in decisions concerning pretrial confinement,[31] grants of immunity to witnesses,[32] and disposition of the charges.[33] After the court-martial renders a verdict and sentence, the convening authority has some power to review and modify the findings and sentence of the court-martial, depending on the severity and nature of the charges that result in convictions.[34]

Throughout this process, uniformed judge advocates are heavily engaged. Uniformed lawyers do much more than provide legal advice to the commanders. Although the practice among the Services may vary, judge advocates shepherd the criminal investigation, advise the criminal investigators on whether to title the Service member, draw up the charge

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[25] *See* UCMJ art. 32 (2021).
[26] *Id.* arts. 32(f)(1)-(3).
[27] UCMJ art. 34 (2021); MCM, *supra* note 15, R.C.M. 406.
[28] *See* UCMJ art. 22 (2021).
[29] *See* UCMJ art. 25 (2016).
[30] *See* UCMJ art. 33 (2016).
[31] *See* UCMJ art. 9 (1956).
[32] MCM, *supra* note 15, R.C.M. 704.
[33] *Id.* R.C.M. ch. IV at II-35.
[34] *Id.* R.C.M. 1109, 1110.

sheet, represent the command at the Article 32 hearing, and prosecute the accused Service member at the court-martial.[35]

B. The Relentless Drumbeat for Removing the Commander from the American Military Justice System

Since the founding of the country, the American military justice system has relied on commanders.[36] As noted in the preceding discussion, the system has been command-centric. Commanders at all levels are an integral part of preferring, processing, and referring charges to courts-martial.[37] In 1950, when Congress adopted the UCMJ, uniformed judge advocates became an important part of the system, but commanders—for the most part—have retained the final authority over many aspects of the military justice system. For example, until the last decade, the convening authority, the commander who referred court-martial charges, had the power to take a wide range of post-trial actions on both the findings and sentence of the court-martial.[38]

Starting in 2010, Congress began slowly diminishing the role of commanders.[39] By transferring more authority to military judges and

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[35] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (20 Nov. 2020) (directing uniformed judge advocates to perform various duties).

[36] *See generally* 1 SCHLUETER, *supra* note 20, § 1-8 (discussing the current system of military justice, which relies heavily on commanders for pretrial processing of a court-martial).

[37] *See generally* David Schlueter & Lisa Schenck, *Taking Charge of Court-Martial Charges: The Important Role of the Commander in the Military Justice System*, 14 N.Y.U. J. L. & LIBERTY 529 (2020) (addressing commanders' important roles in the military justice system).

[38] *See* 1 SCHLUETER, *supra* note 20, § 17-7 (discussing role of convening authority in post-trial review of court-martial).

[39] *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, sec. 566, 123 Stat. 2189, 2313 (2009) (directing a determination of whether DoD's standing sexual assault prevention policies and implementation plans are adequate to adjudicate violations under the UCMJ); *see also* National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, sec. 576(d)(1)(G), 126 Stat. 1632, 1760 (directing an assessment of "proposed legislative initiatives to modify the current role of commanders in administration of military justice and adjudication of . . . sexual assault crimes"); *see also* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, sec. 1731(a)(1)(A), 127 Stat. 672, 973 (2013) (directing an assessment of "the impact . . . that

uniformed attorneys, the military justice system has taken on the look of a lawyer-centric system that could be described as a civilianization of military justice.[40]

Some argued that the frequency of sexual assault in the military must be tied to the uniqueness of the command-centric decision-making authority within the military justice system, insinuating that commanders were not taking the problem seriously.[41]

Some believed that uniformed judge advocates, not commanders, should be responsible for preferring and referring charges to a court-martial.[42] Still others have suggested that the trial of Service members should be the responsibility of civilian prosecutors[43] or perhaps an independent military command.[44]

In response to this chorus of reformers, in the 2022 NDAA, Congress addressed the commander's role in the military justice system.

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removing from the chain of commander any disposition authority regarding charges preferred under . . . the [UCMJ] would have on . . . prosecution of sexual assault cases.").

[40] *See generally* Walter Cox, *The Army, the Courts, and the Evolution of Military Justice*, 118 MIL. L. REV. 1, 28-30 (1987); Delmar Karlen, *Civilianization of Military Justice: Good or Bad*, 60 MIL. L. REV. 113 (1973); Fredric I. Lederer, *From Rome to the Military Justice Acts of 2016 and Beyond: Continuing Civilianization of the Military Criminal Legal System*, 225 MIL. L. REV. 512 (2017).

[41] *See, e.g., The Military Services' Prevention of and Response to Sexual Assault: Hearing Before the Subcomm. on Pers. of the Comm. on Armed Servs.*, 116th Cong. (2019) (statement of Sen. Kirsten Gillibrand) (stating that "one of the main causes of [continued sexual assaults in the armed forces] is that despite many good leaders, far too many commanders do not make it a priority to address the problem of sexual assault in the military in a meaningful way"). *But see* Jordan Stapley & Geoffrey Corn, *Military Justice Reform: The 'Be Careful What You Ask For' Act*, MIL. TIMES (June 2, 2021), https://www.militarytimes.com/opinion/commentary/2021/06/02/military-justice-reform-the-be-careful-what-you-ask-for-act (arguing that shifting authority away from commanders is "more symbolic than necessary").

[42] *See, e.g., supra* note 4.

[43] *See generally supra* note 5.

[44] *See supra* note 3.

C. The Compromise: The Pentagon, the Senate, and the House of Representatives Weigh In

The final provisions in the 2022 NDAA, which ultimately reduced the commander's role in the military justice system, were a compromise between proposals from the DoD, the Senate, and the House of Representatives.[45]

While it does not appear that the DoD formally presented documented, proposed legislation, its views were reflected in the recommendations from the Independent Review Commission on Sexual Assault (IRC) (established by Secretary of Defense Austin) issued in May 2021.[46] That Commission recommended, *inter alia*, the establishment of the Office of the Special Victim Prosecutor in the Office of the Secretary of Defense (OSD).[47] That office would decide whether to prosecute certain offenses, including sexual assault, sexual harassment, and certain hate crimes.[48]

The House and Senate approaches, both of which seemed to be attempts to implement the recommendations of the Independent Review Commission, were similar, but they included more offenses that would fall under the discretion of a special military prosecutor.[49] The House proposed delimiting the commander's prosecutorial authority for thirteen offenses, and two Senate proposals would have covered eight and thirty-eight offenses, respectively.[50]

The compromise among the various proposals resulted in the creation of the Office of Special Trial Counsel, a new position for a uniformed judge advocate. The special trial counsel will be entrusted

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[45] *See* ALAN OTT & KRISTY N. KARMARK, CONG. RSCH. SERV, R46940, MILITARY JUSTICE DISPOSITION DELIMITATION LEGISLATION IN THE 117TH CONGRESS (2021).
[46] *See generally* IND. REV. COMM'N ON SEXUAL ASSAULT IN THE MIL., HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY (2021) [hereinafter IRC HARD TRUTHS 2021] (issuing more than eighty recommendations to address sexual assault accountability and prevention).
[47] *See id.*
[48] *See id.*
[49] *See* OTT & KARMARK, *supra* note 45.
[50] *See id.*

with prosecutorial discretion over fourteen of the most serious offenses, and three inchoate offenses, under the UCMJ.[51] Additionally, special trial counsel will take on those related offenses that may be joined with those charges at trial.[52]

D. Creation of the Special Trial Counsel

Section 531 of the 2022 NDAA creates the Office of Special Trial Counsel by directing the addition of Article 24a to the UCMJ.[53] In summary, that new article provides that each military Service Secretary will promulgate regulations assigning commissioned judge advocates, uniformed lawyers, to serve as special trial counsel.[54] The lead special trial counsel must be in the grade of at least O-7,[55] with military justice experience.[56]

The special trial counsel will have exclusive authority to refer court-martial charges for "covered offenses."[57] The covered offenses include: Article 117a (Wrongful Broadcast or Distribution of Intimate Visual Images); Article 118 (Murder); Article 119 (Manslaughter); Article 120 (Rape and Sexual Assault Generally); Article 120b (Rape and Sexual Assault of a Child); Article 120c (Other Sexual Misconduct); Article 125 (Kidnapping); Article 128b (Domestic Violence); Article 130 (Stalking); Article 132 (Retaliation); Article 134 (Child Pornography); Article 80 (Attempt to commit one of the foregoing offenses); Article 81

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[51] *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 531(a), § 824a(c)(2)(B), 135 Stat. 1541, 1692 (2021) (effective Dec. 2023); *infra* notes 57-58 and accompanying text.
[52] Sec. 531(a), § 824a(c)(2)(B), 135 Stat. at 1692.
[53] *Id.* sec. 531, 135 Stat. 1541, 1692 (2021).
[54] *Id.* sec. 531(a).
[55] *Id.* sec. 531(a), § 824a(b)(2).
[56] *Id.* sec. 531(a), § 824a(b)(1)(B) (specifying that the special trial counsel shall be "qualified, by reason of education, training, experience, and temperament"). Later within the statutory scheme, Congress directs that in order to be appointment as the lead special trial counsel, an officer must have "significant experience in military justice." *Id.* sec. 532(a), § 1044f(a)(2)(A). The Act does not further address or define what is meant by the term "significant experience in military justice."
[57] *Id.* sec. 531(a), § 824a(c)(2)(A).

(Conspiracy to commit one of the foregoing offenses); and Article 82 (Solicitation to commit one of the foregoing offenses).[58]

In the 2023 National Defense Appropriations Act,[59] Congress added the following offenses to the list of covered offenses that will fall within the Office of the Special Trial Counsel's prosecutorial discretion: Article 119a (Death or injury of an unborn child);[60] Article 120a (Mails: deposit of obscene matter);[61] and Article 134 (Sexual harassment) (effective at the later date of 1 January 2025).[62]

The special trial counsel's decision to refer charges and specifications to a court-martial is binding on the convening authority.[63] In addition, where the covered offenses are concerned, the special trial counsel has the exclusive authority to withdraw or dismiss the charges,[64] enter into plea agreements with an accused,[65] and determine whether a rehearing would be impracticable.[66] This process stands in stark contrast to the previous system in which only designated commanding officers were authorized to convene courts-martial. These convening authorities then maintained the sole power to refer charges, thereby convening the court-martial,[67] and further maintained the sole power to enter into plea agreements with an accused Service member, although the court acted to bind the parties upon acceptance of the plea.[68]

If the special trial counsel decides not to prefer or refer charges for a covered offense, the commander or convening authority may exercise any of the other options that remain available to that officer under the

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[58] *Id.* sec. 533(2), § 801(17) (amending UCMJ art. 1 by listing covered offenses).
[59] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 541(a)(1), 136 Stat. 2395, 2579-80 (2022).
[60] *Id.* sec. 541(a)(1), § 801(17)(A) (adding UCMJ art. 119a as a covered offense).
[61] *Id.* sec. 541(a)(1), § 801(17)(A) (adding UCMJ art. 120a as a covered offense).
[62] *Id.* sec. 541(b)(1)(B), § 801(17)(A) (adding sexual harassment as a covered offense under UCMJ art. 134).
[63] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 531(c)(4), 135 Stat. 1541, 1692 (2021).
[64] *Id.* sec. 531(a), § 824a(c)(3)(A).
[65] *Id.* sec. 531(a), § 824a(c)(3)(C).
[66] *Id.* sec. 531(a), § 824a(c)(3)(D).
[67] *See generally* UCMJ arts. 22, 23 (2019).
[68] UCMJ art. 53a(d) (2019). *See* Section II.E(6) *infra*.

UCMJ, except referral of charges for a covered offense to a special or general court-martial.[69]

Pursuant to 2022 NDAA Section 532, the Service Secretaries must establish policies for the Office of Special Trial Counsel. Those policies must address oversight functions, responsibilities, experience level of those assigned to work for special trial counsels, insulation from unlawful command influence, and victim input. In short, the 2022 NDAA directs a deliberate, Service-specific process through explicit direction to establish an office which will supervise and oversee the special trial counsel.[70] The lead special trial counsel will be responsible for the special trial counsel in that Service and will report directly to the Secretary of the Service concerned, "without intervening authority."[71] This is an apparent intent to insure that the special trial counsel are not responsible to the established chain of command for uniformed lawyers. The special trial counsel, and other personnel assigned to that office, are to be "independent of the military chains of command of both the victims and those accused."[72] The special trial counsel must be experienced, well-trained, and competent to handle cases involving the covered offenses.[73] Cases are to be free from "unlawful or unauthorized influence or coercion."[74] Commanders of the victim and the accused will have the ability to provide nonbinding input to the special trial counsel regarding the disposition of covered offenses.[75] Finally, the policies must reflect that any lack of uniformity will not make any such "policy, mechanism, or procedure" unconstitutional, although there appears to be no express provision requiring uniformity among the Services.[76]

The 2022 NDAA also provides that beginning on 25 June 2022, the Secretary of Defense and the Secretaries of the military departments must report to the House and Senate Armed Services Committees on

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[69] Sec. 531(a), § 824a(c)(5), 135 Stat. at 1692.
[70] *Id.* sec. 532(a), § 1044f(a)(1), 135 Stat. at 1694.
[71] *Id.* sec. 532(a), §§ 1044f(a)(2)(B)-(C).
[72] *Id.* sec. 532(a), § 1044f(a)(3)(A).
[73] *Id.* sec. 532(a), § 1044f(a)(4).
[74] *Id.* sec. 532(a), § 1044f(a)(3)(B).
[75] *Id.* sec. 532(a), § 1044f(a)(5).
[76] *Id.* sec. 532(a), § 1044f(b).

actions taken and the progress of the Service Offices of Special Trial Counsel in meeting the "milestones" established by the act.[77]

E. Creating a Bifurcated System for Courts-Martial

As previously discussed, commanders traditionally have been an integral part of the military justice system.[78] Even though the role of uniformed judge advocates has expanded over the decades, the commander has remained a key player in ensuring allegations are properly investigated and in processing court-martial charges. This section addresses the commander's role and how the 2022 NDAA diminishes it. The following discussion explains how the 2022 NDAA creates a bifurcated military justice system—one for covered offenses and one for all other offenses.

1. Pretrial Investigations

In most cases, the disposition of court-martial charges begins with an investigation or inquiry into the allegations, which in turn involves coordination with law enforcement personnel.[79] Commanders are involved in authorizing search and seizures.[80] The 2022 NDAA does not directly impact this procedure, but the indication that the special trial counsel will have "exclusive" authority over specified aspects of processing court-martial charges suggests that this power may now

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[77] *See id.* sec. 532(c); *see also* JUDGE ADVOC. GEN., U.S. AIR FORCE, DEPARTMENT OF THE AIR FORCE REPORT ON THE STATE OF MILITARY JUSTICE FOR FISCAL YEAR 2022, at 1 (2022); OFF. OF JUDGE ADVOC. GEN., U.S. ARMY, U.S. ARMY REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2022, at 15 (2022); U.S. DEP'T OF HOMELAND SEC., U.S. COAST GUARD, MILITARY JUSTICE IN THE COAST GUARD (FY 2022): REPORT TO CONGRESS 4 (2022); U.S. DEP'T OF NAVY, U.S. MARINE CORPS, JUDGE ADVOC. DIV., U.S. MARINE CORPS REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2022, at 1-2 (2022); OFF. OF JUDGE ADVOC. GEN., U.S. NAVY, U.S. NAVY REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2022, at 1 (2022).

[78] *See supra* Part II.A.

[79] *See generally* 1 SCHLUETER, *supra* note 20, § 5-1 (discussing commander's investigation into alleged offenses).

[80] MCM, *supra* note 15, M.R.E. 315(d)(1).

reside with the special trial counsel.[81] But the 2022 NDAA is silent on the question of whether the special trial counsel will be involved in investigating the charges.

The 2022 changes to the MCM do not expressly address the role of the commander in the pretrial investigation stage, but the 2023 NDAA provides that when the special trial counsel becomes responsible for a case due to the inclusion of at least one covered offense alleged, the "residual prosecutorial duties and other judicial functions"[82] of the commander will transfer to the special trial counsel, to military judges, or other authorities; the 2023 NDAA specifies that the President is charged with effecting that transfer of power in the MCM.[83] The 2023 NDAA states that these changes will be effective in December 2023.[84]

Given the provisions in the 2023 NDAA, the commander's role in investigating possible charges for any of the covered offenses may change depending on how each Service defines and implements policies regarding the relationship between special trial counsel and the immediate commander.

2. Placing an Accused in Pretrial Confinement

Currently, the decision to maintain an accused in pretrial confinement rests with the accused's commander for the first seventy-two hours.[85] That decision always involves consultation with a uniformed lawyer, usually the counsel who will be responsible for

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[81] National Defense Authorization Act for Fiscal Year 2022 sec. 531(a), § 824a(c)(2)(A) ("A special trial counsel shall have exclusive authority to determine if a reported offense is a covered offense and shall exercise authority over any such offense.").

[82] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 541(c), 136 Stat. 2395, 2580 (2022). The language following this phrase suggests that "residual" in this context means tasks that the 2022 NDAA did not explicitly reassign from the commander to the special trial counsel and others. But this remains an undefined term that may include a non-exhaustive list of what one may consider "residual" during the law-making process. For ease of reference, this article identifies Section 541 as "the 2023 Residual Duties Provision."

[83] *Id*.

[84] *See id.*

[85] *See* MCM, *supra* note 15, R.C.M. 305(h)(2)(A).

prosecuting the case. After an accused is placed in pretrial confinement, the Rules for Courts-Martial (RCM) set out procedural protections for the accused, which include review by a "neutral and detached officer," (usually a judge advocate sitting as a magistrate) of the decision to continue pretrial confinement after seven days.[86]

The 2022 NDAA is silent on the issue of the potential role of the special trial counsel in a commander's decision to confine an accused. But the 2023 amendments to the MCM indicate that if the accused is alleged to have committed one of the covered offenses, the commander who placed the accused in pretrial confinement must notify the special trial counsel, as provided in regulations set out by the Service Secretary.[87]

The role of the commander in deciding whether to place an accused in pretrial confinement may change because of provisions in the 2023 NDAA. Again, because the 2023 Residual Duties Provision[88] specified that the President is charged with establishing regulations for effecting the transfer of the commander's residual powers,[89] one could argue that pretrial confinement decisions should be considered residual. Thus, the commander's role in deciding whether to place an accused in pretrial confinement may change if at least one covered offense is alleged to have occurred, and the new regulations place the decision regarding pretrial confinement exclusively in the hands of the special trial counsel. If the decision-making authority regarding pretrial confinement shifts to the special trial counsel, judge advocates may find themselves attempting to persuade senior uniformed attorneys rather than commanders. If no covered offenses are involved, then the role of the commander will remain the same.

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[86] MCM, *supra* note 15, R.C.M. 305.
[87] Exec. Order No. 14103, annex 2, § 2(m), 88 Fed. Reg. 50535, 50608 (July 28, 2023) (amending R.C.M. 305).
[88] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 541(c), 136 Stat. 2395, 2580 (2022).
[89] *Id.*

3. Initial Disposition and Preferring Court-Martial Charges Against an Accused

Another area not specifically addressed in the 2022 NDAA is the question of the commander's precise role in the disposing of alleged offenses. As discussed above, the commander generally has broad discretion in disposing of allegations of misconduct.[90] A commander, for example, may decide to take no action, issue a reprimand, take steps to administratively discharge a Service member, impose NJP, or prefer criminal charges.[91] Although the MCM provides that anyone subject to the UCMJ can prefer court-martial charges,[92] traditionally the accused's immediate commander signs the charge sheet as the accuser to prefer the charges;[93] then, the same immediate commander forwards those charges with a recommendation as to disposition to the next level commander in the chain of command.[94]

In the 2023 amendments to the MCM, the new RCM 306A, which addresses covered offenses, states that the special trial counsel must "[p]refer, or cause to be preferred" a court-martial charge or "[d]efer the offense by electing not to prefer a charge."[95] If the special trial counsel defers prosecution, they must "promptly forward the offense to a commander or convening authority for disposition."[96] In addition, the new RCM 401A states only a special trial counsel may dispose or defer charges alleging a violation of a covered offense, regardless of who preferred a specification.[97] This procedure, however, limits the convening authority's ability to take follow-on actions due to the fact

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[90] *See* 1 SCHLUETER, *supra* note 20, § 1-8 et seq. (listing various disciplinary options available to military commanders).
[91] MCM, *supra* note, R.C.M. 306.
[92] *See* UCMJ art. 1(9) (2021); *see also* MCM, *supra* note 15, R.C.M. 307.
[93] The process of preferral is analogous to civilian prosecutors filing charges against an individual by complaint or information. It signals the beginning of potential criminal liability followed by a grand jury's review.
[94] *See* 1 SCHLUETER, *supra* note 20, § 6-1 et. seq. (discussing the preferring of charges and processing of those charges by the chain of command).
[95] Exec. Order No. 14103, annex 2, § 2(r) 88 Fed. Reg. 50535, 50618 (July 28, 2023) (R.C.M. 306A(a)(1)-(2)).
[96] *Id.* (R.C.M. 306A(a)(2)).
[97] *Id.* annex 2, § 2(z), 88 Fed. Reg. at 50623 (R.C.M. 401A(a)).

that they may not refer a deferred charge to a special or general court-martial.[98]

In addition to tasks such as granting immunity, the 2023 Residual Duties Provision[99] may impact preferral of charges, although it is not included within the non-exhaustive list.[100] At least one lawmaker's main concern was that commanders were not preferring charges when they should have done so;[101] in response, Congress reduced the commander's role in sexual assault cases by enacting the directive in Section 541 of the 2023 NDAA.[102] This will result in a requirement that for covered offenses, the decision to prefer court-martial charges will rest exclusively in the special trial counsel.[103]

The question remains as to what extent Congress intended to strip the commander's powers to impose administrative measures for covered offenses. If a covered offense is deferred, the commander can decide to impose NJP in accordance with Article 15, UCMJ; however, the commander will have no authority to refer the case to a special or general court-martial. This may cause an issue if the accused refuses the NJP, as is their right.[104]

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[98] *See id.*

[99] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 541(c), 136 Stat. 2395, 2580 (2022).

[100] *See id.*

[101] *See Examining the Role of the Commander in Sexual Assault Prosecutions: Hearing Before the Subcomm. on Mil. Pers. of the H. Armed Servs. Comm.*, 116th Cong. (2019) (statement of Rep. Jackie Speier, Chairwoman, Mil. Pers. Subcomm., H. Armed Servs. Comm.) (stating military lawyers were trusted more than military commanders to make correct charging decisions).

[102] *See* sec. 541, 136 Stat. at 2579.

[103] *See* IRC HARD TRUTHS 2021, *supra* note 46, at 14.

[104] An exception to this rule exists for Service members at sea. UCMJ art. 15(a) (2016) ("However, *except in the case of a member attached to or embarked in a vessel*, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment.") (emphasis added).

4. Ordering an Article 32 Preliminary Hearing

In the current system of military justice, if the chain of command believes that the preferred court-martial charges warrant a general court-martial, an Article 32 preliminary hearing officer must be appointed to hold a hearing on the charges and determine if there is probable cause to believe that the accused committed the charged offenses.[105] The special court-martial convening authority typically appoints that hearing officer. Once the hearing officer completes their review, they submit a written report to the special court-martial convening authority, who in turn forwards the case to the next-level commander in the chain of command, the general court-martial convening authority, who ultimately decides whether to refer the court-martial charges to a general court-martial.

Though the 2022 NDAA did not change the form or substance of an Article 32 preliminary hearing, it did change the procedure for appointing the preliminary hearing officer. For any offense committed on or after 27 December 2023, the special court-martial convening authority will continue to detail the preliminary hearing officer. If the preferred charges are for a covered offense over which a special trial counsel has authority, the special trial counsel must request that the convening authority detail a hearing officer.[106] The report of the preliminary hearing officer will be provided to the convening authority or to the special trial counsel, if the special trial counsel requested the detail of the hearing officer.[107] Generally, other than adding the ability for the special trial counsel to request a hearing officer and review the report, the Article 32 process remains largely the same.

5. Entering into a Plea Agreement with an Accused

Currently, the accused and the convening authority may engage in plea bargaining.[108] The parties may reach an agreement about dismissing

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[105] UCMJ art. 32 (2021); *see also* 1 SCHLUETER, *supra* note 20, ch. 7 (discussing and analyzing features of an Article 32 preliminary hearing).
[106] Exec. Order No. 14103, annex 2, § 2(ff), 88 Fed. Reg. 50535, 50627 (July 28, 2023) (R.C.M. 405(c)(2)).
[107] *Id.* annex 2, § 2(ff), 22 Fed. Reg. at 50643 (R.C.M. 405(m)(1)).
[108] MCM, *supra* note 15, R.C.M. 705.

one or more charges or sentencing limitations.[109] In accordance with the 2022 NDAA, the special trial counsel will now have exclusive authority to enter into plea agreements with an accused regarding covered offenses.[110] Any such agreement made by the special trial counsel will be binding on the convening authority and other military commanders.[111]

The amendments to RCM 705 generally track the statutory language concerning the special trial counsel's exclusive powers to enter into a plea agreement with an accused who is charged with a covered offense; the new language in RCM 705(a) adds: "[H]owever, any such agreement may bind convening authorities and other commanders subject to such limitations as prescribed by the Secretary concerned."[112] This language was seemingly added to emphasize that plea agreements between the special trial counsel and the accused are binding on the convening authority and the plea agreement can include non-covered offenses.

If an accused is not charged with a covered offense, then the current system of permitting the convening authority and accused to enter into a plea agreement will continue.

6. Pretrial Discovery, Grants of Immunity, and Requests for Funding Experts

Under the current system, convening authorities possess certain powers that govern pretrial discovery and grants of immunity to witnesses. For example, the convening authority or a military judge may

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[109] *See* MCM, *supra* note 15, R.C.M. 705(b)(2)(C).
[110] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 531(a), § 824a(c)(3)(C), 135 Stat. 1541, 1693 (2021). This new procedure for covered offenses will generally mirror plea bargaining in civilian criminal justice systems, where the defendant and the prosecutor engage in plea bargaining. *See generally How Courts Work: Steps in a Trial*, AM. BAR ASS'N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining.
[111] Exec. Order No. 14103, annex 2, § 2(eee) 88 Fed. Reg. 50535, 50668 (July 28, 2023) (R.C.M. 705(a)).
[112] *Id.*

order a deposition,[113] act on requests for expert witnesses or consultants,[114] and grant immunity.[115]

The 2022 NDAA did not make any changes to those powers, but, the 2023 Residual Duties Provision did. The provision lists the commander's powers to grant immunity, hire experts, and order depositions as examples of those residual powers.[116] As noted above, the 2023 NDAA specifies that the President is charged with effecting that transfer of power through regulations.[117] Accordingly, the 2023 amendments to the MCM provide that, regarding grants of immunity, in cases where a special trial counsel is exercising authority over the charges, the special trial counsel, or that counsel's designee, is authorized to grant immunity to witnesses.[118] In addition, the 2023 amendments also transfer the convening authority's power to authorize a pre-referral deposition to the military judge;[119] the same is true for authorizing the funding of expert assistance for the defense.[120] The 2023 Act states that these changes will be effective in December 2023.[121]

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[113] MCM, *supra* note 15, R.C.M. 702(b).

[114] MCM, *supra* note 15, R.C.M. 703(d) (requiring a convening authority to decide whether to fund such requests upon application from both the Government and defense, as well as requiring a military judge to review any denials). It is worth noting that many civilian jurisdictions process requests to fund experts through the courts focusing, primarily, on the indigency of the accused. *See e.g.*, U.S. DEP'T OF JUST., JUSTICE MANUAL § 3-8.520 (2018).

[115] MCM, *supra* note 15, R.C.M. 704(c).

[116] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 541(c), 136 Stat. 2395, 2580 (2022).

[117] *Id.*

[118] Exec. Order No. 14103, annex 2, § 2(bbb), 88 Fed. Reg. 50535, 50665 (July 28, 2023) (R.C.M, 704(c)(2)).

[119] Exec. Order No. 14103, annex 2, § 2(x), 88 Fed. Reg. 50535, 50622 (July 28, 2023) (R.C.M, 309(b)(10)). An amendment to R.C.M. 702(b) states that in cases involving a special trial counsel, "only a military judge may order a deposition," whether before or after referral of charges. *Id.* annex 2, § 2(xx), 88 Fed. Reg. at 50659 (R.C.M, 702(b)(2)).

[120] *Id.* annex 2, § 2(zz), 88 Fed. Reg. at 50660 (R.C.M, 703(d)(2)).

[121] *See* sec. 541(c), 136 Stat. at 2580.

7. *Convening a Special or General Court-Martial*

Currently, a general or special court-martial convening authority is authorized to convene a court-martial.[122] Convening a court-martial is the act of issuing a convening order, which creates the court-martial and assigns personnel to serve as members of the court-martial—the rough equivalent of jurors in a civilian criminal trial.[123] Convening authorities personally select the members,[124] an element of the commander's authority that has been somewhat controversial. The 2022 NDAA made no changes to the process of convening a court-martial, but, as discussed in more detail in section VI.A of this work, the 2023 NDAA did make changes to the process of selecting the members to sit on the court-martial. Section 543 of the 2023 NDAA adds a new subdivision (4) at the end of Article 25, which provides:

> When convening a court-martial, the convening authority shall detail as members thereof members of the armed forces under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent practicable.[125]

The effective date of this change to Article 25—which seemingly applies to all courts-martial, not just those for the covered offenses— is 23 December 2024, two years after the 2023 NDAA was signed.[126] Revised RCM 911, included in the 2023 MCM amendments, now requires the military judge or a designee to randomly assign numbers to panel members appointed by the convening authority and subsequently determine how many members must be present; those members must be

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[122] MCM, *supra* note 15, R.C.M. 504(a).
[123] *See id.* R.C.M. 504(d).
[124] *See* UCMJ art. 25(e) (2016).
[125] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 543(a), § 825(e)(4), 136 Stat. 2395, 2582 (2022). *See infra* Section VI.A.
[126] *See id.* sec. 543(b).

present "according to the randomly assigned order,"[127] a practice that was previously required in accordance with the 2019 MCM.[128]

8. Referring Charges to a Court-Martial

Under the current system, a convening authority refers charges to a specific court-martial, after receiving written legal advice from the staff judge advocate, as to whether there is probable cause to believe that offenses were committed, that the accused committed the charged offenses, and that the court-martial would have jurisdiction over the offenses.[129]

Under the 2022 NDAA, if any of the charges include at least one covered offense, then the special trial counsel has exclusive authority to refer those charges and charges for other known or related offenses to either a special or general court-martial.[130] In the 2023 MCM amendments, RCM 601(d)(1)(B) provides that the special trial counsel is responsible for making a written determination regarding probable cause to believe that offenses were committed, that the accused committed them, and that the court-martial has jurisdiction to try the accused for those offenses.[131]

Moreover, either the convening authority or the special trial counsel can refer the charges to a court-martial by a personal order.[132] In either case, a convening authority will select the members for the court-martial.

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[127] Exec. Order No. 14103, annex 2, § 2(jjjj) 88 Fed. Reg. 50535, 50684 (July 28, 2023) (R.C.M, 911(b)).
[128] *See* MCM, *supra* note 15, R.C.M. 912(f)(5).
[129] UCMJ arts. 34(a)(1)(A)-(C) (2021); *see also* MCM, *supra* note 15, R.C.M. 601(d)(1)(B).
[130] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 531(a), § 824a(c)(3)(B), 135 Stat. 1541, 1692-93 (2021).
[131] Exec. Order No. 14103, annex 2, § 2(ss), 88 Fed. Reg. 50535, 50652 (July 28, 2023) (R.C.M. 601(d)(1)(B)).
[132] *See id*., 88 Fed. Reg. at 50654 (R.C.M. 601(e)).

9. Post-Trial Review of a Court-Martial

Under the current system, following a conviction by a court-martial, Article 60a and RCM 1109 limit the convening authority's ability to act on the findings of guilt and the sentence.[133] If:

> (1) [t]he court-martial found the accused guilty of—(A) [a]n offense for which the maximum authorized sentence to confinement is more than two years, without considering the jurisdictional maximum of the court; (B) a violation of Article 120(a) or (b); (C) a violation of Article 120b; or (D) a violation of such other offense as the Secretary of Defense has specified by regulation; or
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> (2) [t]he sentence of the court-martial includes—(A) [a] bad-conduct discharge, dishonorable discharge, or dismissal; (B) [a] term of confinement, or terms of confinement running consecutively, more than six months; or (C) [d]eath[,]
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> . . . [then] the convening authority may not set aside, disapprove, or take any other actions on the findings of that court-martial.[134]

If the results of the court-martial do not involve any of those findings or sentences, the convening authority may take any of the following post-trial actions: "[c]hange a finding of guilty to a charge or specification . . . [of] a lesser included offense,"[135] "set aside any finding of guilty and . . . [d]ismiss the specification and, if appropriate, the charge,"[136] or "[o]rder a rehearing."[137]

It is important to note that Congress did not make changes to Article 60a in either the 2022 NDAA or the 2023 NDAA, and there are no proposed amendments to the post-trial RCM. Thus, the convening

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[133] *See* UCMJ art. 60a (2016); MCM, *supra* note 15, R.C.M. 1109.
[134] MCM, *supra* note 15, R.C.M. 1109(a)-(b); *see* UCMJ, art. 60a (2016).
[135] MCM, *supra* note 15, R.C.M. 1110(b)(1); *see* UCMJ, art. 60b(a) (2019).
[136] *Id.* R.C.M. 1110(b)(2)(A); *see* UCMJ, art. 60b(a) (2019).
[137] *Id.* R.C.M. 1110(b)(2)(B); *see* UCMJ, art. 60b(a) (2019).

authority's post-trial powers, for both covered and non-covered offenses, will remain the same.

III. Transforming Sentencing Procedures

The 2022 NDAA significantly changes sentencing procedures in the military. The first major change requires that in all non-capital special and general courts-martial, the military judge will impose the sentence.[138] The second major change requires the establishment of sentencing parameters and sentencing criteria, which will be used in imposing a sentence on a convicted accused.[139]

A. The Military Judge's Role in Sentencing

For decades, commentators and others have recommended that the military adopt the sentencing procedures used in Federal courts—with the judge imposing the sentence, applying Federal Sentencing Guidelines.[140] Prior to the 2016 Military Justice Act, the accused could

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[138] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 539E(a)(1), § 853(b)(1), 135 Stat. 1541, 1700 (2021). Compare this to MCM, *supra* note 15, R.C.M. 1002(b) (2019), which permits an accused Service member to choose between the panel and the judge to assign a sentence.

[139] *See* sec. 539E(e), 135 Stat. at 1700.

[140] *See*, *e.g*., MJRG REPORT, *supra* note 16, at 475-76; Colin A. Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39 (2009); James Kevin Lovejoy, *Abolition of Court Members Sentencing in the Military*, 142 MIL. L. REV. 1 (1993); Captain Megan N. Schmid, *This Court-Martial Hereby (Arbitrarily) Sentences You: Problems with Court Member Sentencing in the Military and Proposed Solutions*, 67 A.F. L. REV. 245, 267-68 (2011). The Military Justice Review Group recommended that the military should align more closely to Federal civilian practice, and, according to the Military Justice Review Group, this would also:

> conform military sentencing standards to the practice in the vast majority of state courts, as reflected in the ABA Standards for Criminal Justice in Sentencing, which state: "Imposition of sentences is a judicial function to be performed by sentencing courts. The function of sentencing courts is to impose a sentence upon each offender that is appropriate to the offense and the offender. The jury's role in a criminal trial should not extend to determination of the appropriate sentence."

MJRG REPORT, *supra* note 16, at 475. According to the Group's report, requiring judge-alone sentencing would allow for other reforms in the sentencing process, such as

not request trial by members and sentencing by the military judge. If court-martial panel members tried the accused, they would then adjudge the sentence against them. This limitation on sentencing proved controversial because, in most civilian jurisdictions, jurors decide on the defendant's guilt, but the judge determines the sentence.[141] The Military Justice Act of 2016 provided military accused with the option to request trial by members and sentencing by the military judge (except in capital cases).[142]

In the 2022 NDAA, Congress made an even more extensive change to military sentencing procedures, adopting an approach similar to Federal sentencing. Specifically, Section 539E provides that if an accused is convicted of non-capital offenses in a general or special court-martial (without regard to whether any of the offenses are considered "covered offenses" discussed above) the military judge will impose the sentence and that sentence is "the sentence of the court-martial."[143] In capital cases, members must decide (1) whether the sentence for the offense will be "death or life in prison without the eligibility for parole;" or (2) "the matter should be returned to the military judge for a determination of a lesser punishment."[144] The military judge must then sentence the accused in accordance with the court members' determination.[145] Essentially, the 2022 NDAA removes any discretion that an accused had under the 2016 Military Justice Act to decide whether the sentence would be imposed by the military judge or the panel members.

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expansion of evidence and information provided to the sentencing authority to adjudge an appropriate sentence, increased transparency in the sentencing process, use of victim-impact statements as in civilian courts, and expansion of R.C.M. 1002 to implement "sentencing guidance," promoting greater consistency. *Id.* at 476.

[141] *See* MJRG REPORT, *supra* note 16, at 475.

[142] *See* UCMJ arts. 53(b), 53(c)(1) (2021); *see also* Military Justice Act of 2016, Pub. L. No. 114-328, sec. 5236, 130 Stat. 2000, 2916; *see generally* David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016,* 49 ST. MARY'S L.J. 1 (2017) (discussing 2016 changes to the UCMJ).

[143] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 539E(a)(1), § 853(b)(1), 135 Stat. 1541, 1700 (2021).

[144] *Id.* sec. 539E(a)(2), §§ 853(c)(1)(A)(i)-(ii).

[145] *Id.* § 853(c)(1)(B).

B. Sentencing Parameters and Criteria

In addition to requiring military judge alone sentencing, the 2022 NDAA requires that the President establish sentencing parameters and criteria, and it creates the Military Sentencing Parameters and Criteria Board within the DoD. Establishing sentencing parameters and criteria essentially requires military judges to apply guidelines, a procedural and substantive change that experts and critics have recommended in the past.[146] Specifically, in its comprehensive 2015 report, the Military Justice Review Group recommended that Congress amend the UCMJ to require sentencing parameters.[147] While the Senate version of the Military Justice Act of 2016 included a provision to that effect, the House version, which ultimately passed instead, implemented mandatory minimum discharge characterizations in some cases, sentencing factors in Article 56.[148]

Section 539E(e) of the 2022 NDAA required the President to prescribe, within two years of the date of enactment, sentencing parameters and criteria for offenses under the UCMJ.[149] Previously, for most charges, rather than prescribing sentencing ranges including a minimum periods of confinement,[150] the military justice system relied on a Maximum Punishment Chart, which imposed a requirement not to

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[146] *See, e.g.*, MJRG REPORT, *supra* note 16, at 511-14 (recommending established sentencing parameters to guide military judges).

[147] According to the group's report, providing sentencing guidance would: 1) promote greater consistency and uniformity among sentencing authorities with respect to the goals of military sentencing and the factors that must be considered and balanced in each individual case; 2) eliminate the need for member instructions and voting before sentencing and issues on appeal; and 3) enhance review of sentence determinations by appellate courts. *See id.*

[148] *See* H.R. REP. 114-840, at 1542 (2016); *see also* Major Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL. L. REV. 159 (2000).

[149] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 539E(e), 135 Stat. 1541, 1704 (2021); *see also infra* note 154 and accompanying text.

