



MILITARY LAW REVIEW

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Major Andrew S. Bowne

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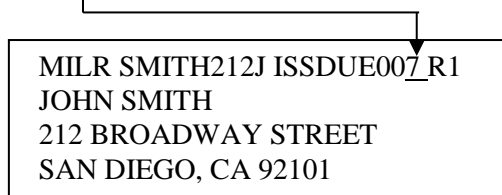
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DEFENDING THE NEW FULDA GAP: DETECTING RUSSIAN AGGRESSION AGAINST THE BALTIC STATES THROUGH FISCAL LEGISLATION

MAJOR ANDREW S. BOWNE*

*THE UNITED STATES HAS AN ESSENTIAL INTEREST IN KEEPING EUROPE AS A VITAL, VIGOROUS, AND VIVID PARTNER AND ALLY; AN ALLY THAT IS CAPABLE AND WILLING TO HELP AMERICA PROTECT AND PROMOTE THE PRINCIPLES OF FREEDOM AND DEMOCRACY. AND EUROPE HAS A CORE INTEREST IN MAINTAINING AN AMERICAN COMMITMENT TO TRANSATLANTIC ECONOMIC AND SECURITY COOPERATION.*¹

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¹ ANDERS FOGH RASMUSSEN, *THE WILL TO LEAD: AMERICA'S INDISPENSABLE ROLE IN THE GLOBAL FIGHT FOR FREEDOM* 151 (2016). Rasmussen is the former Secretary-General of the North Atlantic Treaty Organization (NATO). *Id.* at ix.

I. Introduction

The fall of the Soviet Union ushered in a two-decade long era of relative peace and stability in Europe.² The North Atlantic Treaty Organization (NATO or the Alliance) appeared to have successfully fulfilled its mission to defend Europe from Russian aggression and began to reinvent itself in the wake of growing threats from Islamic terrorism.³ However, in 2014, Russia illegally invaded and annexed the Crimean peninsula in the Ukraine.⁴ Very suddenly, an emboldened and more militant Russia challenged the security of NATO, forcing the Alliance to “return to its roots: deterring and defending against Russian aggression.”⁵

Nowhere is the specter of Russian hostility more apparent, and problematic to U.S. national security interests, than in the Baltic States of Estonia, Latvia, and Lithuania.⁶ The combination of a greatly diminished American force in Europe,⁷ the decrease in defense spending across NATO,⁸ and the modest defense capacity of each of the Baltic States,⁹ made these former-Soviet satellites and newly-

² See DOUGLAS E. SCHOEN WITH EVAN ROTH SMITH, PUTIN’S MASTER PLAN: TO DESTROY EUROPE, DIVIDE NATO, AND RESTORE RUSSIAN POWER AND GLOBAL INFLUENCE 29 (2016) [hereinafter SCHOEN].

³ See *id.*

⁴ *Id.* at v.

⁵ *Id.* at 29.

⁶ See Ashley Deeks & Benjamin Wittes, *We’re Worried About the Baltics: What does Trump’s Election Portend for these Tiny U.S. Allies?*, LAWFARE (Nov. 17, 2016), <https://www.lawfareblog.com/were-worried-about-baltics-what-does-trumps-election-portend-these-tiny-us-allies> [hereinafter Deeks & Wittes].

⁷ Having peaked during the Cold War at 277,000 soldiers, U.S. Army Europe (USAREUR) downsized to 29,000 in the summer of 2013. Major Craig A. Daniel & Robin T. Dothager, *Resetting the Theater to Equip Rotational Forces in Europe*, ARMY SUSTAINMENT MAG. 36, 38 (May-June 2016), <http://www.alu.army.mil/alog/2016/mayjun16/pdf/mayjun2016.pdf>.

⁸ Since 2009, NATO defense expenditures have decreased from nearly \$1.1 trillion to an estimated \$890 billion in 2016 (using 2010 prices) [hereinafter NATO Defense Expenditures]. *Defence Expenditures of NATO Countries (2009-2016)*, NATO (July 4, 2016),

http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2016_07/20160704_160704-pr2016-116.pdf [hereinafter NATO Defense Expenditures].

⁹ See CHRISTOPHER S. CHIVVIS ET AL., RAND, NATO’S NORTHEASTERN FLANK—EMERGING OPPORTUNITIES FOR ENGAGEMENT: AN OVERVIEW 4 (2016), http://www.rand.org/content/dam/rand/pubs/research_reports/RR1400/RR1467z1/RAND_RR1467z1.pdf [hereinafter CHIVVIS ET AL.].

minted NATO members¹⁰ especially vulnerable to an existential threat from their eastern neighbor.¹¹ Russia acquired capabilities ranging from “strategic systems to anti-access/area denial to . . . a growing adeptness at operating . . . just short of traditional military conflict that is posing a significant threat in the future.”¹² Under NATO’s current defense posture, war gaming scenarios predict it would take Russian forces no more than sixty hours to reach the outskirts of Tallinn, Estonia, and Riga, Latvia, the capitals of the two NATO allies closest to Moscow.¹³ Russian President Vladimir Putin ominously claimed, “if I wanted, in two days I could have Russian troops not only in Kiev, but also in Riga, Vilnius, Tallinn, Warsaw, and Bucharest.”¹⁴

This tension harkens back to the Cold War, when many military leaders spoke of the strategic vulnerability of the Fulda Gap in western Germany, considered a primary objective for Soviet advances into NATO territory.¹⁵ The Baltic States, vulnerable to attack from Russia due

¹⁰ See *id.* at 1. Estonia, Latvia, Lithuania, Poland, Czech Republic, Hungary, Slovakia, Bulgaria, Croatia, Romania, and Slovenia are current NATO members that were previously part of the Soviet Union or Warsaw Pact. See OFFICE OF THE HISTORIAN, DEP’T OF STATE, THE WARSAW TREATY ORGANIZATION 1955, <https://history.state.gov/milestones/1953-1960/warsaw-treaty> (last visited Feb. 12, 2019). The German Democratic Republic (East Germany) was also aligned with the Soviet Union before it merged with West Germany. See *id.*

¹¹ Lisa Ferdinando, *Breedlove: Russia, Instability Threaten US, European Security Interests*, DoD NEWS, (Feb. 25, 2016), <https://dod.defense.gov/News/Article/Article/673338/breedlove-russia-instability-threaten-us-european-security-interests/>.

¹² National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5301 (as passed by Senate, June 21, 2016) [hereinafter FY17 NDAA] (quoting Major General James Marrs, Director for Intelligence in the Joint Staff).

¹³ DAVID A. SHLAPAK & MICHAEL W. JOHNSON, RAND, REINFORCING DETERRENCE ON NATO’S EASTERN FLANK 1 (2016), http://www.rand.org/content/dam/rand/pubs/research_reports/RR1200/RR1253/RAND_RR1253.pdf [hereinafter SHLAPAK & JOHNSON]. Estonia, Latvia, and Lithuania are collectively known as the Baltic States. See *id.* The report concludes that “such a rapid defeat would leave NATO with a limited number of options, all bad.” *Id.*

¹⁴ SCHOEN, *supra* note 2, at 13.

¹⁵ See Konstantin von Hammerstein, *NATO Struggles to Recover after Years of Budget Cuts*, SPIEGEL ONLINE (May 24, 2016), <http://www.spiegel.de/international/world/nato-struggles-to-prepare-for-potential-threat-from-russia-a-1093358.html> [hereinafter Hammerstein]; Associated Press, *Fulda Gap is Key Point in NATO Defense Against Soviet Forces*, L.A. TIMES (Mar. 1, 1987), http://articles.latimes.com/1987-03-01/news/mn-6926_1_fulda-gap (explaining the Fulda Gap was “the only area in the world where large numbers of U.S. and Soviet soldiers [were] lined up so close to each other” on opposite sides of a border and where “NATO planners ha[d] pinpointed . . . as a likely invasion route into Western Europe for Soviet Bloc forces”). The Fulda Gap has

to geographic proximity and cultural ties, are the likely flashpoint in this new era of Russia-NATO conflict.¹⁶ The great disparity between the Baltic States and Russia in terms of defense capability creates a metaphoric gap with the same strategic implications. The clear analogy of the Baltic States to the Fulda Gap has forced NATO to reverse years of defense cuts in order to combat this new strategic threat.¹⁷ The graveness of this situation caused many experts, including the Chairman of the Joint Chiefs of Staff, General Joseph Dunford, to believe the threat from Russia is once again the greatest threat to the national security of the United States.¹⁸

To ensure NATO is capable of deterring or repressing an attack from Russia, it is imperative for all members to build their individual and collective security capabilities. Increased defense spending is the most obvious method of building capacity, but money alone is no silver bullet; “no amount of defense spending constitutes a panacea for maintaining Alliance cohesion.”¹⁹ Promoting interoperability between member states requires trust, which is difficult to achieve without the establishment of a baseline capability. NATO members, specifically the Baltic States, must improve their respective defense capabilities to maximize the effect the U.S. military can have in deterring a Russian advance in Eastern Europe.

In its position as the first among equals in NATO, the United States must determine what it is willing to commit to Europe. Commitments of such magnitude are inherently political and rhetoric often obscures reality.

become an oft-used metaphor for any strategic chokepoint vulnerable to armed conflict and was recently used to describe Arctic Ocean naval passages and straits in the Indian Ocean. See, e.g., Robbie Gramer, *Russia's Ambitions in the Atlantic*, FOREIGN AFFAIRS (Sept. 9, 2016), <https://www.foreignaffairs.com/articles/2016-09-09/russias-ambitions-atlantic>; Robert D. Kaplan, *Center Stage for the 21st Century*, FOREIGN AFFAIRS (Mar./Apr. 2009), <https://www.foreignaffairs.com/articles/east-asia/2009-03-01/center-stage-21st-century>.

¹⁶ See Lincoln Mitchell, *Opinion: Is NATO Still Relevant?*, OBSERVER (Feb. 10, 2015), <https://observer.com/2015/02/natos-relevance-the-view-from-georgia/> (quoting Anders Fogh Rasmussen, “[t]here is a high probability that [Mr. Putin] will intervene in the Baltics to test NATO’s Article 5”); CHIVVIS ET AL., *supra* note 9, at 3.

¹⁷ Hammerstein, *supra* note 15; SHLAPAK & JOHNSON, *supra* note 13, at 3.

¹⁸ Dan Lamothe, *Russia is Greatest Threat to the U.S., Says Joint Chiefs Chairman Nominee Gen. Joseph Dunford*, WASH. POST (July 9, 2015), <https://www.washingtonpost.com/news/checkpoint/wp/2015/07/09/russia-is-greatest-threat-to-the-u-s-says-joint-chiefs-chairman-nominee-gen-joseph-dunford/>.

¹⁹ See Alexander Mattelaer, *Revisiting the Principles of NATO Burden-Sharing*, 46 PARAMETERS 25, 31 (2016) [hereinafter Mattelaer].

A major concern is how financially reliant NATO is on the United States.²⁰ Because the United States's interests are inextricably linked to the fate of its NATO allies, it is in the national interest of the United States to ensure Russian aggression, as seen in Crimea, does not extend into NATO territory. Nowhere is the risk more pronounced than in the most vulnerable NATO states: Estonia, Latvia, and Lithuania. Accordingly, the United States should invest in closing the defense capabilities gap in Eastern Europe and seek to immediately bolster NATO's deterrence strategy to counter Russian aggression.

This strategic problem requires a fiscal solution. With its constitutional prerogative to provide for the "common defense,"²¹ Congress is the linchpin in implementing a U.S.-led deterrence strategy in Eastern Europe. Ensuring a combined force is trained and equipped to deter Russian aggression requires clear and flexible fiscal authorities and accessible funding. However, the current legislative framework of ambiguous and overly restrictive authorizations and non-earmarked appropriations cannot adequately address the defense gap between Russia and the Baltic States. The defense gap risks the security of the Alliance and tempts a potentially catastrophic escalation of force. Without clear fiscal authorities and accessible funding for the NATO mission in Europe, as well as security cooperation programs aimed at building defense capacity in the Baltic States, even the best deterrence strategy would remain hollow. Compounding this problem is Congress's self-inflicted wound of rigid budget control measures that limits flexibility in planning future operations. Given the severity of the threat posed by Russian aggression in NATO territory to U.S. national security interests, it is imperative that Congress improve upon its current legislative efforts by clarifying current fiscal authorities, providing adequate funding to enable mission success, and influencing NATO members to improve their own defenses.

Congress can help defend the Baltic States from Russian aggression by: (1) understanding NATO funding systems and the challenges in implementing combined defense strategy in order to maximize the effect of each defense dollar spent by the United States and its NATO allies; (2) removing unnecessary obstacles from the budget process that hamper defense planning; (3) passing fiscal legislation that provides clear, flexible authority and earmarked appropriations to ensure prioritization of funding

²⁰ See discussion *infra* Section III.

²¹ U.S. CONST. Art. I, § 8.

for programs that will build partner capacity and improve interoperability between U.S. forces and NATO allies, similar to the Afghanistan Security Forces Fund (ASFF); and, (4) crafting legislation that provides fiscal incentives to influence NATO allies to boost their defense spending.²²

Section II provides an overview of NATO's primary efforts in implementing its deterrence strategy in response to Russia's aggressive posture in Eastern Europe. Section III describes how NATO operations are funded and the efforts to increase defense spending and interoperability within the European contingent of the Alliance. Section IV analyzes current United States contributions to the common defense of NATO and the fiscal mechanisms enabling, or limiting, such contributions. This section focuses on efforts to build the defense capabilities of the Baltic States, including recent developments in security cooperation, and recommends how the United States can best leverage its fiscal resources through existing and new fiscal authorities. Finally, Section V recommends that Congress remove unnecessary barriers to effective defense planning, clarify funding sources to prevent confusion and under-utilization of current fiscal authorities, and carefully draft future legislation to maximize the United States' influence in improving NATO's defense capability.

II. NATO and the Russian Threat

Founded on 4 April 1949, NATO is an alliance to safeguard freedom and promote stability in the North Atlantic area through collective defense.²³ Originally twelve members, NATO expanded to twenty-eight, with most of the expansion occurring after the fall of the Soviet Union.²⁴ Despite numerous geopolitical shifts since its

²² This article assumes the national security strategy vis-à-vis Russia will ultimately continue under President Trump. While the Trump administration may decide to diverge from the previous administration's support of NATO, current defense and foreign relations policy show the goal of NATO and the United States is the same: preserve peace by deterring Russian aggression in Europe to avoid triggering an Article 5 conflict. See discussion *infra* Section II.

²³ North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 [hereinafter North Atlantic Treaty].

²⁴ See Fred Dews, *Making Sense of NATO on the US Presidential Trail*, POLICY (Aug. 2, 2016), <https://thepolicy.us/making-sense-of-nato-on-the-us-presidential-campaign-trail-f25f3ec6e0f0>.

inception, NATO is still the “cornerstone of transatlantic security cooperation and the guarantor of peace and stability in Europe.”²⁵ Under Article 5 of the North Atlantic Treaty, NATO members are committed to collective self-defense.²⁶ Thus, an attack against any NATO member is considered an attack on all NATO members, whereby, in the exercise of the right to individual or collective defense under Article 51 of the United Nations Charter, each member will assist the member attacked, including the use of armed force, to “restore and maintain the security of the North Atlantic area.”²⁷

Although Article 5 was not triggered when Russia invaded Crimea because Ukraine is not a NATO member, the prospect of a Russian attack on a NATO member, such as Estonia or Latvia, reinvigorated the concept of collective self-defense under Article 5. This was invoked only once in the Alliance’s history after the terrorists attacks on September 11, 2001.²⁸ At the 2014 Wales Summit, NATO members agreed to respond to Russia and “pledged to stop cuts and increase defense spending to two percent of GDP [Gross Domestic Product] within a decade,” leading many NATO allies to reverse years of defense spending cuts.²⁹ In 2016, spending cuts stopped across Europe and Canada for the first time in years and a three percent increase in defense spending is expected.³⁰ In addition to a pledge to increase defense spending, NATO set out plans to increase readiness and responsiveness in Eastern Europe, called the Readiness Action Plan (RAP).³¹ The United States’ role in the RAP became known as Operation Atlantic Resolve; led by the United States European Command (EUCOM).³² In 2016, both EUCOM and NATO

²⁵ H.R. REP. NO. 114-840, at 1217 (2016).

²⁶ See North Atlantic Treaty, *supra* note 23, 63 Stat. at 2241, 34 U.N.T.S. at 243.

²⁷ *Id.*

²⁸ Sylvain Fournier & Sherrod Lewis, *Article 5 of The North Atlantic Treaty: The Cornerstone of the Alliance*, 34 NATO LEGAL GAZETTE 17 (July 2014), http://www.act.nato.int/images/stories/media/doclibrary/legal_gazette_34a.pdf.

²⁹ Jens Stoltenberg, Opinion, *Now is Not the Time for the U.S. to Abandon NATO—Nor Should its European Allies Go it Alone*, GUARDIAN (Nov. 12, 2016), <https://www.theguardian.com/commentisfree/2016/nov/12/us-must-not-abandon-nato-europe-go-alone-jens-stoltenberg?>. Stoltenberg is the current NATO Secretary General. *Id.*

³⁰ Jens Stoltenberg, NATO Sec’y Gen., Speech at the German Marshall Fund of the United States: A Strong Transatlantic Bond in Uncertain Times (Nov. 18, 2016).

³¹ NATO, READINESS ACTION PLAN, <https://lawfas.hq.nato.int/RAP/SitePages/Home.aspx> (lasted visited Nov. 14, 2016) (on file with author).

³² See U.S. MISSION TO THE NATO, ASSURANCE MEASURES, <https://nato.usmission.gov/our-relationship/policy-history/assurance-measures-commitment-to-european-security/> (last visited Feb. 12, 2019). Despite its name,

significantly expanded their collective efforts to counter Russian aggression by adding deterrence-based measures to the mission of Operation Atlantic Resolve and the RAP.³³ At the Warsaw Summit in July 2016, NATO leaders determined the strategy to respond to Russia's growing Anti-Access/Area Denial (A2/AD) capability in the Baltics was to increase its forward presence in the Baltics significantly.³⁴ The United States, along with NATO partners Germany, Canada, the United Kingdom, and France, began the largest buildup of forces in Europe since the Cold War, adding an armored brigade combat team (ABCT) supported by air assault forces into seven nations stretching along the eastern flank of NATO from Estonia to Bulgaria in January 2017.³⁵

Operation Atlantic Resolve is not a declared contingency operation. *See* 10 U.S.C. § 101(a)(13) (2016) (defining a contingency operation as a military operation “designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force”); *see also*, BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2016, at 1, 30-34 (Oct. 7, 2016) (explaining that the list includes only instances when the U.S. used military forces abroad, not for participation in mutual security organizations; the list does not include Operation Atlantic Resolve). U.S. efforts in Eastern Europe are officially designated as European Reassurance Initiative (ERI) and, as of Fiscal Year 2017, European Deterrence Initiative (EDI). *See discussion infra* Section IV(B)(2). Nonetheless, NATO and United States European Command (EUCOM) refer to the U.S. participation in the Readiness Action Plan as Operation Atlantic Resolve.

³³ U.S. EUROPEAN COMMAND, OPERATION ATLANTIC RESOLVE 2016 FACT SHEET 1 (Apr. 15, 2016), www.eucom.mil/doc/35204/operation-atlantic-resolve-fact-sheet-april-15-2016 [hereinafter OPERATION ATLANTIC RESOLVE] (on file with author); NATO, WARSAW SUMMIT COMMUNIQUÉ ¶ 6 (July 9, 2016), http://www.nato.int/cps/en/natohq/official_texts_133169.htm?selectedLocale=en [hereinafter WARSAW SUMMIT]. In 2016, the United States added a rotational combat brigade while NATO added four multinational battalions, rotating in the Baltic States and Poland. Kristina Daugirdas & Julian Davis Mortenson, eds., *Russia Argues Enhanced Military Presence in Europe Violates NATO-Russia Agreement; United States Criticizes Russian Military Maneuvers over the Baltic Sea as Inconsistent with Bilateral Treaty Governing Incidents at Sea*, 110 AM. J. INT'L L. 562, 563-64 (July 2016).

³⁴ Alexander Vershbow, NATO Dep. Sec'y Gen. Amb., Speech, NATO Post-Warsaw: Strengthening Security in a Tough Neighborhood (Aug. 29, 2016).

³⁵ *See* David Frum, *Trump Will Inherit the Biggest NATO Buildup in Europe Since the Cold War*, ATLANTIC (Jan. 10, 2017), <https://www.theatlantic.com/international/archive/2017/01/trump-nato-europe-russia/512648/> [hereinafter Frum]. Frum speculates that this enhanced NATO presence so close to Russia was “one of the motives that impelled Vladimir Putin to intervene in the U.S. presidential election with a view to weakening the pro-NATO Hillary Clinton and helping the NATO-skeptical Trump.” *Id.* Whether that speculation is true, this supposition underscores the counterargument to this article: the Russia-NATO tension is

The Obama administration demonstrated its intent to shift United States strategy from “reassurance” to “deterrence” as it requested to quadruple the funding for the European Reassurance Initiative (ERI) for Fiscal Year 2017.³⁶ In pursuit of a capable deterrent force, the United States, in its informal role as military leader in NATO, has delineated five lines of effort: increased rotational presence of air, land, and sea forces; additional bilateral and multilateral exercises and training to improve overall readiness and interoperability; repositioning of U.S. equipment to enhance rapid response capabilities in Europe; improve infrastructure to increase flexibility and readiness; and build the capacity of allies and partners in Central and Eastern Europe.³⁷

Despite the renewed emphasis on security within the European contingent of NATO, the United States would face a disproportionate burden within the Alliance, both militarily and financially, if Russia launches an attack across its western border in order to defend what some may consider a minor ally in Estonia or Latvia.³⁸ Although the Obama administration affirmed the United States’ obligation under Article 5 to come to the defense of any NATO member, he stated that the rest of NATO must build its defense capacity to ease the burden on the United States, leading to doubts among European leaders.³⁹ President Donald Trump is even less reassuring than his predecessor was. He has indicated defense provided by the United States may be

directly correlated to the amount of NATO forces present in Eastern Europe. However, Russia’s actions in Crimea, Syria, and the increasingly aggressive posture towards the Baltic States, all of which were executed by Russia prior to this dramatic build-up by NATO, dispel this counter-argument. *Id.*

³⁶ Luis Simón, *Balancing Priorities in America’s European Strategy*, 46 *PARAMETERS* 13, 22 (2016) [hereinafter Simón]; *see also* OFF. OF THE UNDER SEC’Y OF DEF. (COMPTROLLER), EUROPEAN REASSURANCE INITIATIVE, DEP’T OF DEF. BUDGET FY 2017, at 1 (Feb. 2016), <http://comptroller.defense.gov/budgetmaterials.aspx> [hereinafter FY17 BUDGET REQUEST]. *See* discussion *infra* Section IV(B)(2).