[150] Rape, sexual assault, rape or sexual assault of a child, or attempts or conspiracies to commit any of these offenses do carry a mandatory dismissal or dishonorable discharge (but no minimum confinement). UCMJ art. 56 (2021); *see also* MCM, *supra* note 15, app. 12, arts. 120, 120a, 120b, at A12-5.

exceed the listed time in confinement, forfeiture, or discharge description.[151]

The 2022 NDAA requires that the President establish sentencing parameters that must cover (1) "sentences of confinement" and (2) "lesser punishments, as the President determines appropriate."[152] The sentencing parameters shall:

> (A) identify a delineated sentencing range for an offense that is appropriate for a typical violation of the offense, taking into consideration—(i) the severity of the offense; (ii) the guideline or offense category that would apply to the offense if the offense were tried in a United States district court; (iii) any military-specific sentencing factors; (iv) the need for the sentencing parameter to be sufficiently broad to allow for individualized consideration of the offense and the accused; and (v) any other relevant sentencing guideline.
>
> (B) include no fewer than 5 and no more than 12 offense categories;
>
> (C) assign each offense under the this chapter to an offense category unless the offense is identified as unsuitable for sentencing parameters . . . ; and
>
> (D) delineate the confinement range for each offense category by setting an upper confinement limit and a lower confinement limit.[153]

Accordingly, the 2023 MCM amendments revised Appendix 12A, "Presidentially-Prescribed Lesser Included Offenses Pursuant to Article 79(b)(2) Uniform Code of Military Justice;" added a new Appendix 12B, "Sentencing Parameter Table – Confinement Range Categories;" and

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[151] *See* MCM, *supra* note 15, R.C.M. 1003, app. 12.
[152] Secs. 539E(e)(1)(A)-(B), 135 Stat. at 1704.
[153] *Id.* secs. 539E(e)(2)(A)-(D).

added a new Appendix 12C, "Offense Category Chart."[154] The Sentencing Parameter Table sets out the maximum and minimum months of confinement for each category of offense. For example, for a category one offense, the range of confinement is zero to twelve months.[155] The new Appendix 12C Offense Category Chart sets out the sentencing category for each of the offenses listed in the UCMJ.[156]

In addition to establishing sentencing parameters, the 2022 NDAA requires the President to establish sentencing criteria that identifies offense-specific factors the military judge should consider and any collateral effects of the available punishments. This would be used to assist the military judge in imposing a sentence where there is no applicable sentencing parameter for a specific offense.[157] The 28 July 2023 amendments to the MCM added Appendix 12D, "List of Sentencing Criteria Offenses."[158] That appendix lists offenses considered sentencing criteria offenses. Not all UCMJ offenses are included in the list, but the appendix then sets out sentencing criteria for each of the listed offenses.[159]

C. Application of Sentencing Parameters and Criteria

The 2022 NDAA makes several amendments to Article 56, UCMJ, that support and explain the application of the sentencing parameters and criteria. If an accused is convicted in a general or special court-martial of an offense for which a sentencing parameter has been established, the

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[154] Exec. Order No. 14103, §§ 2-3, 88 Fed. Reg. 50535, 50535 (July 28, 2023). For appendix 12A, see *id.*, annex 2, § 6, 88 Fed. Reg. at 50699. For appendix 12B itself, see *id.*, annex 3, § 2, 88 Fed. Reg. at 50731. For appendix 12C, see *id.*, annex 3, § 3, 88 Fed. Reg. at 50732.

[155] *Id.*, annex 3, § 2, 88 Fed. Reg. at 50731.

[156] *Id.*, annex 3, § 3, 88 Fed. Reg. at 50732.

[157] *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 539E(e), 135 Stat. 1541, 1704 (2021).

[158] Exec. Order No. 14103, annex 3, § 4, 88 Fed. Reg. 50535, 50740 (July 28, 2023).

[159] *Id.* at 50741. For example, for the offense of Desertion, Article 85, the Appendix indicates that the sentencing criteria include, among other things, "[t]he age and experience of the accused," "[a]ny mental impairment or deficiency of the accused," and "[w]hether the offense disrupted or, in any way, impacted the operations of any organization." *Id.* at 50742.

military judge must sentence the accused for that offense within the specified parameter.[160] A military judge may sentence an accused outside an applicable sentencing parameter if the judge finds specific facts that warrant a departure from the parameter.[161] In that case, the military judge must include a written statement in the record setting out the factual basis for the departure.[162]

In announcing a sentence under Article 53, UCMJ, the military judge in a general or special court-martial, regarding "each offense of which the accused [was] found guilty, [must] specify the term of confinement, if any, and the amount of a fine, if any."[163] If the military judge is imposing a sentence for more than one offense, the military judge must "specify whether the terms of confinement [will] run consecutively or concurrently."[164]

Sentencing parameters and sentencing criteria do not apply in deciding whether the death penalty should be imposed.[165]

If the accused is convicted of an offense for which a court-martial may impose a sentence of confinement for life, the military judge may impose a sentence of "life without eligibility for parole."[166] In that case, the accused will be confined for the remainder of their life, barring certain actions by the convening authority or applicable Service secretary, post-trial appellate action, or executive pardon.[167]

D. Appellate Review of Sentences by Service Courts of Criminal Appeals

Section 539E(d) of the 2022 NDAA also amended Article 66, UCMJ, which addresses the review powers of the military courts of

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[160] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 539E(c), § 856(c)(2)(A), 135 Stat. 1541, 1701 (2021).
[161] *Id.* sec. 539E(c), § 856(c)(2)(B).
[162] *Id.*
[163] *Id.* sec. 539E(c)(1)(B), § 856(c)(4).
[164] *Id.*
[165] *Id.* sec. 539E(c)(1)(B), § 856(c)(5).
[166] *Id.* sec. 539E(c)(1)(B), § 856(c)(6)(A).
[167] *Id.* sec. 539E(c)(1)(B), §§ 856(c)(6)(B)(i)-(iii).

criminal appeals.[168] Under a new provision, the courts may review whether a sentence violates the law or is inappropriately severe. When determining severity, the court should apply these factors:

> (i) if the sentence is for an offense for which the President has not established a sentencing parameter . . .; or
>
> (ii) in the case of an offense for which the President has established a sentencing parameter . . . , if the sentence is above the upper range of such sentencing parameter.[169]

In addition to law violations and inappropriate severity, the courts may also consider "whether the sentence is plainly unreasonable."[170] If the "sentence [is] for an offense for which [there is a] . . . sentencing parameter," appellate courts may also consider "whether the sentence is the result of an incorrect application of that parameter."[171] And, if the sentence was death or life in prison without the eligibility of parole, they may consider "whether the sentence is otherwise appropriate under the rules prescribed by the President."[172]

The amended Article 66 provides that when the Government is appealing an adjudged sentence, the record on appeal must contain: (1) "any portion of the record that is designated to be pertinent by any party;"[173] (2) "the information submitted during the sentencing proceeding;"[174] and (3) "any information required by rule or order of the Court of Criminal Appeals."[175]

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[168] *Id.* sec. 539E(d).
[169] *Id.* sec. 539E(d)(2), §§ 866(e)(1)(B)(i)-(ii).
[170] *Id.* sec. 539E(d)(2), § 866(e)(1)(D).
[171] *Id.* sec. 539E(d)(2), § 866(e)(1)(C).
[172] *Id.* sec. 539E(d)(2), § 866(e)(1)(E).
[173] *Id.* sec. 539E(d)(2), § 866(e)(2)(A).
[174] *Id.* sec. 539E(d)(2), § 866(e)(2)(B).
[175] *Id.* sec. 539E(d)(2), § 866(e)(2)(C).

E. Military Sentencing Parameters and Criteria Board

Section 539E(e)(4) of the 2022 NDAA creates—within the DoD—the Military Sentencing Parameters and Criteria Board.[176] That board will consist of five voting members: (1) the chief trial judges designated under Article 26(g), UCMJ; (2) a trial judge of the Navy if there is no chief trial judge in the Navy under Article 26(g); and (3) a trial judge of the Marine Corps if Article 26(g) does not include a chief trial judge in the Marine Corps.[177] Section 539E(e)(4) also provides that the board will include the following nonvoting members: (1) a designee by the chief judge of the United States Court of Appeals for the Armed Forces, (2) a designee by the chairman of the Joint Chiefs of Staff, and (3) a designee by the general counsel of the DoD.[178] A vote of at least three members is required for any board action.[179]

Section 539E(e)(4) also sets out the board's duties.[180] Those duties include: (1) determining the appropriateness of creating sentencing parameters for punitive discharges, forfeitures, fines and other lesser punishments; (2) submitting to the President proposed changes to the RCM regarding sentencing procedures and maximum punishments; and (3) consulting with various constituencies of the military justice system, including commanders, senior enlisted personnel, those with experience in trying courts-martial, and any other groups the board considers appropriate.[181] The board must also develop means of measuring the effectiveness of the applicable sentencing, penal, and correctional practices regarding the sentencing factors and policies of Section 539E.[182] This 2022 NDAA Section also repeals the provisions of Section 537 of the 2020 NDAA, which required secretarial guidelines on sentences.[183]

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[176] *Id.* sec. 539E(e)(4)(A).
[177] *Id.* secs. 539E(e)(4)(B)(i)-(iii).
[178] *Id.* sec. 539E(e)(4)(C).
[179] *Id.* sec. 539E(e)(4)(E).
[180] *Id.* sec. 539E(e)(4)(F).
[181] *Id.* secs. 539E(e)(4)(F)(i)-(v).
[182] *Id.* sec. 539E(e)(4)(F)(vi).
[183] *Id.* sec. 539E(g).

F. Potential Issues Regarding New Sentencing Procedures

The 2022 NDAA reflects a clear change in the sentencing process in the military justice system, from indeterminate sentencing[184] to determinate sentencing similar to that of the Federal system. The lingering question is whether the framework established by the Federal Sentencing Commission can or should be applied in the military setting.

The Federal criminal justice system transitioned from indeterminate sentencing to determinate sentencing with the Sentencing Reform Act of 1984, when Congress created the U.S. Sentencing Commission (an independent organization within the judicial branch).[185] The commission was tasked with creating the Federal sentencing guidelines framework.[186] Determinate sentencing was established by creating mandatory guidelines, eliminating parole, and greatly reducing awarded credit for good behavior.[187] Congress sought to enhance the criminal justice system's ability to combat crime through an effective, fair sentencing system with three congressional objectives. The first objective was to enhance honesty in sentencing: to assist in avoiding "confusion and implicit deception that arose out of the pre-guidelines sentencing system."[188] This system required a court-imposed indeterminate sentence of confinement and an empowered parole commission to determine that the offender would actually serve the sentence.[189] The second objective was to provide reasonable uniformity in sentencing by narrowing sentence disparity "for similar criminal offenses committed by similar offenders."[190] The final congressional objective was to provide sentencing proportionality by imposing "appropriately different

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[184] UCMJ art. 56 (2021) (prescribing mandatory minimums and reserving discretionary maximum sentences for the President); *see also* LISA M. SCHENCK, MODERN MILITARY JUSTICE: CASES AND MATERIALS 351-52 (3d ed., 2019) (explaining sentencing pursuant to UCMJ art. 56).

[185] *See* U.S. SENT'G COMM'N, GUIDELINES MANUAL 2021, at 2-3 (2021) [hereinafter GUIDELINES MANUAL].

[186] *Id.*

[187] LUCIEN B. CAMPBELL & HENRY J. BEMPORAD, AN INTRODUCTION TO FEDERAL GUIDELINE SENTENCING 1-2 (8th ed. 2004).

[188] GUIDELINES MANUAL, *supra* note 185, at 3.

[189] *Id.*

[190] *Id.*

sentences for criminal conduct of differing severity."[191] The U.S. Sentencing Commission's *Guidelines Manual* sets forth details regarding how to sentence a convicted felon, further ensuring uniformity.[192]

Some Federal sentences hold a mandatory minimum, while others require the judge to apply the Federal sentencing guidelines and consider the factors provided in 18 U.S.C. § 3553(a)[193] to determine a sentence range based on offense type, offense severity, and the defendant's criminal history.[194] The table's vertical axis reflects one to forty-three offense conduct levels (higher levels are more severe crimes with increased sentences), determined by a base-level offense, which can be increased or decreased due to specific characteristics (such as "with a firearm").[195] The base-level offense is also increased or decreased based on victim-related adjustments, the offender's role in the offense, and obstruction of justice.[196] When there are multiple offenses, the guidelines provide instructions directing judges how to combine offense levels.[197] Judges also may decrease the base offense level by two if the judge decides that the defendant has accepted responsibility for their offense.[198] The horizontal axis of the sentencing table reflects I to VI criminal history categories.[199]

In addition to using the guidelines and policies provided by the commission, the judge receives a detailed presentencing report, which includes a sentence recommendation from the Federal Court

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[191] *Id.*
[192] *Id.*
[193] *See* CHARLES DOYLE, CONG. RSCH. SERV., R41326, FEDERAL MANDATORY MINIMUM SENTENCES: THE SAFETY VALVE AND SUBSTANTIAL ASSISTANCE EXCEPTIONS 2 (2022) (explaining that Federal law's requirement for judges to impose minimum sentences for Federal offenses is subject to exceptions that consider the defendant's characteristics and 18 U.S.C. § 3553 factors).
[194] GUIDELINES MANUAL, *supra* note 185, at 407-08.
[195] *See id*.; *see also See* U.S. SENT'G COMM'N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES 1 (n.d.), https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf.
[196] *See* U.S. SENT'G COMM'N, *supra* note 195, at 2 (explaining adjustments that increase or decrease offense level).
[197] *See id.*
[198] *See id.*
[199] *Id.* at 3; *see also* GUIDELINES MANUAL, *supra* note 185, at 407-08.

Probation Office.[200] Federal court sentencing hearings occur months after trial on the findings and the convicted defendant may be incarcerated pending the sentencing hearing.[201]

So, how will sentencing parameters and criteria be implemented within the existing presentencing structure in the military justice system? Probation is not available as there is no probation office in the military justice system.[202] And rather than relying on presentencing reports, court-martial presentencing procedure is an adversarial hearing. The Government presents aggravation evidence,[203] to include sworn testimony from all prosecution witnesses. The defense presents extenuating and mitigating sentencing evidence[204] including a sworn or unsworn (not subject to cross examination) statement from the accused.[205] The victim may present sworn testimony during the Government's sentencing case, an unsworn statement after the close of the Government's sentencing case, or sworn testimony (if called as a defense witness) during the defense's sentencing case.[206] Following the

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[200] *See* GUIDELINES MANUAL, *supra* note 185, at 487 ("The probation officer must conduct a presentence investigation and submit a report to the court before it imposes a sentence . . . .").

[201] *See Steps in the Federal Criminal Process: Sentencing*, DEP'T OF JUST.: OFFS. OF THE U.S. ATT'YS, https://www.justice.gov/usao/justice-101/sentencing (last visited Aug. 11, 2023) ("A few months after the defendant is found guilty, they return to court to be sentenced.").

[202] *See* U.S. DEP'T OF DEF., INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE (11 Mar. 2009) (C4, 19 Aug. 2020) [hereinafter DODI 1325.07] (reflecting the absence of probation programs in the military justice system).

[203] The prosecution first will present presentencing evidence including:

(i) service data relating to the accused taken from the charge sheet;
(ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused;
(iii) evidence of prior convictions, military or civilian;
(iv) evidence of aggravation; and
(v) evidence of rehabilitative potential.

MCM, *supra* note 15, R.C.M. 1001(a)(1)(A)(i)-(v).

[204] MCM, *supra* note 15, R.C.M. 1001(d)(1)(A)-(B). Prosecution witnesses present sworn testimony, including the victim if called as a prosecution witness. A victim may present an unsworn statement after the close of the government's sentencing case and the Defense may present the sworn testimony of the victim. *See id.* R.C.M. 1001(c).

[205] *See id.* R.C.M. 1001(d)(2).

[206] *See id.* R.C.M. 1001(a)(3)(A), (c), (d), (f).

defense evidence, the prosecution presents matters on rebuttal, and the parties present arguments regarding what sentence the court should impose.[207] Also, the criminal history provision generally does not apply, because having a prior criminal record is a discriminating factor for entry into the military.[208] In short, Service members rarely have any criminal record of note.[209]

In most cases, this adversarial presentencing process occurs immediately after findings and there is no need for the accused to be incarcerated pending sentencing by the military judge. Also, unlike the Federal system, the Government and the accused can appeal the sentence.[210]

The framework that accompanies the Federal sentencing guidelines will not easily transfer to the military justice system without major changes to the RCM. For example, the horizontal axis on the sentencing table reflecting criminal history categories is somewhat inapplicable, because, rather than trial by court-martial, commanders have the alternative of administratively separating (discharging) Service members from the military when they engage in misconduct.[211] Unlike the Federal system, parole (rather than probation) is available in the military corrections system.[212] The 2023 amendments to the MCM do not reflect any major changes to the military justice presentencing procedures,[213] so it does not appear that the addition of sentencing parameters, criteria, and the accompanying

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[207] *Id.* R.C.M. 1001(a)(1)(D)-(F).

[208] *See* 10 U.S.C. § 504(a) (2018) ("No person who . . . has been convicted of a felony . . . may be enlisted in any armed force."); *see also* 32 C.F.R. § 66.6(b)(8) (2016) (listing the "character/conduct" enlistment ineligibility criteria, including being "under any form of judicial restraint" or having "a significant criminal record").

[209] Applicants are able to apply for a waiver to enlist despite a criminal conviction. *See* 32 C.F.R. § 66.7(a)(3) (2016).

[210] *See* UCMJ, arts. 66 (2021), 67a (2016); *see also* MCM, *supra* note 15, R.C.M. 1117(a), 1203, 1204.

[211] *See* MCM, *supra* note 15, R.C.M. 306 (giving commanders authority to dispose of violations without resorting to courts-martial through administrative action, nonjudicial punishment, or summary court-martial); *see also* UCMJ arts. 15, 20 (2016).

[212] *See* DoDI 1325.07, *supra* note 202 (directing parole policies and procedures within the military justice system).

[213] *See generally* Exec. Order No. 14103, 88 Fed. Reg. 50535 (July 28, 2023).

board will include a complete overhaul of the presentencing process in the military justice system.

IV. Victims' Rights

A. In General

Over the past decade, the Armed Forces have implemented extensive protections for victims' rights in the military justice system. Those rights are set forth expressly in the UCMJ,[214] in the RCM,[215] or in Service regulations.[216] The 2022 NDAA included further changes designed to protect victims and provide them with procedural rights.[217]

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[214] *See, e.g.*, UCMJ art. 6b (2021). Article 6b of the UCMJ provides:

> (a) A victim of an offense under this chapter has the following rights:
>
> (1) The right to be reasonably protected from the accused.
>
> (2) The right to reasonable, accurate, and timely notice . . . .
>
> . . .
>
> (3) The right not to be excluded from any public hearing or proceeding . . . .
>
> (4) The right to be reasonably heard at any of the following:
>
> (A) A public hearing concerning the continuation of confinement prior to trial of the accused.
>
> (B) A sentencing hearing relating to the offense.
>
> (C) A public proceeding of the service clemency and parole board relating to the offense.
>
> (5) The reasonable right to confer with the counsel representing the Government at any proceeding described in paragraph (2).
>
> (6) The right to receive restitution as provided in law.
>
> (7) The right to proceedings free from unreasonable delay.
>
> . . .
>
> (9) The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.

Id.

[215] *See, e.g.*, MCM, *supra* note 15, R.C.M. 1001(c)(1) ("After presentation by trial counsel, a crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing proceeding relating to that offense.").

[216] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 7-8 (explaining the Army's policy against sexual assault and how it offers support to victims).

[217] *See, e.g.*, National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, secs. 545, 546 135 Stat. 1541, 1711, 1712 (2021) (codifying sexual assault victims'

B. The Right to Be Informed of Military Justice Proceedings

One of the key provisions in Article 6b of the UCMJ is the requirement that the victim be apprised of the status of the case.[218] The 2022 NDAA expands Article 6b(a), UCMJ, by adding a new provision, which states—

> (8) The right to be informed in a timely manner of any plea agreement, separation-in-lieu-of-trial agreement, or non-prosecution agreement relating to the offense, unless providing such information would jeopardize a law enforcement proceeding or would violate the privacy concerns of an individual other than the accused.[219]

The application of this requirement potentially implicates both counsel and commanders, even if commanders are no longer involved in the formal prosecution of covered offenses. For example, if the case involves covered offenses, the special trial counsel leading the preferral and referral process is best suited to oversee and ensure the required timely updates to any victims. In cases involving noncovered offenses the trial counsel is better suited for ensuring compliance with Article 6b(a) requirements. Additionally, in a case involving a military victim, the commander of the victim, who already has the responsibility to ensure their subordinate receives appropriate care, should be aware of the new provisional requirement that the victim receive information about dispositional decisions.[220]

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rights to notification when a case is not referred to court-martial and continuing legal services support through special victims' counsel).

[218] UCMJ art. 6b (2021).

[219] Sec. 541, 135 Stat. at 1708.

[220] *See, e.g.*, U.S. DEP'T OF DEF., INSTR. 1030.02, VICTIM AND WITNESS ASSISTANCE para. 3.2 (27 July 2023) (assigning responsibilities to commanders to assist victims and witnesses).

C. Referral of Complaints of Sexual Harassment to Independent Investigator

Only one portion of the 2022 NDAA is expressly titled "Military Justice Reforms," however, other portions of the act provide additional reformative language. Specifically, the 2022 NDAA also amended Section 1561 of Title 10 thereby requiring that a commander who receives a formal complaint of sexual harassment, to direct, within seventy-two hours of receiving the complaint, that an independent investigation be conducted.[221] The commander must report on the results of that investigation to the next superior officer within twenty days after the investigation commences and every fourteen days thereafter until the investigation is completed, and then submit a final report on the results of the investigation and any actions taken as a result of that investigation.[222]

D. Modification of Notice to Victims of Disposition of Cases

Section 545 of the 2022 NDAA modifies Section 549 of the National Defense Authorization Act for Fiscal Year 2020[223] by adding language that requires a commander, after final disposition of a case, to notify a victim of "the type of action taken on such case, the outcome of the action (including any punishments assigned or characterization of service, as applicable), and such other information as the commander determines to be relevant."[224]

E. Civilian Positions to Support Special Victims' Counsel

Section 546 of the 2022 Act states that each Secretary of a military department may establish one or more Civilian positions within every Office of Special Victims' Counsel. Those individuals are to provide support to special victims' counsel, which will include "legal, paralegal,

[221] Sec. 543(a), § 1561(b), 135 Stat. at 1709.
[222] *Id.* sec. 543(a), § 1561(d).
[223] National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019).
[224] Sec. 545, 135 Stat. at 1712.

and administrative" support.[225] Section 546 states that the purpose of these Civilian positions is to provide continuity of legal services when special victims' counsel transition to other positions.[226]

V. Changes to the Punitive Articles

A. The New Offense of Sexual Harassment

Section 539D of the 2022 NDAA requires the President, within thirty days of the act's enactment, to include in the MCM the offense of sexual harassment under Article 134.[227] Section 539D(b) of the 2022 NDAA sets out the elements of the new offense of Sexual Harassment as follows:

> (1) that the accused knowingly made sexual advances, demands or requests for sexual favors, or knowingly engaged in other conduct of a sexual nature;
>
> (2) that such conduct was unwelcome;
>
> (3) that, under the circumstances, such conduct—
>
> (A) would cause a reasonable person to believe, and a certain person did believe, that submission to such conduct would be made, either explicitly or implicitly, a term or condition of that person's job, pay, career, benefits, or entitlements;
>
> (B) would cause a reasonable person to believe, and a certain person did believe, that submission to, or rejection of, such conduct would be used as a basis for decisions affecting that person's job, pay, career, benefits, or entitlements; or

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[225] *Id.* sec. 546(b)(1).
[226] *Id.* sec. 546(b)(2).
[227] *Id.* sec. 539D(a).

> (C) was so severe, repetitive, or pervasive that a reasonable person would perceive, and a certain person did perceive, an intimidating, hostile, or offensive working environment; and
>
> (4) that, under the circumstances, the conduct of the accused was—
>
> (A) to the prejudice of good order and discipline in the armed forces;
>
> (B) of a nature to bring discredit upon the armed forces; or
>
> (C) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.[228]

On 26 January 2022, the President signed Executive Order 14062 amending the MCM to reflect the new offense.[229] The executive order adds a new paragraph 107a in Part IV of the MCM, for the offense of Sexual Harassment, and also makes other amendments to existing offenses in Part IV.[230] One of those amendments covers the existing offense of Domestic Violence (Article 128b), which is covered in the new Paragraph 78a.[231]

B. Amendments to Article 133

Article 133 of the UCMJ is one of two general articles, the other being Article 134. Article 133 focuses on the conduct of commissioned officers.[232] This punitive article has been commonly referred to as

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[228] *Id.* sec. 539D(b).
[229] *See* Exec. Order No. 14062, 87 Fed. Reg. 4763 (Jan. 26, 2022).
[230] *See id.*, annex, § 1(p), 87 Fed. Reg. at 4784.
[231] *See id.*, annex, § 1(o), 87 Fed. Reg. at 4777.
[232] UCMJ art. 133 (2021). *See generally* 1 SCHLUETER, *supra* note 20, § 2-5 (discussing offenses under Article 133).

"conduct unbecoming an officer and a gentleman."[233] Section 542 of the 2022 NDAA amended Article 133 making gender-neutral by removing the words "and a gentleman."[234] Apparently, Congress did not intend to make any other changes to the coverage of Article 133 with this amendment.

VI. Other Provisions in the 2023 NDAA

The 2023 NDAA included additional provisions that will have a dramatic impact on military justice. The following section of this article briefly addresses those changes.

A. Random Selection of Court Members

As previously discussed in Section II.E.7, one of the hallmarks of the American military justice system is the convening authority's power to select the members to serve on courts-martial. Article 25, UCMJ states that in selecting the members, the convening authority "shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[235] Although commentators have proposed reforms for the methods of selecting members,[236] and in particular random selection of members,[237] random

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[233] UCMJ art. 133 (1956).

[234] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 542(a), 135 Stat. 1541, 1709 (2021); *see also* Nino C. Monea, *An Officer and a Gentlewoman: Why Congress Should Modernize Article 133 of the UCMJ*, 61 WASHBURN L.J. 345 (2022) (recommending Article 133 be amended to make the language gender-neutral).

[235] UCMJ art. 25(e)(2) (2016).

[236] *See generally* Joseph Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 IND. L.J. 193 (1973) (proposing reforms); Major Gary C. Smallridge, *The Military Jury Selection Reform Movement*, 19 A.F. L. REV. 343, 380-81 (1977) (proposing various changes to methods of selecting members, including random selection); Captain John D. Van Sant, *Trial by Jury of Military Peers*, 15 A.F. L. REV. 185 (1973) (noting attempts by Senator Birch Bayh to change methods of selecting members); Major Craig Schwender, *One Potato, Two Potato . . . : A Method to Select Court Members*, ARMY LAW., May 1984, at 12 (proposing changes to method of selecting members).

selection has not been required.[238] Nonetheless, some installations have used random selection[239] and the Army Court of Military Review approved an experimental program for random selection.[240]

As previously discussed, in the 2023 NDAA, Congress made random selection a reality by adding a new provision to Article 25(e), which states:

> When convening a court-martial, the convening authority shall detail as members thereof members of the armed forces under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent practicable.[241]

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[237] *See, e.g.*, Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 72 (1998) (recommending development of computer database to randomly select court members and noting that random selection promotes diversity and fairness); Major R. Rex Brookshire, *Juror Selection under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71, 106-07 (1972) (recommending random selection of members).

[238] In the Defense Authorization Act for Fiscal Year 1999, Congress directed the Secretary of Defense to study the possibility of using randomly selected members in courts-martial. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, sec. 552, 112 Stat. 1920, 2023 (1998). No changes were made to Article 25. *See* Smallridge, *supra* note 236, at 354 (noting prior attempts by Congress to require random selection of members).

[239] *See* Lieutenant Colonel Bradley J. Huestis, *Anatomy of a Random Court-Martial Panel*, ARMY LAW., Oct. 2006, at 22 (discussing procedures used by Army's V Corps to select randomly court members and satisfying requirements of Art. 25).

[240] *See* United States v. Perl, 2 M.J. 1269, 1271 (A.C.M.R. 1976) (approving an "experimental program [at Fort Riley, Kansas,] for the selection of court members on a random basis").

[241] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 543(a), § 825(e)(4), 136 Stat. 2395, 2582 (2022). The issue of random selection was before Congress two decades ago. The Secretary of Defense was tasked with studying the possibility of using randomly selected juries in the military; that report was due in April 1999, *see* Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, sec. 552, 112 Stat. 1920, 2023 (1998), but no changes resulted from the report.

This amendment will go into effect on 22 December 2024, two years after the President signed the Bill.[242]

New RCM or regulations, that would provide an efficient and randomized selection process, would also have to be consistent with the current Article 25 requirements for selecting the best-qualified members.[243] And while there are good arguments for using a randomized selection process,[244] it is important to note that it reduces the convening authority's power to use their discretion in selecting the members for a particular trial.

B. Expanding the Jurisdiction of the Service Courts of Criminal Appeals

Article 66 of the UCMJ addresses the jurisdiction of the Service Courts of Criminal Appeals.[245] Currently, Article 66(b)(1) provides that an accused can appeal their court-martial conviction if the sentence adjudged is more than six months;[246] the Government has previously appealed a ruling by a military judge under Article 62, UCMJ;[247] the Government has appealed a court-martial sentence;[248] or the accused has filed an application for review of a decision by the Judge Advocate General.[249] On the other hand, review by the Service courts is automatic if the judgment entered by the court-martial includes a sentence of death, dismissal of a commissioned officer, cadet, or midshipman, a dishonorable discharge, a bad-conduct discharge, or confinement for two years or more.

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[242] Sec. 543(b), 136 Stat. at 2582.
[243] *See* John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20x*, 156 MIL. L. REV. 1, 25 (1998) (noting that random selection process could be administratively cumbersome and disruptive of military operations).
[244] *See* David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect*, 133 MIL. L. REV. 1 (1991) (noting the "appearance of evil" of commanders selecting the members, the continual proposals for changing the selection process, and that random selection should be considered).
[245] UCMJ art. 66 (2021); *see supra* Section III.D.
[246] *Id.* art. 66(b)(1)(A).
[247] *Id.* art. 66(b)(1)(B).
[248] *Id.* art. 66(b)(1)(C).
[249] *Id.* art. 66(b)(1)(D).

In the 2023 NDAA, Congress dramatically amended Article 66(b)(1) by deleting the existing provisions and inserting new language, to include the provisions below, which provides that the Service appellate courts will have jurisdiction over:

> (A) a timely appeal from the judgment of a court-martial, entered into the record under section 860c(a) of this title (article 60c(a)), that includes a finding of guilty; and
>
> (B) a summary court-martial case in which the accused filed an application for review with the Court under section 869(d)(1) of this title (article 69(d)(1)) and for which the application has been granted by the Court.[250]

The amendment eliminates the ability of the accused to appeal to a Service court if the Government has appealed a ruling under Article 62 or if the Government has appealed a sentence. So, while on the one hand the accused's ability to seek review by a Service appellate court has been reduced in those two instances,[251] on the other hand the courts' jurisdiction will be expanded because an accused will be able to appeal a court-martial conviction, regardless of the adjudged sentence, and regardless of whether it was a special or general court-martial. These amendments apparently went into effect the date the President signed the bill, 22 December 2022.

In addition, Congress amended Article 69, UCMJ, which provides for review by the Judge Advocate General of certain court-martial convictions.[252] That article was amended, *inter alia*, by changing the deadlines for seeking Judge Advocate General review. As with the

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[250] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 544(b)(1), § 866(b)(1), 136 Stat. 2395, 2582 (2022).

[251] Even though the amendment removes language that provided the accused with those two paths to the Service appellate courts, in reality, if the Government has appealed a military judge's ruling under Article 62 or has appealed the sentence, the accused will be provided with an opportunity to appear before the Service court, albeit on a more limited basis.

[252] Sec. 544(c), § 869, 136 Stat. at 2582.

amendments to Article 66 above, these changes apparently went into effect the date the President signed the bill: 22 December 2022.

C. Prohibiting Identification of Convening Authority

At the first session of the court-martial, the trial counsel announces the convening order, which created the court-martial, and the names of the parties who are present in the courtroom.[253] Those announcements, on the record, help ensure any jurisdictional prerequisites of the court-martial are noted on the record.[254] However, in the 2023 NDAA, Congress directed the amendment of RCM 813, and other rules, to make sure that at the beginning of the court-martial the name, rank, or position of the convening authority are not announced.[255] The exception to that rule is if the convening authority is the President, the Secretary of Defense, or the Secretary concerned.[256] No similar amendment is being made to announcing who referred the charges to the court-martial.

It is not clear why Congress thought this change was necessary. Perhaps lawmakers were concerned that announcing who convened the court-martial amounts to some sort of unlawful command influence; but it is not clear that that has ever been a serious argument. And the beginning session of a court-martial may be a pretrial hearing under Article 39(a), UCMJ, where the court members are not present.[257] In any event, the amendment seems to cut against the transparency that is so important in military justice. As a practical matter, if the parties have reason to believe that the court-martial convening authority was not authorized to convene the court, the matter should still be resolved in an out-of-court session, on the record.

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[253] MCM, *supra* note 15, R.C.M. 813(a).

[254] *See id.* R.C.M. 201(b)(1) (providing that as a jurisdictional matter "[t]he court-martial must be convened by an official empowered to convene it"); *see also* UCMJ arts. 17 (1956), 18-19 (2016).

[255] Sec. 541(d), 136 Stat. at 2580.

[256] *Id.*

[257] UCMJ art. 39(a) (2017); *see also* MCM, *supra* note 15, R.C.M. 803; *see generally* 1 SCHLUETER, *supra* note 20, ch. 12 (discussing procedures in Article 39(a) pretrial sessions).

VII. Concluding Thoughts

It is clear that the 2022 and 2023 NDAAs will effect major changes to the military justice system. The real question is whether the changes will result in the outcomes that Congress intended.

For example, reserving charging decisions for special trial counsel will certainly provide what some reformers have been arguing for—more control by uniformed judge advocates. But, will that shift result in more sexual assault prosecutions and convictions, the perceived goals of the legislation? Perhaps not. If lawyers alone are examining the evidence and measuring the credibility of witnesses, they may be even more hesitant to bring a close case to trial. Under the current system, both the commander and a uniformed lawyer are involved in the decision as to whether and what charges should be preferred. As such, there may be cases where the two parties do not agree on those questions; in a command-centric system, the commander's view can prevail. It is important to recall that uniformed lawyers, unlike commanders, are bound by rules of professional responsibility, such that a decision by a uniformed lawyer must be informed by those rules. If the new system results in fewer prosecutions, then what is Congress to do next—remove uniformed judge advocates from the equation?

Because the new system will be bifurcated, there are bound to be expected—at least initially—problems of coordination and communication. Commanders will need to be aware that they may find themselves dealing with at least two different types of prosecution teams: one for Service members who allegedly commit covered offenses and another for Service members who allegedly committed offenses that are not covered. And depending on how each Service organizes their Office of Special Trial Counsel, there will be potential communication problems up and down that chain of command and in communications between local and area and regional special trial counsel and investigators working on cases involving covered offenses. Much will depend on whether the Services rely on local special trial counsel or counsel at a higher level. It will also be necessary to work out the new working relationships between staff judge advocates and the special trial counsel. The latter will no longer be in the chain of command for the staff judge advocate; there will certainly be a need to maintain clear lines of authority and communication.

As we point out above, adopting something like the Federal sentencing guidelines is likely to create a number of unintended consequences, one of which is a dramatic increase in appellate review of sentences imposed by military judges who may have erred in applying sentencing parameters or criteria.

It remains to be seen whether the changes in the 2022 and 2023 NDAAs will have a negative effect on the efficiency and speed that have been hallmarks of the American military justice system and, ultimately, on one of the goals of military justice—promoting and maintaining good order and discipline. Scholars have addressed the issue of the growing complexity of legal systems and agree that complexity in justice systems can be problematic.[258] Implementing a new sentencing regimen and creating the Office of Special Trial Counsel certainly will introduce new complexities.

Finally, to avoid such potentially adverse consequences to the military justice system, we encourage Congress in the future to hold extensive hearings on proposed amendments to the UCMJ.[259] Congress should hear the views of a wide range of stakeholders and interest groups and also consider the full extent of ripple effects from its proposals so that the American military justice system is transformed at a principled and measured pace. In that way, Congress will be able to more effectively carry out its constitutional mandate to make rules and regulations affecting the military.

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[258] *See, e.g.*, Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, And Cures*, 42 DUKE L.J. 1, 6-7 (1992) (citing other scholarly works on the issue of complexity in legal systems and stating that many commentators have noted the administrative and transaction costs, which complexity generates); *see also* J.B. Ruhl & Daniel Martin Katz, *Measuring, Monitoring, And Managing Legal Complexity*, 101 IOWA L. REV. 191 (2015) (addressing the issue of measuring legal complexity).

[259] In enacting the extensive legislation in the 2016 Military Justice Act, Congress held no real hearings on the legislation. In subsequent NDAAs, few comprehensive hearings have been held.

THE DEATH OF NEUTRALITY IN DJIBOUTI: INVITING STRATEGIC COMPETITORS, THE UNITED STATES AND CHINA, TO BUILD MILITARY BASES WITHIN ITS BORDERS

MAJOR ADAM S. REITZ*

I. Introduction

The United States and the People's Republic of China (P.R.C.) are engaged in a strategic power competition.[1] The United States has declared that the P.R.C. is the only competitor "capable of combining its economic, diplomatic, military, and technological power to mount a sustained challenge to a stable and open international system."[2] As the United States attempts to outpace the P.R.C., it must also prepare to militarily defeat it both at home and abroad.

The challenges surrounding this defense preparedness have increased as the P.R.C. updates and expands its military capabilities. More specifically, the P.R.C. recently increased defense spending to include building military bases overseas,[3] and in 2017, the P.R.C. opened its first

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[1] *See* THE WHITE HOUSE, INTERIM NATIONAL SECURITY STRATEGIC GUIDANCE 8 (2021) [hereinafter INTERIM NATIONAL SECURITY STRATEGIC GUIDANCE].

[2] *Id.*

[3] Debra Orock Enoru, The Rise of the People's Republic of China Poses a Potential Strategic Challenge to the United States 4 (2021) (Ph.D. dissertation, National American University) (ProQuest).

overseas military base in the Republic of Djibouti (Djibouti), located in East Africa.[4] The U.S. Department of Defense (DoD) reports that, "Beyond its base in Djibouti, the P.R.C. is pursuing additional military facilities to support naval, air, ground, cyber, and space power projection."[5] This same report identified several countries, including the United Arab Emirates (UAE), as potential locations for future P.R.C. military bases.[6] The UAE, like Djibouti, already hosts a U.S. military installation.[7] If the P.R.C.'s plan to expand its overseas presence is accomplished, more U.S. and P.R.C. installations located in the same countries becomes inevitable. Currently, this reality only exists in Djibouti, making it ripe for a case study.

In the event of an international armed conflict (IAC) between the United States and the P.R.C., countries like Djibouti, which have allowed both nations to build military installations within their borders, may become third-party hosts to that conflict, raising significant legal questions. One such legal question is whether a host country can claim neutrality when it invites competitor military bases within its borders. This paper explores this question via the present Djibouti situation and concludes that Djibouti cannot be a neutral state when it invites competitor foreign militaries to build within its borders.

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[4] *Investing in America's Security in Africa: A Continent of Growing Strategic Importance: Hearing Before the S. Armed Servs. Comm.* 117th Cong. 3 (2022) (Statement of Gen. Stephen A. Townsend, Commander, USAFRICOM) [hereinafter 2022 USAFRICOM Posture Statement].

[5] OFF. OF SEC'Y OF DEF., MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 130 (2021) [hereinafter 2021 P.R.C. DEVELOPMENTS]. Section 1202 of the National Defense Authorization for Fiscal Year 2000 requires the Secretary of Defense to submit this annual report to Congress addressing the P.R.C.'s military and security developments. National Defense Authorization for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512, 781 (1999).

[6] 2021 P.R.C. DEVELOPMENTS, *supra* note 5, at 130-31.

[7] MATTHEW WALLIN, AM. SEC. PROJECT, U.S. MILITARY BASES AND FACILITIES IN THE MIDDLE EAST 2, 10 (2018). Since World War II, the U.S. military has established bases throughout the world, with approximately 750 military installations in more than eighty countries and territories. David Vine, *The United States Probably Has More Foreign Military Bases Than Any Other People, Nation, or Empire in History*, THE NATION (Sept. 14, 2015), https://www.thenation.com/article/world/the-united-states-probably-has-more-foreign-military-bases-than-any-other-people-nation-or-empire-in-history; David Vine, *Lists of U.S. Military Bases Abroad, 1776-2021*, AM. UNIV. DIGITAL RSCH. ARCHIVE (July 4, 2021), https://doi.org/10.17606/7em4-hb13.

The discussion below proceeds in five parts. Part II provides a background of U.S. and P.R.C. involvement and military presence in Djibouti. Part III explores the legal agreements between the United States and Djibouti that govern the U.S. military presence within Djibouti's borders. Part IV evaluates the law of neutrality and how Djibouti's declaration of neutrality, if recognized, would affect military operations. Part V analyzes the P.R.C.'s recent actions and Djibouti's response, which are inconsistent with a neutral stance. Finally, Part VI provides a proposed U.S. approach to Djibouti's potential declaration of neutrality.

II. Background: The United States, the P.R.C., and Djibouti

Two competitor nations constructing military bases in Djibouti creates a complex environment for neutrality. To understand why the United States and the P.R.C. constructed these military bases, a look at each state's national and defense strategies and the geographic importance of the region is necessary.

A. The U.S National Security Strategy and National Defense Strategy

The United States regularly publishes its *National Security Strategy* (NSS), which outlines the current presidential administration's goals and policies.[8] The NSS informs U.S. agencies, including the DoD, of the "proposed uses of all facets of U.S. power needed to achieve the [N]ation's security goals."[9] In 2021, President Joseph Biden signed the Interim National Security Strategic Guidance, which states that ensuring our national security requires the United States to "[p]romote a favorable distribution of power to deter and prevent adversaries from directly threatening the United States and our allies, inhibiting access to the global commons, or dominating key regions."[10] The interim guidance was followed by the 2022 NSS, which states, "Amid intensifying competition, the military's role is to maintain and gain warfighting advantages while limiting those of our competitors. The military will act urgently to sustain

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[8] *National Security Strategy*, HIST. OFF., OFF. OF THE SEC'Y OF DEF., https://history.defense.gov/Historical-Sources/National-Security-Strategy (last visited June 1, 2023).
[9] *Id.*
[10] INTERIM NATIONAL SECURITY STRATEGIC GUIDANCE, *supra* note 1, at 9.

and strengthen deterrence, with the [P.R.C.] as its pacing challenge."[11] Applying this strategy to Djibouti, the United States must deter and prevent the P.R.C. from dominating and threatening the United States and its allies through its military presence in the region.

The Office of the Secretary of Defense implements the NSS by creating the *National Defense Strategy* (NDS), a report outlining how the DoD will contribute to the mission.[12] The 2022 NDS identifies four defense priorities, two of which directly reference the P.R.C: "Defending the homeland, paced to the growing multi-domain threat posed by the [P.R.C.]" and "[d]eterring aggression, while being prepared to prevail in conflict when necessary—prioritizing the [P.R.C.] challenge in the Indo-Pacific."[13] These DoD priorities highlight the importance of preparing first to deter the P.R.C. while preparing to defeat the P.R.C. if deterrence fails and conflict is necessary.

After the DoD published its 2018 NDS, Congress created a commission to independently review it and make recommendations.[14] The 2018 NDS review emphasized the necessity of military presence to deter adversaries from dominating regions: "Forward posture is a key component of deterring competitors and adversaries and assuring allies and partners."[15] The United States, per the 2018 NDS, recognizes the importance of strengthening alliances under its strategic approach and identifies its plan to do so in Africa.[16] Specifically, in Africa, the United States "will bolster existing bilateral and multilateral partnerships and develop new relationships to address significant terrorist threats that threaten U.S. interests."[17] In addition, the United States will work with

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[11] THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 20 (2022) [hereinafter 2022 NATIONAL SECURITY STRATEGY].
[12] *National Defense Strategy*, HIST. OFF., OFF. OF THE SEC'Y OF DEF., https://history.defense.gov/Historical-Sources/National-Defense-Strategy (last visited June 1, 2023).
[13] U.S. DEP'T OF DEF., 2022 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 7 (2022) [hereinafter 2022 U.S. NATIONAL DEFENSE STRATEGY].
[14] COMM'N ON THE NAT'L DEF. STRATEGY FOR THE U.S., PROVIDING FOR THE COMMON DEFENSE: THE ASSESSMENT AND RECOMMENDATIONS OF THE NATIONAL DEFENSE STRATEGY COMMISSION 1 (2018) [hereinafter COMM'N ON THE NAT'L DEF. STRATEGY].
[15] *Id.* at 33.
[16] U.S. DEP'T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 10 (2018).
[17] *Id*.

local partners to counter threats and "limit the malign influence of non-African powers."[18]

Thus, the 2022 NDS demonstrates that the DoD's current strategy is consistent in its focus to deter the P.R.C. overseas. "The NDS directs the [DoD] to act urgently to sustain and strengthen U.S. deterrence, with the [P.R.C.] as the pacing challenge for the [DoD]."[19] Specific to Africa, the NDS states the United States will increase coordination with "[a]llies, multilateral organizations, and regional bodies that share U.S. objectives . . . to disrupt malign [P.R.C.] . . . activities on the continent."[20]

The U.S. presence in Djibouti assists in countering the P.R.C.'s "malign" influence throughout the region.[21] Djibouti has become a key partner in the U.S. effort to accomplish its national security and defense strategies in a key region of the world.

B. Post-9/11 Relationship between the United States and Djibouti

Since World War II, the United States has established a forward posture by building a military presence throughout the world.[22] At the end of the Cold War, the United States decreased its overseas military presence, but after the 9/11 terrorist attacks, the United States once again expanded its footprint.[23] Just after the events of 9/11, the United States created the Combined Joint Task Force-Horn of Africa (CJTF-HOA) in Djibouti to conduct operations in the Horn of Africa.[24] In November 2002, CJTF-HOA "conducted its operations from the USS *Mount Whitney*, moored in the port of Djibouti, while negotiations began with the Djibouti

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[18] *Id*. (including "violent extremism, human trafficking, trans-national criminal activity, and illegal arms trade").
[19] 2022 U.S. NATIONAL DEFENSE STRATEGY, *supra* note 13, at iii.
[20] *Id*. at 16.
[21] *See id*. at 10 (explaining that the United States' "posture" will help deter P.R.C. attacks).
[22] Bruna dos Santos Lersch & Josiane Simão Sarti, *The Establishment of Foreign Military Bases and the International Distribution of Power*, *in* 2 UNIVERSIDADE FEDERAL DO RIO GRANDE DO SUL, MODEL UNITED NATIONS: QUESTION OLD STRUCTURES FORGE THE FUTURE 84, 85 (2014).
[23] *Id.* at 85-87.
[24] *See About the Command*, COMBINED JOINT TASK FORCE-HORN OF AFRICA, https://www.hoa.africom.mil/about-the-command (last visited June 21, 2023).

government to host a U.S. presence ashore."[25] The parties identified Camp Lemonnier, a previous French Foreign Legion outpost, as the location for the U.S. presence.[26] "The U.S. and Djibouti governments signed a land lease agreement for the use of the facility in April 2003."[27]

Presently, CJTF-HOA continues to be headquartered at Camp Lemonnier in Djibouti and is the only enduring U.S. military presence in Africa.[28] Originally, Djibouti and CJTF-HOA were part of the U.S. Central Command (USCENTCOM), but, in 2007, they transitioned to the new U.S. Africa Command (USAFRICOM).[29] The DoD's creation of USAFRICOM reflected Africa's growing strategic importance.[30] Although the United States did not have a focus on Djibouti during the Cold War, "since 9/11 this small city-state has gained pivotal importance in [U.S.] military strategy in terms of power projection in the Horn of Africa, the Gulf, and the Sahel."[31] As the only enduring base in the region, Djibouti is regionally and strategically crucial to U.S. operations in Africa and the Middle East.[32]

C. Djibouti's Strategic Importance to the United States

Djibouti is located near the strategically important opening of the Red Sea and the narrow Bab al-Mandab Strait:

> With Djibouti located at the entrance to the Red Sea—one of the most sensitive straits in global trading—the small nation plays a major role for stakeholders far and wide. Positioned directly at the Bab al-Mandab Strait, anyone

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[25] CTR. FOR ARMY LESSONS LEARNED, NO. 16-19, COMBINED JOINT TASK FORCE-HORN OF AFRICA: FROM CRISIS ACTION TO CAMPAIGNING, at 1 (July 2016).
[26] *Id.*
[27] *Id.*
[28] Katie Lange, *What is Combined Joint Task Force Horn of Africa?,* U.S. DEP'T OF DEF. (Apr. 19, 2019), https://www.defense.gov/News/News-Stories/Article/Article/1819068/what-is-the-combined-joint-task-force-horn-of-africa.
[29] *See History of U.S. Africa Command*, U.S. AFR. COMMAND, https://www.africom.mil/history-of-us-africa-command (last visited June 22, 2023).
[30] *Id.*
[31] Degang Sun & Yahia H. Zoubir, *The Eagle's Nest in the Horn of Africa: US Military Strategic Deployment in Djibouti*, 51 AFR. SPECTRUM 111, 112 (2016).
[32] Lange, *supra* note 28.

> wanting to travel from Asia to Europe or vice versa by ship via the Suez Canal has to pass through Djibouti.
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> Over 10 [percent] of world trade passes along the coast of Djibouti. Therefore, various economic world powers have a stake in securing their goods that pass through the strait, especially with their military presence.[33]

Moreover, Djibouti is "[s]trategically located in the Horn of Africa . . . and is a key U.S. partner on security, regional stability, and humanitarian efforts across the region."[34] Djibouti is also near Somalia, where Al-Shabaab, a terrorist organization associated with Al Qaeda, is based.[35]

General Stephen A. Townsend, former Commander of USAFRICOM, described East Africa, which includes Djibouti, as "vital to U.S. [n]ational [s]ecurity."[36] Further, when describing the three facilities that make up the Djibouti base cluster—Camp Lemonnier, Chabelley Airfield, and the Port of Djibouti—General Townsend stated, "[T]his vitally important base . . . enables the [United States] to protect the [sea line of communication] through the Red Sea and project power across East, Central, and Southern

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[33] Jan Philipp Wilhelm, *Djibouti's Role in Geopolitics*, DEUTSCHE WELLE (Aug. 8, 2021), https://www.dw.com/en/tiny-but-mighty-djiboutis-role-in-geopolitics/a-57136069.

[34] *See U.S. Relations with Djibouti*, U.S. DEP'T OF STATE (Nov. 7, 2022), https://www.state.gov/u-s-relations-with-djibouti [hereinafter *U.S.-Djibouti Relations*].

[35] Claire Klobucista, Jonathan Masters, & Mohammed Aly Sergie, *Al-Shabaab*, COUNCIL ON FOREIGN RELS. (Dec. 6, 2022), https://www.cfr.org/backgrounder/al-shabab. Al-Shabaab has conducted attacks in Somalia, Kenya, Uganda, Ethiopia, and Djibouti. *References—Terrorist Organizations*, CENT. INTEL. AGENCY: WORLD FACTBOOK, https://www.cia.gov/the-world-factbook/references/terrorist-organizations (last visited June 23, 2023). In 2020, Al-Shabaab attacked a U.S. airfield in Kenya, killing three Americans. Abdi Guled, Tom Odula, & Cara Anna, *Extremists Attack Kenya Military Base, 3 Americans Killed*, ASSOCIATED PRESS (Jan. 5, 2020), https://apnews.com/article/somalia-us-news-ap-top-news-international-news-east-africa-65926ee82091f779d28d6a9644fb739f. The United States responded by bombing Al-Shabaab in Somalia during the summer of 2021. Harun Maruf, *US Military Targets Al-Shabaab in Somalia with More Air Strikes*, VOICE OF AM. NEWS (Aug. 1, 2021), https://www.voanews.com/a/africa_us-military-targets-al-shabab-somalia-more-airstrikes/6209034.html.

[36] *See National Security Challenges and U.S. Military Activities in the Greater Middle East and Africa: Hearing Before the H. Armed Servs. Comm.* 117th Cong. 11 (2021) (statement of Gen. Stephen A. Townsend, Commander, USAFRICOM) [hereinafter 2021 USAFRICOM Posture Statement].

Africa as well as into the USCENTCOM and [U.S Indo-Pacific Command areas of responsibility]."[37]

Camp Lemonnier helps the United States not only project power but also conduct humanitarian operations, such as support missions during the COVID-19 pandemic.[38] Djibouti remains one of the few stable nations in the region, which makes it a reliable U.S. ally.[39] However, the United States is not the only nation that has recognized the strategic importance of Djibouti.[40] Djibouti is also home to bases controlled by Japan, France, Italy, and the P.R.C., with a regular military presence from other nations, including Germany, the United Kingdom, and Saudi Arabia.[41]

When the United States recognized that two of its major competitors—the P.R.C. and Russia—were gaining influence in Djibouti, it leveraged its relationship with Djibouti to prevent Russia from building a base there.[42] Djibouti denied Russia's request, stating that "it doesn't want to become a battleground for the competing interests of superpowers."[43] However, shortly after denying Russia, Djibouti allowed the P.R.C. to

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[37] *Id*.

[38] *See, e.g.*, Senior Airman Gage Daniel, *Task Force Supports Djibouti's COVID-19 Fight*, U.S. DEP'T OF DEF. (July 1, 2020), https://www.defense.gov/News/Feature-Stories/Story/Article/2242373/task-force-supports-djiboutis-covid-19-fight.

[39] Jessica Borowicz, *Port in The Desert Djibouti as International Lessor*, 1 ÆTHER: J. OF STRATEGIC AIRPOWER & SPACEPOWER 81, 82 (2022).

[40] In 2019, General Thomas D. Wauldhauser, then-Commander, USAFRICOM, stated, "Djibouti, a nation about the size of New Jersey, remains congested with a preponderance of foreign forces from the [United States], France, Germany, Japan, and China maintaining bases and competing for access and airspace." *United States Africa Command and United States Southern Command*: *Hearing Before the S. Comm. on Armed Servs.*, 116th Cong. 35 (2019) (statement of Gen. Thomas D. Wauldhauser, Commander, USAFRICOM); *see also* Wilhelm, *supra* note 33; Richard Milner, *Why Djibouti Has So Many Military Bases*, GRUNGE (May 27, 2023, 7:00 PM), https://www.grunge.com/1296703/why-djibouti-has-foreign-military-bases; Abu Mubarik, *Why Tiny Djibouti Hosts Both China and U.S. Military Bases – Only a Few Kilometers Apart*, FACE2FACE AFR. (Sept. 29, 2020 1:20 PM), https://face2faceafrica.com/article/why-tiny-djibouti-hosts-both-china-and-u-s-military-bases-only-a-few-kilometers-apart.

[41] Nigusu Adem Yimer, *How Djibouti Surrounded Itself by Military Bases*, POLITICS TODAY (Mar. 17, 2021), https://politicstoday.org/djibouti-surrounded-by-military-bases-of-china-us-france-uk-germany-others.

[42] Ivan Ulises Kentros Klyszcz, *Russia's Thwarted Return to the Red Sea,* RESPONSIBLE STATECRAFT (Nov. 15, 2020), https://responsiblestatecraft.org/2020/11/15/russias-thwarted-return-to-the-red-sea.

[43] Mubarik, *supra* note 40.

build a base within its borders, which "blindsided" the United States.[44] To better understand why the P.R.C. is interested in Africa and identified Djibouti as strategically important, a review of its national strategy and objectives follows.

D. The P.R.C.'s National Strategy

The 2021 DoD annual report states that the P.R.C.'s national strategy "aims to achieve 'the great rejuvenation of the Chinese nation' by 2049."[45] As part of the great rejuvenation, the P.R.C. "continued its efforts to advance its overall development including steadying its economic growth, strengthening its armed forces, and taking a more assertive role in global affairs."[46] The P.R.C. views the United States as trying to "contain" it, and "[P.R.C.] leaders are increasingly willing to confront the United States and other countries in areas where interest diverge."[47]

The P.R.C. has moved towards these objectives by taking an active role in global affairs in Africa and building up its military presence in key areas like Djibouti. In 2020, the P.R.C. continued "emphasizing a greater global role for itself . . . through delivering COVID-19 aid abroad and the pursuit of overseas military facilities, in accordance with the [P.R.C.'s] defense policy and military strategy."[48]

The P.R.C.'s presence in Djibouti provides it "with the ability to support a military response to contingencies affecting . . . investments and infrastructure in the region and the approximately [one] million [P.R.C.] citizens in Africa and 500,000 in the Middle East."[49] The decision to build the base in Djibouti, along with future plans to build other overseas bases,

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[44] Andrew Jacobs & Jane Perlez, *U.S. Wary of Its New Neighbor in Djibouti: A Chinese Naval Base*, N.Y. TIMES (Feb. 25, 2017), https://www.nytimes.com/2017/02/25/world/africa/us-djibouti-chinese-naval-base.html.
[45] 2021 P.R.C. Developments, *supra* note 5, at 1.
[46] *Id*.
[47] *Id*.
[48] *Id*. at 30.
[49] *Id*. at 53.

is likely driven by the P.R.C.'s "One Belt, One Road" initiative and the "perceived need to provide security for [One Belt, One Road] projects."[50]

E. The P.R.C.'s Rise in Djibouti

The One Belt, One Road initiative seeks to connect Asia with Africa and Europe via land and maritime networks to stimulate the P.R.C.'s economic growth and improve diplomacy.[51] The P.R.C. invests heavily in African nations to achieve this goal, which, in turn, causes some of these nations to be heavily indebted to the P.R.C.[52] Djibouti has welcomed the P.R.C.'s investment and has accumulated a significant debt; a 2019 Washington Post report stated that "Beijing now holds over 70 percent of Djibouti's gross domestic product in debt."[53] The P.R.C.'s investments in Djibouti have placed them in a "debt trap," which allows the P.R.C. to "reinforce its influence on the continent."[54]

The P.R.C. gains influence through not just its financial investments, it also creates multi-lateral forums to generate engagements.[55] In 2018, the P.R.C. hosted the first "China-Africa Defense and Security Forum."[56] Also in 2018, the P.R.C. held the Forum on China-Africa Cooperation, where it "announced a China-Africa Peace and Security Fund and pledged

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[50] U.S. DEP'T OF DEF.., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 2019, at 3 (2019). It must be noted that the P.R.C. decision to build a military base in Djibouti is inconsistent with its "stated position of not interfering in foreign countries' internal affairs." *Id.*at 113.

[51] Scott Kennedy & David A. Parker, *Building China's "One Belt One Road,"* CENTRE FOR STRATEGIC INT'L STUDS. (Apr. 3, 2015), http://csis.org/publication/building-chinas-one-belt-one-road.

[52] Harry G. Broadman, *Africa's Debt Dance with China in Creating the Belt Road Initiative*, AFR. REP. (Apr. 21, 2021), https://www.theafricareport.com/81857/africas-debt-dance-with-china-in-creating-the-belt-road-initiative.

[53] Max Bearak, *In Strategic Djibouti, a Microcosm of China's Growing Foothold in Africa*, WASH. POST (Dec. 30, 2019, 5:00 AM), https://www.washingtonpost.com/world/africa/in-strategic-djibouti-a-microcosm-of-chinas-growing-foothold-in-africa/2019/12/29/a6e664ea-beab-11e9-a8b0-7ed8a0d5dc5d_story.html; *see also* Mordecai Chaziza, *China Consolidates Its Commercial Foothold in Djibouti*, THE DIPLOMAT (Jan. 26, 2021), https://thediplomat.com/2021/01/china-consolidates-its-commercial-foothold-in-djibouti (last visited June 22, 2023).

[54] Chaziza, *supra* note 53.

[55] 2021 P.R.C. DEVELOPMENTS, *supra* note 5, at 134.

[56] LAURA P. BLANCHARD & SARAH R. COLLINS, CONG. RSCH. SERV., IF11304, CHINA'S ENGAGEMENT IN DJIBOUTI 1 (2019).

to support programs on law and order, peacekeeping, antipiracy, and counterterrorism." [57] If the P.R.C.'s investments and community engagement do not indicate its intent to remain in Djibouti for the long term, its construction of a military installation in Djibouti provides additional evidence of its plans.

F. The P.R.C.'s Military Base in Djibouti

In 2017, the P.R.C. built its first—and currently only—overseas military base in Djibouti.[58] While the P.R.C. has military installations throughout the South China Sea, including three militarized artificial islands,[59] the base in Djibouti is its first installation that is not located in areas adjacent to its mainland.[60]

Initially, the P.R.C. would not acknowledge that its new base in Djibouti was anything more than a logistical facility.[61] The P.R.C. wanted the base to be recognized as part of a peace-keeping effort to help combat piracy in the Red Sea and Bab al-Mandab Strait.[62] Nevertheless, the P.R.C. has continued to expand the base "into a platform to project power across the continent and its waters," including a "large naval pier."[63] With the completion of this pier, the P.R.C. can use its base in Djibouti to

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[57] *Id*.

[58] *China Formally Opens First Overseas Military Base in Djibouti*, REUTERS (Aug. 1, 2017), https://www.reuters.com/article/us-china-djibouti/china-formally-opens-first-overseas-military-base-in-djibouti-idUSKBN1AH3E3.

[59] Jim Gomez & Aaron Favila, *AP Exclusive: US Admiral Says China Fully Militarized Isles*, ASSOCIATED PRESS (Mar. 21, 2022), https://apnews.com/article/business-china-beijing-xi-jinping-south-china-sea-d229070bc2373be1ca515390960a6e6c.

[60] At this time, it is unclear how far the P.R.C. will go with building military installations throughout the world. The United States identified several potential locations in its 2021 report on the P.R.C.: "The PRC has likely considered Cambodia, Myanmar, Thailand, Singapore, Indonesia, Pakistan, Sri Lanka, United Arab Emirates, Kenya, Seychelles, Equatorial Guinea, Tanzania, Angola, and Tajikistan among other places as locations for PLA military logistics facilities." U.S. DEP'T OF DEF., MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 2022, at 145 (2022) [hereinafter 2022 P.R.C. DEVELOPMENTS].

[61] Jean-Pierre Cabestan, *China's Djibouti Naval Base Increasing its Power,* E. ASIA F. (May 16, 2020), https://www.eastasiaforum.org/2020/05/16/chinas-djibouti-naval-base-increasing-its-power.

[62] *See id*.

[63] 2021 USAFRICOM Posture Statement, *supra* note 36, at 5.

accommodate an aircraft carrier and other Chinese naval ships,[64] transforming what the P.R.C. was touting as a logistical facility to a fully capable military installation. In addition, the P.R.C. is "planning to construct a permanent spaceport . . . [and] seeks to establish additional military and space facilities in multiple African countries, notably on the West Coast."[65]

Although, the DoD has determined that the current threat from P.R.C. basing in Djibouti is marginal, its "expanded" military presence allows it "to project power against the United States, our allies, or global commerce."[66] Moreover, as discussed more below, the P.R.C. base's short distance from Camp Lemonnier—just twelve kilometers away—raises logistical issues and security concerns for the United States.[67] The United States may not be able to slow down the P.R.C.'s expansion in Djibouti; however, it can continue to enter into and rely on legal agreements that provide Djibouti and the region with stability and an alternative geopolitical partner to the P.R.C.

III. Agreements Between the United States and Djibouti

A. Types of Agreements

States can enter into several types of agreements to facilitate cooperation among nations.[68] Common agreements that relate to the DoD include status of forces agreements (SOFA), defense cooperation

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[64] Tsukasa Hadano, *China Adds Carrier Pier to Djibouti Base, Extending Indian Ocean Reach*, NIKKEI ASIA (Apr. 27, 2021), https://asia.nikkei.com/Politics/International-relations/Indo-Pacific/China-adds-carrier-pier-to-Djibouti-base-extending-Indian-Ocean-reach. "In late March 2022, a FUCHI II class (type 903A) supply ship *Luomahu* docked at the 450-meter pier for resupply; the first such reported [People's Liberation Army] Navy port call to the Djibouti support base, indicating that the pier is now operational." 2022 P.R.C. DEVELOPMENTS, *supra* note 60, at 144.

[65] *Hearing on the Posture of United States Central Command and United States Africa Command in Review of the Defense Authorization Request for FY 2024 and the Future Years Defense Program, Hearing Before the S. Armed Serv. Comm*., 118th Cong. 10 (2023) (statement of Gen. Michael E. Langley, U.S. Marine Corps, Commander, USAFRICOM) [hereinafter 2023 USAFRICOM Posture Statement].

[66] *Id*. at 11.

[67] *See* 2021 USAFRICOM Posture Statement, *supra* note 36, at 5.

[68] This article does not provide the exhaustive list of agreements that states may enter or that may involve the DoD.

agreements (DCA), base land-lease agreements, logistics agreements including acquisition and cross-servicing agreements (ACSA), and arms sales.[69] Each relationship the United States has with other states is unique and may include all or some of the agreements stated above. The U.S. relationship with Djibouti is governed by the 2003 Access Agreement and 2014 Implementing Arrangement.[70] The United States works "with the base commander, the CJTF-HOA commander, and their teams, to ensure that our access, rights, and privileges under those agreements are fully respected."[71]

1. 2003 Access Agreement between the United States and Djibouti

In 2003, the United States entered into a written agreement for access to and use of facilities in Djibouti (2003 Agreement), including Camp Lemonnier and Djibouti's port facilities and airport.[72] The 2003 Agreement acknowledges the United States and Djibouti's "need to enhance their common security, to contribute to international peace and stability, and to initiate closer cooperation . . . that will support their defense relations and the fight against terrorism."[73] The terms of the agreement include, but are not limited to: use of facilities, logistics support, entry and exit of U.S. personnel, status of U.S. personnel, bearing of arms and wearing of uniforms, contracting, taxation, importation and exportation, claims, movement of aircraft and vehicles, security, and utilities and communications.[74]

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[69] This article references these agreements to provide context to the complexity they add to state relations but does not go into great detail for each one.

[70] *See* U.S. DEP'T OF STATE, INTEGRATED COUNTRY STRATEGY: DJIBOUTI 8 (2022) [hereinafter ICS-DJIBOUTI].

[71] *Id*.

[72] Agreement between the U.S. and Djibouti, U.S.-Djib., art. II, Feb. 19, 2003, T.I.A.S. No. 03-219 [hereinafter 2003 Agreement]. This agreement replaced the SOFA, which was previously in place between the United States and Djibouti. *Id.* art. XX(2).

[73] *Id.* pmbl.

[74] *See id*. arts. II to XV. Many of these terms could also be found in a status of forces agreement between states. *See* NAT'L SEC. L. DEP'T, THE JUDGE ADVOC. GEN'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 286 n.40 (2020) [hereinafter OPERATIONAL LAW HANDBOOK] ("Standard SOFA provisions typically address the following topics: entry and exit, import and export, taxes, licenses or permits, jurisdiction,

The 2003 Agreement also states that disputes shall "be resolved by consultation between the Parties or their Executive Agents, including, as necessary, through diplomatic channels, and will not be referred to any national or international tribunal or any third party for settlement."[75] There is also a termination clause, which allows either party to terminate the agreement by "one year's written notice through diplomatic channels."[76] Notably, the agreement does not include termination language in the event of an IAC.[77] This means that the agreement will still apply in the event of an IAC and that it cannot be referred to international tribunals if there is a dispute.

2. 2014 Implementing Arrangement between the United States and Djibouti

In 2014, the Obama administration negotiated a ten-year deal to keep the U.S. military base in Djibouti for approximately $63 million a year, which added an implementing arrangement (2014 Implementing Arrangement) to the original 2003 Agreement.[78] The 2014 Implementing Arrangement grants the U.S. access—sometimes exclusive access—to important facilities such as airfields and ports.[79] Namely, the arrangement authorizes the United States unimpeded access to and use of the Chebelley

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claims, property ownership, use of facilities and areas, positioning and storage of defense equipment, movement of vehicles, vessels, and aircraft, contracting procedures, services and communications, carrying weapons and wearing uniforms, official and military vehicles, support activities services, currency and foreign exchange.").

[75] 2003 Agreement, *supra* note 72, art. XIX.

[76] *Id*. art. XX(1).

[77] *See id*. ("This Agreement, of which Annex A forms an integral part, will enter into force upon the date of signature, and shall have an initial term of one year. Thereafter, it shall continue in force unless terminated by either Party on one year's written notice through diplomatic channels.").

[78] Zachary A. Goldfarb, *U.S., Djibouti Reach Agreement to Keep Counterterrorism Base in Horn of Africa Nation*, WASH. POST (May 5, 2014), https://www.washingtonpost.com/politics/us-djibouti-reach-agreement-to-keep-counterterrorism-base-in-horn-of-africa-nation/2014/05/05/0965412c-d488-11e3-aae8-c2d44bd79778_story.html; ICS-Djibouti, *supra* note 70, at 7.

[79] *See* Arrangement in the Implementation of the "Agreement Between the Government of the United States of America and the Government of the Republic of Djibouti on Access to and Use of Facilities in the Republic of Djibouti" of February 19, 2003, Concerning the Use of Camp Lemonnier and Other Facilities and Areas in the Republic of Djibouti, U.S.-Djib., May 1, 2014 [hereinafter 2014 Implementation Arrangement].

Airfield, which is where the DoD's air assets are located.[80] The arrangement also includes dispute language that requires the parties to resolve issues through "consultation or through diplomatic channels" and implements a bilateral interagency working group.[81] Within the bilateral interagency working group, the United States and Djibouti agree to address a variety of issues. These issues include "security assistance, military cooperation, . . . logistics and labor issues . . . [and] other matters that may arise concerning the interpretation of this Implementing Arrangement or related arrangements and agreements." Further, the 2014 Implementing Arrangement's termination language requires one year's written notice, consistent with the 2003 Agreement.[82] Again, nothing within the termination clause indicates that the agreement terminates in the event of an IAC. Moreover, the 2014 Implementing Arrangement references a series of memorandums of understanding that the parties previously agreed to, which further evidences the complexity and extensive commitments between the two nations.[83]

3. Logistical Agreements Between the United States and Djibouti

Logistics, in the context of Djibouti, is largely covered by the 2003 Agreement and the 2014 Implementing Arrangement. However, the 2003 Agreement further references the ACSA between the DoD and Djibouti.[84] An ACSA allows the DoD to provide logistical support, supplies, and services on a reciprocal basis.[85] The support an ACSA provides must be reimbursed through replacement-in-kind, payment-in-kind, and equal-

[80] *Id.*
[81] *Id*. para. 11.
[82] *Id*. para. 15.
[83] *Id*. at 1.
[84] 2003 Agreement, *supra* note 72, art. III. The acquisition and cross-servicing agreement in the 2003 Agreement focuses on the government of Djibouti providing U.S. forces with logistical support, supplies, and services, but the United States can also use the ACSA to obtain reimbursement if it were to provide logistical supplies. *Id*.
[85] Ryan A. Howard, *Acquisition and Cross-Servicing Agreements in an Era of Fiscal Austerity*, ARMY LAW., Oct. 2013, at 26, 27.

value exchange.[86] In addition to these agreements, the United States has a train-and-equip partnership with the Djibouti military.[87]

In 2019, the United States delivered fifty-four new Humvees as "part of a $31 million train-and-equip partnership" between the United States and Djibouti.[88] Overall, "The U.S. military's direct and indirect payments total over $200 million annually, equivalent to around 10 percent of Djibouti's gross domestic product."[89] "The U.S. [G]overnment is also Djibouti's second-largest employer, behind only the government of Djibouti, including its port operations."[90]

4. Cooperation and Security Agreements

According to the Embassy of Djibouti in Washington, D.C., since 2003, "more than [twenty] bilateral agreements have been signed relating to civil, judicial, and military cooperations and the installation of the American forces on our territory."[91] The United States provides Djibouti with security assistance, including border security, coastal security, regional stabilization, and counterterrorism.[92] Since fiscal year 2006, the DoD has spent over $150 million in assistance to Djibouti in "'global train-and-equip' counterterrorism assistance."[93] The United States also conducts joint exercises with Djibouti's military, including a two-week exercise in 2021 to "improve information sharing and promote security."[94]

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[86] *Id*. at 28.
[87] *U.S. Provides Djibouti's Rapid Intervention Unit Tactical Vehicles Seven Months Early*, U.S. AFR. COMMAND (Dec. 26, 2019), https://www.africom.mil/article/32454/u-s-provides-djiboutis-rapid-intervention-unit-tactical-vehicles-seven-months-early (describing how the United States delivered these vehicles to the Armed Forces of Djibouti for use by its "Rapid Intervention Battalion," an infantry battalion that the U.S. military has been training and equipping).
[88] *Id*.
[89] *Id*.
[90] *Id*.
[91] *Djibouti-U.S. Relations*, EMBASSY OF THE REPUBLIC OF DJIBOUTI IN WASHINGTON, D.C., https://djiboutiembassyus.org/page/djibouti-us-relations (last visited June 26, 2023).
[92] LAUREN PLOCH BLANCHARD, CONG. RSCH. SERV., IF11303, DJIBOUTI 2 (2022).
[93] *Id.*
[94] *US Navy Brings 15 Nations Together in Djibouti for Exercise Focused on Maritime Crime, Information Sharing*, STARS & STRIPES (July 27, 2021), https://www.stripes.com/

Djibouti is also part of the State Partnership Program (SPP), a DoD security cooperation program that the Chief of National Guard Bureau manages and that geographic commands execute.[95] As such, the Djibouti military is one of fifteen African nations partnered with a U.S. National Guard unit to "enhance global security, understanding, and cooperation."[96] As the only enduring military installation in Africa, the U.S. presence in Djibouti is critical to the SPP and military agreements with other African nations.[97]

5. Additional Partnerships and Initiatives

In addition to agreements, the United States also implements several initiatives in Djibouti. These initiatives benefit Djibouti by providing jobs and paying for local resources.[98] In 2015, the DoD implemented the "Djibouti First Initiative," which was focused on procuring products and services to "strengthen U.S.-Djibouti ties and solidify an enduring presence in Africa."[99] In 2017, the "Africa First Initiative" replaced the Djibouti First Initiative.[100] The Africa First Initiative gives "authority to limit competition by providing host-nation preference to contracts awarded in support of U.S. operations in Africa."[101] In addition, the United States has engaged in exchange programs with Djibouti: "Through the Young African Leaders Initiative (YALI), the International Visitors Leadership Program, the Fulbright Program, and English language programs, Djiboutian leaders and American experts are exchanging ideas and expertise on issues of mutual interest and developing leadership and

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branches/navy/2021-07-27/cutlass-express-includes-15-nations-this-year-2325950.html [hereinafter STARS & STRIPES].

[95] *State Partnership Program*, U.S. AFR. COMMAND, https://www.africom.mil/what-we-do/security-cooperation/state-partnership-program (last visited June 26, 2023).

[96] *Id*.

[97] *See* STARS & STRIPES, *supra* note 94. The United States conducted a "[fifteen]-nation exercise designed to offer mostly African countries U.S. support in developing their navies and fighting piracy, trafficking and illegal fishing . . . in Djibouti." *Id.* The United States has many lasting SOFAs and DCAs in Africa; for example, as recently as 2020, the United States signed a SOFA with Rwanda. *See* Agreement Between the United States of America and Rwanda, U.S.-Rwanda, May 28, 2020, T.I.A.S. No. 20-528.

[98] Rachel E. Herald, The Africa First Initiative and Local Procurement 2 (Mar. 22, 2018) (M.S. thesis, Air Force Institute of Technology), https://scholar.afit.edu/etd/1842.

[99] *Id*.

[100] *See id*. at 3.

[101] *Id*.

skills training." [102] These initiatives, investments, cooperations, and agreements highlight the importance of an enduring U.S. presence in Djibouti.

B. The Importance of Agreements

In the absence of neutrality, the agreements discussed above provide an important framework for the U.S.-Djibouti relationship. These agreements, especially the 2003 Agreement and 2014 Implementing Arrangement, spotlight a shared commitment to "support their defense relations and the fight against terrorism."[103] In addition, the agreements are indications of the U.S. commitment to Djibouti and the region.[104]

The U.S.-Djibouti relationship is strong in the "increasingly vital but volatile region."[105] Nonetheless, the United States continues to engage with Djiboutian leadership to explore ways to strengthen it.[106] United States Marine Corps General (Gen.) Michael Langley, current USAFRICOM Commander, visited Djibouti in August 2022.[107] During Gen. Langley's visit, he expressed the United States' gratitude for Djibouti's leadership and contributions "to the African Union Transition Mission in Somalia and the gracious hospitality the Djiboutians show to our troops." [108] Further, Gen. Langley discussed the U.S.-Djibouti relationship, stating, "I look forward to continuing to foster our enduring, strong, and cooperative relationship."[109] Both Gen. Langley's statements and his visit to Djibouti call to attention the importance of the U.S. relationship with Djibouti and the cooperation agreements between the parties.

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[102] *U.S.-Djibouti Relations*, *supra* note 34.
[103] 2003 Agreement, *supra* note 72, pmbl.
[104] *Id.* (The U.S. within the purpose of the 2003 Agreement states among the reasons that it is "to contribute to international peace and stability").
[105] 2022 USAFRICOM Posture Statement, *supra* note 4, at 7.
[106] *See Langley Makes First Visit to Africa as Commander*, U.S. AFR. COMMAND (Sept. 1, 2022), https://www.africom.mil/pressrelease/34687/langley-makes-first-visit-to-africa-as-commander.
[107] *Id.*
[108] *Id.*
[109] *Id.*

In the event of an IAC between the United States and the P.R.C., these agreements provide the legal basis for the United States to maintain its presence in Djibouti and exercise self-defense against the P.R.C. to maintain "international peace and stability."[110] With the intent of the agreements in mind, the DoD began an "ambitious [$1 billion] military construction effort" at Camp Lemonnier.[111] "This sent a clear message to the Government of Djibouti: The [U.S.] military presence . . . [is] evolving from expeditionary mode to a more enduring one."[112] Further, the United States has "invested more than $338 million in Djibouti over the last [twenty] years."[113]

Beyond investment, the United States has announced a new Sub-Saharan Africa Policy. The policy identifies the P.R.C.'s attempt to undermine the "rules-based international order" and "weaken U.S. relations with the African peoples and governments" in contrast to the United States' "high-standards, values-driven, and transparent investments" approach.[114] Further, the Sub-Saharan Policy identifies the U.S. goal of assisting "partners' security, intelligence, and judicial institutions to identify, disrupt, degrade, and share information on terrorists and their support networks."[115] These significant goals compliment the intent of the agreements between Djibouti and the United States. A declaration or attempted declaration of neutrality would run counter to this established intent and impede the access the United States must maintain to provide these critical capabilities. Although this article argues that neutrality under the circumstances does not exist, the effect and application of the law of neutrality must be analyzed to fully comprehend the significance of the status.