³⁷ OPERATION ATLANTIC RESOLVE, *supra* note 33, at 2.

³⁸ *See* Simón, *supra* note 36, at 24. The U.S.’s commitment to NATO could be tried when the expansion of the Alliance includes less economically advanced members than the original NATO members, thereby offering less to the United States in return for its security protections. *Id.*

³⁹ Statement by the President on the Fiscal Year 2017 European Reassurance Initiative Budget Request (Feb. 2, 2016). Despite his assurances, former-President Obama called European allies “freeloaders” and reportedly told former United Kingdom (U.K.) Prime Minister David Cameron that the U.K. “would no longer be able to claim a ‘special relationship’ with the United States if it did not commit to spending at least [two] percent of its [gross domestic product] on defense,” leading the U.K. to meet the two percent threshold. Jeffrey Goldberg, *The Obama Doctrine*, *ATLANTIC* (Apr. 2016), <http://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/>.

contingent on a NATO member's own defense spending.⁴⁰ Additionally, a “decade of foreign wars, a devastating global financial crisis, mounting public debt, and profound realignments in international political and economic power have inspired calls for fundamental change from the competing extremes of the American political landscape,” towards an isolationist strategy.⁴¹ There are indications of bipartisan public support for foreign policy retrenchment as well. According to one poll, fifty-seven percent of Americans think the United States should deal with its own problems,⁴² whereas only forty-four percent of the American public would support the use of U.S. troops to defend the Baltic States from a Russian invasion.⁴³

Nonetheless, the importance of a credible deterrent and swift response to Russian aggression cannot be overstated. If Russia chose to attack a Baltic state, it will not only test the collective self-defense commitment under Article 5, it will test the credibility and durability of the United Nations Charter's prohibition of the use of force in other states.⁴⁴ Thus, NATO's response to any future aggression by Russia within the Alliance's territory “has significant implications for both NATO and the Charter.”⁴⁵ As such, “[t]he United States should treat [the Baltic States] with the same importance as France, Germany and the United Kingdom.”⁴⁶

⁴⁰ Andrius Sytas & Gederts Gelzis, *Baltics Keep Fingers Crossed that Trump Won't Keep his Campaign Pledges*, REUTERS (Nov. 9, 2016), <http://www.reuters.com/article/usa-election-baltics-idUSL8N1DA597>.

⁴¹ Jeremi Suri & Benjamin Valentino, *Introduction to SUSTAINABLE SECURITY: RETHINKING AMERICAN NATIONAL SECURITY STRATEGY 1* (Jeremi Suri & Benjamin Valentino eds., 2016).

⁴² Caitlyn Davis, Brookings Institution, *Muddying the Issues: Five Questionable Claims on U.S. Foreign Policy*, ORDER FROM CHAOS BLOG (Nov. 8, 2016), <https://www.brookings.edu/blog/order-from-chaos/2016/11/08/muddying-the-issues-five-questionable-claims-on-u-s-foreign-policy/>.

⁴³ Andrew Shearer, *Can America Still Rely on its Allies?*, CTR. FOR STRATEGIC & INT'L STUD. (Dec. 15, 2016), <https://www.csis.org/analysis/can-america-still-rely-its-allies> [hereinafter Shearer].

⁴⁴ U.N. Charter art. 2, ¶4; see Deeks & Wittes, *supra* note 6 (claiming the United Nations finds itself a little weaker every time a violation of Article 2(4) of the United Nations Charter, which prohibits the use of force against another state, goes unanswered).

⁴⁵ *Id.*

⁴⁶ Mindy Belz, *Baltic Alert: Troop Buildups and New Leaders on Both Sides of the Atlantic could Spell Opportunity for Russia's Vladimir Putin, and Testing for NATO*, WORLD MAG. (Dec. 31, 2016), https://world.wng.org/2016/12/baltic_alert. Paul Miller, associate director of the Clements Center for National Security at The University of Texas at Austin, argues that the Baltics are the test case for the security guarantee

Whatever course of action the Trump administration chooses to take vis-à-vis Russian aggression in Eastern Europe, it is clear President Trump will have to lead NATO through this potentially catastrophic situation with Russia while navigating a fiscal maelstrom of overseas defense spending. Setting up a European response to a Russian A2/AD environment in the Baltics⁴⁷ will cost billions of dollars in planning, movement of troops and assets, and development of effective offset strategy;⁴⁸ the United States must carefully consider any financial assistance it provides.⁴⁹

III. Sources of NATO Funding

As one might expect from a multi-national, multi-cultural defense alliance, funding NATO operations is complex. The primary sources of

provided by membership in the Alliance, stating “if the NATO Article 5 guarantee isn’t enforced for the Baltics, it won’t be enforced anywhere, and NATO is dead.” *Id.*

⁴⁷ See Dave Majumdar, *Can America Crush Russia’s A2/AD “Bubbles”?*, NAT’L INT. (June 29, 2016), <http://nationalinterest.org/blog/the-buzz/can-america-crush-russias-a2-ad-bubbles-16791>. While Russia’s military investments are modest in comparison to the United States, they have been strategic in their spending, focusing on increasing capabilities in certain key conventional areas, specifically in Anti-Access/Area Denial (A2/AD) capabilities that deny adversaries the ability to adequately intervene in an ongoing or imminent military action. *Id.* Russia created a large A2/AD zone in the Baltics, relying on the proximity of Kaliningrad, a Russian exclave, to Poland, Estonia, Latvia, and Lithuania, extending ground to air capabilities throughout a third of Poland’s airspace. Sydney J. Freedberg, Jr., *Russians “Closed the Gap” for A2/AD: Air Force Gen. Gorenc*, BREAKING DEFENSE (Sept. 14, 2015), <http://breakingdefense.com/2015/09/russians-closed-the-gap-for-a2ad-air-force-gen-gorenc/>. Thus, surface to air “launchers on Russian soil can hit targets in NATO airspace.” *Id.* (quoting General Frank Gorenc, commander of U.S. Air Forces in Europe). The United States has not fought a conflict without absolute control of the air since at least 1991; Russian A2/AD zones would severely blunt the U.S. military’s ability to operate as it became accustomed to since 1953, the last time a soldier was killed by enemy aircraft. *Id.*

⁴⁸ A report by RAND Corporation estimated the total cost of \$2.7 billion per year for their recommended deterrent posture of seven brigades, including three armored brigades as well as land-based fires and ready airpower support. See SHLAPAK & JOHNSON, *supra* note 13, at 1-2.

⁴⁹ Compounding this problem is the delicate balancing act played by NATO strategists when pushing military capabilities closer and closer to Russia’s borders. While outside the scope of this article, it is foreseeable that the act of placing U.S. military assets in Eastern Europe could provoke Russia, leading to “unnecessary escalation with Russia, which could tie down excessive resources and undermine U.S. interests beyond Europe.” Simón, *supra* note 36, at 21-22.

funding for NATO operations are national contributions and direct contributions.⁵⁰

A. National Contributions

National contributions are the largest source of funds for NATO and come from member states volunteering military assets, such as troops or equipment to a military operation, taken from the member's "overall [defense] capability to form a combined Alliance capability."⁵¹ The methodology for calculating each member state's national contribution is the dollar amount of its overall defense budget.⁵²

Because the United States is engaged in military operations worldwide, the defense expenditures—or overall defense budget—of the United States represents about seventy-three percent of the entire Alliance's defense spending.⁵³ However, the U.S. defense budget does not translate to the United States covering seventy-three percent of the costs involved in running NATO operations as politicians from both sides of the aisle have claimed.⁵⁴ The failure of analysts, commentators, and politicians to make "the distinction between the

⁵⁰ NATO, FUNDING NATO (June 3, 2015), http://www.nato.int/cps/en/natohq/topics_67655.htm [hereinafter FUNDING NATO]. National contributions are also called indirect contributions. *Id.*

⁵¹ *Id.*

⁵² NATO, SECRETARY GENERAL'S ANNUAL REPORT 122 (2015), http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2016_01/20160128_SG_AnnualReport_2015_en.pdf [hereinafter ANNUAL REPORT]. Defense expenditures are defined "as payments made by a national government specifically to meet the needs of its armed forces of Allies," and includes land, sea, air, and joint formations financed by the respective defense ministry. *Id.* Included in the definition is operations and maintenance, procurement, research, and development, pensions for retired employees, peacekeeping and humanitarian funds. *Id.* Financial aid from one country to another for supporting the recipient's defense effort is included in the donor country's defense expenditures, not the recipient's. *Id.*

⁵³ FUNDING NATO, *supra* note 50. The United States' global responsibilities require much higher defense spending than other NATO members that are not engaged in operations around the world. Glenn Kessler, *Trump's Claim that the U.S. Pays the "Lion's Share" for NATO*, WASH. POST (Mar. 30, 2016),

https://www.washingtonpost.com/news/fact-checker/wp/2016/03/30/trumps-claim-that-the-u-s-pays-the-lions-share-for-nato/?utm_term=.406d81b63e79 [hereinafter Kessler].

⁵⁴ During the 2016 Presidential Election, candidates from both political parties, including the otherwise diametrically opposed candidates, Donald Trump and Bernie Sanders, claimed the United States paid over seventy-three percent of NATO's budget. Kessler, *supra* note 53.

NATO commitment costs to the United States and the gap between the United States and allied defense efforts” has resulted in the erroneous belief that NATO is in crisis and in need of a dramatic policy departure.⁵⁵ To avoid such confusion, U.S. politicians must understand that the calculation of defense expenditures does not distinguish what portion of that amount is devoted to defense spending on the Alliance and other national defense responsibilities.⁵⁶ Ivo Daalder, a former U.S. ambassador to NATO, explained that it is difficult to calculate how much of overall U.S. defense spending is devoted exclusively for NATO. “Since we now have global responsibilities and since we now also redeploy forces that are based in Europe for other theaters (including Iraq, Afghanistan, Africa, etc.) it isn’t really possible to come up with an accurate picture of how much of U.S. spending is in fact for NATO.”⁵⁷

Although it is difficult, if not impossible, to determine the precise amount of expenditures the United States commits directly to NATO, estimates by RAND Corporation and the Center for Strategic and International Studies (CSIS) place the total costs of keeping U.S. forces in key industrial nations at less than \$10 billion a year, or less than two percent of the total defense budget.⁵⁸ While the United States increased defense spending by over eighty percent since 2001, “virtually none of that increase was generated by NATO commitments.”⁵⁹ When compared to the defense posture the United States fielded in Europe during the Cold War, the resources currently obligated to defending

⁵⁵ William C. Wohlforth, *The Right Choice for NATO*, in *SUSTAINABLE SECURITY: RETHINKING AMERICAN NATIONAL SECURITY STRATEGY* 256 (Jeremi Suri & Benjamin Valentino eds., 2016) [hereinafter Wohlforth].

⁵⁶ Mattelaer, *supra* note 19, at 27.

⁵⁷ Kessler, *supra* note 53. To illustrate how difficult it is to track U.S. spending for NATO, consider the role of an F-15E Strike Eagle stationed at Royal Air Force Lakenheath, United Kingdom. Because military assets are fungible, the Strike Eagle can be tasked to fly sorties in Europe, Africa, and the Middle East or conduct exercises in the United States. To complicate matters, note that flying and maintaining a Strike Eagle costs Operations & Maintenance (O&M) funds, with each mission described above funded by different commands under different authorizations, with the possibility the sortie could be funded by Overseas Contingency Operations (OCO) funds. Any costs assessment is further complicated by considering the original Research & Development (R&D) funds and Procurement funds used for the acquisition of the airframe, avionics, munitions, and upgrades.

⁵⁸ See Kathleen Hicks & Michael O’Hanlon, *Donald Trump is Wrong about NATO*, USA TODAY (July 8, 2016), <http://www.usatoday.com/story/opinion/columnist/2016/07/08/trump-nato-defense-summit-allies-column/86679096/>.

⁵⁹ Wohlforth, *supra* note 55, at 257.

Europe are remarkably low. In 1990, approximately fifteen percent of the total worldwide active strength was stationed in Europe, whereas only three percent of a significantly smaller total active force remains in Europe in 2017.⁶⁰ Thus, despite the political rhetoric and fact that the United States spends more on defense than all other NATO members combined, it is clear the actual contribution to NATO is a relatively small portion of the overall U.S. defense budget.

It is critical to understand the parameters of the United States' contribution to NATO because the United States has finite resources, and, since enactment of the Budget Control Act (BCA) of 2011, legally binding caps on funding.⁶¹ Every dollar spent towards the objectives of NATO is, in theory, a dollar less going to fight the Islamic State or towards the Pacific pivot. However, the misunderstanding of the true costs of the United States' role in NATO could have dangerous consequences. If the U.S. budgets and plans for NATO operations based on the false premise that it already spends too much and its partners do not contribute enough, U.S. leadership will likely make decisions that adversely affect its own national security interests.

Although Europe is not as reliant on U.S. contributions, as is claimed, a spending and capability gap drives tension and strategy within the Alliance. Due to the proportionately lower defense spending by NATO members, the Alliance is dependent on the United States for essential capabilities, specifically "in regard to intelligence, surveillance and reconnaissance; air-to-air refueling; ballistic missile defense; and airborne electronic warfare."⁶² Recognizing this gap, the members agreed during the 2014 Wales Summit to spend at least two percent of their respective Gross Domestic Product (GDP) on defense as well as devote at least twenty percent of defense expenditures to major equipment spending.⁶³ Despite this agreement, only five allies

⁶⁰ ANTHONY H. CORDESMAN, CTR. FOR STRATEGIC & INT'L STUD., NATO AND THE DELICATE BALANCE OF DETERRENCE: STRATEGY VERSUS BURDEN SHARING 28 (Feb. 7, 2017) [hereinafter CORDESMAN]. In 1990, 321,300 U.S. military personnel were assigned to Europe, out of 2,117,900 active duty personnel; in 2017, 40,500 active duty personnel, only about seventeen percent of the 1990 figure, are assigned to Europe. *Id.*

⁶¹ Budget Control Act of 2011, Pub. L. 112-25, 125 Stat. 240, 256; *see* discussion *infra* Section V(A).

⁶² FUNDING NATO, *supra* note 50.

⁶³ *Id.* Major equipment includes: missile systems; missiles (conventional weapons); nuclear weapons; aircraft; artillery; combat vehicles; engineering equipment; weapons and small arms; transport vehicles; ships and harbor craft; and electronic and communications equipment. NATO Defense Expenditures, *supra* note 8.

met the two percent target in 2015, and only eight met the twenty percent goal.⁶⁴ However, the Warsaw Summit, held in July 2016, recognized the collective defense expenditures have increased for the first time in seven years, and the majority of the members have halted or reversed declines in their own budgets.⁶⁵ Moreover, “[fifteen] of the [twenty-eight] member states have increased their military spending, especially in countries on the NATO’s eastern flank that feel most threatened by Moscow.”⁶⁶ Nonetheless, the Warsaw Summit reiterated the need for all members to display the political will to provide required capabilities in defense, and to further a more balanced sharing of the costs and responsibilities.⁶⁷

B. Direct Contributions

The other, much smaller, source of funding comes from direct financial contributions in the form of common funding or joint funding.⁶⁸ Common funding occurs when NATO identifies a requirement that serves the interests of all the contributing members, and should be supported by

⁶⁴ Mattelaer, *supra* note 19, at 29. NATO members that met the two percent defense expenditures target were the United States, Greece, Poland, the United Kingdom, and Estonia. ANNUAL REPORT, *supra* note 52, at 28. The eight members that met the twenty percent equipment expenditures target were Luxembourg, Poland, the United States, Turkey, France, the United Kingdom, Norway, and Lithuania. *Id.*

⁶⁵ WARSAW SUMMIT, *supra* note 33, ¶ 34.

⁶⁶ Hammerstein, *supra* note 15. Latvia raised its defense budget by sixteen percent, while Poland spent an extra twenty-two percent. *Id.*

⁶⁷ WARSAW SUMMIT, *supra* note 33, ¶ 33. Several experts dismiss the wisdom of the two percent goal. *See, e.g.*, CORDESMAN, *supra* note 60, at 32-34; Judy Dempsey, *NATO’s Red Herring*, CARNEGIE EUROPE (Feb. 14, 2017), <http://carnegieeurope.eu/strategieurope/67986>; Richard Sokolsky & Gordon Adams, *Penny Wise, Pound Foolish: Trump’s Misguided Views of European Defense Spending*, WAR ON THE ROCKS (Mar. 7, 2017), <https://warontherocks.com/2017/03/penny-wise-pound-foolish-trumps-misguided-views-of-european-defense-spending/>. Each NATO member has very different resources and abilities to spend on defense; overspending on defense to meet an arbitrary threshold could lead to or exacerbate dysfunction within a country, which would certainly disrupt the defense strategy of NATO writ large more than universal spending at the two percent target could ever help the Alliance. *See* CORDESMAN, *supra* note 60, at 33. Spending metrics, without a nexus to a given military strategy or measures of effectiveness, have little to no meaning. *Id.* While this argument is persuasive, this article focuses on factors within the control of the U.S. Congress. Any change in NATO’s spending policy would have to come about organically within the Alliance and driven by the Executive branch rather than Congress.

⁶⁸ The common-funded military budget for 2016 was €1.16 billion, compared to about \$612 billion for the U.S. defense budget in 2016. *See* FUNDING NATO, *supra* note 50; National Defense Authorization Act for Fiscal Year 2016, Pub. L. 114-92, 129 Stat. 726 (2015) [hereinafter FY16 NDAA].

all members.⁶⁹ The personnel and administration of NATO headquarters and the NATO Command Structure use common funds, as well as military capabilities in excess of an individual nation's military requirements. The excess capability is pledged to NATO for common purposes such as the NATO Security Investment Program.⁷⁰ Member States contribute to common-funded budgets and programs through an agreed cost-sharing formula, based in part on each respective member's Gross National Income.⁷¹ One caveat to this formula is the United States, which covers 22.14 percent of common-funded budgets and programs in 2016, "whereas its economic weight within the Alliance accounts for more than forty percent of the NATO total."⁷² This cost-share system was structured to fairly apportion costs and "emphasize the strong cooperative nature of the organization, in which each member has an equal voice."⁷³

Although the NATO common-funded programs account for a small portion of the total defense spending of NATO members, it easily demonstrates the benefit of the Alliance to the United States. "[E]very \$22 the U.S. contributes leverages \$100 worth of Alliance capability."⁷⁴ This cost-sharing method is used to "achieve economies of scale in developing collective capabilities to support critical NATO operational requirements," such as NATO Ballistic Missile Defense, NATO Airborne Early Warning Control, Alliance Ground Surveillance System, NATO Joint Intelligence, Surveillance and Reconnaissance, Strategic Airlift

⁶⁹ FUNDING NATO, *supra* note 50.

⁷⁰ *See id.* The NATO Command Structure consists of permanent party civilians at NATO headquarters as well as other infrastructure. *Id.* The United States provides 930 personnel, or about ten percent of the 8,950 total personnel required to staff the NATO Command Structure. WHITE HOUSE FACT SHEET: U.S. CONTRIBUTIONS TO NATO CAPABILITIES (June 8, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/07/08/fact-sheet-us-contributions-nato-capabilities> [hereinafter U.S. CONTRIBUTIONS TO NATO CAPABILITIES].

⁷¹ FUNDING NATO, *supra* note 50.

⁷² Mattelaer, *supra* note 19, at 29. Germany, long accused of not meeting its two and twenty percent target requirements in national defense spending, bears the largest proportional share of NATO common funding. *Id.* The largest contributors to common-funded programs, aside from the United States, are Germany (14.65%), France (10.63%), the United Kingdom (9.85%), and Italy (8.41%). FUNDING NATO, *supra* note 50. In 2018, NATO common funding was budgeted for \$2.27 billion. *See id.*

⁷³ Major Israel D. King, *Preserving the Alliance: The Need for a New Commitment to Common Funding in NATO Financing*, 74 A.F. LAW REV. 113, 117 (2015) (quoting NATO, *The Establishment of an International Budget for NATO: First Interim Report of the Working Group*, at 4-8, NATO Doc. D-D(51)59 (Mar. 2, 1951), http://archives.nato.int/uploads/r/null/3/1/31088/D-D_51_59_ENG.pdf).

⁷⁴ U.S. CONTRIBUTIONS TO NATO CAPABILITIES, *supra* note 70.