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[110] 2003 Agreement, *supra* note 72, pmbl.
[111] ICS-DJIBOUTI, *supra* note 70, at 5.
[112] *Id.*
[113] *U.S. Renews Its Commitment to Djibouti with $9 Million Development Objective Grant Agreement*, U.S. EMBASSY IN DJIBOUTI (July 6, 2020), https://dj.usembassy.gov/u-s-renews-its-commitment-to-djibouti-with-9-million-development-objective-grant-agreement.
[114] THE WHITE HOUSE, U.S. STRATEGY TOWARD SUB-SAHARAN AFRICA 5 (2022).
[115] *Id.* at 8.

IV. The Law of Neutrality

Within neutrality, a state can be considered either a belligerent state, neutral state, or non-belligerent state.[116] A belligerent state is engaged in an IAC.[117] A neutral state is does not take part in the IAC.[118] A non-belligerent state refrains from active participation in hostilities while departing from or abandoning non-participant duties.[119] Djibouti is a non-belligerent state because, as discussed below, it has created conditions that preclude its neutrality. Nonetheless, it is important to understand the dramatic impact that Djibouti's neutrality—if recognized—would cause. This section introduces the law of neutrality and its impact in a potential IAC in Djibouti. It then makes the case for Djibouti's inability to declare neutrality in the modern legal and geopolitical landscape.

The law of neutrality permits a state to avoid taking sides in an IAC and "seeks to prevent . . . states from being drawn into an armed conflict" and to "minimiz[e] the effects of armed conflict" on the neutral state.[120] The rights and duties of neutrality are largely provided in two 1907 Hague Conventions: Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land[121] and Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War.[122] The law of neutrality is also mentioned in several other documents, including the Hague Convention (III),[123] *San Remo Manual*,[124] the 1977 Additional

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[116] OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 15.1.2 (12 June 2015) (C2, 13 Dec. 2016) [hereinafter LAW OF WAR MANUAL].
[117] *Id.* § 15.1.2.1.
[118] *Id.* § 15.1.2.2.
[119] *Id.* § 15.1.2.3.
[120] *Id.* § 15.1.3.
[121] Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, pmbl., Oct. 18, 1907, 36 Stat. 2310 [hereinafter Hague (V)].
[122] Hague Convention (XIII) Convention Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415 [hereinafter Hague (XIII)].
[123] Hague Convention (III) Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259.
[124] SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995).

Protocol I to the Geneva Conventions,[125] and the *DoD Law of War Manual*.[126]

In the event that an IAC between the United States and the P.R.C. occurs, this armed conflict may not be isolated to the South China Sea or North America.[127] An IAC may start elsewhere and trickle into Djibouti, or it may begin in Djibouti and extend elsewhere. Because Djibouti relies heavily on both the United States and the P.R.C. for aid and its economy, Djibouti may not want to be involved in the conflict and, therefore, declare neutrality. In the event neutrality is recognized, the neutral state and belligerents will have obligations and duties towards one another.

A. Neutral Power Obligations

A neutral power must observe two main concepts. First, in order to be a neutral power, the state must abstain from participation in the conflict.[128] Second, a neutral is required to treat each belligerent impartially.[129] "The law of neutrality . . . rest[s] on the principle that nations which are not engaged in a war are bound to observe absolute impartiality towards the belligerents and to abstain from all acts of war . . . ."[130] In addition, "Every measure of restriction or prohibition taken by a neutral Power . . . must be impartially applied by it to both belligerents." [131] Abstention and

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[125] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 87, June 8, 1977, 1125 U.N.T.S. 3.
[126] LAW OF WAR MANUAL, *supra* note 116.
[127] History shows IACs are not isolated geographically to the borders of the waring nations. For example, during World War II, the United States fought Nazi Germany in North Africa. Basil Liddell Hart, *Operation Torch*, BRITANNICA, https://www.britannica.com/event /North-Africa-campaigns/Operation-Torch (last visited June 27, 2023). Similarly, the United States fought Japan throughout the South Pacific as far south as New Guinea and the island of Guadalcanal. *The Pacific Strategy, 1941-1944*, NAT'L WWII MUSEUM, https://www.nationalww2museum.org/war/articles/pacific-strategy-1941-1944 (last visited June 27, 2023).
[128] LAW OF WAR MANUAL, *supra* note 116, § 15.3.2.
[129] Hague (V), *supra* note 121, art. 9; *see also* LAW OF WAR MANUAL, *supra* note 116, § 15.3.2.
[130] George Greenville Phillimore, *The Future Law of Neutrality*, 4 TRANSACTIONS OF THE GROTIUS SOC'Y, 43, 43 (1918).
[131] Hague (V), *supra* note 121, art. 9.

impartiality are the two overarching concepts a neutral must follow when enforcing its neutral status and meeting its neutral obligations.

1. Hague Convention V

Under Hague Convention V, which addresses war on land, a neutral "must not allow" certain acts "to occur on its territory."[132] These acts include allowing belligerents to move troops or convoys of munitions or supplies across the neutral territory.[133] Moreover, the neutral "must not allow" belligerents to erect any devices on its territory to communicate with its forces on the land or sea.[134] This also includes the use of communication apparatuses established before the war on neutral territory for "purely military purposes" if the apparatus has not been opened for public messages.[135] Further, the neutral "must not allow" belligerents to recruit assistance within the neutral territory.[136]

The neutral has additional obligations when belligerent troops enter or are already present within its territory. It must intern belligerent troops "as far as possible" from the conflict and provide the interned with "food, clothing, and relief required by humanity."[137] The neutral may, but is not required to, authorize the belligerent's sick and wounded to pass through its territory.[138] In addition to these robust land-based responsibilities under Hague Convention V, the neutral has additional duties related to its waters pursuant to Hague Convention XIII.

2. Hague Convention XIII

Neutral powers have a variety of duties and obligations to prevent hostilities within their territorial waters. Under Hague Convention XIII, which addresses naval war, a neutral is obligated to use surveillance to

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[132] *Id*. art. 5 ("A neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory.").
[133] *Id*. art. 2
[134] *Id.* art. 3.
[135] *Id*.
[136] *Id*. art. 4.
[137] *Id*. arts. 11-12.
[138] *Id*. art. 14.

prevent violations of the convention in its ports and waters.[139] Hague Convention XIII strictly forbids belligerents from preventing warships from exercising their power to search in the territorial sea of the neutral.[140] In addition, neutrals must prevent a belligerent's use of neutral ports and waters to engage their adversaries or establish communication stations with "belligerent forces on land or sea."[141] Further, the neutral power may prevent the fitting out or arming of vessels that it has reason to believe will be engaged in hostilities.[142] Moreover, under Hague Convention XIII, a neutral is expected to prevent belligerent warships from completing its crew, resupplying, or increasing supplies of war material or armament in "neutral ports, roadsteads, or territorial waters."[143]

Although the above is not an all-inclusive list of the neutral's obligations on land and sea, it provides a framework for the complexity of the obligation and the friction that neutrality can cause.

3. Enforcing Neutrality Is Not a Hostile Act

According to Hague Convention V, belligerents may not treat a neutral that is enforcing its obligations within the neutral's territory and water as unfriendly or hostile.[144] The neutral nation has a duty to prevent hostile acts within its borders and, if necessary, enforce neutrality by force.[145] Exercising this right to enforce neutrality does not provide the belligerents with a basis to respond in kind unless enforcement exceeds what is necessary.[146] A belligerent's obligations under the conventions to not violate the neutral territory or waters is a recognition that a neutral's waters are sovereign and its territory inviolable.[147]

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[139] Hague (XIII), *supra* note 122, art. 25.
[140] *Id*. art. 2.
[141] *Id*. art. 5.
[142] *Id*. art. 8.
[143] *Id*. art. 18.
[144] Hague (V), *supra* note 121, art. 10; Hague (XIII), *supra* note 122, art. 26.
[145] *See* Hague (V), *supra* note 121, art. 10; Hague (XIII), *supra* note 122, art. 26.
[146] PROGRAM ON HUMANITARIAN POL'Y AND CONFLICT RSCH. AT HARV. UNIV., HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 390 (2013) (para. X.II.169(2)).
[147] Hague (V), *supra* note 121, art. 1; Hague (XIII), *supra* note 122, art. 1.

While the steps a neutral must take to maintain its neutrality are not considered hostile, they are not without impact. The following section analyzes these effects in the case of an IAC in Djibouti.

B. Neutrality's Effects and Belligerents' Obligations

A neutral has an obligation to enforce neutrality, but belligerents also have an obligation under neutrality to comply with the Hague Conventions and respect the state's neutral status.[148] In terms of inviolability, belligerents are prohibited from entering the neutral nation unauthorized.[149] Simply put, belligerents may not attack the neutral territory or use the neutral territory to attack another belligerent.

In Djibouti, legal agreements authorize the U.S. military's presence in-country, providing exclusive use and unimpeded access to certain facilities within Djibouti, including airports and seaports.[150] Separate agreements authorize the P.R.C. military's presence in Djibouti.[151] Neutrality directly conflicts with these agreements' purposes. In an IAC between the United States and the P.R.C., Djibouti would need to deny entry to any troops from both these belligerent nations. It would also need to intern these nations' troops already within its territory.[152] Moreover, a

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[148] *See, e.g.*, Hague (V), *supra* note 121, art. 2 ("Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power."); *id.* art. 3.

> Belligerents are likewise forbidden to: (a)Erect on the territory of a neutral Power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea; (b)Use any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages.

Id.

[149] *See* Hague (V), *supra* note 121, art. 1. *See also* Lieutenant Colonel Jimmy Gutzman, *State Responsibility for Non-State Actors in Times of War: Article VI of the Outer Space Treaty and the Law of Neutrality*, 80 A.F. L. REV. 87, 104 (2019) (citing Michael Bothe, *The Law of Neutrality*, *in* HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 571, 559 (Dieter Fleck ed., 2d ed. 2008) ("Above all, this means that the armed forces of the parties to the conflict may not enter neutral territory. They may not in any way use this territory for their military operations, or for transit or similar purposes.").

[150] *See, e.g.*, 2014 Implementation Arrangement, *supra* note 79.

[151] *See* PLOCH BLANCHARD, *supra* note 92, at 2.

[152] *See* Hague (V), *supra* note 121, art. 11.

neutral Djibouti must prevent U.S. supplies and equipment from entering Djibouti, which would directly violate the terms of the U.S.-Djibouti agreements.[153]

As mentioned above, Hague Convention V forbids belligerent munition and supplies from moving across neutral territory.[154] This is especially problematic for the United States given Camp Lemonnier's role as the main support for operations throughout Africa and adjunct support to operations in the Middle East. Preventing troops and convoys to enter Djibouti's neutral territory or territorial seas during an IAC threatens the United States' ability to protect its national security interests in Africa and abroad.

Moreover, access to and use of ports is crucial to U.S. operations in the region. The inability to stay in port long-term, to re-supply, or use the naval base in the territorial sea of Djibouti for naval operations against its adversaries would drastically impede U.S. military capabilities. Both the U.S. and P.R.C. bases have ports, and to end hostilities in the region, the United States would need to engage and defeat the P.R.C.'s navy from its ports in Djibouti.

As identified above, U.S. recognition of Djibouti's neutrality would be problematic and affect U.S. military operations in the region against the P.R.C., counterterrorism operations, and humanitarian operations. However, because Djibouti created the conditions for international armed conflict by inviting competitor militaries within its borders, it cannot declare neutrality. If Djibouti chooses to not participate in an IAC between the United States and the P.R.C., it can only be classified as a non-belligerent.[155] Nonetheless, even if the United States recognized Djibouti as a neutral power, it would not be without remedy if Djibouti failed to

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[153] *See* 2003 Agreement, *supra* note 72. The 2003 Agreement allows U.S. forces and contractors to import "any equipment, supplies, material or services required for their operations in the Republic of Djibouti" and further states that importation in accordance with the agreement shall not be restricted by the Djibouti Government. *Id*. art. X.
[154] *Id*. art. 1.
[155] *See* LAW OF WAR MANUAL, *supra* note 116, § 15.1.2.3.

meet its neutral duties, which would include its inability or unwillingness to prevent the P.R.C. from violating Djibouti's neutrality.[156]

C. Evolving Neutrality

"International concepts are not final, they are not immutable, nor embodied in cement. An approach that may have been satisfactory in 1907 may no longer reflect the view of the present time and may no longer be fully acceptable."[157] The law of neutrality is no exception. Some experts have argued that neutrality "disappeared" with the adoption of the United Nations (U.N.) Charter because, in legal terms, "'war' was outlawed and . . . therefore there were no actions that would allow states to remain neutral." [158] In practice, however, the international community still recognizes the concept of neutral states; even the concept of a permanent neutral state has survived.[159] The U.N. Charter also identifies situations in which neutrality could not exist: The "[U.N.] Security Council could require an otherwise neutral [s]tate to cease economic relations with a belligerent . . . require a [s]tate to cease telegraphic, radio, and other means of communications with an aggressor . . . [and] could also require military action against an aggressor."[160]

This article does not take the position that a neutrality has disappeared; rather, it argues, as the U.N. Charter suggests, that under certain

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[156] A neutral nation is obligated to prevent belligerents from violating its neutrality and from entering or using its land, air, or sea. *Id.* § 15.4.2. If Djibouti is unable or unwilling to do so, the law of neutrality authorizes belligerents to use force on neutral territory against the belligerent that is violating that territory's neutrality. Ashley Deeks, *Unwilling or Unable: Toward an Normative Framework for Extra-Territorial Self-Defense*, 52 VA. J. OF INT'L L., 483, 499 (citing ERIK CASTREN, THE PRESENT LAW OF WAR AND NEUTRALITY 441 (1954)) ("These sources make clear that neutrality law permits a belligerent to use force on a neutral state's territory if the neutral state is unable or unwilling to prevent violations of its neutrality by another belligerent."). Overall, this article is premised on the basis that Djibouti is not a neutral state and the unable and unwilling criteria will not be required although it further bolsters the conclusion that there is no neutrality under these conditions.
[157] Egon Guttman, *The Concept of Neutrality Since the Adoption and Ratification of the Hague Neutrality Convention of 1907*, 14 AM. U. INT'L L. REV. 55-60, 58 (1998).
[158] Detlev F. Vagts, *The Traditional Legal Concept of Neutrality in a Changing Environment*, 14 AM. U. INT'L L. REV. 83, 89 (1998).
[159] As recently as 1995, the U.N. recognized Turkmenistan as a permanent neutral state. Gutzman, *supra* note 149, at 109.
[160] *Id.* at 108.

circumstances neutrality is not possible. A state may intertwine its military practices to a level at which a state is no longer capable of declaring neutrality. If that state does not participate in the conflict, it would be a non-belligerent, and neutrality restrictions would not apply to the belligerents in the conflict.

In this case, Djibouti is host to several foreign militaries.[161] Its intense popularity across the international community—thanks to its uniquely geostrategic location—shines a spotlight on the implications that our increasingly globalized world has on international law. This shifting global landscape necessitates a fresh look at the doctrine of neutrality and its non-applicability to circumstances involving foreign basing. Djibouti's militarization through foreign military basing has evolved and, therefore, so should the doctrine of neutrality. The following examination of the U.S. position on neutrality over time and the recent Russia-Ukraine War further support this argument.

D. The U.S. Position on "Qualified Neutrality" and the Russia-Ukraine War

1. The U.S. Position of "Qualified Neutrality"

The United States availed itself of the law of neutrality as early as 1793, when President George Washington proclaimed neutrality in the war between Great Britain and France.[162] President Washington declared that the United States "would engage in conduct friendly and impartial towards the belligerent powers."[163] In 1939, Congress enacted the Neutrality Act

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[161] While the landscape is constantly changing, a 2021 report included Germany, Spain, Italy, France, the United Kingdom, and Saudi Arabia in the list of militaries present in Djibouti in addition to the United States and China. Nigusu Adem Yimer, *How Djibouti Surrounded Itself by Military Bases*, POLITICS TODAY (Mar. 17, 2021), https://politicstoday.org/djibouti-surrounded-by-military-bases-of-china-us-france-uk-germany-others.

[162] HARLOW GILES UNGER, "MR. PRESIDENT": GEORGE WASHINGTON AND THE MAKING OF THE NATION'S HIGHEST OFFICE 165-66 (2013).

[163] *Id.* at 165.

in an effort to keep the United States from "being dragged into war through trade."[164]

As the law surrounding armed conflicts has evolved, so has the U.S. position on neutrality. During World War II, the United States adopted "qualified neutrality," a position that gives neutral states the ability to support belligerent states who are the victim of "flagrant and illegal wars of aggression."[165] Thus, neutral states no longer had to treat all states equally; rather, they could "discriminate in favor of" a victim state and provide them with support.[166] The U.S. position was controversial.[167] However, as discussed below, it became widely accepted over time.

2. "Qualified Neutrality" and the Russia-Ukraine War

In February 2022, Russia invaded the eastern borders of Ukraine.[168] After Russia's invasion, several nations, including the United States, provided the Ukraine with "billions of dollars in lethal military aid, including weapons and ammunition."[169] The transfer of arms, which was "inconsistent with the traditional law of neutrality, have been justified . . . under the concept of qualified neutrality."[170] Once a controversial position, several states have used qualified neutrality to maintain neutral

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[164] Aaron Xavier Fellmeth, *Divorce Waiting to Happen: Franklin Roosevelt and the Law of Neutrality, 1935-1941*, 3 BUFF. J. INT'L L. 413, 422 (1997) (citing Neutrality Act of 1939, 54 Stat. 4, 4 (1939)).

[165] LAW OF WAR MANUAL, *supra* note 116, § 15.2.2.

[166] *Id.*

[167] *Id*. The United States is no stranger to taking policy positions that are supported by the law but may not be widely accepted. For example, in addition to qualified neutrality, the United States recognizes anticipatory self-defense. Under this concept, the United States may exercise national self-defense to preemptively strike before an adversary attacks. KARL P. MUELLER, STRIKING FIRST: PREEMPTIVE AND PREVENTIVE ATTACK IN U.S. NATIONAL SECURITY POLICY 6 (2006). ("National Security Strategy and other recent policy statements use the 'preemption' label to refer to a wide range of actions that involve striking the first blow against perceived security threats . . . ."). Anticipatory self-defense is "controversial in the international community." OPERATIONAL LAW HANDBOOK, *supra* note 74, at 6.

[168] *Timeline: The events leading up to Russia's invasion of Ukraine*, REUTERS (Mar. 1, 2022), https://www.reuters.com/world/europe/events-leading-up-russias-invasion-ukraine-2022-02-28.

[169] Raul (Pete) Pedrozo, *Ukraine Symposium – Is The Law Of Neutrality Dead?*, ARTICLES OF WAR (May 31, 2022), https://lieber.westpoint.edu/is-law-of-neutrality-dead.

[170] *Id.*

status while providing lethal arms to the conflict zone during the Russia-Ukraine War.

The Russia-Ukraine War—and the international community's willingness to get involved via qualified neutrality—demonstrates how law of neutrality has, and is able to, evolve based on the circumstances. Similarly, two competitor military bases located in the same state necessitates an evolution of the law of neutrality. In this case, the modern reality should lead to the conclusion that Djibouti is not a neutral state, and the law of neutrality may not exist based on the conditions it has created by inviting competitor militaries into its borders.

E. Djibouti's Degradation of Neutrality

Djibouti has degraded its potential claim of neutrality in various ways. First, Djibouti has entered into basing agreements with competing nations, which allows a robust military presence within its borders. Second, neutrality will violate or frustrate the binding agreements by disallowing military operations within Djibouti. Third, under the law of neutrality, Djibouti will not be able to enforce its neutrality against the P.R.C. nor will it be able to distinguish between military versus civilian activities based on the P.R.C.'s civil-military fusion. Fourth, under the law of neutrality, it is unable to remain impartial based on its economic reliance to the P.R.C.

First, by allowing both the United States and the P.R.C., strategic competitors, to build military bases within its borders, Djibouti has precluded its ability to declare neutrality in an IAC involving these countries. The invitations to build military bases within Djibouti has created a robust military presence within its borders. As discussed in the next section this has already created tension between the United States and the P.R.C. It is foreseeable that the two competing nations or the other militaries with bases in Djibouti would have conflict based on the close proximity of the militaries. The militarization of Djibouti alone is sufficient to question neutrality, however, the legally binding agreements further support the idea of no neutrality.

Second, Djibouti has entered into various agreements which allow two competitor militaries to base within its borders. In other words, military

presence in Djibouti by the United States and P.R.C. is authorized via binding agreements. Therefore, the U.S. and P.R.C. military presence is legally authorized within Djibouti within the parameters of the agreements which at least in the United States' case is quite expansive, as previously defined. The U.S. forces are legally in Djibouti based the 2003 Access Agreement and 2014 Implementing Arrangement, which allows the DoD access to and use of the Djibouti base cluster. The agreements authorize military operations to contribute to peace and stability, enhance cooperation, and fight against terrorism.[171] Djibouti presently permits both militaries to conduct operations within its borders. For example, the United States has conducted several anti-piracy military operations from Djibouti.[172] Similarly, the P.R.C. has also conducted military operations against piracy in the region. [173] Neutrality would challenge these capabilities and violate or frustrate the intent of these agreements as it requires belligerent troops in the neutral territory to be interned by the neutral power.[174] The United States would be unable to contribute to peace and stability or fight terrorism within the agreement if its military members are not authorized to move and must be interned.[175] This, combined with the other legal instruments that Djibouti has signed with the United States, creates an extensive reliance on the agreements to ensure regional peace and stability. The U.S. military provides training of partner militaries, security to fragile governments against "destabilizing forces," and "directly support[s] partner missions in the United Nations and African Union missions."[176] The U.S. base in Djibouti is used by the U.S. military to protect American lives in the region and build stability for other African states. [177] The United States exercises its rights regularly under the agreements. "The U.S. military accounts for just over half of all flights from Djibouti's airport. The U.S. Navy regularly refuels . . . warships at Djibouti's oil terminal."[178]

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[171] 2003 Agreement, *supra* note 72, at 1.
[172] Jessica Martin, *Djibouti, Africa: A Potential Point of U.S.-China Engagement*, ICAS (Nov. 25, 2020), https://chinaus-icas.org/research/djibouti-africa-a-potential-point-of-u-s-china-engagement.
[173] *Id.*
[174] *See* Hague (V), *supra* note 148, art. 11.
[175] 2003 Agreement, *supra* note 72, at 1.
[176] ICS-DJIBOUTI, *supra* note 70, at 8.
[177] *Id.*
[178] *Id.* at 6.

The stability and security that the U.S. provides to Djibouti and neighboring nations, while also protecting U.S. national security interests, is the intent of the agreement between the states. Taking away these capabilities via neutrality frustrates the purpose of the agreement and leaves an already vulnerable region unprotected against malign P.R.C. forces.

Third, Djibouti has drastically weakened its ability to prevent either the United States or the P.R.C. from using its territory for hostilities when it allowed the P.R.C., a potential U.S. adversary, to build a base within its borders and in such close proximity to the U.S. base. If Djibouti attempts to declare neutrality, the United States should be concerned about Djibouti's ability to enforce neutrality by controlling the P.R.C.'s troop movement and naval operations within its territory (as required by a neutral nation).[179] Djibouti's military strength is small with approximately "10,500 active troops (8,000 Army; 250 Naval; 250 Air; 2,000 Gendarmerie)."[180] Djibouti's military is not as sophisticated as either the U.S. or P.R.C. military, as they are armed with "older French and Soviet-era weapons systems."[181] The P.R.C. "base includes personnel from various branches, including marines and special forces."[182] The base has a "heliport which can also be used by drones" and a 660 meter-long pier for its ships.[183] "Underground, the base is equipped with cyber and electronic warfare facilities."[184] In addition, the P.R.C., as previously established, is investing heavily in military capabilities and continues to develop its base in Djibouti. Based on the capabilities listed and the P.R.C.'s continual advancement, Djibouti does not appear to have the military capabilities to enforce neutrality or prevent P.R.C. actions directed towards the United States.

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[179] *See* Hague (V), *supra* note 148, art. 2; Hague (XIII), *supra* note 122, art. 18.
[180] *Djibouti*, CENT. INTEL. AGENCY: WORLD FACTBOOK (Feb. 16, 2022), https://www.cia.gov/the-world-factbook/countries/djibouti/#military-and-security (last visited Feb. 25, 2022).
[181] *Id.*
[182] Jean-Pierre Cabestan, *China's Djibouti Naval Base Increasing Its Power*, EAST ASIA FORUM (May 16, 2020), https://www.eastasiaforum.org/2020/05/16/chinas-djibouti-naval-base-increasing-its-power.
[183] *Id.*
[184] *Id.*

An additional challenge created by Djibouti allowing the P.R.C. to build a base in the region is whether Djibouti can determine if activities conducted by the P.R.C. are civil or military in nature. The P.R.C. integrates the civilian mariner population a maritime militia to support the P.R.C.'s armed forces.[185] The P.R.C. intertwines its military and civilian sector in its maritime operations, which creates ambiguity as to whether a vessel or actor is civilian or military in nature. "The militia is an armed reserve force of civilians available for mobilization. It is distinct from the People's Liberation Army's (PLA) reserve forces. Militia units organize around towns, villages, urban sub-districts, and enterprises and vary widely in composition and mission."[186] The Maritime militia also trains for "anti-air missile defense, light weapons use, and sabotage operations" as well as reconnaissance and surveillance.[187] This ability to change the nature of the vessel becomes challenging for Djibouti or the United States to determine whether it is engaged in civilian business or military operations. This is also challenging because Djibouti is reliant on P.R.C. imports and exports. As of 2022, the P.R.C. is approximately 43 percent of Djibouti's imports and 27.5 percent of its exports.[188] All civilian P.R.C. vessels that import and export could have military capabilities based on the P.R.C.'s maritime militia. The United States could board and search these vessels outside of neutral waters to ensure they are not carrying contraband to support the military objectives of the P.R.C.[189] However, this may be impractical based on the volume of vessels coming in and out of Djibouti. These issues add to the unique situation Djibouti has created within its borders and support the degradation of neutrality.

Fourth, as previously established Djibouti has significant debt to the P.R.C. Djibouti holds the highest debt burden to the P.R.C. among nations that it has invested in.[190] This creates significant risk that the P.R.C. will

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[185] Andrew S. Erickson & Connor M. Kennedy, *China's Maritime Militia* 1, CNA CORPORATION, https://www.cna.org/archive/CNA_Files/pdf/chinas-maritime-militia.pdf [hereinafter *Maritime Militia*].

[186] 2021 P.R.C. DEVELOPMENTS, *supra* note 5, at 75.

[187] *Maritime Militia*, *supra* note 185, at 6.

[188] *Djibouti*, OBSERVATORY OF ECON. COMPLEXITY, https://oec.world/en/profile/country/dji?yearlyTradeFlowSelector=flow0 (last visited Feb. 25, 2022).

[189] U.S. DEP'T OF NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 7.6 (2022).

[190] Katharina Bucholz, *The Countries Most in Debt to China [Infographic]*, FORBES (Aug. 19, 2022), https://www.forbes.com/sites/katharinabuchholz/2022/08/19/the-countries-most-in-debt-to-china-infographic/?sh=218a888f61d8.

use its economic power to influence Djibouti. The P.R.C. has shown that it is willing to use its economic and political influence to further its agenda. In October 2022, the P.R.C. used its economic power to influence the United Nations Human Rights Council to defeat a motion calling for a debate on human rights violations against Uyghur Muslims in Xinjiang, China.[191] Many of the 47 nations that voted on the motion are poor nations that fear publicly speaking out against the P.R.C. and jeopardizing future investment in their respective nations.[192]

Based on the significant investment and subsequent debt that Djibouti has created with the P.R.C., it is foreseeable that the P.R.C. will use its economic power as it did with the U.N. to influence Djibouti to ignore P.R.C. violations of neutrality in fear of economic consequences. This, combined with the complexity of the P.R.C.'s civil-military fusion and Djibouti's limited military capabilities, provides the United States with a strong argument to not recognize a neutral Djibouti.

These factors all contribute to the conclusion that Djibouti has degraded its ability to declare neutrality to the point that it no longer exists, which precludes them from declaring neutrality in an IAC involving the United States and the P.R.C. The P.R.C.'s actions towards the United States within Djibouti's borders, which have created tension between the states, further support this assertion.

V. The P.R.C.'s Misconduct and U.S. Self-Defense

A. Misconduct in Djibouti

It did not take long after the P.R.C. established its base in Djibouti for disagreements to arise between it and the United States. The bases' close quarters, with a mere twelve kilometers separating them, is fertile ground

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[191] Angeli Datt, *How Long Can Beijing Avoid Accountability for Its Abuses in Xinjiang?*, THE DIPLOMAT (Oct. 20, 2022), https://thediplomat.com/2022/10/how-long-can-beijing-avoid-accountability-for-its-abuses-in-xinjiang.

[192] Emma Farge, *U.N. Body Rejects Debate on China's Treatment of Uyghur Muslims in Blow to West*, REUTERS (Oct. 6, 2022), https://www.reuters.com/world/china/un-body-rejects-historic-debate-chinas-human-rights-record-2022-10-06.

for issues.[193] For example, in 2018, the United States formally complained to the P.R.C. and requested that it investigate its use of high-grade lasers, which were pointed at a U.S. aircraft.[194] The high-grade lasers the P.R.C. used can temporarily blind a pilot, and they caused two American Airmen minor eye injuries from the exposure.[195] The P.R.C. subsequently denied directing any lasers at U.S. aircraft.[196]

Just over a year later, the United States accused the Chinese military of "irresponsible actions" and attempting to gain entry to Camp Lemonnier. [197] Rear Admiral Heidi Berg, Director of Intelligence, USAFRICOM, described these irresponsible actions: "China tried to 'constrain international airspace' by barring aircraft from flying over the Chinese military base, flashed ground-based lasers into the eyes of American pilots and deployed drones designed to interfere with U.S. flight operations."[198] Again, the P.R.C. denied the allegations and responded by accusing the United States of violating international law.[199] The P.R.C. stated:

> [I]t was the [U.S.] warplanes that flew over the PLA Support Base in Djibouti, attempting to gather military intelligence, which seriously threatened the security of the Chinese base and personnel.

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[193] *See* 2021 USAFRICOM Posture Statement, *supra* note 36, at 5.

[194] Paul Sonne, *U.S. Accuses China of Directing Blinding Lasers at American Military Aircraft in Djibouti*, N.Y. TIMES (May 4, 2018, 3:36 AM), https://www.washingtonpost.com/news/checkpoint/wp/2018/05/03/u-s-accuses-china-of-directing-blinding-lasers-at-american-military-aircraft-in-djibouti.

[195] *Id.*

[196] *China Denies U.S. Accusation of Lasers Pointed at Planes in Djibouti*, REUTERS (May 3, 2018, 1:29 PM), https://www.reuters.com/article/us-usa-china-djibouti/china-denies-u-s-accusation-of-lasers-pointed-at-planes-in-djibouti-idUSKBN1I429M.

[197] Geoff Hill, *China, U.S. Military Clash over Djibouti Airspace*, WASH. TIMES (June 16, 2019), https://www.washingtontimes.com/news/2019/jun/16/china-us-military-clash-over-djibouti-airspace.

[198] *Id.*

[199] Guo Yuandan & Liu Xuanzun, *China Dismisses 'Irresponsible Actions' Accusation by US in Djibouti*, GLOB. TIMES (June 17, 2019), https://www.globaltimes.cn/content/1154646.shtml.

> It is the [United States] who should reflect on what it did and stop this act that violates the international law.[200]

Djibouti officials have rejected U.S. attempts to warn them about the P.R.C.[201] Chairman Aboubaker Omar Hadi, chairman of the ports and free-trade authority in Djibouti, stated, "I think the American politicians are manipulated, they are given wrong information, they are far away from Africa and Djibouti."[202] The P.R.C. is unwilling to confirm any allegations made by the United States and is actively engaged with the United States outside of Djibouti as well. These peacetime examples demonstrate that Djibouti, by not confronting the P.R.C., is unlikely to act as a neutral.

B. Disagreements between the United States and the P.R.C. Outside of Djibouti

A historical background of all conflicts the United States and the P.R.C. have engaged in is outside the scope of this article, but the following provides some current examples to highlight the possibility of an IAC between the United States and the P.R.C. outside of Djibouti. Recently, spokesperson Tan Kefei, China's Ministry of National Defense, stated, "[T]he United States has aggravated tension by blatantly sending military ships and aircraft to the South China Sea."[203] In addition, the P.R.C. described the United States as a "troublemaker" instead of "a 'defender' of free navigation and overflight."[204]

In January 2022, Qin Gang, the P.R.C. ambassador to the United States, accused Taiwan of moving towards independence and further warned that the United States "could face 'military conflict' with China

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[200] *Id.*
[201] *See* Geoffrey York, *Parting the Red Sea: Why the Chinese and U.S. Armies Are Fortifying This Tiny African Country*, GLOBE & MAIL (June 6, 2019), https://www.theglobeandmail.com/world/article-parting-the-red-sea-why-the-chinese-and-us-armies-are-fortifying.
[202] *Id.*
[203] Xinhua, *US is South China Sea 'Troublemaker': Military Spokesperson*, CHINA.ORG.CN (Feb.25, 2022), http://www.china.org.cn/china/2022-02/25/content_78070939.htm.
[204] *Id.*

over the future status of Taiwan."[205] Recently, P.R.C. military aircraft entered into Taiwan's declared air defense zone.[206] The United States responded by stating that this act was a provocation of military action that "could lead to conflict."[207] In September 2022, President Biden, while referring to the P.R.C.'s potential invasion of Taiwan, said the United States would defend Taiwan.[208]

Just after the 2022 Winter Olympic Games concluded in Beijing, North Korea's Kim Jun Un praised the P.R.C. and "vowed to strengthen cooperation with China and together 'frustrate' threats and hostile policies from the United States and its allies."[209]

Just days later, the P.R.C. blamed the United States for Russia's invasion of the Ukraine.[210] Instead of condemning Russia's military action towards the Ukraine, the P.R.C. stated that the United States caused the invasion.[211] "Those who follow the [United States'] lead in fanning up flames and then shifting the blame onto others are truly irresponsible."[212]

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[205] Steve Inskeep, *China's Ambassador to the U.S. Warns of 'Military Conflict' Over Taiwan*, NPR (Jan. 28, 2022, 5:09 AM), https://www.npr.org/2022/01/28/1076246311/chinas-ambassador-to-the-u-s-warns-of-military-conflict-over-taiwan. Further, Ambassador Qin Gang added that although the P.R.C. does not want war with Taiwan, it remains a big issue, and if Taiwan seeks independence, it may result in a military conflict between the P.R.C., Taiwan, and the United States. *Id.*

[206] Richard Sisk, *Taiwanese Fighters Scrambled Amid Fears Beijing Could Be Emboldened by Ukraine Invasion*, MILITARY.COM (Feb. 24, 2022), https://www.military.com/daily-news/2022/02/24/taiwanese-fighters-scrambled-amid-fears-beijing-could-be-emboldened-ukraine-invasion.html.

[207] *Id.*

[208] David Brunnstrom & Trevor Hunnicutt, *Biden Says U.S. Forces Would Defend Taiwan in the Event of Chinese Invasion*, REUTERS (Sept. 19, 2022, 10:09 AM), https://www.reuters.com/world/biden-says-us-forces-would-defend-taiwan-event-chinese-invasion-2022-09-18.

[209] Thomas Maresca, *N.Korea's Kim Congratulates China on Olympics, Says Together They Will 'Frustrate' U.S. Threats*, REUTERS (Feb. 21, 2022, 5:01 PM), https://www.reuters.com/world/asia-pacific/nkoreas-kim-congratulates-china-olympics-says-together-they-will-crush-us-2022-02-21.

[210] Simone McCarthy, *As War Breaks Out in Europe, China Blames the US*, CNN WORLD (Feb. 25, 2022), https://www.cnn.com/2022/02/25/china/china-reaction-ukraine-russia-intl-hnk-mic/index.html.

[211] *Id.*

[212] *Id.*

These examples highlight how complex the U.S.-P.R.C. relationship is throughout the world.

Based on the two superpowers' diverging interests in Djibouti and the South China Sea, it is possible that an IAC in one location spills over to the other regions, especially in Djibouti, where the militaries sit just twelve kilometers apart.[213] The P.R.C. has continued to develop its military presence in Djibouti and can project a stronger presence through their ability to accommodate warships. Based on the conflicts that have occurred both and in out of Djibouti between the United States and the P.R.C., Djibouti is on notice that an IAC may occur.[214] In the event of an IAC, international law permits the United States to exercise self-defense while seeking a U.N. security resolution, which is discussed in more detail below.

C. United Nations Security Council Resolution and the Right to Self-Defense

For the United States to lawfully engage in an IAC, it must seek a U.N. Security Council (UNSC) resolution or act in self-defense under Article 51 of the U.N. Charter.[215] The general rule under U.N. Charter Article 2(4) is as follows: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the [U.N.]"[216] In other words, nations have an obligation to be peaceful. If a nation violates Article 2(4), the United States may threaten or use force if a UNSC resolution under Chapter VII of the U.N. Charter authorizes such actions.[217] However, the UNSC has five permanent members: the P.R.C., France, Russia, the United Kingdom, and the United States.[218] Decisions of the UNSC require "concurring votes of [all]

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[213] 2021 USAFRICOM Posture Statement, *supra* note 36, at 5.
[214] *See also* York, *supra* note 201 (describing how Aboubaker Omar Hadi, chairman of the ports and free trade authority in Djibouti, "agrees that the Chinese and U.S. troops are in close enough proximity to trigger an accidental conflict").
[215] *See* OPERATIONAL LAW HANDBOOK, *supra* note 74, at 2.
[216] U.N. Charter art. 2, ¶ 4.
[217] *See* U.N. Charter ch. VII.
[218] U.N. Charter art. 23, ¶ 1.

permanent members." [219] In the case at hand, the P.R.C. would undoubtedly veto any resolution that the United States proposed to use force against it, effectively blocking the ability to secure a UNSC resolution.

Although the P.R.C.'s inevitable veto makes a U.N. resolution unattainable, the United States would still be authorized to act in self-defense. The U.N. Charter reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence [sic] if an armed attack occurs against a Member of the [UN], until the Security Council has taken measures necessary to maintain international peace and security."[220] In the U.S. view, this includes the right to anticipatory self-defense.[221] Further, the U.S. position is that the right of self-defense exists against any illegal use of force, including when use of force does not rise to the level of armed attack.[222] Based on the P.R.C.'s provocations of the United States, the self-defense route to legal justification is the more plausible path than obtaining a UNSC resolution. The United States maintains its inherent right to self-defense against the P.R.C. The P.R.C. has used drones to restrict airspace and P.R.C.-operated lasers have injured U.S. pilots.[223] Although the United States has not declared these actions use of force, it could interpret similar behavior in the future as triggering the U.S. right to self-defense.

As the United States could have a legal basis for engaging China in an IAC, judge advocates and commanders must prepare for the possibility that this conflict may erupt in Djibouti, and that Djibouti may respond by declaring neutrality. The U.S. approach to Djibouti's neutrality must be well-planned and transparent from the outset. The following section articulates this position.

VI. Proposed U.S. Position

If Djibouti declares neutrality, the United States must remain operable in the Horn of Africa. Judge advocates and commanders must prepare to

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[219] *Id.* art. 27, para. 3.
[220] *Id.* art. 51.
[221] LAW OF WAR MANUAL, *supra* note 116, § 1.11.5.2 (Use of Force Versus Armed Attack).
[222] *Id.*
[223] 2021 P.R.C. DEVELOPMENTS, *supra* note 5, at 131-32.

legally continue operations under these conditions. The U.S. response to Djibouti's neutrality must first emphasize that the law of neutrality does not exist in Djibouti or, more generally, when any state invites competing powers to base troops within its borders. Since neutrality could not exist in Djibouti, the United States must create an operational plan to degrade the P.R.C.'s capabilities as soon as possible. The United States would do this militarily by utilizing the access and capabilities its agreements with Djibouti provide. At the same time, the United States must emphasize to Djibouti that U.S. Armed Forces must maintain maximum operational freedom. This proposed U.S. viewpoint can be summarized as: (1) deny claims of neutrality, (2) utilize legal agreements, and (3) maintain operational freedom.

A. Deny Claims of Neutrality in Djibouti

Competitor foreign military forces' basing in Djibouti necessitates a re-evaluation of the law, and the U.S. military should embrace this evolution. Inviting competitor military bases and intermingling the state's economic viability with foreign militaries strain the neutral state's ability to abstain or remain impartial, which are key elements of neutrality. A state like Djibouti, which relies upon foreign military assistance and funding for security and economic stability, will not be able to remain impartial or have the appearance of impartiality.[224] In addition, Djibouti's heavy reliance on the P.R.C. economically, including large amounts of debt,[225] further emphasizes that abstention and impartiality are impossible under these conditions.

The United States cannot risk its only enduring military capabilities in Africa on Djibouti's ability to abstain or remain impartial. Indeed, in the past, Djibouti failed to heed U.S. warnings, continuing instead to support the P.R.C., and failed to condemn P.R.C. aggression towards the United States, which is largely explained by the P.R.C.'s economic influence over Djibouti. The United States is also enmeshed in Djibouti's economy via

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[224] *See, e.g.*, 2021 P.R.C. DEVELOPMENTS, *supra* note 5, at 85. Djibouti's forces have participated in exercises and training with not just the United States, but also with the People's Liberation Army Navy Marine Corps, which supports the P.R.C.'s military diplomacy. *Id.*

[225] *See* Chaziza, *supra* note 53.

security assistance, aid, and jobs, which further complicates Djibouti's ability to abstain and maintain impartiality.

Additionally, the law of neutrality is designed to prevent states from being pulled into the conflict and minimizing the overall effects of IAC on the neutral state.[226] In this case, Djibouti has invited the competitor states, or belligerents, to set up shop within its own borders. The 1907 view of neutrality likely did not consider a state allowing competitor foreign militaries to build bases within its borders. Under such circumstances, in an IAC between the United States and the P.R.C. in Djibouti, Djibouti cannot expect to be completely unaffected. In fact, Djibouti's leaders have admitted that a conflict between the two nations within its country are possible.[227] Creating the conditions in which foreign militaries can conduct IAC operations within the potential neutral state's borders is counter to the concepts of neutrality. A state that has intertwined its capabilities through cooperation agreements and invited competitor bases within the state in a modern view of the law cannot expect to avoid the effects on the state or to not be pulled into the conflict by one of the belligerents.

For similar reasons, the United States must conclude that Djibouti will be unable or unwilling to enforce neutrality on the P.R.C. A failure to comply with the obligations under neutrality means Djibouti, or a similar state, fits into the legal status of a non-belligerent.[228] The effect of such a status is that Djibouti can attempt to refrain from being part of the conflict without having to enforce its obligations impartially under neutrality to the parties. Also, this means that the United States would not be bound by the strict rules of neutrality because Djibouti would not be a neutral state.

The viewpoint that neutrality does not exist is further supported by the legal agreements that the parties have entered.[229] A state that enters into binding legal agreements to have a foreign military base within its borders must have an expectation that the foreign military will conduct military operations from within its borders. As discussed in Section II.F above,

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[226] LAW OF WAR MANUAL, *supra* note 116, § 15.3.2.
[227] *See supra* note 214 and accompanying text.
[228] LAW OF WAR MANUAL, *supra* note 116, § 15.1.2.3.
[229] These agreements include terms regarding the use and exclusive use of a port, airfield, and land capabilities for military operations, security, and stability. *See* 2003 Agreement, *supra* note 72; 2014 Implementation Arrangement, *supra* note 79; *supra* Section III.A.

both the United States and the P.R.C. have conducted military operations from Djibouti. In this case, where a host state allowed competitor militaries to build bases and operate within its borders, the risk of an IAC is amplified, and the state should bear that risk.

B. Utilize Legal Agreements

Through various agreements, the United States has contracted for the right to operate its military in Djibouti's air, land, and sea.[230] "Aircraft, vessels, and vehicles operated by or for U.S forces may enter, exit, and move freely within the territory of the Republic of Djibouti."[231] The parties' intentions were stated within the four corners of the agreements. Among these intentions was a recognition of "the need to enhance their common security, to contribute to international peace and stability, and to initiate closer cooperation."[232] The parties also acknowledged a desire to enhance "cooperation between the United States of America and the Republic of Djibouti that will support their defense relations and the fight against terrorism."[233] The United States must not ignore the importance of these agreements and must exercise its legal rights within them. These legal agreements do not become void because of an IAC; they have legal effect that the parties must respect. If there is a dispute, the parties must follow the process delineated within agreements.[234] If Djibouti wishes to terminate the agreements, it must do so as outlined in the agreement, by providing "one year's written notice through diplomatic channels."[235]

The United States, or any nation building military bases, expects to utilize its base for military operations, including during an IAC. In Djibouti, the United States and the P.R.C. are peer and geopolitical competitors with extensive military capabilities within 20 kilometers of one another. Judge advocates must work with all levels of the legal domain to provide context and explain why the 2013 Agreement and 2014 Implementing Arrangement remain legally enforceable in an IAC and support Djibouti's lack of neutrality. Taking a transparent approach early

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[230] *See supra* Section III.A.
[231] 2003 Agreement, *supra* note 72, art. XII(1).
[232] *Id.* pmbl.
[233] *Id.*
[234] *Id*. art. XIX.
[235] 2003 Agreement, *supra* note 72, art. XX, para. 1.

on is important; waiting for an IAC is not the appropriate time to begin to advance the U.S. position.

Declaring neutrality must not become a way for a state to avoid or circumvent its duties under an agreement when that state also invited competing interests to its table. Judge advocates must emphasize that the United States will exercise its existing rights under the agreements to resolve any potential disputes with Djibouti, including those that may arise due to an IAC.

C. Maintain Operational Freedom

Judge Advocates must help commanders and leaders understand neutrality's threat to maximum operational freedom before a potential IAC. "U.S. Mission Djibouti's top priority is to ensure long-term viability, reliable logistics (especially at the ports), and maximum operational freedom for our American military presence."[236] In order for the United States to maintain operational freedom, judge advocates must reference the legal language within the agreements and reference international law to advise commanders. During this time, the United States must be clear that if Djibouti does not become a co-belligerent with the P.R.C., it is not the target of operations. All U.S. operations will comply with the intent of the agreements to enhance peace, stability, and security with Djibouti.

In this effort, judge advocates need to ensure that the United States presents its position clearly to Djibouti and articulates that they will only target the P.R.C., specifically just the military capabilities that threaten the United States, minimizing the effect on Djibouti. Engagement with Djibouti's military and government early and often will help establish the legal standards and expectations for continued cooperation within the strong relationship.

As engagements occur with Djibouti's leadership, U.S. military leadership must educate Djibouti on the NSS and NDS driving these considerations. Namely, the NSS is clear that the military "will act urgently to sustain and strengthen deterrence, with the [P.R.C.] as its

[236] ICS-DJIBOUTI, *supra* note 70, at 5.

pacing challenge."[237] The 2022 NDS also specifically identifies the P.R.C. pacing challenge when discussing its goal to "meet growing threats to vital U.S. national security interests and to a stable and open international system."[238] It is imperative that Djibouti understands that in order to accomplish the intent of its shared agreements and NDS priorities, the United States must maintain a forward posture.[239] Djibouti must also understand that U.S. presence alone is not enough to deter the P.R.C.; the United States must have maximum operational freedom in the region.

The U.S. military understands the importance of its relationship with Djibouti and the strategic location in which it sits. "With the inclusion of the Iranian threat, East Africa is a nexus of four of the five major threats identified in the [NDS]: The [P.R.C], Russia, Iran, and violent extremist organizations."[240] If an IAC occurs, the United States cannot shut down operations with major threats present in the region.

United States Africa Command created four campaign objectives, all of which, if accomplished, can help U.S. military leadership guide conversations with Djibouti leadership. The objectives are: "1) [g]ain and maintain strategic access and influence, 2) [d]isrupt [violent extremist organization] threats to U.S. interests, 3) [r]espond to crises to protect U.S. interests, [and] 4) [c]oordinate action with allies and partners to achieve shared security objectives."[241] Accepting Djibouti's position of neutrality would severely frustrate these four objectives, leaving the United States and its national security interests vulnerable. As Djibouti is home to the majority of U.S. forces in the region, the United States must reject any claims of neutrality, as they would derail the United States' ability to work toward these critical campaign objectives.

VII. Conclusion

This article used Djibouti as a case study to argue that a state can create the conditions in which neutrality cannot exist through various actions, such as inviting adversarial or competitor foreign militaries to militarize

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[237] 2022 NATIONAL SECURITY STRATEGY, *supra* note 11, at 20.
[238] 2022 U.S. NATIONAL DEFENSE STRATEGY, *supra* note 13, at 1.
[239] COMM'N ON THE NAT'L DEF. STRATEGY, *supra* note 14, at 3.
[240] 2021 USAFRICOM Posture Statement, *supra* note 36, at 6.
[241] *Id.* at 7.

the state. The U.S. base in Djibouti is central to counterterrorism operations in Africa and the Middle East, military cooperation agreements in the region, international peace, and stability of African states, including Djibouti. Camp Lemonnier is vitally important to protecting U.S. national security interests on the continent, including maligning the P.R.C.'s influence in Africa. Based on this, the United States must adopt a position to ensure that it can accomplish these objectives.

Denying claims of neutrality, utilizing existing legal agreements, and maximizing operational freedom is the best U.S. approach in the face of an IAC against the P.R.C. in Djibouti. This approach is transparent and based on modern interpretations of existing international law and the policy to restore peace and stability in the region. Just as the Russia-Ukraine War has caused the international community to adopt positions it did not contemplate before, the situation in Djibouti challenges the traditional view of neutrality.

While Djibouti is currently the only state that has both a U.S. and P.R.C. military base within its borders, this situation may not be unique in the future given the P.R.C.'s plans to expand its global presence. This proposed U.S. viewpoint can not only get out in front of a potential IAC in Djibouti, but also, it can serve as a guidepost for managing international relationships and expectations as the global landscape continues to evolve.

PROCUREMENT BY OTHER MEANS: REFORMING WARZONE CONTRACTING

MAJOR ANTHONY A. CONTRADA*

An army is a collection of armed men obliged to obey one man. Every change in the rules which impairs the principle weakens the army.[1]

What is clear is that [the contracting officer] . . . is the only person legally authorized to sign the contract. In addition, the contracting officer administers the contract and prepares a report on contractor performance. Everything else is unclear.[2]

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[1] Letter from W.T. Sherman to General W. S. Hancock, President, Mil. Serv. Inst. (Dec. 9, 1879), *reprinted in* WILLIAM T. SHERMAN, MILITARY LAW 130 (1880); *see also* David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 21 (2013).

[2] JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 321(1989).

I. Introduction

The United States military's geographic combatant commanders[3] (COCOMs) possess the wartime authority to command vast armies, control billions of dollars of equipment, order lethal strikes, and lawfully detain combatants and noncombatants. Yet they do not have the authority to purchase a pallet of bottled water or rent a truck.[4] Meanwhile, contracting officers are bound by a vast array of laws, regulations, policies, and litigation constraints,[5] yet are expected to efficiently contract in warzone environments This uneasy balance of divided authority calls out for reform in an era of renewed great power competition.

The Federal Acquisition Regulation (FAR) and Competition in Contracting Act (CICA) were not developed with warzone environments or a COCOM's combat mission accomplishment in mind.[6] Within a bureaucratic process like government acquisition, officials "must serve a variety of contextual goals as well as their main or active goal."[7] Specifically, the FAR prioritizes best value acquisitions and multiple stakeholder interests.[8] The CICA prioritizes competition and provides disappointed contractors modes of redress through litigation[9] in hopes of providing interested businesses the opportunity to compete for

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[3] *See* 10 U.S.C. § 161 (establishing combatant commands).

[4] JOINT CHIEFS OF STAFF, JOINT PUB. 4-10, OPERATIONAL CONTRACT SUPPORT, at I-13 (4 Mar. 2019) [hereinafter JP 4-10]; FAR 1.602-1 (2023) (stating contracting officer authority); DFARS PGI 202.101 (Aug. 2023) (listing Department of Defense contracting activities).

[5] *See generally* JAMES F. NAGLE, HISTORY OF GOVERNMENT CONTRACTING 7 (2d ed. 1999) ("Contracting officers today are told what to do and how to do it, down to the most minute details."); *see also id.* at 494 (describing the litigious nature of Government contracting).

Competition in Contracting Act of 1984, Pub. L. No. 98-369, div. B, tit. VII, §§ 2701–2753, 98 Stat. 1175, *with* U.S. DEP'T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY (2018) ("[T]he Department of Defense's enduring mission is to provide combat-credible military forces needed to deter war and protect the security of our [N]ation. Should deterrence fail, the Joint Force is prepared to win.").

[7] WILSON, *supra* note 2, at 349; *see also* FAR 1.102(a)-(b) (2023) (identifying multiple acquisition process stakeholders); NAGLE, *supra* note 5, at 485 (discussing proliferation of socioeconomic goals in the post-World War II period).

[8] FAR 1.102(a)-(b) (2023).

[9] 31 U.S.C. § 3552 (statutory authority for bid protests).

Government contracts.[10] In contrast to civilian bureaucracies, the military tries to mitigate this aspect of Government process, particularly in wartime, through the principles of command unity and mission command.[11] Yet, acquisition, even in response to critical needs in a warzone setting, stands as a unique carve-out from that principle of military command.[12] As a result, the FAR's multiple contextual goals[13] can displace or hamper the military mission.[14]

Today's defense acquisition laws and policies were developed during the Cold War era,[15] when the military possessed greater in-house military logistical[16] capabilities to supply its global military operations.[17]

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[10] Daniel H. Ramish, *Midlife Crisis: An Assessment of New and Proposed Changes to the Government Accountability Office Bid Protest Function*, 48 PUB. CONT. L.J. 35, 41-42 n.55 (2018) (quoting H.R. REP. NO. 98-1157, at 11 (1984)). One commentator has noted the FAR's "goal of maintaining the public's trust and fulfilling public policy objectives is notably absent" from the Defense Federal Acquisition Regulation Supplement (DFARS). Moshe Schwartz, *Social and Economic Public Policy Goals and Their Impact on Defense Acquisition*, DEF. ACQUISITION RSCH. J., July 2019, at 210–11. The DFARS instead identifies "mission capability and operational support" as its primary objective. *Id.*; DFARS 201.101(3) (Feb. 2022).

[11] *See generally* JOINT CHIEFS OF STAFF, JOINT PUB. 1, JOINT PERSONNEL SUPPORT at I-3 (1 Dec. 2020) (identifying "unity of command" as a "Principle of War"); U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-0, MISSION COMMAND: COMMAND AND CONTROL OF ARMY FORCES para. 1-14 (31 July 2019).

[12] JP 4-10, *supra* note 4, at I-13; FAR 1.602-1 (2023) (stating contracting officer authority); DFARS PGI 202.101 (2023) (listing DoD contracting activities).

[13] WILSON, *supra* note 2, at 349.

[14] *See* Jacques S. Gansler & William Lucyshyn, *Contractors Supporting Military Operations*, *in* CONTRACTORS & WAR: THE TRANSFORMATION OF US MILITARY OPERATIONS 286 (Christopher Kinsey & Malcolm H. Patterson eds., 2012) ("Peacetime [Government contracting] business processes are ill-suited to support contingency operations.").

[15] *See generally* NAGLE, *supra* note 5, at 446–56, 495–504 (recounting the development of modern acquisition regulations).

[16] This article relies on the general definition of "logistics" in the military context as given by Jomini: "the practical art of moving armies and keeping them supplied." MARTIN VAN CREVELD, SUPPLYING WAR 1 (2d ed. 2004); *see also* JOINT CHIEFS OF STAFF, JOINT PUB. 4-0, JOINT LOGISTICS, at GL-8 (4 Feb. 2019) (C1, 8 May 2019) (defining logistics as "[p]lanning and executing the movement and support of forces.") [hereinafter JP 4-0].

[17] *See generally* Major Michael A. Cryer, Enabler or Vulnerability: Operational Contract Support in Large-Scale Combat Operations (May 23, 2019) (Advanced Military Studies, U.S. Army Command and General Staff College), https://apps.dtic.mil/sti/trecms/pdf/AD1083234.pdf (recounting the military's drift away from organic support units towards contracted support since the Vietnam War) (citations omitted).

However, today's context is quite different. In the three decades following the end of the Cold War, the United States military lost much of its organic logistical capability and increasingly relied on contractors for its warzone logistical needs.[18] Further, multiple sophisticated adversaries today have the potential to disrupt the United States' logistics and communications.[19] In a conflict against a peer or other capable adversary, the United States military could quickly find its current acquisition system insufficiently flexible or resilient to effectively accomplish basic combat zone acquisitions.

In light of these looming challenges, law and policy should view warzone acquisition as a command-driven military logistics function,[20] rather than a subfield within the highly intricate, bureaucratic, and litigious Government contracting system.[21]

Outside of the acquisition context, the law already recognizes the reality of logistical expediency: military commanders possess seizure and requisition authority under the law of war.[22] Yet, acquisition law lacks any

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[18] *See generally id.*; HEIDI M. PETERS, CONG. RSCH. SERV., R40057, TRAINING THE MILITARY TO MANAGE CONTRACTORS DURING EXPEDITIONARY OPERATIONS 1 (2008).

[19] DEF. SCI. BD., FINAL REPORT OF THE DSB TASK FORCE ON SURVIVABLE LOGISTICS, EXECUTIVE SUMMARY 1 (2018).

[20] *Cf.* Major Justin M. Marchesi, *Pass the SIGAR: Cutting Through the Smoke of Lessons Learned in Simplified Contingency Contracting*, 219 MIL. L. REV. 53, 70, 76 (2014) (arguing that "the overwhelmingly logistical nature of the contingency contracting mission" shows the need to better align for small-scale contingency contracting with brigade commanders).

[21] Framed organizationally, the current warzone contracting system resembles the regulatory landscape of the "administrative military," while it instead should belong to the "operational military." Mark P. Nevitt, *The Operational and Administrative Militaries*, 53 GA. L. REV. 905, 908–911 (2019) (positing that the U.S. military should be understood as "two militaries," an operational military led by combatant commanders, and an administrative military led by the Service chiefs and civilian Secretaries).

[22] *See generally* OFF. OF GEN. COUNS., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL §§ 5.17 and 11.18.7.1 (12 June 2015) (C3, 13 Dec. 2016) [hereinafter LAW OF WAR MANUAL] (method of requisition is to be determined by the local commander). "Requisition is the taking of private or state property or services needed to support the occupying military force." NAT'L SEC. L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK app. B, para. I(C)(4), at 91 (2022) [hereinafter 2022 OPERATIONAL L. HANDBOOK]. Multiple forms of legal warzone takings exist (for example, requisition, seizure, and confiscation), *see generally id.* para. I(C), but need not be differentiated for the purposes of this paper. The relevant difference

meaningful combat zone exceptions from either contracting authority strictures or competition requirements' litigation risk.[23] To ignore this disconnect is to invite self-inflicted logistical or (more likely) legal breakdowns in high-intensity or complex hybrid conflicts in which the United States may not enjoy uninterrupted supply routes, connectivity, or air dominance. In such a setting—where access to contracting officers is limited and may be disrupted—flexible, fast, and resilient command-driven acquisition authority would quickly become paramount, and current competition requirements would become unworkable due to the disruptive nature of bid protests. These features could contribute to a breakdown of logistics or a disregard of the current acquisition system (in extremis and of necessity) and move towards seizure or requisition.[24]

Acquisition law and policy should therefore be reformed prior to a future conflict in which the current system that separates command and purchasing authority will be severely tested and interrupted. In warzones, some level of purchasing authority should be fully subordinate to COCOM logistics authority, and the disruptive litigation impacts of bid protests should be reduced or eliminated.

This paper will focus on a narrowly-defined subtype of overseas contingency contracting: [25] short-term mission critical contracting,

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is between a mutually-bargained-for commercial transaction (such as a contract or purchase), versus a military taking (requisition) that is not mutually voluntary and for which payment is neither made nor definitized at the time of taking.

[23] The FAR contains well-known justifications for limiting competition on a case-by-case basis that are applicable to warzones. *See, e.g.*, FAR 6.3, 13.106 (2023) (for example, urgency). However, the general competition mandate exists as much in the warzone contracting setting as it does in peacetime domestic contracting. Further, the enumerated exceptions to competition do not negate vendors' ability to protest contract actions. *See infra* sections II.B and III.C regarding bid protests.

[24] *See generally* Elyce K.D. Santerre, *From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield*, 124 MIL. L. REV. 111, 149 (1989) (arguing that an insufficiently flexible battlefield acquisition system can lead to problems of confiscation of private property).

[25] "Contingency contracting" is defined as the "process of obtaining goods, services, and construction via contracting means in support of contingency operations." JP 4-10, *supra* note 4, at GL-6. Contingency operations are defined in statute as a military operation "designated by the Secretary of Defense as an operation in which members of the [A]rmed [F]orces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or results in the call

awarded and performed overseas in a conflict in which a sophisticated adversary has the potential to severely degrade in-theater contracting efforts (hereinafter warzone contracting).[26] In referring to "warzone" procurement, this paper primarily envisions contracts for emergent, rudimentary, critical supplies and services that directly enable ground and close air support combat operations.[27] Geographically, such requirements may be localized and relatively small, or theater-wide and large-scale. To qualify as warzone purchases, contracts would be awarded and performed within meaningful reach of physical enemy attack or other significant disruptive activity.[28]

Section II provides a brief background in warzone procurement and review of relevant contracting authorities. Section III will then identify the legal and regulatory risks present in the current contingency contracting systems, particularly in the context of potential conflicts with peer adversaries, or other technologically and legally sophisticated adversaries.

The first overarching risk discussed in Section III is the disconnect between contracting authority and command authority, and how that risk is heightened by the United States military's reliance on a handful of deployable contracting officers.[29] Further, Congress's recent recognition

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or order to, or retention on, active duty of members of the uniformed [S]ervices under [various specified provisions]." 10 U.S.C. § 101(a)(13).

[26] The term "contingency contracting" can also refer to humanitarian assistance and disaster relief. *See, e.g.*, An Act to Enact Certain Laws Relating to Public Contracts as Title 41, United States Code, "Public Contracts," Pub. L. No. 111-350, § 2312, 124 Stat. 3677, 3739 (2011) (codified at 41 U.S.C. § 2312) (creating a "Contingency Contracting Corps" to respond to disasters and military contingency operations). This paper uses of the term "warzone" to sharpen its focus on the military conflict context and to emphasize the environment in which the proposed reforms of Section IV would apply.

[27] For example, water, food, fuel, construction materials and equipment, and ad hoc transportation and facilities usage.

[28] See *infra* Appendix A (this paper's proposed statutory reform), which would provide flexibility to the Secretary of Defense to tailor the geographical parameters of a warzone (within limits) for purposes of the proposed command contracting authority.

[29] Cryer, *supra* note 17, at 27–28 (arguing that the current contingency contracting system would be insufficient in a large-scale conflict); *see also* MARK BALBONI ET AL., MISSION COMMAND OF MULTI-DOMAIN OPERATIONS 31 (2020) (describing likelihood of degraded communications in future conflicts), https://press.armywarcollege.edu/cgi/viewcontent.cgi?article=1917&context=monographs.

of the need for command-driven vendor vetting[30] highlights the related need for increased command contracting authority if such vetting is to be sufficiently flexible. The second category of risk is the disruptive effects of bid protests. This invited disruption encompasses both self-inflicted and adversarial "lawfare" vulnerabilities created by the current bid protest regime.

Section IV proposes and analyzes several statutory and regulatory reforms intended to mitigate these risks, including the assignment of limited non-FAR-based purchasing authorities through combatant commanders for warzone contracting purposes (Appendix A provides model statutory language). Second, Section IV proposes reforms to limit the disruptive impacts of the current bid protest system on battlefield acquisition. Section V provides a brief conclusion.

Given its focus on contracting authorities and regulations, this paper will not address other fiscal and regulatory authorities that would constrain the flexibilities argued for in this paper, absent parallel reforms or authorizations.[31] Further, this paper's scope aspires to a realistic focus on the limited class of rudimentary goods and services that will almost certainly be needed in any warzone. This limited scope is intended both to focus the paper and to argue for realistically achievable reforms. This paper does *not* address the supply and maintenance of complex weapons systems, munitions, information technology, and other requirements that could not be procured in local markets.

Finally, this paper does not contend that warzone procurement is a wise solution—let alone the preferred solution—to satisfy large-scale logistical requirements.[32] Rather, this paper assumes that warzone

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[30] *See* National Defense Authorization Act for 2014, Pub. L. No. 113-66, § 831, 127 Stat. 672, 810–814 (2013) (requiring specified combatant commands to establish vendor vetting procedures).

[31] *See, e.g.*, 10 U.S.C. § 2803 (capping the amount of the Department of Defense's emergency construction authority); U.S. DEP'T OF ARMY, REG. 405-10, REAL ESTATE, ACQUISITION OF REAL PROPERTY AND INTERESTS THEREIN para. 2-11 (14 May 1970) (prohibiting Army organizations other than the Corps of Engineers from leasing property where the total lease value is greater than $500).

[32] *See* JP 4-10, *supra* note 4, at III-11 ("[C]ontracted support should not be the source of last resort."); *see also* Cryer, *supra* note 17, at 26–27 (arguing that U.S. Army force structure doctrine leads to "ad hoc logistics" that are vulnerable in large-scale combat

procurement will be necessary on at least some meaningful scale, as it nearly always has been,[33] particularly during a chaotic opening phase of a large conflict.[34]

By their nature, combat logistics contain significant elements of improvisation.[35] In order to improvise successfully and legally, commanders must actually possess sufficient control over their logistics operations and options.[36] Acquisition regulations should therefore be made less restrictive and more resilient in anticipation of disrupted warzone environments.

II. Background

This section provides a brief historical background regarding warzone contracting before reviewing the current acquisition system and related vendor vetting programs.

A. Historical Background of Warzone Contracting and Logistics

Warzone acquisition has a long and sordid history. While armies have often satisfied supply needs through on-site contracting, more often armies relied on procurement by other means: pillage on a massive scale,

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operations because of over-dependence on locally-contracted support). Overreliance on local supply could be particularly dangerous today where civilian economies in developed countries typically rely on just-in-time delivery of food, fuel, and such, and in a warzone such civilian logistical systems would come under similar strains as military systems.

[33] *See, e.g.*, WILLIAM G. PAGONIS & JEFFREY L. CRUIKSHANK, MOVING MOUNTAINS 107 (1992) ("[O]ur limited-and-precious transport space [was] reserved for combat troops, and for those supplies, such as weapons and ammunition, that could not be procured in the theater. Everything else was our problem, to be found and contracted for.") (discussing the Gulf War).

[34] *See* Lieutenant Colonel Scott B. Kindberg, Accumulation of Degradation Sustainment Force Structure Imbalance 4-5 (Jan. 4, 2018) (Strategic Research Project, U.S. Army War College) (arguing that initial phases of campaigns will suffer from slow deployment of sustainment and logistics forces due to current force structure), https://publications.armywarcollege.edu/publication/accumulation-of-degradation-sustainment-force-structure-imbalance.

[35] *See* VAN CREVELD, *supra* note 16, at 236; MOSHE KRESS, OPERATIONAL LOGISTICS 53 (2d ed. 2016); THOMAS M. KANE, MILITARY LOGISTICS AND STRATEGIC PERFORMANCE 4 (2001).

[36] *See* KRESS, *supra* note 35, at 53.

extortion, and the like.[37] Modern military procurements has its roots in the late 17th century French army's semi-regularized supply contracts, which coincided with the advent of standing professional armies.[38] Modern armies have tried to add greater internal supply train capabilities to reduce the need for acquiring necessaries on site but have often still filled gaps through on-site purchase or pillage.[39] More recent history shows that locally-sourced warzone procurement remains an important component of present-day military logistic. Common examples of critical supplies acquired in-theater during the United States' conflicts in the Middle East include potable water, fuel, food and food-related services, and large-scale ground transportation and shipping.[40] The United States military is not the only present-day military demonstrating the necessity of locally-acquired warzone goods and services to fill gaps in long logistical chains. Russia's modern mechanized military struggled to supply itself with adequate food,

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[37] *See generally* VAN CREVELD, *supra* note 16, at 30, 33. Historically, pillage was an accepted aspect of warfare in the pre- or early-modern age, when soldiers were often expected to provide for their own food and supply needs. *Id.* at 6-7. Today, pillage is defined as "the taking of private or public movable property (including enemy military equipment) for private or personal use" and is unlawful. LAW OF WAR MANUAL, *supra* note 22, § 5.17.4.1.

[38] VAN CREVELD, *supra* note 16, at 20. Even goods for which early modern armies contracted were often financed with cash "contributions" extorted from the local populace or local rulers under threat of violence. *Id.* at 27, 30; CHRISTOPHER DUFFY, THE MILITARY EXPERIENCE IN THE AGE OF REASON 166 (1987).

[39] *See generally* VAN CREVELD, *supra* note 16, at 30-34, 72, 233.

[40] Water, often in bottled form, has been a perennial contracting requirement during the United States' operations in the Middle East. *See, e.g.*, Captain Jason A. Miseli, *The View From My Windshield*: *Just-in-Time Logistics Just Isn't Working*, ARMOR, Sept.–Oct. 2003, at 16; *see also* Colonel Max Brosig et al., *Implications of Climate Change for the U.S. Army*, at 26–28 (2019), https://climateandsecurity.files.wordpress.com/2019/07/implications-of-climate-change-for-us-army_army-war-college_2019.pdf (discussing reliance on bottled water and the precarious nature of U.S. Army water supply during overseas operations). The Defense Logistics Agency (DLA) often relied on fuel purchased from (and delivered and stored by) vendors in theater. *See generally* INSPECTOR GEN., U.S. DEP'T OF DEF., REP. NO. 2021-129, AUDIT OF DEFENSE LOGISTICS AGENCY AWARD AND MANAGEMENT OF BULK FUEL CONTRACT IN AREAS OF CONTINGENCY OPERATIONS (2021). For DLA's current overseas food contracts, see generally, *Food Services Contract Search*, DEF. LOGISTICS AGENCY, https://www.dla.mil/TroopSupport/Subsistence/FoodServices/Contract-Search (last visited Aug. 1, 2022). Regarding DoD's use of large-scale shipping contracts, see, for example, INSPECTOR GEN., U.S. DEP'T OF DEF., REP. NO. 2019-069, AUDIT OF ARMY'S OVERSIGHT OF NATIONAL AFGHAN TRUCKING SERVICES (2019); 3 RICHARD L. OLSON ET AL., U.S. DEP'T OF AIR FORCE, GULF WAR AIR POWER SURVEY: LOGISTICS AND SUPPORT, pt. I at 144, 164 (1993) (recounting the United States' reliance on thousands of contracted trucks and drivers during the Gulf War).

among other items, from the rear during the opening weeks of its invasion of Ukraine, although their immediate solution appeared to be pillage or requisition rather than contracting.[41]

B. The Contracting Carve Out from Command Authority over Warzone Logistics

The United States has a history of bureaucratic, congressionally scrutinized, military contracting dating back to the Revolution.[42] After World War II, the military agencies served as the foundation of modern Government procurement system.[43] During the post-World War II period, Congress oversaw the expansive growth of procurement regulations in an effort to achieve manifold socioeconomic policy goals, rather than through an effort to improve contract performance.[44]

Under the current acquisition regime, contracting authority and command authority are disconnected. Contracting authority resides within Department of Defense (DoD) contracting organizations—for example the

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[41] *See, e.g.*, Tom Levitt & Chris McCullough, *'Russian Soldiers Took over My Farm': The Battle for Food Supplies in Ukraine*, THE GUARDIAN (Mar. 16, 2022, 11:28 AM), https://www.theguardian.com/environment/2022/mar/16/russian-soldiers-took-over-farm-battle-food-supplies-ukraine; Russia, or any invading army, may of course have limited opportunities to purchase supplies from an overwhelmingly hostile local populace. *See, e.g.*, Yaroslav Trofimov, *A Ukrainian Town Deals Russia One of the War's Most Decisive Routs*, WALL ST. J. (Mar. 16, 2022), https://www.wsj.com/articles/ukraine-russia-voznesensk-town-battle-11647444734 (describing Ukrainian woman who provided meals to invading Russian soldiers in exchange for payment under investigation and who was described as a "traitor" by Ukrainian commander).

[42] *See* DUFFY, *supra* note 38, at 174. The Continental Congress established a procurement structure for the Continental Army in 1775 relying on a commissary general and quartermaster general. By 1809, however, Congress removed contracting authority from the military staff and gave it to civilian contracting officers. NAGLE, *supra* note 5, at 31–39, 70–71. *See also* SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE 400 (1957) (explaining how Congress focuses on military procurement even during periods when it otherwise displays little interest in military affairs). However, there were interludes of decentralized authority as well. During the Civil War a significant degree of acquisition authority was decentralized to commanders. *See* Lt. Col. Douglas P. DeMoss, *Procurement During the Civil War and Its Legacy for the Modern Commander*, ARMY LAW., Mar. 1997, at 10–11.

[43] *See generally* NAGLE, *supra* note 5, at 446–56 (recounting the post-World War II development of Government contracting regulations).

[44] *See generally id.* at 481–518.

Army Contracting Command, or other specialized organizations like the Army Corps of Engineers—while command authority for combat operations resides with the statutorily-designated geographical combatant commanders and their subordinates.[45] Both acquisition law and military policy doctrine require commanders to avoid improper influence over contracting officer decisions.[46] Yet, it is the COCOMs and their subordinate commanders—not contracting officers—who retain the responsibility both to determine the extent of contracting support appropriate to an operation, and the primary responsibility of operational contract planning.[47]

This divided authority is at least partially dissonant with defense doctrine regarding command authority over logistics. Defense doctrine defines operational contract support as a core logistics function,[48] and both statute and doctrine include logistics squarely within a COCOM's command authority.[49] COCOMs possess the power, in times of war, to "make diversion of the normal logistics process" and "use all facilities and supplies of all forces assigned to their commands."[50] Yet they do not possess the power to enter into contracts of any size.[51] The current system does not differentiate for purposes of contracting authority between contracts awarded and performed entirely in the United States or peacetime foreign territory and those awarded and performed on foreign battlefields.

Congress and the DoD have recognized the need for greater flexibilities in some defense contracting authorities in recent years, however, none of these changes have altered the status quo of contracting authority.[52] The Army has also made several modest organizational

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[45] *See* JP 4-10, *supra* note 4, at I-13; FAR 1.602-1 (2023); DFARS PGI 202.101 (Aug. 2023).
[46] FAR 1.602-2; JP 4-10, *supra* note 4, at I-13.
[47] JP 4-0 at II-10; JP 4-10, *supra* note 4, at xii, II-8.
[48] U.S. DEP'T OF DEF., INSTR. 3020.41, OPERATIONAL CONTRACT SUPPORT encl. 2, para. 2 (20 Dec. 2011) (C2, 31 Aug. 2018) [hereinafter DODI 3020.41].
[49] JP 4-0, *supra* note 4, at II-10; 10 U.S.C. § 164.
[50] JP 4-0, *supra* note 4,at III-3.
[51] *See* authorities cited *supra* note 12.
[52] Examples include the creation of alternative procedures when acquiring goods or services from local or host nation vendors within certain DoD contingency or assistance operations, but these were limited to contracts intended for socioeconomic development of

reforms following various contracting scandals in the first decade of the War on Terror.[53] In 2007, the so-called Gansler Commission identified the need for the Army to improve its expeditionary contracting capability by increasing the number of uniformed contracting officers who could deploy to contingency theaters.[54]

C. Contract Litigation Background

Bid protests are challenges either to the terms and conditions of a contract solicitation or award decision.[55] Protests can be filed with the contracting agency, the Government Accountability Office (GAO), or at the Court of Federal Claims (COFC).[56] If a protest is timely filed with the agency, the FAR requires the contracting officer to stay (i.e., stop or indefinitely postpone) the award or performance of the contract until the

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the host nations and did not increase a commander's own logistical flexibility. *See*, *e.g.*, National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 886, 122 Stat. 3, 266 (limiting competition to Iraqi or Afghan vendors). In implementing this authority, Defense agency procedures permitted award "to a particular source or sources from Afghanistan" using "other than competitive procedures." DFARS 225.7703-1 (Aug. 2023). *See also*, *e.g.*, National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, § 899A, 130 Stat. 1999, 2336 (2016) (granting authority to limit competition for certain defense contracts in African countries). See also the Commander's Emergency Response Program (CERP), which enabled commanders to spend money on small projects for the benefit local Iraqi and Afghan communities. *See*, *e.g.*, An Act Making Emergency Supplemental Appropriations for Defense and for the Reconstruction of Iraq and Afghanistan for the Fiscal Year Ending September 30, 2004, and for Other Purposes, Pub. L. No. 108-106, § 1110, 117 Stat. 1209, 1215 (2003) (providing appropriated funds to the CERP program); *see also* Heidi Lynn Osterhout, *No More "Mad Money": Salvaging the Commander's Emergency Response Program*, 40 PUB. CONT. L.J. 935, 940 (2010).

[53] For a well-known example, see DEP. OF JUST., https://www.justice.gov/opa/pr/army-officer-wife-and-relatives-sentenced-bribery-and-money-laundering-scheme-related-dod (last visited Mar. 3, 2022).

[54] *See* COMM'N ON ARMY ACQUISITION AND PROGRAM MGMT. IN EXPEDITIONARY OPERATIONS, URGENT REFORM REQUIRED: ARMY EXPEDITIONARY CONTRACTING 62 (2007) [hereinafter GANSLER COMM'N], https://ogc.altess.army.mil/Documentation/EandF/Guidance/Gansler%20Commission%20Report_Final%20Report_10-31-07.pdf. This led, for instance, to the creation of the Army's expeditionary contracting command. MOSHE SCHWARTZ, CONG. RSCH. SERV., R40764, DEPARTMENT OF DEFENSE CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND AND ANALYSIS 13-14 (2010).

[55] FAR 33.101 (2023).