Command, and Precision-Guided Munitions.⁷⁵ Like common funding, the sum parts of the individual NATO members combined with the enabling capabilities of the U.S. equate to significant force multipliers for each of the members, including the United States.⁷⁶ Rather than viewing the collective defense of the other NATO members, the United States should recognize that the benefit of access to NATO's "nearly two million military personnel equipped and potentially available for joint operations"⁷⁷ outweighs the relatively small portion of the defense budget provided for NATO defense and deterrence.

Though this discussion sheds light on the erroneous belief that the United States bankrolls NATO, it is clear the United States' role in the collective defense is paramount. This understanding will allow Congress to more effectively appropriate funds towards NATO, armed with the ability to counter claims that it is spending too much on Europe. Given the modest increases in defense spending described above, focused appropriations on building defense capacity in the Baltic States are necessary to help close the capabilities gap and lead to better interoperability between U.S. forces and its NATO allies in the Alliance's eastern frontier. The following section examines some of the current programs aimed towards reassuring NATO members and building defense capabilities through U.S. funding.

IV. Current U.S. Contributions to NATO

Despite bipartisan criticism of the perceived lack of funding from other NATO members, the United States still recognizes that its leadership in the Alliance is vital to its own national security.⁷⁸ There are clear benefits to combined defense in terms of national security, foreign relations, and the economy,⁷⁹ placing U.S. funding of NATO at the

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See S. 2943, 114th Cong. § 1259I (as passed by Senate on June 21, 2016) (providing that "[i]t is the sense of Congress that continued United States leadership in the North Atlantic Treaty Organization is critical to the national security of the United States").

⁷⁹ A recent study found "the economic losses from retrenchment [of U.S. overseas security commitments] are conservatively estimated to be three and a half times greater than the gains." Daniel Egel & Howard J. Shatz, *Economic Benefits of U.S. Overseas Security Commitments Appear to Outweigh Costs*, RAND BLOG (Sept. 23, 2016), <http://www.rand.org/blog/2016/09/economic-benefits-of-us-overseas-security-commitments.html>.

intersection of foreign and domestic policy. While the President has constitutional authority in defense, as the Commander-in-Chief, and to enter into agreements with foreign states,⁸⁰ Congress can affect both defense and foreign affairs through its power of the purse.⁸¹ Accordingly, this section analyzes the reflection of U.S. foreign and defense policies through Congressional authorizations and appropriations that affect the implementation of Operation Atlantic Resolve's lines of operation, particularly in increasing interoperability and improving the defense capacity of the Baltic States.⁸²

A. Congress's Role in Funding NATO Operations

Congress's power to authorize expenditures through legislation is instrumental in national security and foreign relations, as it determines the amount and purpose for which expenditures are authorized.⁸³ Because military activities and foreign assistance require expenditures of funds, the United States cannot implement its strategic goals in Eastern Europe without fiscal authority.⁸⁴ The constitutionally provided power of the

⁸⁰ U.S. CONST. Art. II, § 2, cl. 1 ("The President shall be the Commander in Chief of the Army and Navy of the United States . . ."); U.S. CONST. Art. II, § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

⁸¹ See U.S. CONST. Art. I, § 9, cl. 7. While President Trump will undoubtedly face the challenges of countering Russia and navigating the complicated relationship with Vladimir Putin, he will not face those challenges alone. Congress "has an opportunity to address this threat by focusing time and resources on legislation and oversight to safeguard U.S. interests and influence abroad, demonstrating real leadership to fulfill its constitutionally mandated role in foreign policy." Jason Bruder, *How Congress Can Protect the U.S. from Russia*, POLITICO (Oct. 26, 2016), <http://www.politico.com/agenda/story/2016/10/congress-role-countering-russia-000225>.

⁸² This is a non-exhaustive discussion of U.S. funded programs that benefit NATO. There are numerous operational funding programs, such as Humanitarian and Civic Assistance, Foreign Disaster Assistance, Emergency & Extraordinary Expenses, etc., that could be used to assist NATO members. However, this article focuses on funding reasonably likely to support the NATO mission of collective defense, specifically as a deterrent against Russia within the context of Article 5 of the North Atlantic Treaty.

⁸³ Congress, by controlling the government's money, "wields great power to shape and control the government itself by determining, for example, the purpose for which government may use money or the amounts that are available for its endeavors." GAO, *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1-4* (4th ed. 2016).

⁸⁴ Despite the responsibility of the president in national security and foreign affairs, the Constitution provides for checks and balances, prohibiting expenditures from the Treasury absent legislation to appropriate funds. See U.S. CONST. Art. I, § 9, cl. 7. An appropriation is the statutory authority to incur obligations and make payments out of the

purpose therefore places Congress as the cornerstone of the United States' participation in NATO operations. While U.S. funding for deterring Russian aggression is complex and lacks clarity, sources of funding generally fall within three categories: service component funds, the European Reassurance/Deterrence Initiative, and security cooperation.

B. Building Better Allies through Funding Resources

1. *Service Operations & Maintenance Funds*

As the Unified Combatant Command with an area of responsibility covering Europe and Russia, EUCOM is tasked with managing theater requirements, to include supporting NATO operations and meeting U.S. national security objectives.⁸⁵ While EUCOM has authority over the conduct of operations within this region, it is the military services that receive direct funding from Congress through Operations and Maintenance (O&M) funds.⁸⁶ Like all Unified Combatant Commands during the budget planning phase, EUCOM is limited to providing inputs to influence the armed services, and sets priorities for funding, but Congress may appropriate different amounts and purposes than requested by the combatant commander.⁸⁷

Treasury for specified purposes. *See* 31 U.S.C. § 1101 (2016); 31 U.S.C. § 1301 (2016). Congress authorizes the appropriation of funds through permanent authorizations codified in a statute, or through temporary authorizations. *See* U.S. CONST. Art. I, § 9, cl. 7; 31 U.S.C. § 1341(a)(1)(A) (2016); *see also* United States v. MacCollom, 426 U.S. 317, 320 (1976) (holding “[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress”). Authority for defense expenditures is typically found in the annual National Defense Authorization Act (NDAA) and Department of Defense Appropriation Act (DODAA). *See, e.g.*, Nat’l Def. Authorization Act of 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016) [hereinafter FY17 NDAA]; Dep’t of Def. Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2333 (2015).

⁸⁵ EUCOM, MISSION, <http://www.eucom.mil/mission> (last visited Feb. 12, 2019).

⁸⁶ UNITED STATES EUROPEAN COMMAND OFFICE OF STRATEGY IMPLEMENTATION, THEATER SECURITY COOPERATION RESOURCES HANDBOOK 3 (Oct. 21, 2016) [hereinafter THEATER SECURITY COOPERATION RESOURCES HANDBOOK]. Each service makes annual requests to Congress for funding to train and equip their personnel; inherent in this function are the costs to maintain each service’s respective “baseline costs,” or certain level of preparedness. Lieutenant Colonel Teresa G. Love, *Overseas Contingency Operations: The Danger of Fiscal Mission Creep*, 41(2) REPORTER 7, 8 (2014). The combatant command missions are funded through the services via the annual Department of Defense Appropriation Act. *Id.*; *see, e.g.*, Dep’t of Def. Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015).

⁸⁷ THEATER SECURITY COOPERATION RESOURCES HANDBOOK, *supra* note 86, at 3.

To the extent an expense is necessary, fits within EUCOM's mission, and funds are authorized and appropriated, O&M funds are available for the expenditure,⁸⁸ unless the expense is covered by a more specific appropriation.⁸⁹ Another caveat is that the expenditure of funds must be for the primary benefit of the United States.⁹⁰ These two limitations to the use of service O&M funds obfuscate the analysis of how to fund operations in support of the NATO mission properly. First, it is unclear which agency's funds can be used. Under the Foreign Assistance Act, the Department of State (DoS) is the agency responsible for coordinating all foreign development activities.⁹¹ An exception to the Foreign Assistance Act is when Congress specifically authorizes the Department of Defense (DoD) to obligate defense funding for the benefit of a foreign state, military or population, or if the funding is for "little t" training.⁹² Because "little t" training, which protects U.S. forces by promoting safety, familiarization, and interoperability with foreign forces, does not constitute security cooperation, such activities are funded by O&M. However, a second issue arises because most efforts to build NATO ally and partner capacity likely will exceed the parameters of "little t" training and will fall under the umbrella of foreign assistance. Accordingly, funding for such security cooperation programs will come from more specific appropriations, as described below.

⁸⁸ The NDAA contains funding tables of each authorized line item funded by acquisition type. *See, e.g.*, FY17 NDAA, Pub. L. No. 114-328, § 4301, 130 Stat. 2000, 2851 (2016).

⁸⁹ *See* Hon. Lawrence B. Gibbs, 65 Comp. Gen. 881, 884 (Sept. 26, 1986) (explaining as a general rule, "an appropriation for a specific object is available for that object to the exclusion of a more general appropriation which might otherwise be considered available for the same object, and the exhaustion of the specific appropriation does not authorize charging any excess payment to a more general appropriation"); 31 U.S.C.A. § 1301 (West, Westlaw through Pub. L. No. 114-244) (citing 1908, 27 Op. Atty. Gen. 31, to explain the general rule of law is that, when Congress makes a general appropriation applicable to the same purpose as a specific appropriation, the specific appropriation "operates *pro tanto* as a repeal or suppression of the general, and renders its use for the specific purpose illegal").

⁹⁰ *See* Hon. Bill Alexander, 63 Comp. Gen. 422, 424 (1984) (determining the Department of Defense (DoD) may not use O&M funds when foreign assistance funds were specifically provided for by Congress in the applicable defense appropriations act).

⁹¹ Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. § 2151 (2012)).

⁹² *See id.*; Hon. Bill Alexander, 63 Comp. Gen. at 441 (deciding that some degree of familiarization and safety instruction is necessary before combined-forces activities are undertaken, in order to ensure interoperability of the two forces, and such activities are financed by O&M appropriations because they do not constitute "training").

2. *European Reassurance/Deterrence Initiative*

Since the Wales Summit in 2014, the United States increased funding for building ally and partner capacity in line with the goals of NATO as well as its own national security objectives through Operation Atlantic Resolve.⁹³ Beginning in Fiscal Year 2015, Congress authorized funds for the European Reassurance Initiative (ERI) “to reassure allies through expanded U.S. military presence in Europe through rotational deployments of U.S. troops, bilateral and multilateral equipment, and building partner capacity.”⁹⁴ The ERI represents the U.S. contribution to NATO’s assurance efforts through the RAP.⁹⁵

In 2016, the President requested \$3.4 billion for the ERI in the Fiscal Year 2017 National Defense Authorization Act (FY17 NDAA), nearly quadrupling the previous year’s appropriation, in order to begin the transition from reassurance to deterring Russian aggression in Eastern Europe.⁹⁶ The transition in focus from reassurance to deterrence was reflected in the change in terminology to European Deterrence Initiative (EDI), though both ERI and EDI are used, seemingly interchangeably, in the FY17 NDAA.⁹⁷ Congress received the request and approved the \$3.4 billion in funding for EDI, noting that it is an important step to “support the stability and security of the region and deter further Russian antagonism and aggression.” Adding that the funding will “serve as an

⁹³ MARK CANCIAN & LISA SAMP, CTR. FOR STRATEGIC & INT’L STUD., CRITICAL QUESTIONS: THE EUROPEAN REASSURANCE INITIATIVE (Feb. 9, 2016), <https://www.csis.org/analysis/european-reassurance-initiative-0> [hereinafter CANCIAN & SAMP].

⁹⁴ FY15 NDAA, Pub. L. No. 113-291, §§ 1511, 4502, 128 Stat. 3612 (2014); S. 2943, 114th Cong. § 1234 (as passed by Senate on June 21, 2016). The ERI “does not require State Department concurrence or other input, to improve the security and capacity of U.S. partners in the region.” BOLKO J. SKORUPSKI & NINA M. SERAFINO, CONG. RESEARCH SERV., R44602, DOD SECURITY COOPERATION: AN OVERVIEW OF AUTHORITIES AND ISSUES 8 (Aug. 23, 2016).

⁹⁵ See CANCIAN & SAMP, *supra* note 93.

⁹⁶ FY17 NDAA, Pub. L. No. 114-328, § 1233, 130 Stat. 2000, 2488 (2016); *see also* Security Assistance Appropriations Act, 2017, Pub. L. No. 114-254, 130 Stat. 1005, 1023-24 (2017) (approving the requested ERI funding).

⁹⁷ Compare H.R. REP. NO. 114-840, at 1219 (2016) (describing the sense of Congress in support for the “European Deterrence Initiative”); with H.R. REP. NO. 114-840, at 865 (identifying line item appropriations in O&M OCO authorizations as “ERI”). Throughout this article, the specific efforts carried out pursuant to EUCOM’s mission under Operation Atlantic Resolve are referred to as “ERI” before FY17 and as “EDI” in FY17 and after.

important tool to bolster U.S. force presence in the region, train and equip the security forces of European partners and allies . . . and improve U.S. agility and flexibility through strategic infrastructure investments.”⁹⁸

Included in the budget request was \$507 million to ensure that U.S. Army ABCTs are deployed to Europe on a continued rotation schedule that would have one ABCT in the Baltic States and Poland at all times, as well as \$1.8 billion to reposition equipment of a second ABCT which could be manned by troops flown in from the United States.⁹⁹ The \$3.4 billion EDI for Fiscal Year 2017 “strengthens deterrence through measures that provide a quick joint U.S. response against any threat made by aggressive actors in the region.”¹⁰⁰ Moreover, the request included increased funding for unconventional warfare resources such as “cyber and special operations forces, as well as for intelligence and indicators and warning.”¹⁰¹ Congress accepted the importance of this request, adding “additional emphasis is necessary on developing capabilities for countering unconventional methods of warfare such as cyber warfare, economic coercion, information operations, and intelligence operations.”¹⁰²

Operation Atlantic Resolve’s five lines of effort, as discussed above in Section II, are the focus of EDI.¹⁰³ While each line of effort makes up part of the strategic goal of deterring Russian aggression, combined, the five lines reinforce the necessity of building the capacity of the NATO members on the front line.¹⁰⁴ The increased presence of U.S. forces and additional exercises and training will build capability and confidence in the Baltic State forces.¹⁰⁵ Improved infrastructures, while necessary to support U.S. aircraft and vehicles in a contingency, serve as permanent improvements to local military installations, paving the way for more advanced weapon systems the host nation may not have been able to procure if not for the funded footprint. Encouraging the Baltic State militaries to invest in advanced systems of their own to occupy the

⁹⁸ H.R. REP. NO. 114-840, at 1218.

⁹⁹ FY17 BUDGET REQUEST, *supra* note 36, at 1.

¹⁰⁰ THEATER SECURITY COOPERATION RESOURCES HANDBOOK, *supra* note 86, at 54.

¹⁰¹ S. 2943, 114th Cong. § 1234 (as passed by Senate on June 21, 2016). Funding of these advanced capabilities is critically important to counter Russia’s advanced military capabilities, especially A2/AD and electronic warfare, which blunt NATO’s offensive air and sea capabilities. *See* CANCIAN & SAMP, *supra* note 93; Freedberg, *supra* note 47.

¹⁰² H.R. REP. NO. 114-840, at 1218 (2016).

¹⁰³ *See* FY17 BUDGET REQUEST, *supra* note 36, at 1.

¹⁰⁴ *See id.*

¹⁰⁵ *See id.* at 5, 14-16.

improved infrastructure will further benefit interoperability with U.S. forces. Thus, through funding EDI, the United States will promote the capabilities of its NATO allies, and shore up its own national security interests on NATO's most vulnerable front. However, there are limitations with the EDI.

The funding for the EDI has always been included in Overseas Contingency Operations (OCO), or war funding, because budget caps do not restrict OCO.¹⁰⁶ Traditionally, OCO funding is reserved for operations designated by the Secretary of Defense as a contingency operation,¹⁰⁷ because contingency operations require more flexibility than steady state DoD activities which require advanced planning and budgeting.¹⁰⁸ However, Operation Atlantic Resolve is not a contingency operation; thus, the budget request and subsequent authorization of OCO funds towards EDI represents part of the increasing level of OCO funding for the base budget as a way to circumvent the BCA, limiting the amount of defense and nondefense spending.¹⁰⁹ The potential problem with OCO funding is that it lacks permanence as it is tied to overseas wars in Afghanistan and in Iraq against the Islamic State.¹¹⁰ Moreover, the gradual blurring of the lines for OCO funded appropriations resulted in meaningless enforcement of the BCA, setting up costly delays in the signing of the FY17 NDAA.¹¹¹

While Fiscal Year 2017 funding will dramatically improve readiness in the region and implement deterrence-based missions as well as reassurance, the key to making the most of the increased funding is how those funds are ultimately used. The gutting of most of the U.S. defense assets in the post-Cold War era led to a decline in overall European

¹⁰⁶ See CANCIAN & SAMP, *supra* note 93.

¹⁰⁷ See 10 U.S.C. § 101(a)(13)(A) (2016).

¹⁰⁸ See Love, *supra* note 86, at 7.

¹⁰⁹ Budget Control Act of 2011, Pub. L. 112-25, § 302, 125 Stat. 240, 256. See SUSAN B. EPSTEIN & LYNN M. WILLIAMS, CONG. RESEARCH SERV., R44519, OVERSEAS CONTINGENCY OPERATIONS FUNDING: BACKGROUND AND STATUS, Summary (June 13, 2016).

¹¹⁰ CANCIAN & SAMP, *supra* note 93.

¹¹¹ See EPSTEIN & WILLIAMS, *supra* note 109, at Summary (explaining that the House Armed Services Committee moved an additional \$18 billion in DoD base budget requirements to the OCO budget, effectively exempting over \$23 billion in defense funding from the spending caps set by the BCA. Without providing an equivalent increase in spending for nondefense programs, the Committee exacerbated the policy debate over spending in FY17, resulting in lengthy delays in the authorization and appropriation of OCO funds); see also discussion *infra* Section V(A).

security capabilities.¹¹² Because it is incredibly difficult to reverse decades of defense cuts in Europe, by both the United States and NATO members,¹¹³ the gap must be filled by building capacity in the Baltic States by making the most effective use of the funding available.

Finally, outside of training Eastern European security forces in multilateral exercises, which is provided specific funding authorization,¹¹⁴ funding activities in line with the EDI lacks clear authority from the FY17 NDAA.¹¹⁵ Under the Fiscal Year 2015 NDAA—the first year of ERI—funds were authorized for Fiscal Year 2015 for expenses, not otherwise provided for, and were available through 30 September 2016, if they were used for one of the five purposes, or lines of effort.¹¹⁶ The Fiscal Year 2016 NDAA does not discuss ERI as the authority from Fiscal Year 2015 extended to the end of Fiscal Year 2016,¹¹⁷ although Congress fully

¹¹² CANSIAN & SAMP, *supra* note 93.

¹¹³ *See id.*

¹¹⁴ FY17 NDAA, Pub. L. No. 114-328, § 1233, 130 Stat. 2000, 2488 (2016). Section 1233 amends Section 1251 of the FY16 NDAA, and provides specific authority to conduct training with security forces of countries that became members of NATO after 1 January 1999 for the purpose of increasing interoperability, build capacity to respond to external threats, hybrid warfare, and Article 5 calls to action. *See* FY16 NDAA, Pub. L. No. 114-92, § 1251, 129 Stat. 726, 1070 (2015). This includes each of the Baltic States, which all became NATO members on 29 March 2004. *Seven New Members Join NATO*, NATO UPDATE (Apr. 1, 2004), <http://www.nato.int/docu/update/2004/03-march/e0329a.htm>. The Secretary of Defense may pay up to \$28 million in incremental expenses to eligible countries from amounts authorized to be appropriated for O&M, Army, and available for the Combatant Commands Direct Support Program; O&M, Defense-wide, and available for the Wales Initiative Fund; and OCO O&M, Army, and available for additional activities for the European Deterrence Initiative. § 1233(b), 130 Stat. at 2488 (amending § 1251(d), 129 Stat. at 1070).

¹¹⁵ The ERI “does not provide stand-alone authority to execute the stated purposes; ERI funding is predicated on other authorities to execute the stated purpose when that purpose does not fall within [EUCOM’s] general mission authority.” THEATER SECURITY COOPERATION RESOURCES HANDBOOK, *supra* note 86, at 55. For example, exercise-related construction projects in support of unspecified minor military construction, while receiving \$5 million in appropriated funds as part of the ERI, receives its authorization from 10 U.S.C. § 2805. *See* FY17 BUDGET REQUEST, *supra* note 36, at 8.

¹¹⁶ National Defense Authorization Act for Fiscal Year 2015, Pub. L. 113-291, §§ 1507, 1535, 128 Stat. 3292, 3612, 3618 (2014). The five purposes are: (1) Activities to increase the presence of the U.S. Armed Forces in Europe; (2) Bilateral and multilateral military exercises and training with allies and partner nations in Europe; (3) Activities to improve infrastructure in Europe to enhance the responsiveness of the U.S. Armed Forces; (4) Activities to enhance the prepositioning in Europe of equipment of the U.S. Armed Forces; and (5) Activities to build the defense and security capacity of allies and partner nations in Europe. § 1535, 128 Stat. at 3618.