[56] *Id.*; 28 U.S.C. § 1491(b); *see also* the Administrative Dispute Resolution Act of 1996, Pub. L, No. 104-320, § 12(d), 110 Stat. 3870, 3874-75 (ending district court jurisdiction over bid protests on 1 January 2001).

protest is complete.[57] Statute requires an automatic stay following a timely filed protest at the GAO.[58]

Contract stays that attach to protested actions are subject to an override process in which a senior agency contracting official may determine that the award or performance of the procurement at issue should proceed despite the pending protest.[59] Protestors may challenge an override at the COFC, and the court may determine that the override decision by the agency is unlawful and invalid.[60] Bid protests before the COFC do not include an automatic stay, however the court may enjoin contract award or performance pending the outcome of the protest.[61] Warzone contracts are not exempt from standard bid protest jurisdiction or procedures.[62]

D. Vendor Vetting Background

Over the last two decades of conflict in the Middle East, the DoD and Congress have recognized the need to identify current or potential contractors that have ties with enemy forces. The processes that emerged are generally referred to as "vendor vetting."[63] In 2010, the DoD created "Task Force 2010" to enable commanders and contracting personnel to understand whether local Afghan contractors had ties to insurgent or

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[57] FAR 33.103(f) (2023).
[58] 31 U.S.C. § 3553(c)(1); *see also* FAR 33.104(b), (c) (2023).
[59] 31 U.S.C. § 3553(c)(1); FAR 33.104(h)(3) (2023).
[60] *See* Spherix, Inc. v. United States, 62 Fed. Cl. 497, 503 (2004) ("The United States Court of Federal Claims also has jurisdiction to hear an objection to the override of a statutory stay pursuant to the CICA.") (citing RAMCOR Servs. Group v. United States, 185 F.3d 1286, 1289 (Fed. Cir. 1999)). The COFC may provide a protestor relief from an agency override (such as reinstate the stay) through its powers declaratory judgement or an injunction. *See, e.g.*, Cigna Gov't Servs., LLC v. United States, 70 Fed. Cl. 100, 109 (2006).
[61] 28 U.S.C. § 1491(b)(2) (granting the COFC power to grant declaratory and injunctive relief in bid protests).
[62] Various GAO and COFC opinions (cited below) describe elements of Central Command's otherwise non-public vendor vetting processes. Because only a broad understanding of the process is necessary here, this paper will not attempt to synthesize different terminology used across the cases cited.
[63] *See generally* Brett Sander & Joe Romero, *Vendor Vetting of Non-US Contractors in Afghanistan*, 50 PROCUREMENT LAW. 1 (2015); Todd J. Canni & Jason A. Carey, *Contractors Beware--COFC Endorses Clandestine Debarment*, GOV'T CONTRACTOR, no. 30, 2013, at 251.

criminal networks.[64] Also in 2010, Central Command[65] (CENTCOM) established its "Vendor Vetting Cell" for essentially the same purpose.[66] A negative vetting rating may make a vendor ineligible for award,[67] although the case law also suggests that such a finding may also be waived.[68]

Shortly thereafter, Congress directed CENTCOM to identify contractors that support insurgents, or oppose the United States and coalition forces, and refer them to the appropriate head of the contracting activity for designation as an ineligible contractor.[69] Congress has since expanded this program to other COCOMs.[70] Vetting procedures may prevent contracting officers from notifying vendors with negative ratings about their ineligibility.[71] However, a vendor may nevertheless discover it has an unfavorable rating during bid protest litigation.[72]

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[64] MOSHE SCHWARTZ, CONG. RSCH. SERV., R42084, WARTIME CONTRACTING IN AFGHANISTAN: ANALYSIS AND ISSUES FOR CONGRESS 10 (2011).

[65] Central Command's area of responsibility is the Middle East, including Iraq and Afghanistan. *Area of Responsibility*, U.S. CENTRAL COMMAND, https://www.centcom.mil/AREA-OF-RESPONSIBILITY/ (last visited Aug. 7, 2023).

[66] SCHWARTZ, *supra* note 64, at 10.

[67] *See, e.g.*, MG Altus Apache Co. v. United States, 111 Fed. Cl. 425, 434 (2013).

[68] *Id.* at 436.

[69] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 841(c)(2), 125 Stat. 1298, 1510–12 (2011).

[70] The mandate has since broadened to include United States Africa Command, United States Central Command, United States European Command, United States Indo-Pacific Command, United States Southern Command, and United States Transportation Command. *See* U.S. DEP'T OF DEF., DTM 18-003, PROHIBITION ON PROVIDING FUNDS TO THE ENEMY AND AUTHORIZATION OF ADDITIONAL ACCESS TO RECORDS, at 15 (9 Apr. 2018) (C5, 11 Jan. 2022) (defining "covered CCMD [Combatant Command]").

[71] *See MG Altus Apache Co.*, 111 Fed. Cl. at 445–46 (stating that procedures in effect limited contracting officers to telling negatively rated ("rejected") "apparent[ly] successful offeror[s]" that they were "ineligible" while prohibiting any mention of ineligibility for offerors not apparently in line for award).

[72] *See, e.g.*, *id.* at 435–36 ("A military intelligence unit, CJ2X, assesses vendors by 'risk to mission,' and classifies that risk as either 'MODERATE, SIGNIFICANT, HIGH, or EXTREMELY HIGH.' A rating of 'MODERATE' means that [redacted]. A rating of 'SIGNIFICANT' means that [redacted]. A rating of 'HIGH' means that [redacted]. A rating of 'EXTREMELY HIGH' means that [redacted].") (internal citations omitted; bracketed redactions in original); *see also, e.g.*, Aria Target Logistics Serv., B-408308.23, 2014 WL 4363483, at *1 (Comp. Gen. Aug. 22, 2014) ("Pursuant to the vetting program, vendors are assigned one of four force protection risk ratings: [redacted] (moderate risk);

The case law shows that a negative vendor vetting rating may result in two types of exclusionary actions: a contracting officer's non-responsibility determination[73] based on the rating,[74] and a commander's base access denial.[75] The case law also shows that contracting officers have made non-responsibility determinations on the basis of a commander's installation access determination. [76] The contracting officer's responsibility determination is a contracting action and may be challenged in the GAO or COFC.[77]

Further, a tailored CENTCOM provision or clause can explicitly link base access eligibility (a command decision) to contract award eligibility (a contracting officer decision). [78] Under the provision, offerors are ineligible for award under the terms of a solicitation if ineligible for base access, and an awardee that is later denied base access by the command is in breach of a solicitation term or contract clause.[79] In the bid protest context, the COFC may "consider [vendor vetting processes] to the extent the resultant vendor vetting rating was a basis for the contracting officer's non-responsibility determination."[80]

Contract award ineligibility due to a negative vendor vetting rating will likely amount to a de facto debarment because it "effectively [deprives

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[redacted] (significant risk); [redacted] (high risk); or [redacted] (extremely high risk).") (alterations in original).

[73] Responsibility findings inquire into an offeror's apparent ability and capacity to adequately perform. *See* FAR 9.104 (2023). Contracting officers must find an offeror responsible prior to contract award. FAR 9.103 (2023).

[74] *Cf.* Leidos Innovations Corp., B-414289.2, 2017 CPD ¶ 200, at 4 (Comp. Gen. June 6, 2017); Omran Holding Group v. United States, 128 Fed. Cl. 273, 277 (2016). The court in *Omran* appears to use the term "responsive" synonymously with "responsible" for this opinion. *See Omran*, 128 Fed. Cl. at 275–76.

[75] *Omran*, 128 Fed. Cl. at 277. Regarding a commander's inherent authority to exclude, *see* Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 893 (1961) (commanding officers possess power to summarily exclude from area of command).

[76] *Cf. Omran*, 128 Fed. Cl. at 277 ("The [contracting] agency found Omran to be installation access ineligible, and thus it deemed Omran's proposal nonresponsive.").

[77] *See, e.g.*, *Leidos*, 2017 CPD ¶ 200, at 4; *See generally* NCL Logistics Co. v. United States, 109 Fed. Cl. 596 (2013).

[78] *See Omran*, 128 Fed. Cl. at 275–76 (quoting the CENTCOM theater base access eligibility clause).

[79] *Id.*

[80] MG Altus Apache Co. v. United States, 111 Fed. Cl. 425, 444 (2013).

the vendor] of future DoD contract awards." [81] Under normal circumstances, contractors can only be suspended or debarred from contracting with an agency following an administrative process.[82] Such a process should provide notice and an opportunity to respond to the specific derogatory information relied on by the agency. [83] Where an agency sidesteps its prescribed debarment process and blacklists a firm in some other manner, the firm will have a strong case that it is subject to an unlawful de facto debarment.[84] However, in the context of warzone vendor vetting, the COFC has held that national security concerns trump the general requirement for the Government to notify a contractor of the reasons for its de facto debarment.[85]

The COFC has generally shown deference to contracting officers' decisions not to award to offerors with negative vendor vetting ratings.[86] The GAO has shown deference to contracting officer's vetting-driven non-responsibility determinations. [87]

III. The Current Warzone Contracting System's Risks and Challenges

The current warzone contracting system is ripe for disruption. The relatively favorable conditions in which it operated during the last twenty years will not likely obtain in a conflict against a peer adversary or in a large-scale conflict. [88] This section identifies two overarching risks

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[81] *Id.* at 445.
[82] *See* Old Dominion Dairy v. Secretary of Defense, 631 F.2d 953, 968 (D.C. Cir. 1980) (stating that due process requires that the contractor must be "notified of the specific charges concerning the contractor's lack of integrity" and be provided an "opportunity to respond").
[83] *Id.*
[84] *Cf. Old Dominion Dairy* at 962 n.17, (declining to take up the issue of whether or not the actions of the Government in this case constituted a de facto debarment, only remarking that there was a case to be made that it had).
[85] MG Altus Apache Co., 111 Fed. Cl. at 445 (citing 28 U.S.C. § 1491(b)(3) (2006)) (holding that the Tucker Act requires that the COFC "give due consideration to national security interests in exercising its bid protest jurisdiction").
[86] *See, e.g., id.*
[87] *See, e.g.*, Leidos Innovations Corp., B-414289.2, 2017 CPD ¶ 200, at 6 (Comp. Gen. June 6, 2017).
[88] *See, e.g.*, John E. Wissler, *Logistics: The Lifeblood of Military Power*, *in* 2019 INDEX OF U.S. MILITARY STRENGTH 93, 97 (Dakota L. Wood ed., 2019), https://www.heritage.org/

inherent to the current system in adversary-disrupted environments: the contracting authority divide, and the risks to warzone logistics and purchasing stemming from bid protest litigation. The section will then address policy considerations to include the current system's implicit tilt toward requisition, and the inapplicability of competition considerations to warzone contracting.

A. Risks Stemming from Bifurcated Contracting and Command Authority

Contracting authority in its current form was not designed to function in warzones and is easily disrupted. A contracting officer's authority is a specific grant to one person from an individual warrant,[89] and that contracting officer has only a limited ability to delegate purchasing authority to individual ordering officers.[90] With these limitations, a contracting officers' ability to execute contracts is therefore hostage to their mobility and communications. In a disrupted warzone where contracting officers are few and far between, unable to communicate, or casualties of war, frontline units could quickly find themselves without a legal method of purchasing critical supplies and services. Command authority, by contrast, permeates a theater of operations: the chain of command exists anywhere there is a functioning military unit.

1. Separate Contracting Authority Is Ill-Suited for Disrupted Warzones

In both the Gulf War and in post-September 11, 2001, Middle East conflicts, the United States enjoyed overwhelming air superiority, including secure aerial supply routes to major bases, and largely uninterrupted communications.[91] Notably, in this context, the Gansler

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sites/default/files/2018-09/2019_IndexOfUSMilitaryStrength_WEB.pdf (highlighting that the U.S. did not face a peer or near-peer adversary while executing logistics in Iraq).

[89] *See* FAR 1.602-1(a) (2023).

[90] *See generally* FAR 1.603-3 (2023); DFARS 213.306 (Aug. 2023); AFARS 5101.602-2-92 (Feb. 8, 2022).

[91] *See, e.g.*, INSPECTOR GEN., U.S. DEP'T OF DEF., REP. NO. 2020-094, AUDIT OF ARMY CONTRACTING COMMAND—AFGHANISTAN'S AWARD AND ADMINISTRATION OF CONTRACTS 27 (18 June 2020) [hereinafter DOD IG AUDIT: ACC-A]. Even in this relatively favorable environment and after almost two decades on site, sporadic IT and connectivity issues degraded contracting efforts.

Commission did not propose lessening the regulatory burden placed on contracting personnel, or expanding contracting authority to military commanders for battlefield contracting; rather, it accepted that "expeditionary contracting" was merely "the same business operating at a mission-critical tempo" and that the FAR's "special provisions" were sufficient if contracting personnel were properly trained, and if their numbers were increased.[92]

While such an understanding may have been valid the early-2000s, focus on counter-insurgency and train-advise-assist missions of Iraq and Afghanistan, it should be reexamined against foreseeable risks present in large-scale conflicts.[93] During the Battle of Mosul,[94] contracting officers struggled to award contracts using simplified acquisition procedures, where the requesting units were engaged in combat often and their request were needed within forty-eight hours or less—faster than current procedures could accommodate.[95]

In future conflicts with sophisticated adversaries, U.S. forces must anticipate a greater level of airspace competition, and relatedly, communication and supply route disruption.[96] This different type of

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[92] GANSLER COMM'N, *supra* note 54, at 6. Gansler's own writing several years later, however, may suggest less confidence in such conclusions. *See* Gansler & Lucyshyn, *supra* note 14, at 286.

[93] National security strategy and defense doctrine increased focus on large-scale combat operations in the last several years. *See generally* RONALD O'ROURKE, CONG. RSCH. SERV., R43838, RENEWED GREAT POWER COMPETITION: IMPLICATIONS FOR DEFENSE—ISSUES FOR CONGRESS (2021); U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (1 Oct. 2022) [hereinafter FM 3-0].

[94] The Iraqi army (with assistance from the United States and coalition forces) battled ISIS to recapture the city of Mosul from October 2016 through July 2016. The U.S. military has closely studied this large battle to inform future operations. *See, e.g.*, MOSUL STUDY GROUP, WHAT THE BATTLE FOR MOSUL TEACHES THE FORCE, U.S. ARMY TRAINING AND DOCTRINE COMMAND, REP. NO. 17-24 U (2017), [hereinafter MOSUL STUDY GROUP] https://www.armyupress.army.mil/Portals/7/Primer-on-Urban-Operation/Documents/Mosul-Public-Release1.pdf.

[95] Major Nolan Koon, *Contracting in a Deployed Environment*, ARMY LAW., Nov./Dec. 2018, at 31. *See also* MOSUL STUDY GROUP, *supra* note 94, at 26 ("[T]he U.S. Army may be reaching the limits of its approach to contractor support and utilization. The U.S. Army must re-examine the employment of contractors in a high-intensity conflict.").

[96] *See generally* U.S. ARMY TRAINING AND DOCTRINE COMMAND, MULTI-DOMAIN BATTLE: EVOLUTION OF COMBINED ARMS FOR THE 21ST CENTURY 3 (2017) ("The intensity of

operating environment would have degrading impacts on the current contingency contracting system.[97] Such disruptions could be localized and sporadic, or systemic and ongoing.

First, future warzone conditions and enemy action could disrupt the contracting support received remotely from largely civilian defense contracting organizations located in the United States.[98] Additionally, in a dynamic environment, reach-back contracting personnel would likely have limited knowledge of the local vendors, business practices, or access to interpreters. Such knowledge and resources, to the extent it exists, would more likely exist within the COCOM's units in theater.

Second, a sophisticated adversary could disrupt networked support from contracting personnel who are deployed in the theater, but not immediately adjacent to a given unit, with an urgent requirement. While a low-tech paper contracting method (the Standard Form 44) can be used in situations without connectivity, such methods are still limited above the micro-purchase threshold by the necessity of having a contracting officer on location to execute the contract.[99] That is a luxury that cannot be assumed in future operations that could extend hundreds of miles with

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operations and the enemy's ability to deny or degrade communications require resilient formations to conduct the mission command philosophy and employ new capabilities that express and communicate the integration of capabilities across domains, environments, and functions over longer time periods and expanded physical spaces."), https://www.tradoc.army.mil/wp-content/uploads/2020/10/MDB_Evolutionfor21st.pdf.

[97] *See generally* Lieutenant General Scott McKean, *Sustainment at Speed and Range*, U.S. ARMY (Aug. 11, 2021) https://www.army.mil/article/249270/sustainment_at_speed_and_range ("[S]ustainment formations will be required to support operations at greater ranges, in decreased response times, and in environments with denied, degraded, intermittent, or limited network communications.").

[98] *See generally id.* (describing the likelihood of denied or degraded communications).

[99] Micro-purchase threshold is $35,000 for overseas contingency operations. *See* FAR 13.201(g)(1)(ii) (2023). Contracting officer-appointed ordering officers may make purchases up to the micro-purchase threshold. DFARS 213.306(a)(1) (Aug. 2023); AFARS 5101.602-2-92 (7 Sept. 2023). Contracting officers and ordering officers will have even less purchasing power relative to local prices in many potential areas of operations (for example, Eastern Europe or East Asia) compared to Afghanistan or Iraq. Contracting officers may use the Standard Form 44 for on-the-spot purchases of supplies up to the simplified acquisition threshold in support of overseas contingency operations (and subject to other criteria). *See* DFARS 213.306 (Aug. 2023).

widely dispersed forces,[100] yet rely on only a handful of contracting officers possessing contracting authority.[101]

The current expeditionary contracting units within Army Contracting Command rely primarily on web-based software and commercial telecommunication to create and administer contracts in combat zones,[102] and routinely service operational units that are hundreds of miles away, even if in the same country or theater. Further, these expeditionary contracting units are not large,[103] and even in relative peacetime the uniformed contracting officers deploy overseas at a high rate, [104] meaning there is a limited surge capacity to respond to a large-scale conflict. Even in the recent experiences in the Middle East, contracting officers could quickly become overwhelmed trying to contract for urgent logistical needs while not running afoul of the FAR.[105]

Commanders should therefore possess some level of battlefield contracting authority to increase its potential for dispersal and survivability.

2. Vendor vetting or vendor selection?

The inaptness of today's divergent contracting and command authority model is clearly illustrated through the vendor vetting process. In recent years, Congress appears to have noticed some of the disparity

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[100] FM 3-0, *supra* note 93, at 1-20 (identifying the likely need for maximum dispersal of forces and resulting challenges to sustainment).

[101] Physical distance also created significant challenges for contracting offices in recent conflicts. *See, e.g.*, MAJORITY STAFF OF SUBCOMM. ON NAT'L SEC. AND FOREIGN AFFS., H. COMM. ON OVERSIGHT AND GOV'T REFORM, WARLORD, INC., EXTORTION AND CORRUPTION ALONG THE U.S. SUPPLY CHAIN IN AFGHANISTAN 49-50 (2010), https://www.cbsnews.com/htdocs/pdf/HNT_Report.pdf (last visited Aug. 8, 2023) [hereinafter WARLORD, INC.].

[102] *See* AFARS 5104.8 (Sept. 7, 2023).

[103] *See generally* U.S. DEP'T OF ARMY, TECHS. PUB. 4-71, CONTRACTING SUPPORT BRIGADE ch. 1 (4 June 2021) (describing the structure of contract support brigades and subordinate units).

[104] U.S. ARMY CONTRACTING COMMAND, https://acc.army.mil/about (last visited Aug. 8, 2023) ("ACC supports approximately 180 expeditionary missions in 50 countries each year.").

[105] *See* Koon, *supra* note 95, at 31 (discussing contracting officers becoming "overwhelmed" by the contract requirements in the 2017 operations in Iraq and Syria to counter ISIS).

between the standard FAR-based business judgment[106] model of vendor responsibility and debarments,[107] and the need for greater combat theater vendor vetting.[108] In one sense, Congress has tacitly acknowledged that commanders should have a larger role in vendor selection, however, this relatively new mandate to conduct vendor vetting creates more questions about the role of commanders than it answers.

The primary question posed is whether a contracting officer-driven source selection process can or should continue to be the default in future warzone acquisitions, where presumably every single vendor also must be screened by the command. In the more controlled context of the United States' conventional force dominance in the Middle East, vendor vetting may have fit into the acquisition process as something of a command security veto appended to an otherwise normal contracting process.[109]

The publicly disclosed information regarding the recent vendor vetting process suggests the ability to conduct a discrete, collateral vendor screening (undertaken by the COCOM) appended to an otherwise standard acquisition process (undertaken by the contracting officer). Such is the picture painted in the facts of *Omran Holding Group v. United States*.[110] There, the contracting officer reviewed an online database containing the base-access approval status of various vendors and determined that Omran was not responsible because they were not approved for base access, relying on the information in a database.[111] The contracting officer explained that he did not play any part in the base access determination, but rather relied on the information in the system as to whether Omran had been denied base access as a matter of "inherent commander authority."

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[106] FAR 1.602-2 (2023).
[107] *See generally* FAR 9.104 (2023) (standards of contractor responsibility). Part 9 of the FAR also implements procurement law-based (as opposed to command authority-based) debarment procedures. *See* FAR 9.4 (2023). Agency debarment officials (rather than the contracting officer) determine whether contractors should be suspended or debarred from contracting with the agency. *See, e.g.*, DFARS 209.403 (Aug. 2023).
[108] *See supra* Section II.D.
[109] *See, e.g.*, Leidos Innovations Corp., B-414289.2, 2017 CPD ¶ 200 (Comp. Gen. June 6, 2017).
[110] Omran Holding Group v. United States, 128 Fed. Cl. 273, 277 (2016).
[111] *See, e.g.*, *id.* at 277.

Because Omran was listed as ineligible for base access, the contracting officer determined it was not a responsible offeror.[112]

However, one wonders how such a process will work at scale, at greater speed, and against potential adversaries that are well versed at the use of proxies and commercial espionage.[113] Russia's use of hybrid tactics, for example, could present a challenging setting for the current military acquisition system in a setting short of full-scale peer-on-peer combat. If the United States were ever to find itself conducting ground operations in Eastern Europe, the selection of vendors would at least at times need to be driven by a commander's vendor vetting process or pressing operational concerns, with business judgment or acquisition system priorities representing distant secondary or tertiary concerns.

Further, warzone contracting must take into account not only business judgment and security concerns, but also related political or social concerns, which may—reasonably and appropriately—impact which firms it makes sense to do business with. For instance, tribal, ethnic, religious, or political affiliations of a given contractor's personnel may make them unable to travel through or work in environments controlled by other groups hostile to them.[114] Commanders, unlike contracting officers, will have more resources and information to analyze such situations.

Therefore, vendor vetting could quickly become—by necessity—indistinguishable from vendor selection. Assuming security, or some other aspect of operational necessity, in a warzone is often the overriding concern, what is left of a contracting officer's independent business judgment? What should be left? The current state of the law recognizes a

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[112] *Omran*, 128 Fed. Cl. at 278-279.

[113] *See generally* Christopher Wray, Director, Federal Bureau of Investigation, Remarks at Department of Justice China Initiative Conference: Responding Effectively to the Chinese Economic Espionage Threat (Feb. 6 2020), https://www.fbi.gov/news/speeches/respond ing-effectively-to-the-chinese-economic-espionage-threat; William Akoto, *Hackers for Hire: Proxy Warfare in the Cyber Realm*, MOD. WAR INST. (Jan. 31, 2022), https://mwi.usma.edu/hackers-for-hire-proxy-warfare-in-the-cyber-realm.

[114] *See, e.g.*, Koon, *supra* note 95, at 3 ("[Contracting officers] operating in Erbil, Iraq, could not award trucking contracts to Iraqi Arab companies because they could not get through Kurdish checkpoints. In some instances, KOs had to facilitate the release of Iraqi Arab truck drivers, who were detained at the border by the Kurdistan Regional Government and the Peshmerga Armed Forces.").

de facto command veto,[115] but does not allow the commander to make a positive award decision. As the GAO stated when discussing vendor vetting, "We recognize that […] the contracting officer's judgment is limited by a military command decision to deny [the barred entity] access to military installations."[116] When trying to operate at speed in a complex warzone, however, it is a reasonable next step, or a simple reframing, to allow for command selection of vendors.

To illustrate a one-step command vetting-plus-selection in a future conflict—one in which the current contracting authority divide still exists—imagine the following scenario: A U.S. military unit in a contested warzone urgently needs to purchase large quantities of gravel and lease the equipment required to move and emplace it on a damaged road. This work needs to be completed in the next several days before the launch of a fast-developing new operation. There are several vendors in the region capable of supplying these goods and services. The unit's intelligence section has one day in which to conduct a hurried screening of the vendors' political leanings and identify any business entanglements with the foreign adversary whose proxies and partisans are at work in a neighboring district. There is not time to forward information for a formal vetting process under the congressionally mandated vetting program. The marginal difference in price between vendors is not nearly as important to the commander as knowledge of the vendor. Operating on the information available to them after a few hours of intelligence gathering, the commander and his intelligence staff identify several viable vendors. They also identify several who present security concerns. The commander's staff calls the contracting officer on the phone and puts her in touch with their chosen vendor. The commander joins the call and tells the contracting officer to execute the contract.

Continuing with our hypothetical, the contracting officer is a hundred miles away and does not want to slow down the operation. She awards the

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[115] *See, e.g.*, Leidos Innovations Corp., B-414289.2, 2017 CPD ¶ 200, at 5-6 (Comp. Gen. June 6, 2017). For a proposed reform on this point, see Captain Thomas Cayia & Captain Joshua McCaslin, Contracting with the Enemy: The Contracting Officer's Dilemma, at 80 (June 2015) (M.B.A. report, Naval Postgraduate School), https://apps.dtic.mil/sti/pdfs/AD1014644.pdf (arguing for a "modif[ication of] the relationship between military command authority and contracting authority" by granting COCOMs contracting-based "authority to declare an enemy-affiliated contractor ineligible" for award).

[116] *Leidos*, 2017 CPD ¶ 200, at 6.

contract that night but does not have the time to do anything other than copy and paste a similar contract she executed recently, change a few key terms like quantity and price, and send it to the awardee via email (happily, telephones and Wi-Fi are working this week), because she has a dozen other area commanders calling her with similar requests. If one's frame is battlefield logistics, they both achieved their missions under challenging circumstances. However, if one's frame of reference is the current FAR-based contracting, the commander and the contracting officer in this scenario likely acted unlawfully. In this case, the standard analysis is; the contracting officer failed to exercise independent judgment, failed to document the justification for the sole-source acquisition, failed to solicit competition, and failed to complete a fair and reasonable price determination. Such an eminently foreseeable scenario should highlight some of the unrealism of the current FAR-based acquisition system.

In conclusion, the contracting officer's independent business judgment and the Federal procurement system's manifold contextual goals[117] should not be talismanic—especially when the business at hand is warzone logistics rather than business as usual. In warzones that are contested by peer or sophisticated adversaries, where the military mission is paramount and the contracting process is not, the vetting and selection roles will quickly collapse into each other. Vendor vetting therefore provides a useful point of reference to highlight the unsustainable nature of the contracting authority divide in warzone acquisition.

B. Risks Stemming from the Bid Protest Regime

Bid protests present another form of disruptive risk built into the current warzone acquisition system. While in peacetime settings, planners can account for the possibility of a protest in their acquisition timeline,[118] such a luxury will rarely exist in the warzone contracting context. Warzone contracts are by their nature subject to the greatest level of disruption. Requirements emerge at a fast pace and allow little time for the lengthy

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[117] WILSON, *supra* note 2, at 349.

[118] *See, e.g.*, Memorandum from Command Gen. of Army Contracting Command to Headquarters, Army Contracting Command et al., subject: FY18 Procurement Action Lead Time (PALT) Metric, para. 4(b) (12 Mar. 2018) (considering protests a PALT factor).

acquisition planning and tidy evaluations that adjudicative bodies are used to seeing.

The concept of lawfare provides a useful lens through which to view the risks to warzone acquisition created by the bid protest regime. Bid protests' inherently disruptive nature in a warzone are both a form of self-inflicted lawfare and an opportunity for adversarial lawfare.

The prominent exponent of the concept lawfare, retired Major General Charles Dunlap, proposes a neutral definition of the term: the "strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective."[119] Major General Dunlap has also identified the potential for "self-inflicted" lawfare, whereby a nation or military hamstrings itself through its unwise creation of new legal requirements or interpretation of existing legal obligations.[120] Such "unintended consequences of well-meant positions" can needlessly hinder operations and provide adversaries with opportunities for exploitation.[121]

The following subsections analyze the impacts of bid protests through a lawfare lens and argue that the new Congressional emphasis placed on vendor vetting runs counter to the interests pursued through the bid protest regime.

1. Self-inflicted Lawfare

A bid protest to a warzone contract solicitation or award is a legal action that can have immediate and automatic impacts on kinetic operations.[122] A bid protest to the GAO or the agency requires the immediate halt to the award process or work stoppage without regard to the merit of the filing or the importance of the stopped work.[123] Such

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[119] Charles J. Dunlap, Jr., Commentary, *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFFS. 146, 146 (2008).
[120] Charles J. Dunlap Jr., *Does Lawfare Need an Apologia?*, 43 CASE W. RESERVE J. INT'L L. 121, 133 (2010) (using the 2007 example of NATO's self-imposed restrictions on airstrikes as "beyond what the law of armed conflict would require").
[121] *Id.* at 133.
[122] *See* authorities regarding automatic stays cited *supra* notes 57-58.
[123] 31 U.S.C. § 3553(c)(1); FAR 33.104(b), (c), (h)(1), (3) (2023).

invited disruption may be accomplished merely through a brief email, handwritten note, or simple electronic filing.[124]

This invited disruption to ongoing warzone operations is unique to the law. While the United States may be sued for its military activities in any number of fora, a bid protest is singular in its ability to automatically and immediately halt a military logistical operation, rather than provide a forum for after-the-fact redress or punishment.[125] Such disruption is inherent to any bid protest, whether it is filed by a vendor in good faith, or by a malicious actor.[126]

Unlike the familiar, hotly debated subfields in the lawfare literature (e.g., use of force or detainee operations), restraints on the U.S. military's ability to purchase goods and services on the battlefield are entirely a matter of self-binding[127] and not the result of competing interpretations of the law of war. The law of war and international law do not require that

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[124] Protests to the agency have essentially no barriers to filing. *See, e.g.*, AFARS 5133.1 (Sept. 7, 2023); *HQ AMC-Level Protest Procedures Program*, ARMY MATERIEL COMMAND, https://www.amc.army.mil/Connect/Legal-Resources (last visited Oct. 5, 2023) (protest may be filed by mail, email, or fax to the contracting officer or the agency address provided). Protests to the GAO require electronic filing and require a $350 fee. *See* 4 C.F.R. 21.1(b) (2023); GOV'T ACCOUNTABILITY OFF. ELECTRONIC PROTEST DOCKETING SYSTEM INSTRUCTIONS, (Oct. 2021), https://www.gao.gov/assets/2021-10/EPDS_ Instructions.pdf. An agency protest to a contracting officer could be submitted by handwritten note. Regarding protests to the contracting officer, see generally FAR 33.103(b) (2023). Written guidance is limited (based on the author's reading of AFARS) regarding contracting officer-level protests in the U.S. Army, although they are generally treated in a similar manner as agency-level protests. This assertion is based on the author's recent professional experiences as the Command Judge Advocate for U.S. Army Contracting Command-Afghanistan from December 2018 to August 2019. *Cf.* AFARS 5133.103 (Sept. 7, 2023).

[125] For example, multiple claims processes (contract and non-contract) address monetary remedies, military or international criminal law addresses criminal misconduct, and detainee litigation seeks restitution of liberty or the right to be tried in civilian court, yet such filings do not stop ongoing operations as a matter of default.

[126] Government contracting became increasingly litigious. This is due to increasing regulatory complexity and evolving judicial interpretations that read procurement regulations as granting quasi-rights to contractors rather than merely creating principal-agent rules through which agencies controlled their contracting officers. *See* NAGLE, *supra* note 5, at 492–94.

[127] *See generally* Nathan A. Sales, *Self-Restraint and National Security*, 6 J. NAT'L SEC. L. & POL'Y 227, 230, 239 (2012) (using the phrase and discussing different theories of "why officials adopt these restraints even when they believe them to be legally unnecessary").

the United States follow its Federal procurement procedures in warzone settings.[128] Further, a protestor's commercial interests are far less weighty than plaintiffs seeking redress on matters of life or liberty.[129] Yet protests, in contrast, automatically impact operation in a manner that weightier claims filed in Federal district court do not.

In the case of agency and GAO bid protests, an agency's stay override authority offers the apparent prospect of relief. However, the override process merely inserts an additional, burdensome, and litigation-constrained bureaucratic process into the warzone contracting effort.[130] This is because the bureaucratic nature of the stay override process will typically require the involvement, review, and approval of remote senior officials,[131] and the stay override is itself subject to challenge by the protestor before the COFC.[132]

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[128] Considered under the law of war, such self-binding in the warzone purchase process may place the United States on worse footing vis-à-vis the law of armed conflict if its aggregate practical effect is to encourage taking rather than purchasing. *See* Santerre, *supra* note 24, at 149–52. Relevant requirements of international commercial law are discussed in section III.C below.

[129] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008) (considering whether a foreign detainee held at Guantanamo Bay could petition for writ of habeas corpus); Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56 (D.D.C. 2014) (relatives of U.S. citizens killed in drone strikes allege Fourth and Fifth Amendment violations).

[130] Defense agencies issue stay overrides in fewer than 2 percent of GAO protests. MARK ARENA ET AL., RAND CORP., RR2356, ASSESSING BID PROTESTS OF U.S. DEPARTMENT OF DEFENSE PROCUREMENTS 32 (2018) [hereinafter RAND REPORT]. One reason for this relative infrequency is that agencies often account for the 100-day GAO protest timeline in their acquisition planning. *See, e.g.*, Memorandum from Command General of Army Contracting Command to Headquarters, Army Contracting Command et al., subject: FY18 Procurement Action Lead Time (PALT) Metric, para. 4(b) (12 Mar. 2018) (considering protests a PALT factor). *See also* Kevin J. Wilkinson & Dennis C. Ehlers, *Ensuring CICA Stay Overrides are Reasonable, Supportable, and Less Vulnerable to Attack: Practical Recommendations in Light of Recent COFC Cases*, 60 A.F. L. REV. 91, 110 (2007) ("Acquisition personnel should build into the procurement process time for potential bid protests . . . [because] an agency's finding that an alternative [to a stay override] is not reasonable will be analyzed [by the COFC] in light of its lack of advance planning and the source of the problems encountered, including the failure to factor in time for a potential protest.") (citing Reilly's Wholesale Produce vs. United States, 73 Fed. Cl. 705, 715–16 (2006)).

[131] *See* authorities cited *supra* note 59.

[132] *See* cases cited *supra* note 60.

Further, the general trend at the COFC has been to give less deference to agency stay overrides.[133] While override decisions based on national security or defense will at times receive greater deference from the COFC judges, such deference is far from guaranteed.[134] The outcomes of CICA stay override challenges at the COFC are unpredictable because the FAR and CICA provide little meaningful guidance on what standards agencies should consider when they enact a stay override, and the COFC's relatively young jurisprudence in this area has resulted in a conflicting body of case law regarding the standard of review and which party bears the burden.[135] This can mean that the outcome may greatly depend on which judge presides over the challenge.[136]

Even if the military agency ultimately prevails before the judge, the mission will likely have been harmed by the process. Under a realistic timeline, drafting a litigation-resistant override documents will take several days at least, and must be accomplished at the same time the contracting officer must assemble the administrative record for the protest.[137] Override determinations for sensitive contracts will take longer if they require classified information that entails additional time for classification reviews and redaction decisions. During this time, award or

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[133] KATE M. MANUEL & MOSHE SCHWARTZ, CONG. RSCH. SERV., R40228, GAO BID PROTESTS: AN OVERVIEW OF TIME FRAMES AND PROCEDURES 14 (2016) (citations omitted). *See also* Steven L. Schooner, *Postscript III: Challenging an Override of a Protest Stay*, 26 NO. 5 NASH & CIBINIC REP. ¶ 25 (May 2012) ("[T]he Court of Federal Claims may be slowly, inexorably, and, alas, inconsistently, raising the bar for agencies to justify their override decisions."); Kara M. Sacilotto, *Is the Game Worth the Candle? The Fate of the CICA Override*, 45 PROCUREMENT LAW. 3, 3 (2009) ("[W]ithin the last few years, agency overrides have not experienced an 'easy course' at the COFC and, instead, arguably have met with the 'uphill battle' that plaintiffs were said to face. Judicial review generally has been searching, and some judges on the court have effectively placed the burden on the agency to defend its override decision instead of on the plaintiff to demonstrate that the override is arbitrary and capricious.").

[134] MANUEL & SCHWARTZ, *supra* note 133, at 14 (citations omitted).

[135] Nathaniel E. Castellano, *Year in Review: The Federal Circuit's 2019 Government Contract Law Decisions*, 69 AM. U. L. REV. 1265, 1294 (2020).

[136] Kevin J. Wilkinson & John M. Page, *CICA Stays Revisited: Keys to Successful Overrides*, 66 A.F. L. REV. 135, 141 (2010). Further, not every COFC "judge will have published a definitive position on each issue relevant to a CICA override challenge. This often requires that parties to override litigation must brief their (likely expedited) case against multiple alternative standards." Castellano, *supra* note 138, at 1296.

[137] *See, e.g.*, Beechcraft Defense Company, LLC v. United States, 111 Fed. Cl. 24, 29 (2013) (override determination documentation took four days to complete).

performance will have stopped. Instead of purchasing critical commodities and services, the contracting officer will be on the phone with lawyers and multiple levels of supervisors, working on litigation strategies and drafting Determination and Findings documents. If this defensive process is required across dozens of warzone contracts in a compressed time period, the effects will quickly become deleterious.[138]

To counter the challenges just discussed, creative contracting officers with strong stomachs could likely develop various contracting strategies to ensure continued performance. Such approaches might include stretching the definition of immediately stay to a flexible few days in the case of a contract that only took a few days to perform. Another approach could be to award a short-term sole-source contract to the protested-awardee as many times as is necessary during the pendency of the protest—staying one step ahead of the pace of additional bid protest filings if these stopgap contracts themselves are subsequently protested.[139]

Such stopgap measures only demonstrate that warzone acquisitions do not fit neatly into the current bid protest regime: short-term critical commodity or service contracts under protest could likely be "bridged away" in a matter of weeks, long before any decision on the merits of the protest could be reached. In practice, in a warzone contracting environment there would likely be strong pressure on a contracting officer to disregard stays in certain high-pressure situations. While contracting officers and other agency officials certainly feel the weight of statutory stays and COFC injunctions, in a battlefield contracting scenario there could be potentially overwhelming countervailing pressures of immediate security or sustainment needs.[140] Contracting officers should not be placed

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[138] One predictable outcome would be for units to give up on the acquisition process and rely more on requisition, or perhaps split purchases by Government card holders or ordering officers. A split purchase is an impermissible method of breaking up larger purchases in order to avoid thresholds or use certain procedures not otherwise available. *See* FAR 13.003(c) (2023) (prohibiting the practice regarding the micro-purchase threshold).

[139] *See, e.g.*, Access Sys. v. United States, 84 Fed. Cl. 241, 243 (2008) (holding that bridge contract did not constitute a de facto override of automatic stay of original contract's performance).

[140] *Cf.* Jeffery Alan Green, *Alternatives for the Future of Contingency Contracting: Avoiding a Repeat of the Mistakes of Iraq*, 35 PUB. CONT. L.J. 447, 453 (2006) (It is possible that contracting officials placed in a life-threatening situation are motivated by

in such an untenable and predictable position by a bid protest regime designed with inapposite peacetime procurement system interests in mind.

Thus, the current state of the law produces an unreasonable and self-imposed burden on the United States military in the field, with little or no practical benefit to, or relationship with, the greater acquisition system. The bid protest regime that currently applies to warzone contracting—in the same way it applies to General Services Agency furniture purchases—should be reformed prior to the next large conflict, or risk injuring combat logistical effectiveness and making a mockery of the bid protest system. Congress should "un-bind" the military's warzone purchasing system and end an era of self-inflicted lawfare before the system breaks down in a near-future warzone.

Instead, Congress should empower COCOMs to develop and train on more realistic and resilient purchasing processes so that units are trained and prepared to execute that mission in disrupted settings. Proposed reforms are discussed in Section IV.

2. Adversarial Lawfare

Moving beyond the self-inflicted lawfare just discussed, this subsection will now argue that the bid protest regime is a ripe target for adversary-driven lawfare. The status quo presents an opportunity-laden system for hostile actors to conduct lawfare-via-protest against United States contracting and logistical activities in a theater of operations. Adversaries would have little difficulty in convincing through bribery, political sympathies, threats, or other means, some number of foreign vendors to file protests for malign purposes.

Broad categories of adversarial lawfare could include disruption-via-stay, information gathering, or propaganda. To achieve disruption, a lawfare-driven protest might target particular contract actions at select

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factors of far more immediate importance than the FAR, such as their personal safety. If contracting officials' actions directly affect the safety of a large group of military and civilian personnel, perhaps it is appropriate to shift 'fair and reasonable' price to a secondary consideration while life-threatening circumstances exist.").

moments, or file coordinated protests against multiple actions to delay contracting work across the broadest spectrum as possible.

Even in normal domestic settings, some firms may use bid protests as a method of learning information about the Government's source selection processes,[141] or pursue frivolous cases for the purpose of harassing rival firms or procuring agencies.[142] Similarly, foreign adversaries, through proxy firms, could use the bid protest system for their own malign purposes. Bid protests could be used by adversaries as a quasi-open-source intelligence gathering technique. Intelligence gleaned could include information on logistical requirements and planning, or information about local vendors willing to do business with the United States.

Protests require the Government to provide protestors with troves of documents regarding the contract planning and award process.[143] Adversaries' intelligence services could find agency protest reports useful to fill in in a "mosaic"[144] of information about the military's logistical needs and operations. It is true that bid protest processes protect various categories of sensitive information and documents.[145] However, such safeguards are not bulletproof and tend to focus on pricing and proprietary information, which may be of less interest than the basic contracting documents that state times, locations, and quantities. Further, a pro se litigant, while not able to receive material subject to a protective order,[146] nevertheless receives the remainder of the administrative record, much of which is not otherwise publicly available.[147]

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[141] *See* RAND REPORT, *supra* note 130, at xiii.

[142] *See generally* Bruce Tsai, Targeting Frivolous Bid Protests by Revisiting the Competition in Contracting Act's Automatic Stay Provision (Dec. 2014) (M.P.A. capstone paper, Johns Hopkins University), http://jhir.library.jhu.edu/handle/1774.2/37240.

[143] *See* 4 C.F.R §§ 21.3(c), 21.3(d) (2023); R. CT. FED. CL. 52.1(b).

[144] "Mosaic theory" is "a method by which all intelligence agencies collect seemingly disparate pieces of information and assembl[e] them into a coherent picture." Berman v. CIA, 378 F. Supp. 2d 1209, 1215 (E.D. Cal. 2005) (internal quotation marks omitted).

[145] *But see* Christopher R. Yukins, *Stepping Stones to Reform, Making Agency-Level Bid Protests Effective for Agencies and Bidders by Building on Best Practices from Across the Federal Government*, 50 PUB. CONT. L.J. 197, 209 (2021) ("[T]here is no clear authority for protective orders in agency-level bid protests.").

[146] *See* 4 C.F.R. § 21.4(a) (2023).

[147] A comparison with what information, and on what timeline, would be releasable under the Freedom of Information Act would be instructive but is beyond the scope of this paper.

In addition to information released to protestors, the publicly-released GAO and COFC opinions resulting from warzone protests similarly carry the risk of revealing sensitive, though not classified, information about otherwise non-public warzone vendor vetting processes. While agencies may request that GAO and COFC redact information from publicly released opinions, the result is not a foregone conclusion.[148] Iterate this process over many dozens or hundreds of cases and opinions, and adversaries will inevitably gain a clearer, if still incomplete, picture of both vendor vetting processes and the pool of vendors that work with the United States in the warzone.

More broadly, bid protests in warzones offer adversaries propaganda opportunities in an age when such propagandistic "information warfare"[149] is increasingly critical.[150] Protests filed by adversary-influenced vendors would "cause lawfare mischief by being a public forum for official criticism and judgment of U.S. military action,"[151] particularly while such action is still in progress. As Justice Jackson warned in *Johnson v. Eisentrager*,

> [Providing litigation fora to foreign adversaries] diminish[es] the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and

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[148] *See* Akal Sec., Inc. v. United States, 87 Fed. Cl. 311, 314 n.1 (2009) (declining to redact various portions of opinion).

[149] *See, e.g.*, CATHERINE A. THEOHARY, CONG. RSCH. SERV., R45142, INFORMATION WARFARE: ISSUES FOR CONGRESS 1 (2018) (defining "information warfare" as "the range of military and government operations to protect and exploit the information environment").

[150] *See, e.g.*, Stuart A. Thompson & Davey Alba, *Fact and Mythmaking Blend in Ukraine's Information War*, N.Y. TIMES (July 30, 2004), https://www.nytimes.com/2022/03/03/technology/ukraine-war-misinfo.html.

[151] JACK GOLDSMITH, THE TERROR PRESIDENCY 63 (2007).

> military opinion highly comforting to enemies of the United States.[152]

Congress intended CICA and the bid protest process to pressure the executive branch into compliance with the law through the force of publicity.[153] While this is no doubt a noble goal and is presumably good policy in a peacetime setting, however, inviting adversary-driven publicity into warzone logistical operations seems less wise. One of lawfare's great strengths as a tactic is that it provides a platform on which a belligerent can assert "the apparent moral high ground."[154] In the warzone contracting context, every protest, no matter how meritless or malign, can become potential propaganda fodder for U.S. adversaries, who would be able to point to an official pending legal matter before the GAO or COFC and claim it as an example of the United States military dealing unfairly with the local populace. Viewed through this lens, the current bid protest system is a clear case of invited disruption.

3. Congress Should Limit Protestors' Ability to Challenge Contracting Exclusions Based on Vendor Vetting

Vendor vetting not only is a challenge to the survival of the contracting authority divide but is also an issue in the context of bid protests, where the uneasy relationship between vetting and source selection will frequently emerge in a large conflict with high volumes of bid protests. To date, the GAO and the COFC have been relatively deferential to vendor vetting processes, but this is still a relatively underdeveloped area of the law. The intermingling of command and contracting authority will create pitfalls for contracting officers and result in numerous cognizable, even if infrequently successful, protests.

At first impression, the most litigation-resistant approach for warzone contracting officers may be to keep at arms-length from the vetting process in order to maintain their independence. For example, the contracting officer in *Omran* appears to have been walled-off from the vendor vetting

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[152] Johnson v. Eisentrager, 339 U.S. 763, 779 (1950).
[153] Ameron, Inc. v. United States, 809 F.2d 979, 984 (3d Cir. 1986).
[154] GOLDSMITH, *supra* note 151, at 63.

process.[155] Such an approach is consistent with how contracting officers review suspensions and debarments under normal procedures: they rely on vendor exclusions already determined by debarment officials.[156] This frames the question within the traditionally forgiving standard of review regarding inherent command authority over force protection,[157] rather than acquisition authority.

However, in a large, hotly contested, and chaotic future conflict, warzone vendor screening may of necessity, become rushed and untidy. Rather than the walled-off process described in *Omran*,[158] imagine a vetting process that is a series of rushed verbal discussions, first between the commander's intelligence personnel and local sources of information, and then between the command and the contracting officer. If such a process is iterated at scale over a large theater, it is eminently predictable that much of the standard process will not be captured in writing or catalogued in a system.[159] This could lead to difficulties for the Government in a bid protest setting if protestors allege an erroneous internal Government process.[160] Also, in an unfolding warzone, classification decisions regarding the underlying derogatory information

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[155] Omran Holding Group v. United States, 128 Fed. Cl. 273, 274–77 (2016). This and every other bid protest case involving recent vendor vetting issues originated out of the U.S. campaigns in the Middle East, where U.S. agencies enjoyed the benefits of uninterrupted communications and processes developed over two decades of post-September 11th operations.

[156] *See generally* FAR 9.1, 9.4 (2023).

[157] *See, e.g.*, Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 893 (1961).

[158] The Government's argument appears to have relied in part on the contracting officer's lack of interaction with the vetting process. *Omran*, 128 Fed. Cl. at 279. Because the court held that the plaintiff lacked standing (for unrelated reasons), it did not directly address the question of whether the walled-off approach was necessary for the Government to prevail on the merits. *Id.* at 285.

[159] Leidos Innovations Corp., B-414289.2, 2017 CPD ¶ 200, at 2 (Comp. Gen. June 6, 2017) (describing the contracting officer's review of the "Joint Contingency Contracting System" database). Future contracting officers and command personnel may have other more pressing tasks in their warzone than papering a contract file in anticipation of a bid protest

[160] *See, e.g.*, Sander & Romero, *supra* note 63, at 20 ("A practitioner might be able to show that the DoD failed to follow its own [process] in making the decision (i.e. errors were made, such as the incorrect decision maker placed the contractor on the "rejected list") and, therefore, the process was arbitrary and capricious.").

will become rushed or uneven, and any unclassified information relied upon by a contractor officer could be open to scrutiny.[161]

There are other ways in which rushed vendor screening could increase litigation risk for the Government under the current law. First, contracting officers may reasonably believe they should gain personal knowledge of the intelligence underlying vendor vetting and weigh its value, such as the contracting officer in *Leidos Innovations Corp.*, who chose to view the classified report underlying the vendor's ineligibility rating.[162] This intermingling of roles could open the door to greater scrutiny of the reasonableness and independence of a contracting officer's responsibility determination. Second, vendor vetting exclusions create situations where contracting officers are not able to give meaningful debriefings.[163] This could in turn may increase the likelihood of protests.[164]

Third, the inherent authority of a commander to bar firms also includes the discretion to rescind such a bar. In the context of vendor vetting, this could mean that the appropriate commander may choose to waive a negative vendor vetting status or resulting bar to allow for contracting with the otherwise ineligible firm.[165] When making that decision, one of the considerations for commanders may be "market research performed by the contracting agency."[166]

Therefore, while in Section III.A.2 we considered the command influence over the contracting officer's independent business judgment in the vendor vetting context, the waiver process presents the reverse

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[161] *See* Canni & Carey, *supra* note 63, at ¶ 251 ("The ruling suggests that the decision was driven not only by the *classified nature of the information*, but by the fact that *war-zone contracting* was involved. Remove either of these factors from the situation, and the COFC may have reached a different result.") (discussing MG Altus Apache Co. v. United States, 111 Fed. Cl. 425, 434 (2013)).

[162] *Leidos*, 2017 CPD ¶ 200, at 2.

[163] Or similarly, where contracting officers must use cryptic statements to notify unsuccessful offerors where debriefings are not required. The contracting officer can likely say nothing more than, "I find you ineligible for award." *See* NCL Logistics Company v. United States, 109 Fed. Cl. 596, 607-08 (2012) (Policy mandated that rejected status may only be revealed to an "apparent successful offeror," who may only be told that they are "ineligible for award.").

[164] RAND Report, *supra* note 130, at xiii, 20.

[165] *See NCL Logistics Company*, 109 Fed. Cl. at 608–09 (referencing waiver authority).

[166] *NCL Logistics Company*, 109 Fed. Cl. at 608.

potential litigation trap for the contracting officer: commanders may rely, sometimes heavily, on a contracting officer's business advice in determining whether to exercise their inherent powers to bar a firm from their area of operations, or to waive their negative vetting status.[167] What deference might the GAO or COFC make of such intermingled authority in the future?[168] This is an unpredictable and potentially fraught area for future warzone-based litigation.

Congress needs to decide whether it is in the United States' defense mission's interest, or the general procurement system's interest, to have these issues continually litigated in a warzone contracting context—where such issues are likely to proliferate. One approach is to do nothing, and let the law work itself out within the idiosyncratic[169] jurisprudence of the COFC and the easily accessed forum of the GAO. This would enable adversaries not only to disrupt warzone contracting with the litigation effects, but also to rummage around vendor vetting processes via the adjacent responsibility determinations. The better approach is for Congress to cabin warzone bid protest opportunities.

C. Additional Policy Considerations: Requisition and Competition

Having considered the challenges that divided authority, bid protests, and vendor vetting pose to the current warzone acquisition system, this subsection will address several policy considerations relevant to Section IV's proposed bid protest reforms. Section 1 discusses relevant requirements under international law. Section 2 argues for commanders to

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[167] This suggests the viability of the contracting officer's independent review of the derogatory information, so that even if the vendor vetting process is called into question by a reviewing body, the Government may still rely on the contracting officer's responsibility determination. *Cf. NCL Logistics Company*, 109 Fed. Cl. at 618 ("information in investigative reports may be used as the basis of a non-responsibility determination.") (citation omitted). *See also* Sander & Romero, *supra* note 63, at 20–21 ("It is the authors' view that [a responsibility determination] would, at minimum, require the contracting officer to read the reports on which the "rejected" rating is based.").

[168] A protestor could argue that a contracting officer acted unreasonably in failing to seek a waiver of a negative vendor rating. *Cf.* Rockies Express Pipeline LLC v. Salazar, 730 F.3d 1330, 1339 (Fed. Cir. 2013) ("Interior breached the [agreement] by refusing to seek a deviation from the FAR provisions").

[169] *Cf.* Castellano, *supra* note 135, at 1294; Schooner, *supra* note 133, at ¶ 25 ("[A]ll too often, the luck of the draw at the Court of Federal Claims significantly affects a case's outcome.").

possess purchasing authority in warzone environments. Section 3 addresses the Congressional priority of competition, and why it should not drive warzone acquisition policy.

1. International Law Does Not Preclude Warzone Contracting Reforms

International law does not mandate the use of domestic acquisition procedures in warzone settings as a general matter, nor does it foreclose the reforms proposed in Section IV.[170] The World Trade Organization's Government Procurement Agreement[171] established general Government contracting rules for states party to the agreement, including, in relevant part, a preference for competitive procurement[172] and a review procedure (i.e. bid protest) conducted by, or appealable to, an "impartial administrative or judicial authority that is independent of the procuring entity whose procurement is the subject of the challenge."[173] The GPA also requires that procedures "provide for…rapid interim measures" that "may result in suspension of the procurement process," [174] i.e., a stay of performance or award.

However, the GPA also contains several exceptions that would apply to warzone purchasing reforms, including those proposed in Section IV of this paper. The GPA's preamble recognizes the need for "sufficiently

[170] A detailed review of the manifold bilateral trade and defense agreements that touch on U.S. Government procurement is beyond the scope of this paper. *See, e.g.*, *Reciprocal Defense Procurement and Acquisition Policy Memoranda of Understanding*, DEF. PRICING & CONTRACTING, https://acq.osd.mil/asda/dpc/cp/ic/reciprocal-procurement-mou.html (last visited Oct. 5, 2023) (containing current reciprocal procurement agreements). As a general matter, however, in a warzone setting where U.S. forces are present at the invitation of the foreign nation, a new procurement agreement or status of forces agreement could address any bilateral Government procurement concerns.

[171] Agreement on Government Procurement, Apr. 15, 1994, 1915 U.N.T.S. 103.

[172] *See, e.g.*, Agreement on Government Procurement, as Amended on 30 March 2012, arts. IX, XIII, 3008 U.N.T.S. 49, 63–65, 69–70 (2014) [hereinafter Revised GPA]. The DoD is a covered party. *United States of America – Central Government Entities – Annex 1*, WORLD TRADE ORG., https://e-gpa.wto.org/en/Annex/Details?Agreement=GPA113&Party=UnitedStates&AnnexNo=1&ContentCulture=en%20United%20States%20of%20America%20(wto.org) (last visited Oct. 5, 2023) [hereinafter *Annex 1 – U.S. Central Government Entities*].

[173] Revised GPA, *supra* note 172, art. XVIII, ¶¶ 1, 5.

[174] *Id.* art. XVIII, ¶ 7(a).

flexible [terms] to accommodate the specific circumstances of each Party."[175] Following from that principle, the GPA includes a broadly worded national security savings clause that exempts "any action" necessary for the procurement of war materials or otherwise indispensable for national security.[176] Because the reforms proposed in Section IV would only apply in active warzones, this GPA exception would apply.[177]

Additionally, the GPA contains standing exceptions for the lease of land[178] and procurements that fall "under the particular procedure or condition of an international agreement relating to the stationing of troops." [179] Further, under normal circumstances and without other exceptions, DoD purchases of goods and services valued under $182,000 and "construction services" valued at under $7,008,000 are exempt from the GPA's requirements.[180]

In conclusion, the GPA's requirements would not apply to warzone contracting following an appropriate determination.[181] Further, even if reforms were tailored to fit within the GPA as it normally applies, bid protests could be limited or eliminated up to the standard GPA thresholds,[182] and the CICA stay could be made discretionary rather than automatic.

2. Command Purchasing Authority Is Not Scary

Policy considerations demonstrate the reasonableness of vesting COCOMs with some warzone purchasing authority. While there are ample arguments for separating command and contracting authority for major weapon systems procurements and routine domestic and peacetime

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[175] *Id.* at Preamble.
[176] *Id.* art. III, ¶ 1.
[177] The United States in the annex to the GPA exempts DoD from certain categories of purchases outright (primarily relating to weapons systems and rare metals) but also reserves the ability to expand the application of GPA's national security exception more broadly "subject to [U.S.] determinations" under that exception. *Id.*, Annex 1, n.4, U.S.-Central Government Entities.
[178] Revised GPA, at Article II, ¶ 3(a).
[179] Revised GPA, at Article II, ¶ 3(e)(ii).
[180] *Annex 1 – U.S. Central Government Entities*, *supra* note 172, n.4 (U.S.-Thresholds).
[181] *See supra* note 177 and accompanying text.
[182] *Id.*

contracting, such justifications do not have the same purchase in the warzone contracting context. Combatant commanders already possess vast powers in the theater under their command. Compared with such activities as lethal strikes, detentions, etc., the purchase of basic supplies and services is neither particularly weighty nor complex. Rudimentary, if not necessary small, purchases would be well within the competence of commanders and their logistical staff sections.

Further, in a high-intensity or complex hybrid conflict, if commanders were empowered to make short-term critical purchases, they would be able to keep a cleaner balance sheet for the DoD compared to the current system which removes all purchasing authority from commanders. The current system will merely result in more requisition during operations where there are significant disruptions to the standard acquisition system.[183] As a result, the United States military would likely face greater financial and legal jeopardy by tipping the scales away from contracting and in favor of requisition to satisfy fast-moving logistical needs.[184]

While requisition, as opposed to pillage, is permissible under the law of armed conflict, and a routine fact of any conflict, it is neither money-saving nor low risk.[185] Under the law of armed conflict, fair value must be paid as soon as possible for any requisitioned items.[186] In terms of tax-dollar stewardship, military units might account for up-front purchases more efficiently than try to record requisitions for payment at an unspecified later date.[187] Further, commanders may not requisition labor to perform direct military tasks (e.g., constructing defensive positions)

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[183] *See* Santerre, *supra* note 24, at 149–52.

[184] *Id.* at 112 (citing 2 L. OPPENHEIM, INTERNATIONAL LAW § 143 (7th ed. 1952)) ("A violation of contracting regulations and statutes may result in a commander becoming personally liable for payment of a contract or answerable for a domestic 'white collar crime.' A violation of international law in this area could result in a commander being charged with a violation of the law of war.").

[185] *See id.* at 112.

[186] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 55, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] ("Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned [food and medical supply] goods."). *See also* LAW OF WAR MANUAL § 11.18.7 (2016) (addressing requisition of private enemy property).

[187] *See* Santerre, *supra* note 24, at 151.

under the law of armed conflict.[188] However, there is no such restriction against paying the local populace to voluntarily perform such labor.[189] The law of war may weigh an instance of requisition or seizure against its military necessity,[190] whereas voluntary commercial transactions need not meet such a standard.[191]

Assuredly, even if commanders possessed an inherent purchasing authority, requisition will be necessary at times due to battlefield exigencies or the unwillingness of locals to voluntarily contract with the United States.[192] Whenever possible, the policy preference should be to maximize a commander's ability to purchase rather than requisition private property. A policy that lessened the legal and regulatory dichotomy of command and contract authority in the warzone context would therefore not only be administratively cleaner and present less profound legal risk, it could maximize "strategic communications"[193] with the local populace: paying local businesses and individuals (or at least definitizing the amounts of obligations) prior to taking their property would mitigate ill-will towards U.S. forces.[194] Paying local businesses and property owners up front would also mitigate the discipline and morale risks inherent to requisition—particularly the ever-present danger that it spills over into marauding.[195] A status quo of a contracting-officer dependent system that

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[188] Geneva Convention IV, *supra* note 186, art. 51.
[189] *See* LAW OF WAR MANUAL, *supra* note 22, § 11.20.4.
[190] This is clearly the case with *seized* private property, although *requisition* of private property may require a lower standard because the taking will later be compensated. *Cf.* 2022 OPERATIONAL L. HANDBOOK, *supra* note 22, ch. 2 (II)(F)(5), n.316 (citing Geneva Convention IV, *supra* note 186, art. 97); *see also* definition of requisition *infra* note 199.
[191] *See* Santerre, *supra* note 24, at 112.
[192] Another useful definition of requisition is "the right of the occupying force to buy from an unwilling populace." 2022 OPERATIONAL L. HANDBOOK, *supra* note 22, ch. 3, app. B(I)(C)(4).
[193] *See generally* Gregory P. Noone, *Historical and Semiotic Orgins of "Lawfare": Lawfare or Strategic Communications?*, 43 CASE W. RESERVE J. INT'L L. 73, 79 (2010) (discussing "strategic communications" in the lawfare context).
[194] *See* JP 4-10, *supra* note 4, at I-12.
[195] VAN CREVELD, *supra* note 16, at 30, 34, 67, 73; DUFFY, *supra* note 38, at 167. *Cf.* James Dao, *Soldier Who Seized Car in Iraq Is Convicted of Armed Robbery*, N.Y. TIMES (July 30, 2004), https://www.nytimes.com/2004/07/30/us/soldier-who-seized-car-in-iraq-is-convicted-of-armed-robbery.html. Without arguing that this episode was caused by the lack of contracting authority, it does suggest the unpleasant outcomes that could flow from an ineffectively distributed warzone purchasing system.

implicitly favors requisition is, at best, undefinitized contracting by another name; at worst, it is an invitation to run afoul of the law of war.

Therefore, the reform of the contracting dichotomy of authority is an opportunity for offensive lawfare.

3. Competition Should Not Be a High Priority in Warzones

Competition, of a manufactured variety, is a restriction that Congress places on the Federal acquisition system. In the context of military operations warzones, however, competition should not rate especially high. While the current acquisition system's self-binding in a warzone context may be seen as a moral or strategic positive, any consideration of its use in a given context should consider unintended consequences. The competition requirements are closely linked to public transparency.[196] In warzones, however, immediate public transparency regarding ongoing operations is not always a desirable state.[197]

While militaries throughout history have done great damage to civilian populations, merely declining to freely contract with one party in favor of another, for security or expediency reasons, does not register on the scale of military misdeeds. Foreign nationals overseas do not have a right to do business with the United States Government, [198] and warzone policy considerations should prioritize mission accomplishment and abiding by the law of war far above the socioeconomic goals of the Federal acquisition system.

Meanwhile, the benefits of allowing the protest regime are minimal at best. Foreign vendors will mostly be unfamiliar with the United States' Government procurement system and will not typically enter the process with an expectation that a warzone military will choose its goods or services in accordance with a domestic bureaucratic process. Further,

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[196] *See generally* Steven L. Schooner, *Desiderata*: *Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 103, 104–06 (2002).

[197] Transparency and accountability are of course crucial; however, for obvious security reasons, publicizing details of ongoing operations will often need to be delayed.

[198] *Cf.* People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999) ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.").

many such protests will be filed in part by small-business local vendors—exactly the class of protests that have low success rates on the merits.[199] The ultimate success rate of future foreign warzone small businesses can hardly expected to be higher, though the disruption to U.S. operations stemming from the protests can still be significant.

Warzone commanders should be able to tailor the amount of competition and transparency used in acquiring products and services. This would enable them to take into primary account military interests (e.g. security, efficiency, and relations with the local populace) rather than the standard acquisition system's socioeconomic goals.

D. Conclusion

Legally re-categorizing warzone acquisition as a military logistical activity rather than a Federal procurement process would not cause any loss of public trust in the acquisition system. The acquisition system writ large would continue apace, unaffected. Such a re-categorization of warzone purchasing would, however, help minimize requisition, increase mission effectiveness and resiliency, and unburden the GAO and COFC from having to issue myriad bid protests decisions regarding sensitive warzone purchasing activities.

IV. Reforms

This section proposes and analyzes several possible reforms that would address the challenges addressed above. Section A addresses possible reforms of contracting authority, as well as the ability to distribute contracting authority more broadly in theater. Section B addresses possible reforms of the bid protest system for warzone acquisitions. The reforms proposed in these two subsections could be pursued in tandem or independent of one another.

These proposed reforms are relatively straightforward in terms of how they could be accomplished via statute and regulation. This apparent simplicity flows from the shift of warzone purchasing from a highly

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[199] RAND REPORT, *supra* note 130, at 35. More than half of GAO and COFC protests between 2008 and 2016 were filed by small businesses. *Id.* at 30–31.

regulated and litigious system to a decentralized and less litigious system. More challenging, however, may be the second-order requirements of implementation and oversight. Such issues are addressed in Section C.

A. Reforms to Contracting Authority

This subsection will discuss several reforms including the creation of a command-based purchasing authority that would reside outside the Federal procurement system. Appendix A provides an example of a statutory reform providing limited warzone purchasing authority to COCOMs. Next, this section proposes FAR-based reforms that would increase the resiliency of purchasing power within a warzone while still residing within the broader Federal procurement system.

1. Congress Should Create a Command-Based Purchasing Authority

Congress should grant COCOMs purchasing authority and end the current contracting authority divide within warzones. Such authority would need to flow from a newly enacted statute, vesting COCOMs with a delegable purchasing authority outside the general acquisition system.[200] To maximize the authority's resiliency and reach, the authority should be delegable to any level, subject to agency regulations, and able delegable to classes based on position. [201] Implementing regulations could subsequently assign management and oversight to commanders and their logistics staff sections at each level. Appendix A proposes statutory language that would limit this authority to purchases made or contracts awarded and performed in Secretarially designated warzones. Further, the period of performance of any such contract would be limited to three months.

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[200] *See, e.g.*, 10 U.S.C. § 4021 (creating a non-FAR-based authority to enter into transactions for the development of certain prototype projects).

[201] *Cf.* Karen L. Douglas, *Contractors Accompanying the Force: Empowering Commanders with Emergency Change Authority*, 55 A.F. L. REV. 127, 144 (2004) ("With delegation of [contracting] authority by position, whoever is next in rank would gain the emergency contract change authority at the same time as assuming military command.") (discussing a proposed authority for commanders to possess emergency contract modification authority).

This reform would solve the current disconnect between the warzone logistics function and the purchasing function by enabling logisticians on the ground to purchase necessary items themselves.[202] Further, such a dispersed system would be more flexible and resilient in the event an adversary disrupts the current computer- and telecommunications-based—and contracting officer dependent—acquisition system. In the event of such disruptions, logisticians or other designated military personnel in the field would still be able to quickly—and legally—make purchases.[203]

2. FAR-Based Reforms

As an alternative and less ambitious reform, Congress could create a head of a contracting activities within each COCOM. This reform would help distribute contracting authority, but would not require the creation of a separate, non-FAR-based command purchasing authority. A model for this exists in the statute establishing the special operations COCOM, which grants "head of an agency" acquisition authority to the commander of Special Operations Command (SOCOM).[204] This authority enables SOCOM to appoint its own contracting officers.[205]

While this reform would not solve the lack of resiliency and limited distribution of contracting authority inherent to the contracting officer acquisition model, several accompanying regulatory reforms could mitigate this concern. Class deviations could allow a COCOM head of

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[202] *Cf. See* Marchesi, *supra* note 20, at 70 ("Given the overwhelmingly logistical nature of the contingency contracting mission, the Logistics branch is the natural choice. As subject matter experts in the logistics field, these officers are uniquely suited to effectively serve as small-scale contingency contracting officers.") (proposing expanding FAR-based contracting authority up to the simplified acquisition threshold to logistics officers within maneuver units).

[203] While such an approach is comparable on its face to a contracting officer-appointed ordering officers, the command-driven approach is vastly more resilient because of the omnipresence of command authority. Ordering officers, by contrast, require specific appointment, and are greatly limited in their purchasing power. Further, this proposed authority would not be limited to the micro-purchase threshold, as are ordering officers. DFARS 213.306(a)(1) (Aug. 2023); AFARS 5101.602-2-92 (Sept. 7, 2023). Additionally, areas of potential future conflicts (for example, East Asia or Eastern Europe) are more expensive than Iraq or Afghanistan, meaning diminished purchasing power if FOO thresholds are maintained.

[204] 10 U.S.C. § 167(e)(4)(B).

[205] *See* SOFARS 5601.602 (June 30, 2021).

contracting to grant contracting officer authority based on position, rather than individuals, or to a class (e.g., logistics officers above a certain rank), so that killed, injured, or unavailable personnel do not create an absence of purchasing authority.[206] To supplement this contracting authority, Congress could permanently raise the warzone micro-purchase threshold for overseas contingencies and thereby enable contracting officers to appoint ordering officers with sufficient purchasing authority to fill in gaps in communications-disrupted warzones.

In smaller theaters, another solution could be to increase the number of uniformed contracting officers and distribute them among lower-echelon units.[207] However, such a proposal is very likely infeasible at a large enough scale to diffuse purchasing power throughout a larger contested theater. The significant education and training requirements[208] of the contracting officer career path, and the difficulty and fierce budgetary competition involved in the creation of any new personnel billets, make expansion and flexibility difficult.[209] Further, such an approach would likely degrade standard contracting organizations if their acquisition workforce is cannibalized to serve as warzone contracting officers.

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[206] *See* Douglas, *supra* note 201, at 144. Deviations allow agencies to use contracting methods or issue policies that are inconsistent with the FAR. *See generally* FAR 1.4 (2023).

[207] *See* Marchesi, *supra* note 20, at 68–70 (proposing assignment of contracting officers at the combat brigade level).

[208] The process to become a DoD contracting officer typically requires years of education, training, and work experience as a contract specialist. *See* DFARS 201.603-2 (Aug. 2023) (listing requirements); *but see also* DFARS 218.201(1) (Aug. 2023) (waiving requirement for baccalaureate degree for DoD contingency contracting officers).

[209] *See, e.g.*, RAND REPORT, *supra* note 130, at 20 ("The workforce was cut massively in the 1990s and is still in the process of rebuilding. New process requirements are constantly being added or changed to meet the rapidly evolving marketplace. Future budgets are likely to severely constrain training, recruiting, and retention."). Further, it may not be a safe assumption that in a larger or bloodier conflict the U.S. military could rely on civilian contracting officer volunteers for expeditionary contracting to the extent it did in recent U.S. conflicts in the Middle East (for any number of policy, organizational, or personal reasons). *See, e.g.*, Gansler & Lucyshyn, *supra* note 14, at 283 (discussing reliance on civilian personnel for expeditionary contracting); DOD IG AUDIT: ACC-A, *supra* note 91, at 2 (As of October 2019, 65 percent of the Army's contracting office personnel in Afghanistan were Civilian DoD employees or contractors).

B. Bid Protest Reforms

Congress should limit the effects of bid protests on warzone purchasing. Such reforms could be accomplished independent of any of the reforms to contracting authority proposed in the above section.

1. Congress Should Limit Bid Protest Effects on Warzone Contracts

Congress should eliminate bid protest jurisdiction at the GAO and COFC for warzone acquisition activities whether conducted under FAR-based authorities or under the proposed authorities in Subsection IV.A above. Defense agencies could continue to offer disappointed vendors an agency protest process, which could take better account of security considerations. Further, such a carve-out of bid protest jurisdiction could prove a valuable test case for some of the bid protest reform proposals[210] made recently by the Section 809 Panel.[211]

Alternatively, Congress should eliminate the automatic statutory and regulatory stay provisions for warzone bid protests.[212] Such reforms would remove or mitigate many of the protest-related threats to logistical activities in future warzones. Further, Congress should grant the GAO the authority to extend protest decision deadlines for warzone-based protests. This would allow hard-pressed warzone contracting officers more leeway when assembling the administrative record and other bid protest requirements. At a minimum, Congress should eliminate GAO and COFC

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[210] These include: limiting jurisdiction at the GAO and COFC to protests of procurements exceeding $75,000, eliminating the opportunity for protestors to file at both the GAO and the COFC, and establishing a "purpose statement" against which adjudicative bodies may measure "protest program performance." ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION REGULATIONS, ROADMAP REPORT 21 (2019), https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Roadmap/Sec809Panel_Roadmap_DEC2019.pdf.

[211] The Section 809 panel was created (and named after) the National Defense Authorization Act of Fiscal Year 2016, Pub. L. No. 114-92, § 809, 129 Stat. 726, 889-90 (2015). The panel was created to study ways to improve defense acquisition processes. *Id.* § 809(c).

[212] *Cf.* Gansler & Lucyshyn, *supra* note 14, at 287 (recommending reforms to contingency contracting that allow the military to "proceed with mission-essential contracts even in light of acknowledged administrative errors").

jurisdiction over protests arising from any warzone contracting officer's responsibility determination based on a commander's vendor vetting or bar decision.

2. A Modest Statutory Reform

Even absent more significant reforms of the bid protest process, Congress could mitigate disruption from statutory stays for warzone contracts by lowering or making delegable stay override authority from the head of the contracting activities (the current statutory approval level)[213] to one level above the contracting officer (the level currently granted stay override authority for agency protests),[214] or, better still, to the contracting officer level. In a disrupted warzone environment, this additional flexibility would minimize delays in securing overrides for critical protested contract actions. Congress could also prohibit or limit the COFC from reviewing or enjoining stay override decisions for warzone contracts.

C. Oversight and Implementation of Proposed Reforms

Military warzone operations are inherently risky and chaotic.[215] These characteristics make oversight of warzone purchasing highly necessary, yet also elusive. This section will argue that the proposed reforms may improve oversight and accountability, relative to the last two decades of Middle East contingency contracting, and in order to maximize this benefit, such reform should be made prior to the next conflict.

1. Command-driven Purchasing Simplifies Oversight and Accountability

The aforementioned reforms would not eliminate the challenges of oversight and accountability, but they do offer the prospect of simplifying

[213] 31 U.S.C. § 3553(c)(2), (d)(3)(C).
[214] FAR 33.103(f)(3), 33.104 (2023). One level above a contracting officer will typically be a supervisory contract specialist in the role of an office or section chief.
[215] *See* NAGLE, *supra* note 5, at 3 ("At the beginning of every war, a cleavage develops between supply and demand that entrepreneurs, both scrupulous and unscrupulous, rush to fill. The result is as chaotic as a barroom brawl.").

and improving them.[216] Concerns regarding oversight or accountability under a command-driven purchasing system cannot be considered in a vacuum, but rather need to be compared to the problematic and uneven performance of the existing contingency contracting system. The last twenty years of FAR-based contracting in the Middle East birthed a misfit family of reports from congressional branch, executive branch, and non-governmental organizations that found or allege mismanagement, waste, and fraud on a grand scale.[217]

The divided authority model presents serious accountability challenges, since the contracting officer controls the contract and the contractor, but the command or program office is responsible for developing the requirement and monitoring its day-to-day performance.[218] Such a system is particularly difficult to oversee in a warzone where contracting officers likely have minimal direct access either to their customer units or servicing contractors due to distance and a limited ability to travel.[219] These experiences suggest the risks of merely maintaining the status quo.

In contrast, placing rudimentary purchasing authority within the remit of commanders would create a single point of accountability.[220] Also, in

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[216] *See* Gansler & Lucyshyn, *supra* note 14, at 281 (suggesting that unifying responsibility for contingency contracts could improve accountability); QUADRENNIAL DEF. REV. INDEP. PANEL, THE QDR IN PERSPECTIVE: MEETING AMERICA'S NATIONAL SECURITY NEEDS IN THE 21ST CENTURY 85 (2010) ("[T]he fundamental reason for the continued underperformance in acquisition activities is *fragmentation of authority and accountability for performance*.") (emphasis in original), https://www.usip.org/sites/default/files/qdrreport.pdf.

[217] These include the Government Accountability Office, DoD Inspector General, Special Inspectors General for Afghanistan and Iraq recovery, the Commission on Wartime Contracting in Iraq and Afghanistan, Brown University's Cost of War Project, and the Project on Government Oversight.

[218] *See generally* WILSON, *supra* note 2, at 321.

[219] Recent contracting oversight struggles in Iraq and Afghanistan often stemmed from the fact that neither contracting officials nor command representatives had direct eyes-on oversight of contractors operating outside of the U.S. bases to which both were largely confined. *See, e.g.*, WARLORD, INC., *supra* note 101, at 49–50; DOD IG AUDIT: ACC-A, *supra* note 91, at 4. In a more conventional or dynamic conflict, however, the commanders would typically have far greater visibility over contractors outside the wire than would the few contracting personnel in the theater. Due to the likely dispersal of forces in a large future conflict, the chain of command would have greater visibility over warzone contractors than would a small number of contracting personnel in theater. *Cf.* FM 3-0, *supra* note 93, at 1-20 (noting likely dispersal of forces).

[220] *See* Gansler & Lucyshyn, *supra* note 14, at 281.

changing the frame of accountability from acquisition systems to military logistics would make accountability more straightforward and effective because military commanders have direct knowledge of their own logistics and budgets. Compliance would more effectively focus on the laws of war, ensuring minimal waste, and policing fraud,[221] because limited resources would not be spent on compliance with thousands of pages of acquisition laws, regulations, policies, directives, and litigation.

Regarding concerns about fraud, [222] bid protest fora are not designed to police or adjudicate fraud allegations, much less in distant and chaotic overseas warzones. Fraud and waste concerns would continue to be addressed by appropriate oversight and law enforcement agencies, such as the DoD Inspector General.[223] Finally, concerned parties could still seek relief for any constitutional or other[224] grievance in Federal district court.

In addition, much of the waste in DoD contracting efforts in the Middle East stemmed from a beneficiary problem: the DoD spent billions of dollars on purchases to benefit the Iraqi or Afghan governments, with very limited ability to oversee delivery of goods and execution of projects.[225] In contrast, the command-driven purchasing power proposed in Section IV.A and Appendix A would be for the immediate needs of the

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[221] Relevant procurement integrity rules would still apply. *See* Appendix A. The Uniform Code of Military Justice and manifold administrative punishments available to the military also provide many avenues for accountability.