¹¹⁷ *See* FY16 NDAA, Pub. L. No. 114-92, § 1251, 129 Stat. 726, 1070 (2015) (providing authority for conducting training and exercises with Eastern European countries,

supported the President's budget request for \$789.3 million in ERI funding.¹¹⁸ However, with the original funding authority expired and no clear authorization written specifically in the FY17 NDAA,¹¹⁹ commanders and fiscal law attorneys in EUCOM are required to interpret the intent of Congress to derive authorization and navigate through a Byzantine system of various security cooperation authorities to lawfully fund activities in support of the ERI lines of effort.¹²⁰ As of October 2016, USAREUR interpreted Congress intent by requiring that ERI activities be funded only if there is a determination that the activity bolsters the security and capacity of a NATO ally or partner nation in Europe through one of the stated lines of effort.¹²¹ With the FY17 NDAA unclear on authorization for EDI activities, the Security Assistance Appropriations Act, 2017—part of the Further Continuing Appropriations Act, 2017—provides better clarity as to what funds can be used for EDI activities as the law appropriated specific amounts to support EDI for Fiscal Year 2017

consistent with the original Fiscal Year 2015 lines of effort, but omitted any mention of ERI).

¹¹⁸ WHITE HOUSE FACT SHEET: THE FY2017 EUROPEAN REASSURANCE INITIATIVE BUDGET REQUEST (Feb. 2, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/02/02/fact-sheet-fy2017-european-reassurance-initiative-budget-request>; see LYNN M. WILLIAMS & SUSAN B. EPSTEIN, CONG. RESEARCH SERV., R44519, OVERSEAS CONTINGENCY OPERATIONS FUNDING: BACKGROUND AND STATUS 31-32 (Feb. 7, 2017).

¹¹⁹ Rather than specifically state authorizations, Congress described its policy and how it sees the policy being implemented. See S. 2943, 114th Cong. § 1234(b) (as passed by Senate on 21 June 2016) (stating the policy of the United States “to reassure U.S. partners and allies in Europe and to work with U.S. partners and allies to deter aggression by the Government of the Russian Federation in order to enhance regional and global security and stability”). Following the statement of policy, the drafted legislation described how to implement the defense strategy, to include the increased presence of U.S. forces, repositioning of equipment, increased infrastructure, and building partnership capacity in Europe. S. 2943, § 1234(b)(2). However, even this broad language was not adopted in the final bill. H.R. REP. NO. 114-840, at 1217 (2016). Only the Conference Report provides any specificity of its intent in the authorization of EDI funding. See H.R. REP. NO. 114-840, at 1217-19.

¹²⁰ Illustrating this point, fiscal law attorneys from USAREUR remarked, “[f]or every great idea a USAREUR planner had to assure U.S. allies and deter Russian aggression, a USAREUR fiscal law attorney ensured the funding and authority was correctly in place to responsibly support the commander’s intent.” Lieutenant Colonel Mike Friess & Major Michael O’Connor, *Operation Atlantic Resolve: US Army Europe Forces and Regionally Aligned Forces in Action*, 16-4 THE OPERATIONAL LAW QUARTERLY 19, 20 (Apr. 8, 2016).

¹²¹ Information paper from USAREUR Contract & Fiscal Law Division, subject: Appropriate Uses of European Reassurance Initiative (ERI) Funding (4 Oct. 2016) (on file with author).

in the OCO accounts for Military Personnel and O&M.¹²² The Security Assistance Appropriations Act, 2017, also appropriated economic assistance and foreign military financing to countries affected by Russian aggression in DoS funds, separate from EDI.¹²³ The Consolidated Appropriations Act for Fiscal Year 2017 reportedly approved spending levels consistent with the Obama administration's budget request and the FY17 NDAA, though there is no specific discussion of what appropriations are available for EDI within the Appropriations Act itself.¹²⁴ Despite the funding provided for the overall EDI effort, there is a lack of clarity as to how activities carried out under EDI are funded.

The lack of clarity for EDI authorities notwithstanding, efforts to build defense capacity in the Baltic States were bolstered by the overhaul of the security cooperation regime in the FY17 NDAA. In an attempt to simplify the quagmire that security cooperation authorities had become over the past fifteen years, Congress streamlined the dozens of various temporary and permanent sources of authority and codified them under one chapter in Title 10 of the U.S. Code.¹²⁵ Congress noted the increasingly more important role security cooperation plays in DoD operations,¹²⁶ and the below discussion of how EUCOM can leverage these new authorities to augment EDI demonstrates the potential utility such activities can have within NATO's deterrence strategy.

3. *Defense Security Cooperation and the Baltic States*

Since the terrorist attacks of 11 September 2001, Congress granted more authority to the DoD to engage in security cooperation with foreign militaries, a mission originally conducted by the DoS. Over that time, security cooperation became an integral part of the DoD's mission and is considered an important tool for executing its national security

¹²² See Security Assistance Appropriations Act, 2017, Pub. L. No. 114-254, 130 Stat. 1005, 1023-24 (2017).

¹²³ 130 Stat. at 1028, 1030 (providing \$157 million for programs to counter Russian influence and \$200 million for foreign military financing out of the State Department's OCO funds).

¹²⁴ See Consolidated Appropriations Act, 2017, Pub. L. 115-31, 131 Stat. 135, 277 (2017); see U.S. H.R. Comm. on Appropriations, Press Release: Fiscal Year 2017 Defense Bill to Head to House Floor (Mar. 2, 2017), <http://appropriations.house.gov/news/documentsingle.aspx?DocumentID=394777>.

¹²⁵ 10 U.S.C.S. § 301 et seq. (LexisNexis 2017). See discussion *infra* Section V(B) recommending additional changes to the security cooperation enterprise.

¹²⁶ See H.R. REP. NO. 114-840, at 1196 (2016).

responsibilities.¹²⁷ The FY17 NDAA overhauled the previously unwieldy patchwork of authorities that made up the security cooperation regime and provides authority for the DoD to enhance interoperability and increase defense capability of friendly foreign militaries. As building partner capacity with newer NATO members is one of the five lines of effort under EDI,¹²⁸ these new authorities should be leveraged to the maximum extent possible by EUCOM in the Baltic States to ensure sufficient capability exists in that vulnerable region to deter Russia aggression. However, as discussed below, the source of funding for these authorities and whether they can be used in conjunction with EDI funds remains ambiguous.

a. Building Defense Capacity

Key among the changes is the replacement of 10 U.S.C. § 2282 on “Authority to Build the Capacity of Foreign Security Forces” with a new permanent authority that widens the scope of security cooperation the DoD can provide.¹²⁹ While the scope of Section 2282 was limited primarily to counterterrorism and stability operations,¹³⁰ broadens the scope of authorized foreign capacity building to include, among other purposes, training, and equipping for border security and operations or activities that contribute to an international coalition operation that is in the national interest of the United States.¹³¹ Moreover, 10 U.S.C. § 333, Section 2282’s replacement, will permit the DoD to provide lethal equipment on a global scale, which it was unable to do under Section 2282.¹³² Finally, Section 333 allows the DoD to support the sustainment of previously provided equipment to foreign partners, whereas such sustainment was previously under the exclusive purview of the DoS through its Foreign

¹²⁷ LIANA W. ROSEN ET AL., CONG. RESEARCH SERV., R44673, SECURITY COOPERATION: COMPARISON OF PROPOSED PROVISIONS FOR THE FY2017 NATIONAL DEFENSE AUTHORIZATION ACT (NDAA) 1 (2016) [hereinafter ROSEN ET AL.].

¹²⁸ FY17 BUDGET REQUEST, *supra* note 36, at 1.

¹²⁹ *See id.* at 4-5.

¹³⁰ 10 U.S.C. § 2282(a) (2016). 10 U.S.C. § 2282 was 270 days after the 2017 NDAA was enacted. FY17 NDAA, Pub. L. No. 114-328, § 1241, 130 Stat. 2000, 2503 (2016). President Obama signed the Act on 23 December 2016, so the section was repealed on 18 September 2017. *See* 130 Stat. at 2000.

¹³¹ 10 U.S.C. § 333(a).

¹³² 10 U.S.C. § 333(c)(1), authorizing the provision and sustainment of defense articles, defined as “any weapon, weapons system, munition, aircraft, vessel, boat or other implement of war” by 22 U.S.C. § 2403(d)(1); ROSEN ET AL., *supra* note 127, at 5.

Military Financing account.¹³³ This bureaucratic anachronism resulted in equipment at risk of disrepair, misuse, and inoperability by the foreign recipient.¹³⁴

Under the definitions section of the Security Cooperation chapter, security cooperation programs, such as those authorized by Section 333, include building and developing allied security capabilities for self-defense and building relationships that promote specific U.S. security interests.¹³⁵ The DoD should utilize these new authorities to build capacity in the security forces of the Baltic States in a way that it was unable to do so under the previous law. However, because Section 333 did not become law until the final days of Fiscal Year 2017 when it replaces Section 2282,¹³⁶ the utility of this new authority was largely unknown in FY17 and remains little used due to the complexity of funding Section 333 activities. Section 333 provides the sole source of funding shall come out of amounts authorized and appropriated for such fiscal year for O&M, Defense-wide, and available for the Defense Security Cooperation Agency.¹³⁷ However, Section 1241 of the FY17 NDAA adds additional sources of funding for Fiscal Year 2017 relevant to the Baltic States, including O&M Defense-wide, available for the Defense Security Cooperation Agency as specified in the funding table in Section 4301 of the FY17 NDAA,¹³⁸ as well as for the same line of items in the OCO O&M funding table in Section 4302.¹³⁹ The dual funding

¹³³ ROSEN ET AL., *supra* note 127, at 5 n.15. The conference report to the NDAA noted the expectation that “there is a plan to transition sustainment support from DoD to other sources of funding, such as foreign countries’ national funds” for the sustainment of equipment provided under this authority. H.R. REP. NO. 114-840, at 1198 (2016). The sustainment is therefore generally limited to five years, unless the DoD provides written justification that sustainment support in excess of five years will enhance the national security of the United States. § 1241, 130 Stat. 2500-01 (to be codified at 10 U.S.C. § 333(d)-(e)).

¹³⁴ *See id.*

¹³⁵ *See* 10 U.S.C.S. § 301(7) (LexisNexis 2017); 10 U.S.C. § 333(a).

¹³⁶ *See* § 1241(d)(5), 130 Stat. at 2503.

¹³⁷ 10 U.S.C. § 333(g).

¹³⁸ § 1241(d)(2)(A), 130 Stat. at 2502; § 4301, 130 Stat. at 2861 (authorizing \$621.8 million in funding for the Defense Security Cooperation Agency). The House-passed bill for the Department of Defense Appropriation Act provided up to \$480 million in funds available until 30 September 2018, under the title of Defense-wide O&M to “provide support and assistance to foreign security forces . . . to conduct, support or facilitate counterterrorism, crisis response, or other Department of Defense security cooperation programs.” Dep’t of Def. Appropriation Act, H.R. 1301, 115th Cong. (as passed by H.R., Mar. 8, 2017).

¹³⁹ § 1241(d)(2)(C), 130 Stat. at 2502-03; § 4301, 130 Stat. at 2867 (authorizing \$2.16 billion in funding for the Defense Security Cooperation Agency). Under the title of

sources, O&M and OCO O&M, highlight the potential overlap between Section 333 capacity building, which are funded by O&M, and EDI capacity building, which is funded by OCO O&M. To avoid obligating funds from the wrong account, commanders must know whether the activity falls under EDI, and whether security cooperation funds can be used in addition to EDI or exclusively. Clarifying legislation can help resolve this confusion.¹⁴⁰

b. Operational Support to Foreign Forces

In addition to the replacement of Section 2282, the FY17 NDAA greatly expands the authority to provide support for conduct of operations to friendly foreign countries, replacing Section 1207 from the Fiscal Year 2016 NDAA, which was limited to providing support to African countries conducting counterterrorism activities.¹⁴¹ Section 1245 of the FY17 NDAA, codified at 10 U.S.C. § 331, greatly expands the scope of the previous authority by eliminating geographic limitations.¹⁴² This new authority provides funding of logistic support, supplies, and services to security forces in a friendly country, as well as small-scale construction projects to facilitate friendly country participation in U.S.-supported operations.¹⁴³

One provision that, if utilized by EUCOM, could meaningfully assist improving the defense capability in the Baltic States is the special procurement authority that allows the DoD to procure equipment “for the purpose of the loan of such equipment to the military forces of a friendly foreign country participating in a U.S.-supported coalition or combined operation.”¹⁴⁴ This is “to enhance capabilities or to increase interoperability with [U.S. forces] and other coalition partners.”¹⁴⁵ Because the intent of the authority is that the friendly country will

Defense-wide O&M for OCO, the House-passed bill for the Department of Defense Appropriation Act provided up to \$750 million in funds available until 30 September 2018, to “provide support and assistance to foreign security forces . . . to conduct, support or facilitate counterterrorism, crisis response, or other Department of Defense security cooperation programs.” H.R. 1301, 115th Cong. (as passed by H.R., Mar. 8, 2017).

¹⁴⁰ See discussion *infra* Section V(C).

¹⁴¹ See FY16 NDAA, Pub. L. No. 114-92, § 1207, 129 Stat. 726, 1040 (2015).

¹⁴² See § 1245, 130 Stat. at 2517 (amending the current 10 U.S.C. § 127d, and repealing § 1207, 129 Stat. at 1040).

¹⁴³ 10 U.S.C.S. § 331(c) (LexisNexis 2017).

¹⁴⁴ 10 U.S.C.S. § 331(c)(3) (LexisNexis 2017).

¹⁴⁵ *Id.*

reimburse the United States for the procurement, or the U.S. forces can to reuse the equipment, there is no limitation on the value of the procurement.¹⁴⁶

The DoD should utilize this authorization to procure an excess quantity of U.S.-used systems to ensure friendly forces use and train on the same equipment as U.S. forces. Use of equipment, coupled with training and exercises will increase familiarity and interoperability with U.S. forces and provide friendly foreign forces with confidence in operating weapon systems alongside the United States. A successful loan may influence the friendly force's procurement decisions, leading to more effective use of defense spending by the friendly force at no real cost to the United States, as the equipment is returned at the end of the loan period. However, it remains unclear as to what limitations on the type of procurement there are, if any. For example, the law is silent as to whether this section authorizes procurement for loaning weapon systems.¹⁴⁷ Nor does it provide the maximum duration of any loan. Nonetheless, the DoD should leverage the seemingly broad authority granted by Congress to procure equipment for the purpose of loaning such equipment to its allies to improve interoperability and bolster the defense capability of its allies in Eastern Europe.

c. Training and Exercises

¹⁴⁶ 10 U.S.C.S. § 331(g) (LexisNexis 2017). The loan should be performed in accordance with the appropriate cross-servicing agreement under 10 U.S.C. § 2342 or acquisition and loan agreement under 10 U.S.C. § 2341 with the recipient country. This bilateral agreement makes clear the conditions of such loan and should assign responsibility for reimbursement or replacement of the equipment. 10 U.S.C. § 2344 (2016).

¹⁴⁷ Although Section 331 discussed logistic support, which is limited by 10 U.S.C. § 2350(1) and excludes “nonlethal items of military equipment which are not designated as significant military equipment on the United States Munitions List promulgated pursuant to section 38(a)(1) of the Arms Export Control Act,” the subsection authorizing the procurement of equipment for the purpose of the loan of such equipment does not state that the purpose is for logistic support. 10 U.S.C.S. § 331(c)(3) (LexisNexis 2017). In fact, the purpose appears much broader: “the loan of such equipment to those forces [is] to *enhance capabilities* or to *increase interoperability*.” *Id.* (emphasis added). This suggests that the Arms Export Control Act does not limit the authority; thus procurement and loan of lethal items may be authorized. *See id.*

Finally, perhaps the best way the DoD can maximize the operational readiness of its NATO partners is through extensive training and exercises.¹⁴⁸ Training of NATO members near Russia is essential to ensure those members, such as the Baltic States and Poland, can cope with hybrid warfare that may not trigger Article 5.¹⁴⁹ Moreover, frequent military exercises with U.S. forces can enhance those armed forces' capabilities. Wide-scale multinational exercises on NATO's eastern flank would also serve a dual purpose of reassuring allies and warning foes.¹⁵⁰ Recognizing the importance of multinational training and exercises, Congress sought to provide broader authority for commanders of combatant commands and service secretaries to authorize payment of certain expenses for friendly foreign countries resulting from participating in training and exercises with U.S. general forces.¹⁵¹ This expands the previous authority, which was limited to payment of only incremental expenses to developing countries when authorized by the Secretary of Defense. This was only after a determination that "the participation by such country is necessary to the achievement of the fundamental objectives of the exercise and that those objectives cannot be achieved unless the United States provides the incremental expenses incurred by such country."¹⁵² The new authority requires only the determination by the Secretary of Defense that support of the friendly foreign force is in the national security interest of the United States to do so, and expands the scope and type of payment for training and exercise expenses.¹⁵³ It allows a commander of a combatant command to authorize payment for expenses associated with training, exercises, deployment to such events, incremental expenses, and small-scale construction directly related to the effective accomplishment of such events, with the prior approval of the Secretary of Defense.¹⁵⁴

Beyond the benefit of paying for expenses to attract participation by other countries, this authority also appears to permit foreign forces to

¹⁴⁸ Interoperability is important in achieving effective multinational capability without sacrificing U.S. capabilities. JOINT CHIEFS OF STAFF, JOINT PUB. 3-16, MULTINATIONAL OPERATIONS I-6 (16 July 2013). Factors that promote interoperability within multinational coalitions include multinational training exercises. *Id.* at I-9.

¹⁴⁹ See RICHARD HAASS, A WORLD IN DISARRAY 217 (2017) [hereinafter HAASS].

¹⁵⁰ See *id.* at 218.

¹⁵¹ See FY17 NDAA, Pub. L. No. 114-328, § 1244, 130 Stat. 2000, 2515 (2016) (codified at 10 U.S.C. § 321 (LexisNexis 2017)). Similar, but separate, authority for payment of expenses for friendly countries engaged in training or exercises with U.S. Special Operations is codified at 10 U.S.C. § 322.

¹⁵² 10 U.S.C. § 2010 (2016).

¹⁵³ See 10 U.S.C.S. § 321(a) (LexisNexis 2017).

¹⁵⁴ 10 U.S.C. § 321(f) (LexisNexis 2017).

develop new capacity by allowing for training to improve the capacity of foreign forces beyond minimal level necessary to achieve interoperability, safety, or familiarization with U.S. forces in preparing for combined military operations.”¹⁵⁵ While the new law states that the primary purpose of the training and exercises is to train U.S. forces,¹⁵⁶ there is no limiting language, such as restricting the training of foreign forces to only safety and interoperability. Thus, so long as U.S. forces are receiving the benefit of the training and exercises, the participation by other friendly forces and use of this authority for funding is permitted. Granting the DoD this authority allows it to better program more robust exercises and training focused on capacity building of the Baltic States’ forces.

Consistent with the intent of EDI and RAP, EUCOM should use this authority to the fullest extent practicable to integrate multinational forces, particularly in command and control, intelligence, surveillance, reconnaissance, and cyber defense, where interoperability is critical to defending against Russian aggression.¹⁵⁷ Moreover, this authority’s provision for small-scale construction permits to building necessary infrastructure within Eastern Europe that would otherwise be challenging for approval. Provided the project does not represent a foreign assistance program, structures built in support of U.S. military personnel participating in overseas training and exercises need not be temporary structures.¹⁵⁸ The explicit limitation on such military construction is that no one project may exceed \$750,000 in costs,¹⁵⁹ and the implicit limitation comes from the absence of any authority for the maintenance of such construction projects after the completion of the exercise. Nonetheless, this authority appears to permit the United States to fund and build in a

¹⁵⁵ DAVID E. THALER ET AL., RAND, FROM PATCHWORK TO FRAMEWORK: A REVIEW OF TITLE 10 AUTHORITIES FOR SECURITY COOPERATION 58 (2016) [hereinafter THALER ET AL.]. Typically, DoD training with foreign forces is limited to “little t” training, or training restricted to promoting safety and interoperability with U.S. forces; however, Section 1203 of the NDAA for Fiscal Year 2014, which is repealed by this authority, was intended to improve the military capacity of allied forces. *Id.* at 58, n. 19. While not explicitly stated, a contextual interpretation of the new authority implies that DoD-funded capacity building training for foreign forces is authorized.

¹⁵⁶ 10 U.S.C.S. § 321(c) (LexisNexis 2017).

¹⁵⁷ See CHIVVIS ET AL., *supra* note 9, at 6-7.

¹⁵⁸ See CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 4600.02A, EXERCISE RELATED CONSTRUCTION (ERC) PROGRAM MANAGEMENT encl. A, para. 5 (18 Mar. 2011).

¹⁵⁹ See 10 U.S.C.S. § 301(8) (LexisNexis 2017). There is also authority to pay for expenses that begin in one fiscal year but end in the next fiscal year. 10 U.S.C.S. § 321(d) (LexisNexis 2017). This authority will provide much needed flexibility to ensure the completion of construction projects, as well as plan for exercises and training that cross fiscal years.

friendly foreign country, and the beneficiary can then decide to keep and maintain the project for its own future use. The resulting infrastructure will provide training and exercise opportunities where there may have been none absent this authority.

Although Section 321 provides authority for training with friendly forces and payment of incremental training and exercise expenses like the more specific Section 1233 of the FY17 NDAA, which provides funding specifically for Eastern European countries, EUCOM can still use Section 321 authority to support the Baltic States. Section 1233 specifically states its authority is in addition to any other authority providing training for national security forces of a foreign country.¹⁶⁰ This allows for additional funding of this activity if necessary, and because Section 321 is a permanent authorization, it will still be available after 30 September 2018, when the authority in Section 1233 expires.¹⁶¹

Despite the clear benefits of using this overhauled authority in Eastern Europe, there are potentially damaging limitations written into the law. Payment of incremental expenses, such as fuel, rations, transportation, and training ammunition, is generally restricted to developing countries.¹⁶² Also, the primary purpose of the training and exercises must be to train U.S. forces,¹⁶³ possibly limiting the types of training that, while rudimentary and superfluous for U.S. forces, is critical to forces in the Baltic States. There is no specific funding for this authority, requiring programs under this authority to compete with all other joint exercises throughout the DoD for limited O&M funds.¹⁶⁴ While this process for funding joint exercises remains the same as prior to the enactment of the FY17 NDAA,¹⁶⁵ Congress can ensure such funding and execution of such programs are prioritized, as discussed in Section V(C).

Efforts such as EDI and security cooperation reform are necessary steps towards defending the U.S.'s allies from Russia. However, these

¹⁶⁰ FY17 NDAA, Pub. L. No. 114-328, § 1233, 130 Stat. 2000, 2488-89 (2016) (extending FY16 NDAA, Pub. L. No. 114-92, § 1251(f), 129 Stat. 726, 1071). *See also supra* note 114 and accompanying text.

¹⁶¹ § 1233(c), 130 Stat. at 2488-89.

¹⁶² *See* 10 U.S.C.S. § 321(f)(2)(C) (LexisNexis 2017). The Secretary of Defense must define “developing countries” by 18 September 2017, 270 days after enactment of the FY17 NDAA. § 1241(n), 130 Stat. at 2510-11. Thus, it is currently unknown whether the Baltic States are eligible for payment of incremental expenses.

¹⁶³ 10 U.S.C.S. § 321(c) (LexisNexis 2017).

¹⁶⁴ CHAIRMAN, JOINT CHIEFS OF STAFF, MANUAL 3511.01, JOINT TRAINING RESOURCES FOR THE ARMED FORCES OF THE UNITED STATES app. D to encl. B, para. 1 (26 May 2015).

¹⁶⁵ *Id.*

laudable efforts remain insufficient. Congress must maximize the effect of U.S. efforts to deter Russian encroachment into NATO by removing impediments to intelligent planning, expanding upon recent reforms in security cooperation, and exerting legislative influence to improve the effectiveness and efficiency of NATO funding.

V. Recommendations for Congress to Improve NATO's Deterrence and Close the Defense Capabilities Gap

Section IV identified several issues with current fiscal law that represent obstacles to the United States effectively supporting its NATO allies in a deterrence-based strategy against Russian aggression. These issues underscore the importance of sound fiscal legislation to the success of NATO's mission and reinforce the critical role Congress plays in the collective defense. Congress must resolve these issues to increase the efficacy of U.S. forces and improve the defense capability of the Baltic States; its failure to do so could result in catastrophe. However, improved fiscal law is attainable and Russian encroachment into NATO territory is preventable. This section provides recommendations to Congress to overcome those obstacles, including ending sequestration, easing burdensome restrictions on security cooperation laws, clarifying fiscal authorities to provide clear and flexible funding sources, and influencing partner spending through conditional aid.

A. Repeal the BCA

One of the major obstacles to adequately responding to Russian aggression is the lack of consistent and predictable funding. While it is imperative for the European contingent of the Alliance to increase spending towards the collective defense, the United States must also reassess its spending in the European theater. More robust funding and flexibility to program future activities focused on collective defense in Eastern Europe is required to address the potential Article 5-triggering threat from Moscow adequately. EDI funding is a good start, but based on Russia's focused strategy to disrupt NATO and war gaming predictions, it appears sustained, if not increased, funding is

required to deter a Russian attack on the Baltic States.¹⁶⁶ Moreover, although EUCOM may have “the authority to plan and conduct security cooperation,” geographic combatant commanders “lack sufficient dedicated resources to support their security cooperation strategy.”¹⁶⁷ However, additional spending by the United States towards EDI will be difficult to obtain in future years due to Congress’s self-imposed restrictions under the BCA, known as sequestration.¹⁶⁸ Intended to reduce the federal debt and deficit, sequestration cuts spending automatically when cap levels, which were determined in 2011 and adjusted several times since, are breached.¹⁶⁹ Because the law rigidly applies automatically when Congress appropriates funds above the cap, sequestration effectively limits the flexibility and funding of defense operations.¹⁷⁰ Within the DoD, the BCA has exacerbated the inter-service rivalries and disconnecting strategy and force plans from long-term spending projections.¹⁷¹ Furthermore, as OCO is exempt from the BCA caps, both the President and Congress have circumvented the defense spending cap by funding base budget activities through OCO, including the ERI, which does not meet the legal criteria for OCO funding.¹⁷²

¹⁶⁶ See CANCIAN & SAMP, *supra* note 93 (arguing the FY17 NDAA level ERI budget of \$3.4 billion is not enough for the U.S. to “rebuild its capabilities to contend with Russia’s employment of advanced military capabilities—especially anti-access/area-denial (A2/AD), electronic warfare (EW), and unmanned aerial vehicles (UAVs)—and a sophisticated mix of deception and coercion in the political, economic, and information spaces”).

¹⁶⁷ GREGORY J. DYKEMAN, SECURITY COOPERATION: A KEY TO THE CHALLENGES OF THE 21ST CENTURY 5 (2007), <https://ssi.armywarcollege.edu/pubs/display.cfm?pubID=820>.

¹⁶⁸ See GRANT A. DRIESSEN & MARC LABONTE, CONG. RESEARCH SERV., R42506, THE BUDGET CONTROL ACT OF 2011 AS AMENDED: BUDGETARY EFFECTS 2 (2015).

Sequestration is a process that refers to “the cancellation of budgetary resources provided by discretionary appropriations or direct spending law.” 2 U.S.C. § 900(c)(2) (2016).

¹⁶⁹ See *id.* at 1-3.

¹⁷⁰ See PAT TOWELL & LYNN M. WILLIAMS, CONG. RESEARCH SERV., R44454, DEFENSE: FY2017 BUDGET REQUEST, AUTHORIZATION, AND APPROPRIATIONS 3 (Apr. 12, 2016) [hereinafter TOWELL & WILLIAMS]. “Sequestration occurs in any year in which appropriated funds exceed the statutory caps for either the defense or non-defense category than the relevant cap allows, and reduces the amount appropriated to the level of the cap through *largely indiscriminate, across-the board* reductions.” *Id.* (emphasis added).

¹⁷¹ ANTHONY H. CORDESMAN, CTR. FOR STRATEGIC & INT’L STUD., TRUMP ON NATIONAL SECURITY: CALLING FOR MORE SPENDING IS NOT ENOUGH 7 (Mar. 2, 2017). Explaining how the BCA has made the budget cycle worse, Cordesman analogizes the service components’ budget planning process under the BCA to “the military equivalent of the food fight that John Belushi led in *Animal House*.” *Id.*

¹⁷² See *supra* Section IV(B)(2). While the BCA was originally intended to force Congress to examine its fiscal policies, the severe imposed austerity of the spending caps “have controlled spending in an irresponsible way while encouraging Congress to game

These fiscal gymnastics result in unpredictability across fiscal years and in delays to authorizations as the NDAA is regularly held hostage by the political process.¹⁷³ The Senate Armed Services Committee recognized the problem with the DoD budgeting EDI activities in the OCO budget, and recommended efforts such as EDI be in the base budget to “address long-term stability on the European continent, reassure our European allies and partners, and deter further Russian aggression.”¹⁷⁴ The bicameral conference committee also encouraged the DoD “to include EDI resources and programs in the base budget in order to ensure persistent funding support.”¹⁷⁵ Yet, despite Congress’s message to the DoD, the BCA forces the executive branch to consider a lose-lose situation: budget EDI activities in the base budget and risk exceeding the budget cap, or make further cuts to already constrained defense spending.

Recent studies and war-gaming scenarios demonstrate the cumulative effects of years of limited defense spending on the readiness of U.S. forces. RAND Corporation, attempting to create budget scenarios sufficient to address the current myriad of national security threats, concluded:

Fielding military capabilities sufficient, in conjunction with those of our allies and partners, to deal with these disparate challenges will require substantial and sustained investments in a wide range of programs and initiatives well beyond what would be feasible under the terms of the Budget Control Act. Without such investments, America’s credibility and influence internationally, the safety and security of its nuclear arsenal, and the viability of its all-volunteer force could erode.¹⁷⁶

the system.” Shai Akabas, Ben Ritz & Mark White, *Congress Should Find Long-term Solution, Not Tricks to Avoid Defense Caps*, BIPARTISAN POLICY CENTER BLOG (June 22, 2015), <http://bipartisanpolicy.org/blog/congress-should-find-long-term-solution-not-tricks-to-avoid-defense-caps/>.

¹⁷³ See TOWELL & WILLIAMS, *supra* note 170, at 4. For Fiscal Year 2017, two issues have caused delay on all appropriation bills: whether OCO funding allows for a higher total appropriation for DoD than the Administration proposed and the demand of some House members to offset the increased non-defense spending by reductions in mandatory spending. *Id.*

¹⁷⁴ S. REP. NO. 114-255, at 313 (2016).

¹⁷⁵ H.R. REP. NO. 114-840, at 1218 (2016).

¹⁷⁶ DAVID OCHMANEK ET AL., RAND, AMERICA’S SECURITY DEFICIT: ADDRESSING THE IMBALANCE BETWEEN STRATEGY AND RESOURCES IN A TURBULENT WORLD 29 (2015).

Repealing the BCA, and ending sequestration, is the first step to implementing a sound deterrent strategy against Russia. The repeal would allow the President to budget and Congress to appropriate funds according to the current needs to provide for the common defense, and not to an arbitrary dollar amount set by a previous Congress, years prior to the current fiscal year. Moreover, the level of defense spending would have no impact on non-defense spending and will eliminate the need to budget, appropriate, and apportion funds through a separate funding stream under OCO, saving significant time and money in the planning process.

Finally, repealing the BCA would provide the flexibility to address unforeseen national security issues. Since 2014, the DoD addressed the rise of the Islamic State, the Russian invasion and annexation of Crimea, North Korean aggression, Chinese “island building” in the South China Sea, numerous terrorist attacks, a refugee crisis, as well as Ebola virus outbreaks.¹⁷⁷ The budget caps under the BCA did not account for any of these national security threats, yet the BCA forced the President to budget defense spending to combat each of these unforeseen issues appropriately. Continued or increased Russian aggression would make this already difficult task a Sisyphean effort.

However, repealing the BCA is not a solution in and of itself. The numerous threats, both internal and external, facing the United States are too many “to manage on its own, even if the new Congress repeals the sequester and defense spending is restored and maintained at a higher level.”¹⁷⁸ To defend its allies from Russia, Congress needs to ensure the United States maintains its status within NATO through strong leadership and assist its allies in building military capability to augment U.S. forces.

B. Continue to Reform the Security Cooperation Enterprise

While engagement with foreign states is typically within the purview of the DoS,¹⁷⁹ the last fifteen years has seen a growing emphasis on the role of the DoD in security cooperation activities.¹⁸⁰ Corresponding to that

¹⁷⁷ See TOWELL & WILLIAMS, *supra* note 170, at 2.

¹⁷⁸ Shearer, *supra* note 43.

¹⁷⁹ Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. § 2151 (2012)).

¹⁸⁰ STAFF OF S. COMM. ON ARMED SERVICES, 114TH CONG., NDAA FY17 EXECUTIVE SUMMARY 14 (2016) [hereinafter NDAA FY17 EXECUTIVE SUMMARY].

increased role, Congress enabled the DoD to respond to threats and build partner capacity through a myriad of authorities and associated funding.¹⁸¹ The increase in the number of authorities permitting the DoD to engage with foreign militaries, though instrumental in commanders' efforts to improve interoperability in combined operations, resulted in a security cooperation enterprise that is incredibly cumbersome, complicating the ability of the DoD to effectively prioritize, plan, execute, and oversee these activities.¹⁸²

The FY17 NDAA attempted to streamline the security cooperation enterprise by consolidating various train and equip authorities into one statute and codifying other security cooperation authorities into one chapter of Title 10 of the U.S. Code.¹⁸³ While this reform represented a vast improvement to the previous patchwork of legal authorities and assist DoD efforts to build capacity in the Baltic States under EDI, Congress can and should continue to improve security cooperation laws to maximize its impact in deterring Russian aggression against NATO allies.¹⁸⁴ Two courses of action Congress can take to improve efforts in accordance with the intent of EDI is to 1) authorize multi-year appropriations for EDI activities and 2) exempt certain expenditures of jointly procured equipment and military construction with certain allies, such as the Baltic States and Poland, from DoS concurrence.

1. Relax Funding Restrictions on Periods of Availability

Most of the authorities within the security cooperation enterprise have a current fiscal year period of availability,¹⁸⁵ permitting the

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ 10 U.S.C.S. § 301 et seq. (LexisNexis 2017); NDAA FY17 EXECUTIVE SUMMARY, *supra* note 180, at 14; *see supra* Section IV(B)(3).

¹⁸⁴ Congress appears to understand the potential shortcomings of the FY17 NDAA with respect to security cooperation reform as it requires the Secretary of Defense to have an independent evaluation conducted in order to assess the strategic framework and recommend areas in which additional guidance “is necessary to achieve greater alignment between the Department of Defense security cooperation activities and the strategic goals and priorities identified within the strategic framework.” H.R. REP. NO. 114-840, at 481 (2016).

¹⁸⁵ Of the twenty-six sections in the new security cooperation chapter of Title 10, only two make funds available across fiscal years. §§ 1241-53, 130 Stat. at 2496-2532. The

obligation of appropriated funds only within the current fiscal year.¹⁸⁶ However, the complex nature of security cooperation makes it difficult for commanders to identify needs, plan an activity, coordinate appropriately, and receive authorization all within one fiscal year.¹⁸⁷ While the FY17 NDAA permitted training and exercises to cross fiscal years, if started in one and completed in another,¹⁸⁸ time remains a severe constraint on most security cooperation activities. Additional time to plan activities will lead to better use of funds, serving a dual benefit of providing better products to foreign forces and more appropriately utilizing U.S. resources. The flexibility gained by relaxing the time constraints will permit the DoD to complete construction projects that would otherwise not get approved despite the apparent necessity as it is nearly impossible to manage under current the authorities. Lengthening the time of the authorities would also permit planning more complex exercises, which is especially important in areas such as cyber defense and hybrid warfare that are particularly relevant to NATO's counter-Russian aggression strategy.¹⁸⁹ Such relief would likewise enable U.S. forces to complete construction projects and "to accommodate delays in the ordering and delivery of equipment" in NATO partner-nations.¹⁹⁰ Adjusting the period of availability of security cooperation funds to "two-year funding could better account for the unpredictability of foreign partner schedules."¹⁹¹

Prior to the enactment of the FY17 NDAA, RAND Corporation concluded that even modest extensions of the time available for security cooperation authorities would "help take some of the 'guesswork' out of [security cooperation] planning while continuing to facilitate close

two exceptions are Sections 321 and 333. § 1241, 130 Stat. at 2502 (to be codified at 10 U.S.C. § 333(g)(2)); 10 U.S.C.S. § 321(d) (LexisNexis 2017).

¹⁸⁶ GAO, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 64 (2005) [hereinafter GAO GLOSSARY]; 31 U.S.C. § 1301(c)(2) (2016) (providing that an appropriation is authorized for only one fiscal year unless the appropriation "expressly provides that it is available after the fiscal year covered by the law in which it appears"; see, e.g., Consolidated Appropriations Act, 2015, Pub. L. No. 113-235, § 8003, 128 Stat. 5 (2015) (stating "[n]o part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year, unless so provided herein").

¹⁸⁷ See THALER ET AL., *supra* note 155, at 53-54.

¹⁸⁸ See § 1241, 130 Stat. at 2502 (to be codified at 10 U.S.C. § 333(g)(2)); 10 U.S.C.S. § 321(d) (LexisNexis 2017).

¹⁸⁹ THALER ET AL., *supra* note 155, at 59.

¹⁹⁰ See *id.*

¹⁹¹ *Id.* at 54.

congressional oversight of DoD activities.”¹⁹² The report recommended extending funding to two years for military-to-military authorities and three years for train-and-equip statutes, as well as relaxing obligation timelines.¹⁹³ While Congress did not comply with that recommendation in its overhaul of security cooperation authorities in its FY17 NDAA,¹⁹⁴ it is worth revisiting for future NDAs. The congressional prerogative for transparency and oversight of the DoD may limit the desire of Congress to elongate the funding period, particularly in a field such as security cooperation and national security; however, the competing interest of ensuring commanders are able to perform their mission should override any trepidation by Congress under these circumstances.

2. *Provide Exemptions from DoS Coordination*

Another way Congress can help streamline the security cooperation process is to legislate exemptions for certain activities from prior coordination between DoD and DoS. There is the potential for relatively low-cost, high-reward activities that may not be possible if the planning takes too long. Congress recognized the process for coordination between the two departments on security cooperation programs “is too ad-hoc in nature and often elevates responsibility for such coordination, particularly those requiring concurrence, to the senior-most echelons of the respective organizations—to include the Deputy Secretary or Secretary level—resulting in a cumbersome and time-intensive process.”¹⁹⁵ Although the legislative history is clear, Congress intended for the secretaries to “designate individuals at the lowest level in their respective organizations with responsibility for such coordination,”¹⁹⁶ the new laws still require concurrence and coordination at the secretary level.¹⁹⁷

¹⁹² *Id.* at 86.

¹⁹³ *Id.*

¹⁹⁴ See FY17 NDAA, Pub. L. No. 114-328, §§ 1241, 1244, and 1245, 130 Stat. 2000, 2496, 2515, 2517 (2016).

¹⁹⁵ H.R. REP. NO. 114-840, at 1198 (2016).

¹⁹⁶ *Id.*

¹⁹⁷ See 10 U.S.C.S. § 331(e) (LexisNexis 2017). Section 331 requires coordination with the Secretary of State as the Secretary of Defense may designate operations to support only with the concurrence of the Secretary of State. *Id.*

Foreign assistance and security cooperation are traditionally diplomatic functions; however, the nature of coalition defense requires a singular voice, and in many cases, that voice should come from the Secretary of Defense. Thus, for small-scale projects that support the mission essential tasks of the combatant commander, Congress should limit the requirements for pre-coordination and concurrence. Rather than require additional levels of bureaucratic red tape that limit the utility and effectiveness of an otherwise useful security cooperation authorization, Congress could exempt logistic support, loans of military equipment, and certain small-scale construction projects from the requirement of prior DoS concurrence for each activity. By shifting the focus from prior coordination to reporting, the DoS and Congress will maintain oversight while allowing the DoD the necessary flexibility to provide support when and where it is needed. The exemption from inter-agency concurrence could be for specified equipment, dollar thresholds, as well as for properly vetted and approved recipient countries, such as the Baltic States and Poland, that have supported the United States in its operations in Afghanistan, meet the NATO defense spending thresholds, support democracy, human rights and civilian control of the military, and have a clear connection to the United States' security interests.

C. Provide Specific Lines of Funding for EDI Activities

As previously discussed, one of the problems with EDI as a means to achieving the United States' strategic goals in the Baltic States is the lack of clarity in funding activities. This hampers efforts to plan, program, budget, and execute activities that could provide meaningful support to the deterrence effort.¹⁹⁸ Although the DoD submits a line item budget for EDI funding requests,¹⁹⁹ the FY17 NDAA did not provide funding authorizations for ERI activities in distinct line items in the funding tables.²⁰⁰

Congress should address this omission to ensure the greatest use of EDI funds possible. Unlike EDI, other operations funded by OCO funds, such as the Afghanistan Security Forces Fund (ASFF) and Counter-ISIL Fund, provide specific line item funding authorizations in the Funding

¹⁹⁸ See *supra* Section IV(B)(2).

¹⁹⁹ FY17 BUDGET REQUEST, *supra* note 36, at 24-28.

²⁰⁰ FY17 NDAA, Pub. L. No. 114-328, § 4302, 130 Stat. 2000, 2862 (2016).

Tables of the FY17 NDAA.²⁰¹ These authorizations provide the commander with clear limits and sources of funding. The ASFF provides a single appropriation with a two-year period of availability to various types of authorized assistance.²⁰² Accordingly, it is easier to align the authority with the source of funding available for each security cooperation activity.

Using ASFF funding as an example, Congress should simplify the funding authorization for EDI activities and earmark funds within each appropriation.²⁰³ This will ensure greater ease in accounting and planning activities consistent with Congress's intent to deter Russian aggression through support of NATO. Designating a portion of appropriated funds specifically for EDI will avoid competition between other non-ERI authorities that are funded with the same money.

Moreover, separate lines of authority specific to EDI will eliminate confusion as to what authority EUCOM should use when multiple appropriations appear to authorize the use of funds for the same purpose. When there are multiple authorizations to use funds for the same purpose, the agency must elect which appropriation to use.²⁰⁴ Due to the EDI's line of effort focusing on building capacity of foreign nations' security forces overlapping with security cooperation authorities,²⁰⁵ there is confusion as to whether EUCOM can use security cooperation funds in addition to EDI funds, or whether one authority is the more specific of the two and must be used exclusively for its purpose. Separate and specific lines of accounting will at least disentangle funds with common purposes. To ensure maximum utility of all the fiscal authorities relevant to defending NATO allies from Russian aggression, Congress should specifically authorize the use of security cooperation appropriations provided for

²⁰¹ § 4302, 130 Stat. at 2862-63.

²⁰² FY15 NDAA, Pub. L. No. 110-181, § 1513, 122 Stat. 428 (2008); FY19 NDAA, Pub. L. No. 115-232, § 4302, 132 Stat. 1636 (2018).

²⁰³ See GAO GLOSSARY, *supra* note 186, at 46 (defining "earmarking" as "[d]esignating any portion of a lump-sum amount for particular purposes by means of legislative language").

²⁰⁴ Payment of SES Performance Awards of the R.R. Ret. Board's Off. of Inspector Gen., 68 Comp. Gen. 337, 339 (1989).