[222] Fraud is a perennial concern with warzone contracts and expenditures. *See, e.g.*, DUFFY, *supra* note 38, at 175; NAGLE, *supra* note 5, at 19, 198–204; SPECIAL INSPECTOR GEN. FOR AFGHANISTAN RECONSTRUCTION, SIGAR-21-05-SP, UPDATE ON THE AMOUNT OF WASTE, FRAUD, AND ABUSE UNCOVERED THROUGH SIGAR'S OVERSIGHT WORK BETWEEN JANUARY 1, 2018 AND DECEMBER 31, 2019 (2020).

[223] Specifically, the DoD and the Services have law enforcement agencies specifically tasked with investigating fraud, waste, and abuse. *See, e.g.*, *Defense Criminal Investigative Service*, DEP'T OF DEF. OFF. OF INSPECTOR GEN., https://www.dodig.mil/Components/DCIS (last visited Oct. 6, 2023).

[224] *See, e.g.*, 31 U.S.C. § 3730 (*Qui Tam* provision of the False Claims Act, incentivizing whistleblowers with share of recovered damages).

[225] *See generally, e.g.*, SPECIAL INSPECTOR GEN. FOR AFGHANISTAN RECONSTRUCTION, SIGAR-18-41-IP, MANAGEMENT AND OVERSIGHT OF FUEL IN AFGHANISTAN (2018) (recounting fraud and waste findings regarding DoD's fuel purchases for the Afghan military). On a smaller scale, the command-directed purchasing program of CERP was intended to benefit local communities. *See, e.g.*, Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, Pub. L. No. 108-106, § 1110, 117 Stat. 1209, 1215 (2003) (providing appropriated funds to the CERP program).

United States military itself. Commanders and their logisticians are better able to assess whether their own immediate and tangible requirements are met, rather than assessing and overseeing the complicated and slippery goals of community relations and nation building that were pursued in Iraq and Afghanistan. Finally, a limited command purchasing for rudimentary goods and services would enable the small numbers of deployed contracting officers to spend their time more effectively on the larger, longer, and more complicated acquisitions that will be required in any theater.[226]

2. Reforms Should Be Implemented Prior to the Next Conflict

Congress should implement these warzone purchasing reforms before they are needed in the field. In the past, while Congress has previously shown some willingness to grant the Secretary of Defense extraordinary powers to waive acquisition laws, although in one instance, the law required deaths in the field to trigger the authority.[227] A more proactive approach in the warzone context would be for Congress to change the law in anticipation of predictable needs and grant limited but permanent purchasing authority to COCOMs. This would save time, as well as enable commanders and their units to train for such field purchasing scenarios rather than having to invent new processes after a conflict has begun.[228]

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[226] *See* Marchesi, *supra* note 20, at 76 ("Mixing the very large number of simplified acquisitions needed by warfighting commanders with the limited number of highly complex and expensive projects does an incredible disservice to the entire contingency contracting mission by overwhelming the acquisition professionals who should dedicate their expertise to the more complex projects.").

[227] The 2005 National Defense Authorization Act granted the Secretary of Defense the authority "to waive any provision of law, policy, directive, or regulation . . . that . . . would unnecessarily impede the rapid acquisition and deployment of the needed equipment." Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 811, 118 Stat. 1811, 2012-13 (2004). This authority was primarily intended to address gaps in heavy military equipment, rather than the types of field-expedient supplies and services addressed in this paper. *See generally* U.S. DEP'T OF DEF., 5000.78, RAPID ACQUISITION AUTHORITY (20 Mar. 2019) [hereinafter DODM 5000.78]. The "fatalities" standard was subsequently broadened to include "likely . . . combat casualties" and "critical mission failure." *See id.* at 7.

[228] *See* Marchesi, *supra* note 20, at 68, 75. *Cf.* NAGLE, *supra* note 7, at 7 ("A major part of America's preparation for its wars, both in the nineteenth and especially in the twentieth

Expanding warzone purchasing authorities would require new implementing processes and training for the newly empowered commands, with presumably the responsibility falling primarily on the logistics branch.[229] However, because of the rudimentary and short-lived nature of the purchasing at issue, such training and process development—and incorporation into exercises—could be achieved in a relatively short time period.

V. Conclusion

Today's new geopolitical threats and potential operating environments highlight the need for fast, adaptable, and resilient warzone procurement systems. Military commanders and their staffs—already entrusted with matters of life and death—can also be entrusted with a limited purchasing authority for critical warzone needs. Such reforms need not affect the broader U.S. Government acquisition system. The reforms would help ensure that even in disrupted warzone settings, military logistics can adapt to challenging realities while staying within legal and regulatory bounds. And beyond the immediate efficiencies gained from a distributed and simplified purchasing regime, reformed warzone contracting and bid protest systems would also minimize adversaries' opportunities for lawfare and propaganda.

The reforms proposed here would not displace the ability to conduct standard contracting in warzones as well. As operations move from a combat phase to a sustainment or rebuilding phase,[230] civilian policymakers and senior commanders would have the flexibility to phase out command purchasing authority in specific areas. But for active warzones, some extent of chaos in logistics and contracting is unavoidable, and complex systems, such as federal acquisition, cannot be expected to fare better than simpler systems in such environments.

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centuries, has been the need to suspend or modify the competitive bidding rules as the country rushed to overcome decades of neglect in a few short months.").

[229] *Cf.* Marchesi, *supra* note 20, at 70–71.

[230] *Cf.* Green, *supra* note 140, at 455 ("What is required is a system of post-conflict and reconstruction contracting that is flexible enough to react to operational realities, while emphasizing the rapid return to full and open competition.").

Finally, warzone contracting should be compared not with tidy peacetime Government contracting, but with its actual alternative: requisition, with all its associated legal and moral risks. Given the choice between a rudimentary command purchasing authority and simply taking, policy makers should prefer the former whenever possible.[231] The current business-as-usual contingency acquisition system places a heavy thumb on requisition's side of the scale in future large-scale conflicts,[232] yet, with minimal effects on the Government acquisition system as a whole, Congress could rebalance these risks for warzone procurement and logistics—and do so before the moment of actual need.

[231] *See* Santerre, *supra* note 24, at 149–52.
[232] *See id.*

Appendix A

10 U.S. Code § _____

Authority of the geographic combatant commanders to carry out certain warzone acquisition activities--

(a) Subject to paragraph (d), unified combatant commanders assigned under section 164 of this title, may, under the authority of this subsection, enter into contracts or other transactions that directly enable their logistical operations in warzones. The authority in this subsection is in addition to other acquisition authorities.

(b) Federal acquisition law shall not apply to this authority. [233] Notwithstanding section 1491(b) of title 28,[234] the Court of Federal Claims shall not have jurisdiction over disputes arising from the use of this authority. The Secretary shall create appropriate agency procedures, or apply existing applicable procedures, to address vendor complaints arising out of solicitation or award actions taken under this authority. Disputes arising out of agreements or transactions made under this authority shall be resolved following the procedures of sections 7101 through 7109 of title 41.[235]

(c) Exercise of Authority by Combatant Commanders: Combatant Commanders may delegate this authority, subject to regulations or approval made by the Secretary of Defense or a designee. The combatant commanders, in coordination with the service chiefs, will ensure that personnel delegated this authority receive appropriate training.

(d) The authority of this section may be exercised only if all of the following criteria are met:

(1) The President or Secretary of Defense determines in writing that a combatant commander may exercise this authority within a delineated warzone. Such warzone may not exceed the boundaries of a related

[233] For narrower language, the Federal Aviation Administration's exemption from CICA and GAO protest jurisdiction could also serve as an example. *See* 49 U.S.C. § 40110(d)(2)(F).
[234] The Tucker Act, granting the COFC jurisdiction over bid protests.
[235] The Contract Disputes Act.

designated combat zone designated under section 112 of title 26[236] or exceed the scope of a contingency operation designated under section 101 of this title.[237]

(2) Purchases are for the exclusive use of United States military forces to satisfy immediate logistical needs. Purchases do not exceed $5,000,000[238] in value or 90 days in length. Any repeat or follow-on purchase of the same service or supply must be approved at a higher level, subject to such regulations as the Secretary shall designate.

(3) Purchases are not for real property, but may be used for the rental or lease of real property.

(4) Funds are available in accordance with applicable law.

(e) Notwithstanding subsection (b), purchases or transactions made under the authority of this section shall be treated as a Federal agency procurement for the purposes of procurement integrity requirements.

(f) Section 31 of title 3730 shall apply to payments made under this authority.[239]

(g) Definition: "Warzone" means an area of imminent or active military conflict.

(h) The staff of a combatant commander exercising the authority under this section shall include an inspector general who shall conduct audits and inspections of purchasing actions made under this authority, and such other inspector general functions as assigned.

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[236] The President's "combat zones" designation authority for taxation purposes.
[237] The Secretary of Defense's "contingency operation" designation authority.
[238] Further analysis beyond the scope of this paper is necessary to determine the appropriate dollar threshold.
[239] The *Qui Tam* provision of the False Claims Act.

THE SIXTEENTH WALDEMAR A. SOLF AND MARC L. WARREN CHAIR LECTURE IN NATIONAL SECURITY LAW: LAW OF ARMED CONFLICT IN THE DARK

PROFESSOR LAURIE R. BLANK[*†]

Introduction

I would like to talk with you about what I will call the "Law of Armed Conflict (LOAC) in the Dark," and let me tell you a story to set the stage for the topic. Let us go back almost twenty-five years exactly. It is late April 1998; I am a third-year law student, and I am sneaking off for a few days to go to Florida with my mom and my grandmother because I was getting married a few weeks later, and a little sunshine seemed like a great idea before the wedding.

We arrive at LaGuardia Airport, and it is a mess – just complete chaos. Everything is delayed, people are milling around everywhere, and it turns out that the computer network system that made everything happen for all the flights is down. They cannot ticket any flights or get any other similar systems to work. After quite a bit of time waiting around at our gate, the pilot comes out and announces that they are really working on getting us going; in particular, that he and the co-pilot are doing all the calculations by hand for lift, weight, and fuel. The pilot was ecstatic – he said, "We don't normally get to do this. This is what we trained for – you know, we are getting out our abacus and calculating things." I thought to myself, this is the pilot I want – he wants to do calculations and figure all this out – we are in good hands. Eventually, he finishes his calculations, and we get to

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[†] This is an edited transcript of remarks delivered on 9 March 2023 to members of the staff and faculty, distinguished guests, and officers attending the 71st Graduate Course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. This lecture is in honor of Colonel Waldemar A. Solf and Colonel Marc L. Warren.

board the plane. They still cannot do seat assignments, so the flight attendants are writing out seat assignments on napkins (we had paper boarding passes in 1998, no e-tickets or smart phones). We get on the plane, and we take off – our pilot did his calculations well.

Why am I telling you this story? Because you can take that same idea and think about it in a situation of armed conflict, where maybe the systems do not go down because they break, but because somebody turns them off or interferes with them. That is the premise of "LOAC in the Dark." What happens to the law when all the capabilities that we take for granted – the technology that is so deeply incorporated into our daily lives and our military operations that we do not even give it a second thought – is not there, because the capabilities have been turned off, jammed, spoofed, or taken down? What happens when all this technology that enables our instantaneous communication, our global positioning, our precision targeting, our intelligence, surveillance, and reconnaissance systems, goes kaput? The law of armed conflict will still be there, of course. The law is not going to be turned off, but we have to think about what something like this happening means. We spend an enormous amount of time, appropriately so, thinking about how the law works in in the context of emerging technologies, so I think we also need to flip that entirely on its head. What happens when we do not have any of these technologies?

Dependency on Technology

Obviously, from an operational and tactical standpoint, there are a lot of challenges with this scenario. The law may be the least of those challenges. But we do not want to forget about what losing all of our technological capability means in thinking about the law, particularly about the law in the long term. What is going to happen? Is it going to put pressures on the law? Is it going to change how we think about it? If we think about how we ordinarily teach and talk about LOAC, we probably do not even notice that we are constantly referring to technological capabilities. We talk about pattern of life assessments. We do not make those by sending people out to walk around and count how many civilians are here and there, and what time they go places. We do pattern of life assessments with drones or other satellite-based capabilities. We talk about collateral damage estimation methodology – that also is not a person

sitting there calculating; it is an algorithm or technological tool. We talk about precision-guided munitions. Clearly, those rely on technology. We talk about cold shift, drones, satellite, Intelligence Surveillance Reconnaissance (ISR), all different things. We walk around with smartphones. Our entire lives are dependent on technology.

The other piece of this issue is that when we talk about an absence of these hi-tech capabilities – a low-tech environment – we tend to talk about it in the context of non-state groups or less equipped forces deliberately blurring the lines or even discarding LOAC rules in order to gain some kind of advantage, either on the battlefield itself or in the information space. That is our lexicon as we think about LOAC and technology and capabilities. But that is not the whole story, because what we are likely to see is a scenario in which we do not have a lot of those capabilities, perhaps because they are deliberately denied to us in a near peer conflict. Obviously, we already have situations where our systems do not work the way they are supposed to. But if we think about the denial or disruption of technological capabilities as an across-the-board, systemic scenario, that becomes a different ballgame altogether.

I want to talk about this idea of LOAC in the dark in a couple of ways. First, we can start to think about what this means for implementation in the moment, and then I want to spend some time talking about the law itself. What does this mean for the law, for how we teach the law, for how we understand the law, for how we apply the law, and for how the law might or might not evolve? You all were questioning whether the law needs to change fundamentally. I will rephrase that as, might the law change, not because we choose to, but because of the pressures put on it? We see that all the time. There is no doubt that twenty years of counterinsurgency (COIN) and counterterrorism (CT) operations has put pressure on the law and has certainly changed how external audiences perceive, understand, or advocate for the law.

Anytime we think about implementation, we need to start by thinking about training. How do we train for this kind of scenario? I understand, for example, that the Navy has training to navigate without high-powered Global Positioning System (GPS) capabilities. I think you need a sextant, the North Star, and you probably need a pretty good sense of direction. We may need to start re-learning some of those instincts that we have lost by having GPS. The Army, similarly, has artillery training where you have to

figure out the relevant calculations without technology involved. But we need to think about what that means in a much more robust manner. What kind of training is really needed if we are going to train the way we fight? We need to be thinking about ensuring that exercises in simulations and other training incorporates a partial or total shut down of technological capability, so it is not a surprise. And I am just talking about it from the legal perspective. How do we take precautions when we do not have all the tools we normally use to take precautions? Well, hopefully we do not want to think about that at the moment we actually need to do it; we want to think about it a little bit in advance.

LOAC Principles

Another aspect is thinking about what it means to learn, train, and think about LOAC. It is not just the how, but the why. We start by learning the four core principles of LOAC. I find myself regularly saying, "If I only had five minutes to teach you LOAC, I can teach you military necessity, humanity, distinction, and proportionality, and if you understand those, you can answer most questions in a reasonable manner." You might not get the answer exactly right, but you can get most of the way to a reasoned and reasonable answer. You might not get everything right about exactly what the rules for internment are or different specific issues, but in terms of the use of force, for example, you will make some pretty good decisions. Those basics are going to become ever more valuable when we are in the dark because we are not going to have the high-powered tools that we are used to, that we do not even realize we are relying upon all the time–all the tools, the capabilities and information, and so on.

We are really talking about how you implement the law, law that essentially requires some amount of information. Distinction inherently means that we have some information. Proportionality inherently means there is some information – it may be a tiny bit, but there is something. Something causes you to say that person is a combatant or that person is directly participating in hostilities. It is not just putting your finger in the air and seeing which way the wind is blowing. We have to figure out how we gather information, how we assess information, when we have a lot less of it. We have spent a lot of time over the last fifteen years talking about the challenges of so much information, which is another, and very interesting, question. How do you process a tidal wave of information and

try to piece out what you need? But what about when there is very little information and very few tools to gather the information we are used to thinking is "the information I need to make my decision," but you might not have it. And it is not only that a small unit out far forward does not have it, but headquarters might not have it. The folks who are ordinarily very used to having it, might not have it. So, how do we think about training? I put this out more as a challenge, as a question. I do not know the answer, but it is important to think about. That is one starting point.

Interoperability

One of the ways we navigate interoperability is through technologies that allow us not just to share information, but to also find common ways of looking at information, and maybe acclimate where we take slightly different perspectives. Although we can have policy overlays and we can use a lot of tools that help us to navigate that space, we may not have all those capabilities. So how do we think about our legal understandings, about policy frameworks? How do we think about those relationships in order to continue and even enhance the shared understandings that we have without maybe some of the crutches that work very well when you have them, but maybe you do not have them available.

As an example, some of you probably have used Google Translate when you were somewhere where you did not speak the language and you were trying to figure out any number of simple questions. I am old enough to remember if you did not speak the language, you pointed at a lot of things and hoped for the best. Now, of course, today I would just look it up on my phone and find my way, so we are losing some of those low-tech ways that we ordinarily might have. If you take that into the more fraught scenario of armed conflict, we can see there are some ways we need to think around some of our current systems.

Consider collateral damage estimation methodology (CDEM) and similar tools, for example. Two different states might have slightly different understandings or ways they implement proportionality, but at least this might be a common tool that they can agree on where they are both going to be comfortable. Now if this is taken out, now you need to find another tool, another way to find common ground. Perhaps this involves more training in a shared space with our partners.

Another important area in this implementation space is just how we talk about the law. We are so accustomed to talking about it in the context of all these capabilities that we almost need to think about other language. I came here to talk to all of you about this, and I am resorting to stories about Google Translate and airplane trips. We do not really have a vocabulary anymore because we are so used to the vocabulary that has developed along with all of our capabilities. We need to think about how we talk about weaponeering, precautions, proportionality, identifying lawful targets, and any other issues without instinctive reliance on the capabilities to which we are accustomed. It would be as if I required you all to talk without using any acronyms.

If all these technologies can be shut off, we have to be able to talk about the law apart from the capabilities that we take for granted. We have to be able to come up with hypotheticals for class or for training that are not based on surveillance and pattern of life assessment, but rather draw from entirely different scenarios. For example, I was part of the Woomera Project on International Law and Military Space Operations. We had a number of international lawyers and, thankfully, some space experts. As we discussed how distinction, proportionality, and precautions work in space, we needed examples to try to tease out what we were talking about. For the first couple of years, nearly every example the lawyers came up with was: if you blow up a satellite what would happen? All we really understood was that there are satellites in space and so the only idea we could come up with was destroying the satellites. I suppose there are a thousand other ways you could think about hard questions in space, but it took us a few years to get that example out of our system and try to be a little bit more sophisticated and diversified in how we talked about it. So, we need to be able to come up with different vocabulary, to bring out examples and hypotheticals from past conflicts in order to draw them out, because they are still relevant, and they may be even more relevant in certain scenarios.

The last point I want to raise in thinking about implementation, before we move on and talk about the law writ large is – as Lieutenant General (LTG) Pede termed it – the "COIN hangover."[1] Most of you have read his piece, *The Eighteenth Gap*, and there has been a lot of discussion over the

[1] Lieutenant General Charles Pede & Colonel Peter Hayden, *The Eighteenth Gap*, MIL. REV., (March- April 2021), at 6, 17.

last few years about the transition to a focus on peer-on-peer conflict and the risk of a counterinsurgency (COIN) or counterterrorism (CT) hangover. We have become very accustomed to operating under highly constrained and policy-driven frameworks – that is not going to look the same in a peer-on-peer conflict, but if we take that posture into a peer-on-peer conflict, we are going to have some challenges. Almost all of those policy constraints – imposed for very good reasons in these types of fights – are dependent on technological capabilities. If you look at the constraints in the Presidential Policy Guidance (PPG), for example, they are inherently based on the fact that we are either fighting in a conflict where we own the ISR space, we have air superiority, or we have the ability to gather enormous amounts of information through drones, satellites, and other technological capabilities – and therefore, we can use that advantage to impose and implement policy constraints. However, that is not going to look the same in a peer-on-peer fight. So, the idea of fighting a conflict in the dark just adds one more challenge in making sure that we are not bringing this COIN hangover with us into the next conflict.

Driving the Law

Now, what about the law itself? It is not hard to see the need to prepare in terms of training and implementation for this idea, but what about the law? What do we need to think about in terms of the law itself? What might be risks for the law in how it develops long-term, in pressure points from this kind of scenario? I like to think about this question of what is going to happen down the road, because often when we are focused on 20-meter targets, we understandably are not initially thinking about whether the law might look different in twenty years. Sometimes you get to that spot twenty years later and you either do not notice that the law looks different, like the story of the frog in the boiling water, or you notice that the law has changed, but you do not really know how you got there or how to get back. For that reason, it is worthwhile to try to think about it ahead of time and drive rather than let the technology drive us.

A couple of areas I would like to highlight. Proportionality – what is this going to mean for how proportionality works and how we understand and implement it? What about precautions? And then at higher altitude, what about the core touchstone of the law, the idea of reasonableness and, as companion issues, doubt and certainty. A fourth area is to explore a few

ideas about specific domains and technologies, even though we are turning them off. And then, that overarching question of what is the relationship between capabilities and obligations, which we are going to flip on its head because we normally talk about it as "if you have a lot of capabilities, you have a lot more obligations." I am going to come back to that: we are going to turn that one on its head.

Proportionality

Let us think about proportionality first. If we played a word association game and I said "proportionality," what would pop into your minds first? Hopefully in the ideal world, if I said "proportionality," somebody would say "reasonableness." Someone else would say "reasonable commander," someone might say "excessive," "military advantage," or "protection of civilians." These all go together. But just as likely, in today's world, if I said "proportionality," someone would say "pattern of life." Someone would say "Collateral Damage Estimate Methodology" or "NCV" (non-combatant cutoff value) or any number of other concepts that are, in effect, third generation when we think about proportionality. They are not at the essence of proportionality, but we cannot help but link them. If you consider the way we think about proportionality, especially in the classroom, it is always based on a hypothetical where you just magically know where the civilians are, when they go to school, and that there is a hospital and kindergarten nearby. You just know all of this information and now, how would you make your assessment? We do not tend, at least in the classroom, to frame scenarios as, "if you do not know any of this information, you still have to make a decision. Now, how are you going to do it?" That is a much more challenging conversation, but you almost need to have the judgment conversation first and then take that into what, paradoxically, is the advanced level where you do not have all the information. We need to think about proportionality not just as a legal principle, which it is, and as a core guiding foundation of the law, but also as a methodology, because ultimately, proportionality and precautions are a methodology for how we implement the law. It is a process for the steps you take in how you work your way from "I need to do something to gain an advantage against the adversary" and "I have to walk through all of these steps." This process is how we implement the law to ensure that in the process of applying combat power, we are doing it in a lawful and moral manner.

How do we think about the value of the target, and how destroying, neutralizing, or capturing it is going to contribute to our tactical and operational end state? How do we think about the civilian population, the civilians in the area, the blast radius, the effects, and what harm might look like? Internalizing those questions beyond the information that we have is going to be an important step in our thinking. How do we understand civilian patterns? How do we understand civilian infrastructure? How do we understand the effect of actions taken in a space where there are civilians if we do not have the technological capabilities that we are used to? The law of armed conflict does not allow us to say, "gee, I just do not know." It does not require that we have all of these capabilities, because it was written and has been implemented long before we had such capabilities. We need to take a step back and ask how do we understand this? What other ways might we have to answer these questions? What information might we gather beforehand, before the conflict? What is useful to know about the environment we are going into? We do that now, but maybe we need to think about it in a way that can self-generate a little bit more and not just feed into our existing systems. For example, what other means might we have of not just gathering but assessing existing information? How can we think about the human capabilities versus the technological capabilities and putting those to use, and also understanding what human judgment means? Ultimately, the reasonable commander is not a calculator that takes all sorts of information and types it in and gets an answer. The reasonable commander is a person who uses considered judgment and feeds information into that considered judgment. To borrow from an article from a number of years ago: there is no "proportionometer"[2] – at least, I did not bring mine with me today.

The loss of capabilities – the LOAC in the dark – also means that a lot of the tools that we might have to disable and degrade enemy capabilities would not be available to us, and we might have to accomplish these objectives through kinetic means. If previously you would jam or otherwise deny the enemy's air defense or any other capability and now you do not have that available, that does not mean you say, "well, I guess they are just going to be able to use their air defense." No, you are still going to want to take it out, but now you need to use kinetic means. That just adds to our thinking about proportionality and about precautions

[2] Joseph Holland, *Military Objective and Collateral Damage: Their Relationship and Dynamics*, 7 YBK. INT'L HUM. L. 35, 48 (2004).

because all of a sudden, we are thinking about other types of potential harm. This does not mean it is unlawful, but it may be harm that we have not had to cause while we have had the ability to take care of some of these objectives without using kinetic means. It is a bit of a socializing, in essence, but it also means that we are going to have more proportionality and precautions assessments and questions. Here is where we get back to the idea of how we transition from thinking about COIN to peer-on-peer conflicts. It might mean that more harm is caused simply because we have more targets that we have to take out kinetically or because we do not have the same precision capabilities available or the same capabilities to know exactly the patterns of movement.

There is an educational component here as well in talking about how the law works and how much harm is reasonable, acceptable, and comfortable. We run the risk of a common, but incorrect, theme that we see in the course of talking about at least some conflicts, that whoever causes more harm must be more at fault – they must be the ones who are committing atrocities. This notion has no basis in law whatsoever. But particularly in a conflict where most of the casualties are on one side because that is where the conflict is being fought, we sometimes hear, "look how many casualties were over there, therefore, they must not be following the law because they are the ones that caused more casualties." That is not how the law works, but it is a huge legitimacy question, and ultimately legitimacy is the key touchstone here. If interpretations are going to change in this way that causes, ultimately, dents in legitimacy, we need to understand that better, because you have to not just comply with the law, but also think about how to maintain your legitimacy so that you can continue operations.

Precautions

What about precautions? What kind of precautions are we talking about? Verify that targets are lawful military objectives, choose means and methods of attack that will minimize harm to civilians, provide effective advance warning – we talk about taking all feasible precautions. Well, what does that mean? How do you define feasible? It is usually defined as those which are practically or practicably possible. It is not based on capability per se, but we cannot help but think and talk about them in the context of capabilities. And feasibility is in some way linked to capability,

because if you have the capability to do something, then it is probably feasible to do it. It is a little bit hard to say, "well, today, that is not feasible. I have an unmanned aerial vehicle (UAV) and other capabilities but it does not feel feasible today. If it was a different day, maybe." Capabilities do matter but that does not mean that when you turn them all off that you do not have to take any precautions. That cannot possibly be the law, because it would not be hard to imagine a belligerent shutting down their own capabilities and then arguing that they do not have to take any of those pesky precautions.

How does a more limited choice of tools to take precautions affect the lawfulness of attacks? As a matter of law, the law only asks if it is a lawful military objective – yes or no? You have to decide that whether or not you have super emerging technological capabilities or just your own two eyes – you still have to actually do the distinction. Is it a lawful military objective or not? You still have to make some judgment about whether there is going to be harm to civilians, and if there is, whether it would be excessive in relation to the military advantage gained. You still have to take those steps. Now, by the same token, we know that just because you have precision-guided munitions or other capabilities, you do not have to use them. There may be times when a commander decides he is not going to use a certain capability because the attack can still be executed lawfully without using it, and that capability may be needed at another time, all understood in the absence of an infinite supply of such capabilities and based on the commander's understanding of the battlespace.

We are talking about reasonableness, common sense, and good faith and we do not in any way want to suggest that parties with lower tech capabilities are not capable of complying with LOAC. That would be an extremely counterproductive result of this conversation because that would just be a recipe for discarding the law. So, I am posing the question, indeed a challenge, for how we can think about and talk about the law and the tools that can enable the implementation of precautions in the absence of or in an environment of severely compromised capabilities? For me, this reinforces the idea of precautions as a methodology, and if you have not read Professor Geoffrey Corn's article about precautions[3] as a methodology, as a process, and as a risk mitigation tool, I strongly urge

[3] Geoffrey S. Corn & James A. Schoettler, Jr., *Targeting and Civilian Risk Mitigation: The Essential Role of Precautionary Measures*, 223 MIL. L. REV. 785 (2015).

you all to read it because it is a great way of thinking about precautions: not just something you check off, but as a mindset. This raises one last question on precautions: Do we need to think about steps to protect our capabilities as a kind of precaution in and of itself? If using these capabilities is a way that we can ensure compliance with the law, that we can ensure or maximize lethality and effectiveness, then we need to think about defending the capabilities almost as a form of precaution – one of our steps to make sure that we still have them available.

Reasonableness

A third area to think about is reasonableness. In a sense, we have been driven to think about reasonableness with the enhanced focus on and use and development of emerging technologies because they have put pressure on reasonableness. I want to take that conversation and see if we still have as robust a conception of reasonableness as we should, and we used to, and that the law thinks we have and relies upon us to have. However, over the last few decades, we have seen a steady chipping away at the idea of reasonableness in thinking about its role in the law in two different ways.

One appears in the international criminal law space. If you think about the big picture, the nature of war – the fog of war – inherently works against any concept of certainty. You have confusion, uncertainty, literally smoke and fog, and the law, as it has developed over time, is based on reasonableness as a touchstone. We talk about the reasonable commander, the commander exercising reasonable judgment. It is how we assess, at the time and after, the lawfulness of actions; was it reasonable at the time, or if not, was it reckless or willful. The law, unlike war, which inherently has confusion and uncertainty and fog, provides for, and demands from us clarity of definition. Who is a combatant? Who is a civilian? What is a military objective? Those definitions are not maybes. We can all recite the definition of military objective, it is clear, it is written in certain words. Now, it may not always be clear in the implementation, but we know what it means. We know who is a combatant, who is a civilian, and who can lawfully be targeted. It is in the implementation of these definitions, in the face of uncertain facts and uncertain information, that we encounter challenging situations. So, we have law that requires clarity in a factual situation that has a lot of confusion and uncertainty, and that is why reasonableness is so important. But what do we see developing over time?

In the criminal accountability space, we have the challenge of taking a law based on reasonableness into the courtroom, and the courtroom likes a little bit more than reasonableness. We see a drive in the criminal accountability space towards certainty or methods of analysis that feel like certainty. Law of armed conflict does not quantify the amount of information that is required for a targeting judgment to be reasonable; LOAC does not say that you need to be 77.85 percent certain and if you are shy of that, well, then it was unlawful, but if you are just above that, you are good to go. There is no magic number. But the courtroom requires more specificity because it is about trying to decide whether somebody is guilty or not, which can lead to an effects-based approach. In the media and the general discourse, there is an instinct that civilian casualties must be a war crime. For example, "I see the effects and what was destroyed. People are killed. Therefore, clearly, somebody did something wrong." That is not how the law works, but it is not hard to see how the layperson makes that connection. One important job, particularly in the educational space, is to push back and make sure that we understand how the law works so the discourse can be productive. It is not hard to see the problems of the effects-based approach, in essence, a strict liability standard where a commander can be reasonable but wrong after the fact, and then liable for misconduct. That type of standard provides no guidance to commanders on how to make decisions, because if the facts afterwards decide whether the commander was right or wrong, then there is no way to decide because there is no methodology.

Another aspect pushing against reasonableness is emerging technology, which has put strong pressure on reasonableness. Consider autonomous weapons in particular – fully autonomous weapons that can identify, select, and engage targets on their own. There are a lot of debates in law and morality and ethics about human in the loop, human on the loop, meaningful human control, and other questions. Underlying this entire debate is the fact that we want and need to know how these weapons systems would work. If we are trying to figure out if they could be used, if they could be lawful, we need to know what they are going to do, which is hard when we are describing a capability that is going to learn as it is used. Anybody here have kids? They are sort of little autonomous weapons of their own. I think I might know what they are going to do, but usually I am wrong even when I have trained them. So that question is constantly present with autonomous weapons: how would they work? What are they

going to do? How are they going to decide what is going to happen? Because especially if we are talking about humans interacting with them, you need to know some of these answers. That is a drive for certainty. If I want to know, what I am looking for is certainty.

The law of armed conflict has space for disparate judgments. The five of you in the front row might make five slightly different judgments. They could all be reasonable, but they might not all be exactly the same. If I take five calculators and I line them up, I am really hoping that all five get the same answer when I ask what 63 times 842 is. There is no reasonableness conception to how a machine like that kind of machine works. If my calculator does not give me the same answer all the time, I am going to throw it out. A reasonable guess is just not that helpful. And if my toaster sometimes toasts but other times decides to air fry, it is not that helpful because when I turn it to toast, I only want toast all the time. Autonomous weapons are not quite like that, and yet our conception of a machine is that we expect it to do the assigned task every time. That is why I got a machine, because it is supposed to do it the exact same way every time. If I wanted variety, I would have asked a human to do it. We have seen a quest for certainty when we think about autonomous weapons and other similar technologies. First, a certainty of technology: How does it work? What is it going to do? Is it durable? Is it reliable? What happens when somebody spoofs or jams or hacks it? Second, we need certainty about the legal norms if we are trying to think about whether these machines could function in compliance with the legal norms. We still often debate exactly what different concepts in LOAC mean. Now, if we add that to not quite knowing how this technology is going to function when it starts learning, that becomes quite complicated. Third, we need certainty about how such a machine makes decisions and how it analyzes, if it is going to make the same decision every time, and what level of certainty is it going to use? Can you program reasonableness? All these different kinds of questions are creating a huge push towards certainty and away from reasonableness.

A big question for me about artificial intelligence (AI) and autonomous weapons is that we might have two parallel conceptions about the law, where the expectation for humans is reasonableness, but with a machine, we want to know firmly—to feel certain about—what is going to happen and what it is going to do. The concern then is how much of that certainty framework is going to bleed back over to how we assess the actions and decisions of humans, which would change the standard. With

all of that pressure happening, what does that mean when we think about LOAC in the dark, where the main pillar we have to hold onto is reasonableness, but then perhaps we have changed to a different conception of reasonableness? That adds to the challenge, because we have to implement the law without the tools we are used to, but with the added a layer of complexity because we are not quite sure what reasonableness means or looks like anymore because we have been pushing on it so hard, inadvertently, as it is being pressured and buffeted by all of these aspects that just make the analysis and implementation a bit more complicated. We can see challenges long term for LOAC. We potentially have a huge disconnect where it is already hard enough to execute military operations and implement the law without the crutch of technology. Add on exaggerated conceptions of certainty or an effects-based analysis and we have a pretty challenging scenario.

Domains of Technological Capability

Two last things before I wrap up. What does this mean in terms of specific domains or technologies when we think about LOAC in the dark? There is little doubt, as evidence from fifteen-plus years of discourse, that heightened technologies can be harnessed to contribute to, to enhance, and even maximize LOAC implementation in any domain. But a couple domains are essentially domains of technological capability: cyber and space. These domains do not really exist without advanced technological capability. We would not be talking about them if we did not have these capabilities. Can we even effectively analyze operations in those spaces if we are talking about technologies turned off or severely compromised? Think about terrain denial fires; we probably need to think about domain denial operations, because if an adversary can turn off all of your space capabilities, then you have essentially been denied access to and use of that domain, which would be significant. Counter-space operations and counter-space capabilities ultimately are about denying access to an entire domain. We need to think not only about how this domain is critical for our military operations, but also that it is critical to our LOAC compliance. It is a key ingredient in ISR and precision targeting, for example, so it is worth considering what kind of defensive precautions and protections should be taken and developed, not just to have the capabilities, but to have LOAC implementation. To think about how to not be put into a position where we are figuring out how to implement LOAC in the dark, because

although it is interesting to discuss, surely it is better not to be in that situation.

Coming back to autonomous weapons as a technology where this is obviously relevant, according to the new DoD Directive, 3000.09,[4] current policy requires that autonomous weapons systems be designed to allow for appropriate levels of human judgment over the use of force. What does that mean if communications are denied; what does that mean if systems or some of these capabilities are turned off? Put yourself out into the future where we have deployed an autonomous system and then certain technologies are turned off. I think that means that appropriate levels of human judgment are no longer available. If the human cannot talk to the machine or the other way around, then there is no more meaningful human control and no more appropriate levels of human judgment. Technologies do not just raise the question of how the law should apply, and can they enhance implementation of the law, which are good questions. As soon as we have a technology, we ought to be thinking about whether we can function without it and how we function without it, because as soon as we have it, someone is going to want to take it away. As soon as we have it, we adapt to using it. We like it. We get accustomed. We move on to the next thing. We better be thinking about how we operate without it.

Obligations

So let me turn to the last question I want to challenge you with, and that is the relationship between capabilities and obligations. It comes up in discussions about LOAC, but usually as a quick aside in the context of whether heightened capabilities bring heightened obligations. Does a state that has precision-guided munitions, that has all of these tools, therefore bear higher obligations under the law compared to an adversary that does not have them? From the perspective of the law, all parties have to abide by the law and comply with the law, to implement distinction and proportionality and precautions, for example. What about the opposite: does the elimination of capability mean a lowering of obligation? Is that an argument that we even want to be made? It is important to distinguish between the obligation itself and the implementation of that obligation. The law of armed conflict requires that an attacking party distinguish

[4] U.S. DEP'T OF DEF., DIR. 3000.09, AUTONOMY IN WEAPON SYSTEMS (25 Jan. 2023).

between civilians and combatants, that an attacker identify military objectives and distinguish them from civilian objects, but does not require a specific way to do that. Law of armed conflict just wants to make sure that you distinguish between the two. If you want to do it by walking around and talking to each person in the unit of the opposing forces that you are about to attack, it would make absolutely no sense, but you theoretically could fulfill the obligation to distinguish that way. The law does not say whether you have to do it that way, or use a UAV, or use some magic sensing power that we have not developed yet. You need to distinguish, that is what the law cares about, and the law provides a methodology for applying combat power and minimizing harm to civilians. A methodology that implements the balance, the interplay and the relationship between military necessity and humanity.

The law of armed conflict rests on a foundational idea of the equal application of the law to all parties to a conflict: big states, small states, and non-state parties, it does not matter; they still have to implement and abide by the law. The fundamental principles are the same. I think it is well established that there is no legal obligation to develop or field precision-guided munitions. If you have them and you can use them, that is great, but the law does not say you cannot fight in a war unless you pursue the research and development and the rest of a lengthy and expensive process in order to have them. It does not tell a small state, "I am sorry you cannot fight a war against your neighbor because you do not have these weapons. Nope, you cannot fight, even though you were attacked, because you do not have those capabilities." However, once we are used to them—not just the military, not just those actually carrying out the military operations, but more challengingly, once the population is used to those capabilities, once the external audiences are used to them and the comfort that they provide, the sense of "of course we comply with the law because look at all these tools that we have to do so"—what is going to happen when we do not have them? This is a key question, not only in terms of implementation of the law, but in terms of the discourse about it, which holds its own weight and is important. It is a legitimacy problem.

Conclusion

So, I will leave you on that note, with the definition of legitimacy from Joint Pub 3.0, which I think highlights this challenge. "Legitimacy is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences."[5] There is a lot in there. The actual and perceived, that is critically important, particularly the word perceived. The actual or perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences—that is a lot to consider in trying to figure out what legitimacy is. So, when we start in a situation where we have produced a perception, not the reality, that attacks are incredibly precise, weapons are flawless and war is sanitary, what are the effects and consequences when that same military now has to operate without those capabilities, but it still has a domestic and international audience that expects the same level of precision and flawlessness? This somewhat convoluted story starts by turning out all the lights and thinking about LOAC in the dark and it trickles into lots of different areas, which brings us back to "how do we train for it? How do we implement it? How do we think about the law?"

[5] UNITED STATES DEPARTMENT OF THE ARMY, JOINT PUBLICATION 3-0, JOINT OPERATIONS, A-4 (Oct. 22, 2018).