²⁰⁵ See *supra* Section IV(B)(3)(c).

DoD-wide use in addition to EDI funds for building capacity of the forces in the Baltic States.²⁰⁶

D. Influence Foreign Military Spending through Conditional Funding

The above recommendations to repeal BCA, remove cumbersome restrictions on security cooperation authorities, and clarify funding sources for U.S. efforts to support its allies all reflect the power Congress has on the conduct of U.S. military operations through fiscal law. However, U.S. money is also a powerful tool that can influence foreign allies.

To fight abroad is a military act, but to persuade enemies or allies that one would fight abroad, under circumstances of great cost and risk, requires more than military capability. It requires projecting intentions. It requires having those intentions . . . and communicating them persuasively to make other countries behave.²⁰⁷

Congress cannot afford to limit its legislative efforts in addressing the United States' role within the context of Russian threats to NATO; it must use its constitutional authority over fiscal law to communicate its intentions and influence military spending by the European contingent of NATO. It is critical for the United States to provide unconditional support to its NATO allies pursuant to Article 5 to ensure meaningful deterrence against Russia. Accordingly, Congress must take care not to undermine that message to the Baltic States, and reaffirm that deterring Russian aggression is the *raison d'être* of the Alliance. Both NATO and Russia should be confident of an unconditional guarantee of U.S. military response should Article 5 be triggered. Conditioning defense spending for activities intended to deter Russian aggression in Eastern Europe would send a mixed message to allies and Russia alike.

²⁰⁶ Examples of instances Congress specifically authorized the use of multiple accounts for the same purpose are 10 U.S.C. § 166a (2016) (providing any amount provided under the Combatant Commander Initiative Funds activities are “in addition to amounts otherwise available for that activity for that fiscal year”) and FY17 NDAA, Pub. L. No. 114-328, § 1237, 130 Stat. 2000, 2495 (2016) (explaining the authority to for the Ukraine Security Assistance Initiation “is in addition to authority to provide assistance and support under title 10, U.S. Code, the Foreign Assistance Act of 1961, the Arms Export Control Act, or any other provision of law”).

²⁰⁷ THOMAS SCHELLING, *ARMS AND INFLUENCE* 36 (1966).

However, funding non-Article 5 activities contingent upon the demonstrated commitment to defense spending and collective security can promote NATO member spending and influence increased defense spending across the Alliance.²⁰⁸ Such conditions would demonstrate the prioritization of collective defense. Conditioning foreign assistance on matters unrelated to defense capabilities can encourage allies to increase their own defense spending in order to maintain or improve their status with the United States. While maintaining the paramount importance of deterrence strategy through collective defense in NATO, the United States should tie some of its foreign assistance spending in Europe for non-Article 5 activities to a country's defense spending. Examples of such activities include counterterrorism training, refugee support, or even trade incentives.

Congress already places conditions on the appropriation of authorized funds on foreign assistance; however, it has not utilized this powerful foreign policy tool to influence NATO member defense spending. When drafting future conditional authorizations, Congress should look to its own example in the FY17 NDAA, for its specific and technical conditions imposed on Ukraine in the Extension and Enhancement of Ukraine Security Assistance Initiative.²⁰⁹ While \$350 million was authorized to be appropriated in Fiscal Year 2017, Congress made available not more than \$175 million in funds to be used for the authorized purposes. The Secretary of Defense, in coordination with the Secretary of State, certified that Ukraine “ha[d] taken substantial actions to make defense institutional reforms, in such areas as civilian control of the military”; increased transparency and accountability in defense procurement; improved transparency to decrease corruption; and sustained improvements of combat capability, among other requirements.²¹⁰ By limiting the amount of assistance, and placing measurable requirements on the beneficiary as a condition to receiving a portion of the funding, Congress is able to maintain some control over the purpose and amount of spending that,

²⁰⁸ Michael O’Hanlon, *Trump’s \$54 Billion Rounding Error*, FOREIGN AFFAIRS (Mar. 1, 2017), <https://www.foreignaffairs.com/articles/2017-03-01/trumps-54-billion-rounding-error>. O’Hanlon laments the prospect of cutting foreign aid programs in order to boost U.S. military spending, arguing conditions-based foreign aid to Iraq gets the United States “leverage and influence, and improves the odds of making current hard-earned military gains durable.” *Id.*

²⁰⁹ FY17 NDAA, Pub. L. No. 114-328, § 1237, 130 Stat. 2000, 2493-95 (2016).

²¹⁰ *See* § 1237, 130 Stat. at 2494.

absent such conditions, are within the exclusive purview of the recipient.

Congress can use similar conditions on future authorizations towards NATO members to influence the amount and purpose of ally defense expenditures. One possibility is to condition some or all Title 10 and Title 22 funding going to each NATO member on their certification, through its annual reporting requirements to the NATO Secretary General, that they have increased their defense spending, or met both defense spending and spending on military equipment targets. Absent certification, the Secretary of Defense can waive the conditions based on his determination that such waiver is in the best interest of the national security of the United States.²¹¹ Another possibility is to focus conditions on the NATO members' commitment to improving combat capability through its spending on research and development or even buying specific weapon systems that promote interoperability with other members of the Alliance, such as cyber defense or intelligence, reconnaissance, and surveillance platforms that are important in countering Russia's hybrid warfare capabilities.

Conditional authorizations for funding foreign aid recognize the reality that there are many other issues, both internal and external, impacting NATO members. The refugee crisis, incidents of terrorism, and nationalism erode the foundations of the European Union. This could lead to decreased military spending and lack of political will to spend precious resources to come to the aid of another NATO member, placing the principles of Article 5, and indeed the very purpose of the Alliance, in question.²¹² Fairly leveraging those threats is a prudent course of action that Congress can take to offer support to U.S. allies, albeit with strings attached, in order to refocus NATO on Article 5 deterrence and boost defense spending. Certain NATO members may see less of a need to meet the NATO defense spending targets, particularly those in the south or the west that have less to fear from Russian aggression than the Baltic States

²¹¹ Waivers of limitations on funding foreign assistance activities based on the Secretary's determination such waiver is in the national security interest of the United States is common. *See, e.g.*, § 1232(c), 130 Stat. at 2488. It is also extremely important in this context as the U.S. should not hold fast to its insistence that NATO members increase defense spending as it may cause more harm than its worth. Regardless of whether certain NATO members fail to increase defense spending to meet the Wales Summit targets, the United States should message clearly to its allies and enemies alike that it will honor its Article 5 obligations and unconditionally support its NATO allies in the event of an attack on its sovereignty.

²¹² *See* Ivo Daalder, Opinion, *Ghost of European Re-nationalism*, POLITICO (Feb. 17, 2017), <http://www.politico.eu/article/ghost-of-european-re-nationalism/>.

or Poland. Those members would face receiving little to no support from the United States in their respective efforts to manage an influx of refugees from the Syrian conflict or train counterterrorism security forces.²¹³ By using a carrot to entice additional defense spending throughout the Alliance, Congress can reinforce a diplomatic truism: that supporting causes, such as the defense of the Baltic States' sovereignty from Russian aggression will earn goodwill from the rest of the Alliance—or more simply, supporting NATO results in NATO support.²¹⁴

In the FY17 NDAA, Congress hinted that it may consider individual NATO member contributions in future foreign assistance authorizations. It decided against expressing the sense of Congress that NATO allies' investments in developing and employing security capabilities should “meet or exceed U.S. efforts in this regard.” Instead, Congress directed the Secretary of Defense to present to the armed services and foreign relations committees an accounting of European investment in security capabilities and efforts to contribute to global security outcomes.²¹⁵ This requirement, along with the reforms to the security cooperation framework that also require country-specific reporting,²¹⁶ indicates Congress may consider implementing conditional funding for NATO members, as they did with Ukraine.

Conditional spending provisions from Congress could also create secondary effects that positively impact the amount of defense spending throughout NATO. It is reasonably foreseeable that the European community could exert its own diplomatic pressure on an ally failing to meet the Wales Summit targets, especially if the loss of U.S. dollars consequently causes a state to struggle to contain their

²¹³ European states receive comparatively less foreign assistance funding than other regions; however, \$54,440,000 in foreign aid is planned for NATO members for Fiscal Year 2017, almost entirely for peace and security sectors such as counterterrorism, stabilization operations, and transnational crime. FOREIGN ASSISTANCE, MAP OF FOREIGN ASSISTANCE—WORLDWIDE, <https://www.foreignassistance.gov/explore> (last visited Feb. 12, 2019).

²¹⁴ See CHIVVIS ET AL., *supra* note 9, at 3.

²¹⁵ H.R. REP. NO. 114-840, at 1218 (2016). Congress specifically requested a detailed accounting of initiatives by NATO allies to deter security challenges posed by Russia, increase capabilities to respond to unconventional or hybrid warfare tactics, enhance security in Europe in ways that match or compliment U.S. contributions to conventional deterrence in the region, as well as contributions to non-European campaigns, such as the counter-ISIS operation and in Afghanistan. *Id.* at 1218-19.

²¹⁶ 10 U.S.C.S. § 386 (LexisNexis 2017).

non-Article 5 security threats within their borders. This would serve as a secondary line of influence towards increasing defense spending. For example, if the Czech Republic, a NATO member that consistently spends less than one percent of its GDP on its defense,²¹⁷ were to lose the millions of dollars it receives from the United States in foreign assistance,²¹⁸ and fail to effectively manage internal security threats, neighboring NATO members, such as Germany or Poland, may exert their own diplomatic pressures on the Czech Republic to increase defense spending.

The United States' national security interest is better served when its NATO allies focus on discrete capabilities to defend and deter Russian aggression than if it were to encourage each of the Baltic States to be independently capable of defending against Russia. Given their size and resources, it is impossible to expect any of the Baltic States to match the strength of the Russian forces aligned on their eastern borders on their own. By influencing their defense spending, Congress can better ensure that the Baltic States' forces provide complementary and integrated capabilities, rather than incompatible or duplicative ones.²¹⁹ By avoiding the duplication of systems and capabilities between multiple allies, limited resources are better managed. Thoughtfully crafted conditions on security cooperation authorities can also leverage existing capabilities, such as encouraging Estonia to build upon their already sophisticated cyber defense capabilities.²²⁰ Such influence will improve interoperability as Congress can ensure strategic oversight and leadership remains within the purview of the DoD.

²¹⁷ ANNUAL REPORT, *supra* note 52, at 112.

²¹⁸ THEATER SECURITY COOPERATION RESOURCES HANDBOOK, *supra* note 86, at 152. The Czech Republic received over \$83 million in aid from the United States from Fiscal Year 2010 to Fiscal Year 2015. *See id.*

²¹⁹ *See* HAASS, *supra* note 149, at 284 (arguing that Europe must spend more on its defense, but more importantly, that the European states coordinate "their spending so the result is additive rather than duplicative," noting that doing so "will require far more specialization").

²²⁰ In 2007, Estonia suffered weeks of cyberattacks from Russia, directed at Estonian government, businesses, and media outlets. Benjamin Oreskes, *Why Trump Makes this Small Country so Nervous*, POLITICO MAG. (Dec. 10, 2016), <http://www.politico.com/magazine/story/2016/12/trump-russia-worries-estonia-214511>. As a result, Estonia focused considerable efforts towards cyber defense and is on the cutting edge of cyber security. *Id.* Tallinn is also the host of its own brain-child, the NATO Cooperative Cyber Defence Centre of Excellence (CCDCOE), dedicated to enhancing the capability, cooperation, and information sharing among NATO, NATO nations, and partners in cyber defense. NATO, CCDCOE HISTORY, <https://ccdcOE.org/about-us/> (last visited Feb. 12, 2019).

Carefully drafting funding authorizations to maximize U.S. influence in improving NATO's defense capability, through conditional foreign aid and other economic incentives, will encourage defense spending and strengthen individual NATO member ties to the United States.²²¹ The resulting increase in ownership of collective security by the European contingent of NATO should improve individual defense capabilities. However, to create a meaningful deterrent to Russia and effectively counter its A2/AD capabilities in Eastern Europe, the whole of the Alliance must be greater than the sum of its parts. By focusing on improving NATO member forces, networks, and weapon systems, Congress can positively influence interoperability within NATO as well as ensure that U.S. dollars spent on defending NATO allies are effective.

VI. Conclusion

Leaving Europe to defend itself against Russia would result in a loss to the United States, "[f]or NATO's borders have always been America's as well."²²² The persistent threat of Russian aggression over the last three years since its illegal annexation of Crimea has "shown that the military arm of the alliance remains a necessary, indeed, existential element of the transatlantic relationship."²²³

To defend its interests and allies closest to Russia, the United States must begin to understand the costs of supporting NATO and the consequences of ignoring the threat. Without a thorough understanding of the mechanisms that fund NATO missions, a fog of

²²¹ While conditioning foreign assistance on the domestic spending of the recipient country should positively influence that country's behavior, it is entirely possible that a NATO member fails to increase its defense spending. This could have the unintended consequence of destabilizing a NATO member or region. Worse yet, Russia could attempt to fill the gap left by the United States and offer funding or assistance to a NATO member, disrupting the Alliance. Thus, the State Department should closely monitor any condition of funding passed by Congress.

²²² Josef Joffe, *The Folly of Abandoning Europe*, FOREIGN AFFAIRS (Dec. 12, 2016), <https://www.foreignaffairs.com/articles/europe/2016-12-12/foley-abandoning-europe> (noting that Europe is the United States' first line of defense).

²²³ Constanze Stelzenmüller, *NATO: Necessary but Not Sufficient*, ORDER FROM CHAOS BLOG (Dec. 7, 2016), <https://www.brookings.edu/blog/order-from-chaos/2016/12/07/nato-necessary-but-not-sufficient/>.

rhetoric will continue to hamper decision-making. Absent this understanding, arguments that foreign policy is a zero-sum game will gain traction—calling into question the utility of the continued existence of NATO to the United States. This would be a grave mistake. The multilateral Alliance provides greater security for the United States than the United States is capable of providing itself. NATO, therefore, promotes, rather than diminishes, the United States' international influence and economic strength. The United States must remain engaged with and firmly entrenched within NATO.²²⁴

While foreign policy is the product of the executive and legislative branches, Congress alone has the fiscal authority to shape the means by which such policy is implemented. Although commanders have many tools afforded by EDI funding and security cooperation authority to build defense capacity and defend the Baltic States, Congress must improve the efficacy of those tools. By removing roadblocks such as the BCA and unduly burdensome limitations and requirements built into the security cooperation regime, and clarifying the funding sources for EDI, Congress can provide the U.S. military with a clear path to properly plan and execute its strategy to build better partners in NATO to collectively deter Russian aggression. Crafting legislation that focuses on Article 5 missions and incentivizes NATO members to bolster their own defense spending and capacity will ensure Congress's intent to strengthen the Alliance's security is realized.

Armed with its constitutionally ordained power of the purse, Congress is responsible for shaping the role of the United States in the strategy to defend its allies, and own interests, against Russia. Congress possesses the tools to influence NATO's ability to implement its deterrence-based strategy by strengthening its allies and address the dynamic threat from Russian aggression. Just as it successfully defended the Fulda Gap during the Cold War, NATO must commit to strengthening its forces to deter any conflict in the Baltic States. Because of its power over funding the U.S. military as well as programs to support and assist other NATO members, Congress is the focal point of the deterrence effort. Thus, how Congress

²²⁴ See Dani K. Nedal & Daniel H. Nexon, *Trump Won't Get the Best Deals*, FOREIGN AFFAIRS (Jan. 31, 2017), <https://www.foreignaffairs.com/articles/2017-01-31/trump-wont-get-best-deals?cid=int-lea&pgtype=hpg> (arguing that the United States should understand the importance of preserving the alliances and defending allies, the authors express hope that the Trump administration "soon realize[s] that burning your own house down is never terribly wise—especially when that house is nicer than any new one you can afford").

addresses, or fails to address, the obstacles to implementing the strategy to counter Russian aggression will have far-reaching impacts. A breakdown of international borders through hybrid aggression, an extension of Russia's A2/AD capabilities in Eastern Europe, or outright conflict, particularly if done so in contravention of Article 5, would mark a failure of U.S. national security and foreign policy, and collapse the American-led liberal world order.²²⁵ Worse still is the possibility that failure to deter such violation of sovereignty by Russia could invite conflict, leading to an unnecessary and preventable war between nuclear powers.²²⁶ To ensure such a fate does not become a forgone conclusion, Congress must improve upon its current legislative efforts and strengthen the NATO defense of the Baltic States through clear and intelligent fiscal laws.

²²⁵ See *id.*; see generally HAASS, *supra* note 150, at 216-18, 232-33.

²²⁶ See Frum, *supra* note 35.

**THE PROCUREMENT SYSTEM WOULD HAVE BROKEN
EINSTEIN'S BRAIN: GOVERNMENT CONTRACTING
AFTER KINGDOMWARE**

MAJOR MATTHEW J. TEXTOR*

*[T]his is a new kind of provision, this mandatory set-aside; isn't that true? So we don't have any -- any logic. We don't have any experience at all.*¹

I. Introduction

The rarity of a Supreme Court decision dealing with a bid protest warrants attention when one occurs.² Indeed, in the last thirty years, only

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¹ Transcript of Oral Argument at 15, *Kingdomware Tech., Inc., v. United States*, 136 S. Ct. 1969 (2016) (No. 14-916), 2016 WL 1028391 (Ginsburg, J.) (United States Reports number forthcoming; commenting on lack of empirical evidence comparing simplified acquisition and supply schedule procedures).

² See Daniel I. Gordon, *Bid Protests: The Costs are Real, But the Benefits Outweigh Them*, 42 PUB. CONT. L.J. 489, 497-499 (2013) (estimating that “99% of procurements are not protested” and calculating a “16% sustain rate” for Fiscal Year 2010).

one Supreme Court decision involved a bid protest.³ The Supreme Court recently decided *Kingdomware Technologies, Inc. v. United States*.⁴ The Court held that the Rule of Two set-aside provision at 38 U.S.C. § 8127(d) imposed a mandatory, rather than permissive, duty on the Department of Veterans Affairs (VA) to set aside procurements for small businesses.⁵ This statute addressed set-asides by the VA to veteran-owned small business (VOSB) and service-disabled veteran-owned small business (SDVOSB) concerns.⁶ In reversing the Court of Appeals for the Federal Circuit, the Supreme Court disagreed that 38 U.S.C. § 8127(d) allowed contracting officer discretion in determining whether to set aside a procurement for small businesses.⁷ The decision holds high importance: During fiscal year 2012, the year of the Government Accountability Office (GAO) opinion in this case,⁸ the VA completed approximately \$3.4 billion in contract actions with SDVOSB concerns and \$6.1 billion with other small businesses, to include VOSBs.⁹

Relevant to Judge Advocate practice, *Kingdomware*, while not directly applicable to DoD procurements, signifies the need to correctly provide contracting advice in order to minimize bid protest litigation and thus, avoid procurement delays.¹⁰ Government contracting practitioners

³ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (concerning a bid protest arising from a city set-aside program held to violate the Fourteenth Amendment's Equal Protection Clause).

⁴ *Kingdomware Tech., Inc. v. United States*, 136 S. Ct. 1969 (2016).

⁵ *Id.* at 1976. The Court also considered applicability of the section to orders placed under the Federal Supply Schedule (FSS). *Id.* at 1979.

⁶ Veterans Benefits, Health Care, and Technology Act of 2006 § 502, 38 U.S.C. § 8127(d) (2018). This statute applies to procurements conduct by the VA and not other federal agencies including the Department of Defense.

⁷ *Kingdomware*, 136 S. Ct. at 1979 (additionally, the Court resolved the issue that FSS "orders" are indeed "contracts").

⁸ *Matter of Kingdomware Tech.*, B-406507, 2012 WL 1942256 (Comp. Gen. May 30, 2012) (during Fiscal Year 2012, the GAO sustained a protest by Kingdomware Technologies of a Department of Veterans Affairs award of a contract to provide employee emergency notification services).

⁹ See *Department of Veterans Affairs FY2012 Small Business Procurement Scorecard*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/sites/default/files/files/FY12_Final_Scorecard_VA_2013-06-20.pdf (last visited Mar. 22, 2018).

¹⁰ See *Matter of Aldevra*, B-411752, 2015 WL 6723876 (Comp. Gen. Oct. 16, 2015) [hereinafter 2015 GAO *Aldevra*], *reconsideration dismissed*, *Matter of Aldevra-Reconsideration*, B-411752.2, 2016 WL 5846457 (Comp. Gen. Oct. 5, 2016). See also Gordon, *supra* note 2, at 507 ("it is quite possible that the fear of protests, whether justifiable or not, is harming the acquisition system by driving bad decisions by federal contracting personnel.").

likely assume that a 2010 amendment to the Small Business Act¹¹ removed mandatory small business set-asides under multiple award contracts.¹² However, this article demonstrates that the *Kingdomware* decision applies beyond the VA and affects current Army contracting practices regarding set-asides.¹³ This article shows that the legal rationales behind *Kingdomware* should be applied to the Small Business Act.

Although the *Kingdomware* decision involved the VA Act Rule of Two, the decision and its reasoning apply in other contexts. Beyond the VA, *Kingdomware* applies to analyzing set-asides under the Small Business Act. Furthermore, its rationales require mandatory set-asides under the Small Business Act Rule of Two such that federal agencies must award contracts to small businesses in every acquisition meeting the Rule of Two.¹⁴

Two approaches exist for set-aside provisions and their relationship to goals for set-asides.¹⁵ One approach holds that set-aside provisions allow

¹¹ See Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1331, 124 Stat. 2504, 2541 (2010) (amending the Small Business Act by adding subsection (r) at 15 U.S.C. § 644(r) (2016)).

¹² See Bruce L. Mayeaux, *Non-Economy Act Authorities: The Other White Meat of Interagency Acquisitions—Their Uses, Mechanics, and Limitations*, ARMY LAW., Nov. 2016, at 15, 24 (“you remember a logistics team member saying something to the effect that [Federal Supply Schedule (FSS)] orders under the [Simplified Acquisition Threshold (SAT)] must be set aside for small businesses. However, you find that in 2010, Congress amended the Small Business Act to remove the nature of the small business set-asides under multiple award contracts like the FSS.”). See also *id.* n. 102 (“Prior to 2010, the Small Business Act required all contracts under the [Simplified Acquisition Threshold] to be exclusively set aside for small businesses.”) (citing 2015 GAO *Aldevra*, *supra* note 10).

¹³ See Transcript of Oral Argument at 50, *Kingdomware Tech., Inc., v. United States*, 136 S. Ct. 1969 (2016) (No. 14-916), 2016 WL 1028391 (“I don’t see how you restrict [the Rule of Two mandate] to this statute [the VA Act] and not all the other ones.”) (Zachary Tripp, Assistant to the Solicitor General, referring to Rule of Two set-asides present in the Small Business Act at 15 U.S.C. § 644(j)). See also *id.* at 35 (“Right now, our choice of whether to do a set-aside when choosing among [Federal Supply Schedule (FSS)] vendors, that is committed to agency discretion by law because when Congress amended this point head-on in 644(r), it said that agencies may, at their discretion do this. But, if suddenly the Rule of Two applies in every case, then in every case a disappointed bidder can come in and say, ‘oh no, you’ve misapplied the Rule of Two.’”).

¹⁴ See Federal Acquisition Regulation [48 C.F.R.] 19.502-2 (2017) [hereinafter FAR].

¹⁵ See *Kingdomware*, 136 S. Ct. at 1973 (2016) (“In this case, we consider whether the [VA] must use the Rule of Two every time it awards contracts or whether it must use the Rule of Two only to the extent necessary to meet annual minimum goals for contracting with veteran-owned small businesses.”).

contracting officer discretion to consider agency contract achievements vis-à-vis contracting goals in considering restricted competition.¹⁶ The second approach holds that contracting officers do not have discretion to determine set-asides, and contracting goals do not affect the requirement to set-aside a contract.¹⁷

This article addresses how the *Kingdomware* decision affects set-asides by agencies when awarding contracts under the Small Business Act.¹⁸ It also focuses on whether *Kingdomware* affects the Small Business Act to require mandatory set-asides and to require contract award to small businesses in all acquisitions meeting the Rule of Two.

First, this article discusses *Kingdomware*'s procedural history. The procedural history begins by providing context to the issues raised in the decisions by the GAO, the Court of Federal Claims (COFC), and the Court of Appeals for the Federal Circuit (CAFC). After examining the procedural history, this article examines the Supreme Court's decision.

Second, this article analyzes the relevant contracting statutory framework. It analyzes the Small Business Act's statutory structure, history, amendments, and Rule of Two. Then, the statutory structure of the Competition in Contracting Act relevant to the Small Business Act is addressed. Finally, it analyzes the *Kingdomware* decision and its result of requiring the Rule of Two to apply in all procurements.

Although the *Kingdomware* decision only applied to the VA Act Rule of Two, the decision should logically be extended to the Small Business

¹⁶ See *Matter of Aldevra*, B-406205, 2012 WL 860813 at *3 (Comp. Gen. Mar. 14, 2012) (“according to the agency, the statute should be interpreted to mean that the VA may consider its current achievements vis-à-vis attaining the Secretary’s SDVOSB/VOSB contracting goals in deciding to do restricted competitions.”). See also *Kingdomware Tech., Inc. v. United States*, 107 Fed. Cl. 226, 239 (2012) (“The government asserts, when read as a whole, the Act provides that a contracting officer need only use SDVOSB and VOSB set-asides when it is necessary ‘for purposes of meeting the goals’ established by the Secretary.”).

¹⁷ See *Kingdomware Tech., Inc. v. United States*, 754 F.3d 923, 933 (Fed. Cir. 2014). “Indeed, Kingdomware conceded at oral argument that under its interpretation of 38 U.S.C. § 8127(d), the VA must continue to apply a Rule of Two analysis for every contract even *after* it has met the goals set under § 8127(a).” *Id.* (emphasis in original).

¹⁸ 15 U.S.C. § 644 (2016). Specifically, the article focuses on a recent amendment by the Small Business Jobs Act of 2010 Pub. L. No. 111-240, § 1331, 124 Stat. 2504, 2541 (2010)). See 15 U.S.C. 644(r) (2016).

Act Rule of Two and applied in all domestic procurements.¹⁹ First, the plain meaning of 15 U.S.C. § 644(j) supports mandatory set-asides in all procurements meeting the Rule of Two. Second, even if ambiguity exists in the Small Business Act, *Chevron* deference supports mandatory set-asides in all procurements meeting the Rule of Two.²⁰ Finally, *Kingdomware* affects the 2015 GAO *Aldevra* decision to result in mandatory set-asides for domestic procurements meeting the Rule of Two.

II. Decisions Background

A. Procedural History of *Kingdomware*

The procedural history of *Kingdomware* involved several decisions below the Supreme Court, with decisions by the GAO, COFC, and CAFC. This article discusses each in turn.

1. *The GAO Decision in Kingdomware*

Kingdomware Technologies, Inc. (Kingdomware) filed a bid protest at the GAO after the VA awarded a contract to a non-VOSB.²¹ Kingdomware alleged that the VA had violated 38 U.S.C. § 8127 by using the Federal Supply Schedule (FSS) without applying the Rule of Two.²² Specifically, Kingdomware alleged, the VA Act Rule of Two required a contracting officer to restrict competition to veteran-owned small

¹⁹ See 15 U.S.C. § 644(l)(9)(B) (2018) (limiting the scope of review by procurement center representatives for Department of Defense procurements for contingency operations and procurements where both the place of award and the place of performance are outside of the United States and its territories).

²⁰ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (courts will defer to an agency's regulatory interpretation of an ambiguous statute after applying a two-step analysis: first, ambiguity must exist in the statute, and second, the agency's regulatory interpretation of the statute must be reasonable).

²¹ Joint Appendix at 31, *Kingdomware Tech., Inc., v. United States*, 136 S. Ct. 1969 (2016) (No. 14-916), 2015 WL 5000098 (filed on March 14, 2012). The VA awarded a task order contract to an FSS vendor, Everbridge, Inc., for the procurement of an Emergency Notification System (ENS) for a grouping of four VA medical centers. *Id.* at 30-31. The contract consisted of a base year cost of \$33,824.10 with two option years at \$33,824.10 each, and a total amount of \$101,472.30 if both option years were exercised. *Id.* at 31.

²² *Matter of Kingdomware Tech.*, B-406507, 2012 WL 1942256 at *1 (Comp. Gen. May 30, 2012).

businesses when its conditions are met.²³ The Rule of Two requires a contracting officer to award contracts, on a restricted basis, to small businesses when there is a reasonable expectation that two or more small businesses will submit offers, and that award can be made at a fair and reasonable price.²⁴

The GAO sustained Kingdomware's protest.²⁵ The GAO reasoned 38 U.S.C. § 8127's plain language mandated the agency to conduct a set-aside, and the mandate applied to FSS acquisitions.²⁶ The GAO *Kingdomware* decision incorporated reasoning set forth in the *Matter of Aldevra*,²⁷ a 2012 GAO opinion that interpreted the VA Act Rule of Two.²⁸ The 2012 GAO *Aldevra* decision noted, without resolving, the VA's argument that the agency could consider its current contract achievements relative to small business contracting goals.²⁹ Instead, the GAO found 38 U.S.C. § 8127(d)'s plain language mandated the VA to use

²³ 38 U.S.C. § 8127(d) (2006).

²⁴ *Id.* Although existing at different authorities, the VA Act Rule of Two and the Small Business Act Rule of Two involve the same practical conditions. *Compare* 38 U.S.C. § 8127(d) (2006) *with* FAR 19.502-2 (2017).

²⁵ *Matter of Kingdomware Tech.*, B-406507, 2012 WL 1942256 at *1 (Comp. Gen. May 30, 2012).

²⁶ *Id.* at *2 (“the plain language of the VA Act mandates that the VA ‘shall’ conduct its procurements, including the FSS acquisitions, using an SDVOSB set-aside when there is a reasonable expectation that two or more SDVOSB concerns can meet its requirements at a reasonable price.”).

²⁷ *Matter of Aldevra*, B-406205, 2012 WL 860813 (Comp. Gen. Mar. 14, 2012) (decided on the same date as the filing of Kingdomware's protest to the GAO) [hereinafter 2012 GAO *Aldevra* Decision].

²⁸ 38 U.S.C. § 8127(d) (2006).

(d) Use of restricted competition.--Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

Id. See 2012 GAO *Aldevra* Decision, *supra* note 27, at *1 n. 2 (“Subsections (b) and (c), permit the use, under certain circumstances, of noncompetitive procedures when the VA enters into contracts with SDVOSB and VOSB concerns.”).

²⁹ See 2012 GAO *Aldevra* Decision, *supra* note 27, at *3.

set-asides when the procurements met the requirements under the VA Act Rule of Two.³⁰

Ultimately, the GAO found the VA Act unambiguous and declined to extend *Chevron* deference.³¹ *Chevron* deference arises when a tribunal defers to an agency's construction of a statute after the tribunal finds ambiguity when interpreting a statute.³² In *Kingdomware*, the GAO declined to apply *Chevron* deference because the GAO found the statute unambiguous.³³ Analyzing the statute's plain meaning, the GAO noted the importance of the mandatory term ("shall") relative to introductory phrases describing purposes of meeting set-aside goals.³⁴ Of note, the GAO recognized that the VA had not performed notice-and-comment procedures, and thus had no agency rules for deference.³⁵

³⁰ See *id.* at *4 ("We find that the plain language of 38 U.S.C. § 8127(d) mandates that the VA shall conduct its procurements using an SDVOSB (or VOSB) set-aside when there is a reasonable expectation that two or more SDVOSB (or VOSB) concerns can meet the requirement at a reasonable price.").

³¹ See *id.* (citing *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). The GAO also noted that the legislative history of the VA Act underscored that 38 U.S.C. § 8127 "was intended to broadly foster participation in VA procurements by SDVOSB and VOSB concerns," and read the legislative history "to reflect a congressional expectation that the VA generally will conduct procurements with the purpose of meeting the SDVOSB and VOSB participation goals." *Id.* (citing H.R. REP. NO. 109-592 (2006) (Veterans and Small Business Memorial Act of 2006)). The GAO noted that the language of the statute as enacted by Congress was identical to the language in the bill described in the House report. *Id.* n. 6 (citing H.R. REP. NO. 109-592 at *3).

³² See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

³³ See *Matter of Kingdomware Tech.*, B-406507, 2012 WL 1942256 at *2 (Comp. Gen. May 30, 2012) (referring to the same reasons discussed at length in the 2012 GAO *Aldevra* Decision, *supra* note 27). "We disagreed on the basis that the plain language of the VA Act mandates that the VA 'shall' conduct its procurements, including FSS acquisitions, using an SDVOSB set-aside when there is a reasonable expectation that two or more SDVOSB concerns can meet its requirements at a reasonable price." *Id.* (citing 2012 GAO *Aldevra* Decision, *supra* note 27 at *5).

³⁴ See *id.* See also 2012 GAO *Aldevra* Decision, *supra* note 27, at *4 (noting that the exceptions set out at 38 U.S.C. §§ 8127(b) & (c) use a discretionary term "may" in contrast to "shall" set out at 38 U.S.C. § 8127(d)).

³⁵ See *id.* (referring to reasoning in the 2012 GAO *Aldevra* Decision, *supra* note 27, at *3–4, which cited *Chevron*, 467 U.S. at 842–43 (1984)). The GAO noted that courts defer to agency interpretation of an ambiguous statute unless the resulting regulation or ruling is procedurally defective, arbitrary or capricious in substance. 2012 GAO *Aldevra* Decision, *supra* note 27, at *4 n. 7 (citing *Chevron*, 467 U.S. at 843–45 (1984)).

2. Court of Federal Claims Decision in Kingdomware

Kingdomware also filed a bid protest with COFC.³⁶ After the GAO sustained Kingdomware's protest, the VA notified the GAO that it would not follow the GAO decision.³⁷ Kingdomware sought injunctive relief to compel the VA to comply with the VA Act.³⁸ Contrasting with the GAO decision, the COFC Judge denied Kingdomware's bid protest.³⁹ Significantly, COFC reasoned that analogy to the Small Business Act⁴⁰ was "misplaced" and not applicable to the *Kingdomware* set-aside occurring under the FSS.⁴¹

The COFC found the VA Act Rule of Two set-aside clause ambiguous based on its goal-setting nature.⁴² The court applied *Chevron's* two-

³⁶ See *Kingdomware Tech., Inc. v. United States*, 107 Fed. Cl. 226, 229 (2012). See also *Kingdomware Tech., Inc. v. United States*, 754 F.3d 923, 929 (Fed. Cir. 2014).

³⁷ See Memorandum from Lynn H. Gibson, U.S. Gov't Accountability Off., to Congressional Committees, subject: Kingdomware Technologies, B-405727, Dec. 19, 2011 CPD ¶ 283; Aldevra, B-406205, Mar. 14, 2012, 2012 CPD ¶ ____; Crosstown Courier Service, Inc., B-406262, Mar. 21, 2012, 2012 CPD ¶ ____ at 7 (30 Mar. 2012), <https://www.gao.gov/assets/650/649957.pdf>.

³⁸ See *Kingdomware*, 107 Fed. Cl. at 229.

³⁹ *Id.* at 244 (decided on November 27, 2012, and approximately six months after the GAO's decision). The individual judges of the COFC issue decisions. 28 U.S.C. 174 (2018). As an Article I court established pursuant to the Tucker Act, decisions are not precedential and thus each Judge is free to rule how they see fit and is only required to follow CAFC case law. See 28 U.S.C. 1491 (2018).

⁴⁰ *Id.* at 239 n. 9 (referring to the Historically Underutilized Business Zone (HUBZone) provisions of 15 U.S.C. § 632(p)(1) and FAR 19.1301(b)).

⁴¹ See *id.* at 242. Kingdomware argued a line of cases concerning HUBZone set-asides, including *DGR Assocs., Inc. v. United States*, 94 Fed. Cl. 189 (2010), *Mission Critical Sol. v. United States*, 91 Fed. Cl. 386 (2010), and *Contract Mgmt., Inc. v. Rumsfeld*, 291 F. Supp. 2d 1166 (D. Haw. 2003). *Id.* at 239.

⁴² *Id.* at 241. The Court found ambiguity based on the "goal-setting nature of the statute cloud[ing] the clarity [Kingdomware] would attribute to the phrase 'shall award' in subsection (d) of the Act." *Id.* The Court presumed "that Congress was aware of the historic exception of the FSS from small business set-asides and [could not] presume as [Kingdomware] urge[d] that Congress intended to extinguish the exception by silence." *Id.* (rejecting GAO's analysis in a 2011 decision, *Matter of Aldevra*, B-405271 *et al.*, 2011 WL 4826148 (Comp. Gen. Oct. 11, 2011)).

pronged analysis,⁴³ and found that the VA Act satisfied the first prong.⁴⁴ The court found the VA Act failed *Chevron*'s second prong and declined to grant *Chevron* deference.⁴⁵ Although declining *Chevron* deference, the court deferred to the VA's agency-level interpretation of the VA Act.⁴⁶ The court departed from the GAO's interpretation of the VA Act, and found that the VA's interpretation of the VA Act was entitled to deference.⁴⁷

⁴³ *Kingdomware*, 107 Fed. Cl. at 237.

Under *Chevron*, this court first must determine 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of the Congress.'

Id. (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). "'[I]f the statute is silent or ambiguous with respect to the specific issue,' a court must proceed to the second step of *Chevron*, which is to ask whether the agency's interpretation of the statute is reasonable." *Id.* (citing *Chevron*, 467 U.S. at 843 (1984)).

⁴⁴ *Kingdomware*, 107 Fed. Cl. at 242 ("Taken as a whole, therefore, the court concludes that under *Chevron* step one the 2006 Act is not plain on its face as to its application to the FSS and is ambiguous with regard to the discretion left to VA in meeting the 2006 Acts' goals.").

⁴⁵ *See id.* at 243 ("The government asserts that VA's position that the 2006 Act's regulations 'do[] not apply to FSS task or delivery orders is reasonable, and entitled to deference. The court agrees."). *See also Kingdomware*, 754 F.3d at 930 (Fed. Cir. 2014) ("Because the regulations themselves do not expressly state that the subsection does not apply to the FSS, the [Court of Federal Claims] declined *Chevron* deference to the VA's interpretation.").

⁴⁶ *Id.* at 243 ("[T]he agency's interpretation of the statute found in the preamble is still entitled to deference so far as it has 'the power to persuade,' . . . based on the agency's consistency, formality, expertise and if the agency's determination fits with prior interpretations.") (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)).

⁴⁷ *Id.* at 244 ("the court . . . finds that [the] VA's decision not to set aside the ENS contract at issue was not arbitrary, capricious or contrary to law.").

3. *United States Court of Appeals for the Federal Circuit Decision in Kingdomware*

a. *Majority Opinion*

Kingdomware filed an appeal with CAFC.⁴⁸ A divided panel of the court affirmed in favor of the VA.⁴⁹ The Court of Appeals for the Federal Circuit reviewed the COFC decision without deference to the lower court, and analyzed the VA Act under *Chevron*.⁵⁰ The Court of Appeals for the Federal Circuit found that the VA Act Rule of Two was not ambiguous.⁵¹

The court reasoned that the statute clearly reflected Congress's intent to directly tie the mandatory Rule of Two to the achievement of small business set-aside goals.⁵² Concerning the VA Act Rule of Two's prefatory clause, CAFC construed the statute by giving effect to each word in the statute.⁵³ Interpreting the statutory scheme as a whole, the court linked the Rule of Two mandate to the goals in the VA Act.⁵⁴ The court found the VA did not need to perform a Rule of Two analysis for every contract, as long as its set-aside goals were met.⁵⁵

⁴⁸ *Kingdomware Tech., Inc., v. United States*, 754 F.3d 923, 924 (Fed. Cir. 2014), *reh'g en banc denied*, Sep. 10, 2014.

⁴⁹ *Id.* at 924–25 (decided on June 3, 2014).

⁵⁰ *Id.* at 930 (citing *Dominion Res., Inc. v. United States*, 681 F.3d 1313, 1317 (Fed. Cir. 2012)). This case involved no factual or mixed factual and legal issues, and the Court first applied the *Chevron* standard before addressing the Administrative Procedure Act's standard of review. *Id.* (citing 5 U.S.C. § 706(2)(A), (D)).

⁵¹ *Id.* at 931 (“We perceive no ambiguity in § 8127, which ‘is the end of the matter, for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress . . .’”) (citing *Chevron*, 467 U.S. at 843 (1984)).

⁵² *Id.* at 931 (“By directly tying the mandatory Rule of Two contracting procedure set forth in subsection (d) to the achievement of the goals set pursuant to subsection (a), Congress’s intent is clear.”).

⁵³ *Kingdomware*, 754 F.3d at 933 (citing *Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995)).

⁵⁴ *Id.* at 933 (“The statutory scheme as a whole links the Rule of Two mandate (denoted by the word ‘shall’) in subsection (d) to the goals set under subsection (a). The mandate is, therefore, the required procedure for meeting these goals . . . the agency need not perform a VOSB Rule of Two analysis for every contract, as long as the goals set under subsection (a) are met.”).

⁵⁵ *Id.* at 934 (“The correct reading of the statute according to its plain meaning puts the ‘shall’ in subsection (d) in harmonious context with the discretionary ‘may’ provisions in subsections (b) and (c), and assures that the goals of subsection (a) will be set by the Secretary, not the success or failure of the Rule of Two in the marketplace.”).

b. Dissent by Judge Reyna

In the dissent, Judge Reyna criticized the statutory construction by the majority.⁵⁶ Judge Reyna posited that 38 U.S.C. § 8127(d) clearly provided an imperative to conduct a Rule of Two analysis in every VA procurement.⁵⁷ The dissent reasoned that the prefatory language could not limit the statute's operative clause.⁵⁸

Judge Reyna offered practical reasoning to require the VA to conduct Rule of Two set-asides in every procurement.⁵⁹ Referring to Federal Acquisition Regulation (FAR) Part 19.502-2, he highlighted the VA's existing obligation to conduct a Rule of Two analysis in nearly every acquisition exceeding the micro-purchase threshold.⁶⁰ He countered the majority's argument that the VA could consider agency contract achievements vis-à-vis contracting goals in considering whether to restrict competition.⁶¹ In support, the dissent highlighted FAR 19.502-6(f) to effectively require set-asides even if small businesses already received a fair proportion of agency contracts.⁶²

Separate from the VA Act, Judge Reyna had concerns about the majority's rationale and its implications for the Small Business Act.⁶³

⁵⁶ *Id.* at 934–38.

⁵⁷ *Id.* at 936.

⁵⁸ *Kingdomware*, 754 F.3d at 936–37 (citing *Dist. of Columbia v. Heller*, 554 U.S. 570, 578 (2008)).

⁵⁹ *Id.* at 938–40.

⁶⁰ *See Id.* at 938 n. 10. After the Federal Circuit's 2014 decision of *Kingdomware*, the FAR's Rule of Two subsequently increased the value of the micro-purchase threshold from \$3,000 to \$3,500. FAR 19.502-2(a) (2017). *See also* FAR 2.101 (2017) (reflecting increased amounts of the micro-purchase threshold (\$3,500) and the simplified acquisition threshold (\$150,000)). The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 increased the value of the micro-purchase threshold to \$10,000, and the value of the simplified acquisition threshold to \$250,000. *See* National Defense Authorization Act for FY 2018, Pub. L. No. 115-91, §§ 805, 806, 131 Stat. 1283 (Dec. 12, 2017). However, the increase in FY 2018 applied to agencies other than the Department of Defense (DoD). *Id.* The FY 2019 NDAA adjusted the value of the micro-purchase threshold for the DoD to \$10,000. *See* National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 821 (Aug. 13, 2017).

⁶¹ *Id.* at 938. “The majority seemingly believes it is bad policy to require an agency to continue efforts to award contracts to small businesses once its participation goals are met, overlooking that participation goals are aspirations, not destinations.” *Id.* (emphasis added).

⁶² *Id.* at 938–39.

⁶³ *Kingdomware*, 754 F.3d at 939.

Judge Reyna highlighted that the majority's decision would render unnecessary the existing FAR Small Business Act goals.⁶⁴

B. Supreme Court Decision in *Kingdomware*

Kingdomware petitioned the Supreme Court for certiorari.⁶⁵ Notably, the government modified its argument when it filed its brief to the Court,⁶⁶ as compared to the arguments made to lower level courts.⁶⁷ Previously, the government argued that the VA Act afforded the contracting officer with discretion to determine set-asides as needed to meet agency goals.⁶⁸

Although the government's argument to the Supreme Court conceded the mandatory nature of the statute, the government shifted its argument to another area.⁶⁹ Instead of focusing on the statute's mandatory or discretionary nature, the government focused on the situations requiring application of the VA Act Rule of Two.⁷⁰ The government argued that the VA Act Rule of Two applied only to situations when new contracts were

⁶⁴ *Id.* at 939 (citing 15 U.S.C. § 644(g)(1) and FAR 19.502-1). The dissent's position was that the majority's holding would upset over thirty years of federal procurement law concerning validity of the Small Business Act Rule of Two to ensure small businesses receive a fair proportion of contracts. *Id.* at 939. Judge Reyna further noted that the origin of the Rule of Two predated the FAR. *Id.* n. 12.

⁶⁵ Petition for Writ of Certiorari, *Kingdomware*, 136 S. Ct. 1969 (No. 14-916), 2015 WL 410706.

⁶⁶ See Brief for the United States at *24, *Kingdomware Tech., Inc., v. United States*, 136 S. Ct. 1969 (2016) (No. 14-916), 2015 WL 5719745 ("Section 8127(d) imposes a mandate . . . the disputed question in this case concerns *when* Section 8127(d)'s Rule of Two mandate applies." (emphasis in original)).

⁶⁷ See Brief for the Defendant-Appellee, the United States at *12, *Kingdomware Tech., Inc., v. United States*, 754 F.3d 923 (Fed. Cir. 2014) (No. 2013-5042), 2013 WL 6221879.

⁶⁸ See *id.* ("[S]ection 8217(d) provides that [VA] contracting officers retain the discretion to determine which procurements to set aside as needed to meet the Secretary's goals."). See also *Kingdomware*, 107 Fed. Cl. at 239 ("According to the government, the 2006 Act gives VA discretion to determine when it will use the set-aside procedures found in the Act to meet those goals.").

⁶⁹ Brief for the United States at *24, *Kingdomware Tech., Inc., v. United States*, 136 S. Ct. 1969 (2016) (No. 14-916), 2015 WL 5719745 ("Section 8127(d) imposes a mandate . . . [t]he disputed question in this case concerns *when* Section 8127(d)'s Rule of Two mandate applies." (emphasis in original)).

⁷⁰ *Id.* at *25 ("VA contracting officers must apply Section 8127's contracting preference whenever they solicit and award new contracts on the open market—*i.e.*, through simplified acquisition procedures, sealed bidding, or contracting by negotiation—even if it is clear that the Secretary's goals for a particular year will be achieved.").

awarded on the open market.⁷¹ By arguing an open-market difference for simplified acquisitions, sealed bidding, and contracting by negotiation, the government distinguished these situations from orders placed under pre-existing FSS contracts.⁷²

In a unanimous opinion, the Supreme Court rejected the government's arguments and reversed the decision of the COFC.⁷³ The Court concluded the statute required the VA to use the Rule of Two even when the VA would otherwise meet its set-aside goals.⁷⁴ The Court held that 38 U.S.C. § 8127 was mandatory and not discretionary.⁷⁵ In holding 38 U.S.C. § 8127(d) unambiguously required the VA to use the Rule of Two before contracting under competitive procedures,⁷⁶ the Court declined to apply *Chevron* deference.⁷⁷

III. Analysis of the Small Business Act Rule of Two Applying to Procurements

Although *Kingdomware* addressed the VA Act Rule of Two, the Supreme Court's decision influences the Small Business Act Rule of

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Kingdomware*, 136 S. Ct. at 1979 (2016).

⁷⁴ *Id.* at 1973.

⁷⁵ *Id.* at 1976.

⁷⁶ *Id.*

⁷⁷ *Id.* at 1979.

Two⁷⁸ as previously interpreted through GAO and court decisions.⁷⁹ The following section addresses how the Small Business Act amendment history, statutory structure, and context relative to CICA⁸⁰ support set-asides when the Rule of Two is met.

A. The Small Business Act Amendment History and Statutory Structure Support Set-Asides

The Small Business Act's amendment history and statutory structure support small business set-asides when the Rule of Two is met. In 1953, Congress enacted the Small Business Act.⁸¹ Importantly, the legislation aimed to assist and protect the interests of small business concerns by ensuring they received a "fair proportion" of the total government

⁷⁸ See Federal Acquisition Regulation (FAR) "Rule of Two"; Requirements for Setting Aside Acquisitions for Small Businesses, 49 Fed. Reg. 40,135-01, 40,135 (Oct. 12, 1984) (describing the Rule of Two in FAR Part 19).

The "rule of two" appears in FAR 19.502 which provides the requirements for setting aside acquisitions for small business . . . The key to this issue is in the Small Business Act (15 U.S.C. 644) requirement that " * * * a fair proportion of the total purchases and contracts for property and services for the Government are placed with small business concerns * * *".

Id. See also LBM, Inc., B-290682, 2002 WL 31086989 at *6 (Comp. Gen. Sept. 18, 2002) (discussing the Rule of Two at FAR 19.502), *request for modification denied*, Dep't of the Army—Request for Modification of Recommendation, B-290682.2, 2003 WL 103408 at *6 (Comp. Gen. Jan. 9, 2003).

⁷⁹ See Matter of Aldevra-Reconsideration, B-411752.2, 2016 WL 5846457 (Comp. Gen. Oct. 5, 2016) (dismissing the request for reconsideration without addressing the merits of the request; the first GAO decision post-*Kingdomware* citing the Supreme Court's decision). Additionally, few GAO opinions have cited the initial 2015 *Aldevra* GAO opinion. See Matter of InfoReliance Corp., B-413298, 2016 WL 5050841 at*2 (Comp. Gen. Sept. 19, 2016) (denying protest of an agency's small-business set-aside in an FSS procurement; citing Matter of Aldevra, B-411752, 2015 WL 6723876 (Comp. Gen. Oct. 16, 2015)).

⁸⁰ Pub. L. No. 98-369, Division B, Title VII, §§2701-2753, 98 Stat. 1175 (July 18, 1984) (codified at 10 U.S.C. §§ 2302-2339 (2015) and 41 U.S.C. §§ 3301-3312 (2011)) [hereinafter CICA].

⁸¹ An Act to dissolve the Reconstruction Finance Corporation, to establish the Small Business Administration, and for other purposes, Pub. L. No. 163, § 201, 67 Stat. 230, 232 (Jul. 30, 1953) [hereinafter Small Business Act of 1953].

contracts.⁸² A national defense rationale for the Small Business Act posits that broad-based and dispersed industry in which many small businesses nation-wide contribute strength and health to the economy.⁸³ The next section examines the Small Business Act amendment history and structure, which support mandatory set-asides when the Rule of Two is met.

1. *The Small Business Act History of Amendments Supports Mandatory Set-Asides*

Several amendments to the Small Business Act occurred between its enactment in 1953 and its current form.⁸⁴ In 1978, amendments to the Small Business Act directed procurement goals for federal agencies on an annual basis.⁸⁵ Ten years later, Congress amended the goals to mandate a twenty percent government-wide goal for small business participation in all prime contracts awarded.⁸⁶

⁸² *Id.* at § 202, (“It is the declared policy of Congress that the Government should aid, counsel, assist and protect insofar as possible the interests of small-business concerns in order . . . to insure that a *fair proportion* of the total purchases and contracts for supplies and services for the Government be placed with small-business enterprises”) (emphasis added); *see id.* at § 203 (establishing the Small Business Administration under the general direction and supervision of the President). *See also* 15 U.S.C. § 631(a) (2016).

⁸³ Irving Maness, *The Emergence of the Current Interest in the Defense Small Business and Labor Surplus Area Subcontracting Programs*, 18 MIL. L. REV. 119, 121 (1962) (noting the defense establishment’s economic expansion and the increasing need to make use of small business productive resources)

⁸⁴ *See, e.g.*, An Act to Amend the Small Business Act of 1953, as amended, Pub. L. No. 85-536, 72 Stat. 384 (Jul. 18, 1958); An Act to Amend the Small Business Act and the Small Business Investment Act of 1958 to Increase Loan Authorization and Surety Bond Guarantee Authority; and to Improve the Disaster Assistance, Certificate of Competency and Small Business Set-aside Programs, and for other purposes, Pub. L. No. 95-89, § 502, 91 Stat. 553, 562 (Aug. 4, 1977) (amending § 15 of the Small Business Act, 15 U.S.C. § 644 (2010)). *See also* An Act to Amend the Small Business Act of 1953, as amended, Pub. L. No. 85-536, 72 Stat. 384 (Jul. 18, 1958).

⁸⁵ *See* An Act to Amend the Small Business Act and the Small Business Investment Act of 1958, Pub. L. No. 95-507, § 221, 92 Stat. 1757, 1760 (Oct. 24, 1978) (adding new subsection (g) to 15 U.S.C. § 644). *See also* Max V. Kidalov, *Small Business Contracting in the United States and Europe: A Comparative Assessment*, 40 PUB. CONT. L.J. 443, 481 (Winter 2011).

⁸⁶ Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, § 502, 102 Stat. 3853, 3881 (Nov. 15, 1988).

Later amendments to the Small Business Act resulted in requiring set-asides. In 1994, the Federal Acquisition Streamlining Act (FASA)⁸⁷ amended the Small Business Act at 15 U.S.C. § 644(j) and mandated small business set-asides within a fixed price range.⁸⁸ Thereafter, the Small Business Act has provided at 15 U.S.C. § 644(j) for small business set-asides between the micro-purchase threshold and the simplified acquisition threshold.⁸⁹ Importantly, on the date of the passage of FASA, the President issued a memorandum to the heads of executive departments and agencies.⁹⁰ The memorandum addressed the fair proportion policy in awarding government contracts to small businesses, and the priority to encourage small business participation in federal procurements.⁹¹

Following major reforms of FASA, the 1996 Federal Acquisition Reform Act (FARA) did not substantively change 15 U.S.C. § 644.⁹² In

⁸⁷ Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 4004, 108 Stat. 3243, 3338–39 (Oct. 13, 1994) [hereinafter FASA].

⁸⁸ *Id.* The FASA amended the Small Business Act at 15 U.S.C. § 644(j) to state:

(j)(1) Each contract for the purchase of goods and services that has an anticipated value greater than \$2,500 but not greater than \$100,000 shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased.

(2) In carrying out paragraph (1), a contracting officer shall consider a responsive offer timely received from an eligible small business offeror

Id.

⁸⁹ *See id.* *See also* FAR 2.101 (2017) reflecting increased amounts of the micro-purchase threshold (\$3,500) and the simplified acquisition threshold (\$150,000). Note that the NDAA for FY 2018 increased the value of the micro-purchase threshold to \$10,000, and the value of the simplified acquisition threshold to \$250,000. *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, §§ 805, 806, 131 Stat. 1283 (Dec. 12, 2017). However, the increase in FY 2018 applied to agencies other than the DoD. *Id.* The FY 2019 NDAA adjusted the value of the micro-purchase threshold for the Department of Defense to \$10,000. *See* National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 821 (Aug. 13, 2019).

⁹⁰ Memoranda of President, subject: Continued Commitment to Small, Small Disadvantaged, and Small Women-Owned Businesses in Federal Procurement, 59 Fed. Reg. 52,397 (Oct. 13, 1994).

⁹¹ *Id.*

⁹² Federal Acquisition Reform Act of 1996, Pub. L. No. 104-106, § 4321(c)(3), 110 Stat. 186, 674 (Feb. 10, 1996) (providing only minor change to 15 U.S.C. § 644: “Section 15(g)(2) (15 U.S.C. 644(g)(2) is amended by striking out the second comma after the first appearance of ‘small business concerns’.”).

the following year, the Small Business Reauthorization Act of 1997 increased contracting goals, last modified in 1988, from twenty percent to twenty-three percent.⁹³ Because no exceptions were ever enacted to the Small Business Act's Rule of Two, the amendment history supports concluding that set-asides must occur when the Rule of Two is met. The next section addresses the structure of the Act.

2. *The Statutory Structure of the Small Business Act Supports Mandatory Set-Asides*

Significant to considering *Kingdomware*'s effect on the Rule of Two, the Small Business Jobs Act of 2010 amended the Small Business Act by adding 15 U.S.C. § 644(r) for the context of a multiple award contract.⁹⁴ Currently in effect, the plain language of section 644(r) makes no reference to section 644(j).⁹⁵ Notably, in the context of multiple award contracts, section 644(r) provides operative discretionary language ("may"), in contrast with section 644(j), which provides mandatory language ("shall") for all contexts.⁹⁶

⁹³ Small Business Reauthorization Act of 1997, Pub. L. No. 103-135, § 603(b)(1)(B), 111 Stat. 2592, 2632 (Dec. 2, 1997) (amending (15 U.S.C. § 644(g)(1)(B) "by striking '20 percent' and inserting '23 percent' . . .").

⁹⁴ Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1331, 124 Stat. 2504, 2541 (Sept. 27, 2010) (reservation of prime contract awards for small businesses). Section 1331 of the Small Business Jobs Act of 2010 amended the Small Business Act, at 15 U.S.C. § 644, by adding subsection (r):

(r) Multiple Award Contracts. Not later than 1 year after the date of enactment of this subsection [September 27, 2010], the Administrator for Federal Procurement Policy and the Administrator, in consultation with the Administrator of General Services, shall, by regulation, *establish guidance under which Federal agencies may, at their discretion—*

- (1) set aside part or parts of a multiple award contract for small business concerns . . . ;
- (2) notwithstanding the fair opportunity requirements under section 2304c(b) of title 10, United States Code, . . . set aside orders placed against multiple award contracts for small business concerns . . . ; and
- (3) reserve 1 or more contract awards for small business concerns under full and open multiple award procurements

Id. (emphasis added).

⁹⁵ Compare 15 U.S.C. § 644(r) (2016) with 15 U.S.C. § 644(j) (2016).

⁹⁶ Compare 15 U.S.C. § 644(r) (2016) with 15 U.S.C. § 644(j) (2016). Note that "[w]hen a statute distinguishes between 'may' and 'shall,' it is generally clear that 'shall' imposes

Internal to the Small Business Act, a statutory provision supports the FAR's regulatory implementation of the Rule of Two.⁹⁷ The statute requires small business concerns to receive a "fair proportion" of government contracts, and thus supports the FAR Rule of Two.⁹⁸ Significantly, and noted by Judge Reyna's dissent to the CAFC *Kingdomware* opinion, the Small Business Act's Rule of Two pre-dates the FAR.⁹⁹ The Small Business Act's fair proportion standard existed in its initial 1953 statute,¹⁰⁰ and not until 1984 did the FAR implement the Small Business Act's existing fair proportion requirement.¹⁰¹ The FAR's Rule of Two requires a contracting officer to determine whether a reasonable expectation exists of obtaining offers from two or more responsible small business concerns.¹⁰² The FAR's Rule of Two also requires competitive offers in terms of market prices, quality, and delivery.¹⁰³

Consistent with Judge Reyna's dissent to the CAFC *Kingdomware* opinion, the FAR's Rule of Two arises under two situations where a contracting officer must apply its analysis.¹⁰⁴ For acquisitions exceeding \$3,500, but not over \$150,000, a contracting officer must apply the Rule of Two.¹⁰⁵ In this range, the contracting offer must automatically set aside

a mandatory duty." *Kingdomware*, 136 S. Ct. at 1977 (2016) (citing *United States ex rel. Siegel v. Thoman*, 156 U.S. 355, 359–60 (1895)).

⁹⁷ Federal Acquisition Regulation (FAR) "Rule of Two"; Requirements for Setting Aside Acquisitions for Small Businesses, 49 Fed. Reg. 40,135, 40,135–36 (Oct. 12, 1984) (noting the Rule of Two appears in FAR 19.502 and "[t]his method of implanting the fair proportion of total contracts has been upheld by the Courts and the Comptroller General.").

⁹⁸ See 15 U.S.C. § 644(a)(1)(C) (2016); See also 15 U.S.C. § 644(a)(5) (2016).

⁹⁹ See *Matter of Delex Sys., Inc.*, B-400403, 2008 WL 4570635 at *5 (Oct. 8, 2008) ("The origin of the Rule of Two predates the FAR; when the FAR was promulgated, the Office of Federal Procurement Policy (OFPP) prepared a Federal Register notice seeking comments on the rule's inclusion in the new government-wide procurement regulation."); see also *Kingdomware Tech., Inc. v. United States*, 754 F.3d 923, 939 n. 12 (Fed. Cir. 2014) (J. Reyna, dissenting).

¹⁰⁰ Small Business Act of 1953, *supra* note 81, at § 202.

¹⁰¹ See Federal Acquisition Regulation (FAR) "Rule of Two"; Requirements for Setting Aside Acquisitions for Small Businesses, 49 Fed. Reg. 40,135 (Oct. 12, 1984) (citing FAR 19.502).

¹⁰² FAR 19.502-2(a) (2017).

¹⁰³ *Id.*

¹⁰⁴ See FAR 19.502-2(a), (b) (2017). See also *Kingdomware Tech., Inc. v. United States*, 754 F.3d 923, 938 n. 10 (Fed. Cir. 2014) (J. Reyna, dissenting) (discussing the two situations in which a contracting officer must conduct a Rule of Two analysis).

¹⁰⁵ See FAR 19.502-2(a) (2017). Note that the NDAA for FY 2018 increased the value of the micro-purchase threshold to \$10,000, and the value of the simplified acquisition

the acquisition for small business concerns unless the Rule of Two is not met.¹⁰⁶ If the Rule of Two is not met, the contracting officer can solicit the acquisition on an unrestricted basis.¹⁰⁷ For acquisitions over \$150,000, a contracting officer must apply the Rule of Two and conduct set-asides for small businesses when the Rule of Two is met.¹⁰⁸

Because of the Small Business Act's statutory structure, no exceptions allow deviation from applying the Rule of Two. In addition to the statutory structure of the Small Business Act and the implementing FAR provisions of the Rule of Two, other sources relate to applying the Rule of Two. External to the Small Business Act, CICA supports concluding that the Rule of Two applies in all domestic procurements where the rule is met.

The next section analyzes how CICA's statutory framework and its relationship with the Small Business Act support mandatory set-asides in procurements meeting the Rule of Two.

B. The Competition in Contracting Act Framework and the Small Business Act

The Competition in Contracting Act's statutory framework and its relationship with the Small Business Act support mandatory set-asides in procurements meeting the Rule of Two. Since Congressional enactment in 1984, CICA has provided a statutory framework for government contracting competition requirements.¹⁰⁹ It requires federal agencies to accomplish full and open competition when procuring property or

threshold to \$250,000. *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, §§ 805, 806, 131 Stat. 1283 (Dec. 12, 2017). However, the increase in FY 2018 applied to agencies other than the DoD. *Id.* The FY 2019 NDAA adjusted the value of the micro-purchase threshold for the DoD to \$10,000. *See* National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 821 (Aug. 13, 2017).

¹⁰⁶ FAR 19.502-2(a) (2017).

¹⁰⁷ *Id.*

¹⁰⁸ *See* FAR 19.502-2(b) (2017). Consistent with the update to FAR 19.502-2(a), the threshold value at 19.502-2(b) received an increase by the FY 2018 NDAA and its change of the simplified acquisition threshold to \$250,000. *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 805, 131 Stat. 1283 (Dec. 12, 2017) (affecting 41 U.S.C. § 134 (2011)).

¹⁰⁹ *See* CICA, 10 U.S.C. §§ 2302–2339 (2015); 41 U.S.C. §§ 3301–3312 (2011).

services.¹¹⁰ It allows that a separate federal statute may expressly authorize deviating from its default rule to accomplish full and open competition,¹¹¹ and internally provides statutory exceptions.¹¹²

Relevant to *Kingdomware's* effects, CICA contains an exception allowing for full and open competition after exclusion of sources.¹¹³ Within this exception, CICA expressly invokes the Small Business Act.¹¹⁴ Within CICA's overall statutory structure, internal references link the Small Business Act to exemptions from certain requirements.¹¹⁵ For example, a contracting officer does not need to provide separate written justification or determination and findings to support certain small business set-asides.¹¹⁶ Thus, CICA's statutory framework and its connection to the Small Business Act support mandatory set-asides in all procurements meeting the Rule of Two. The next section analyzes how *Kingdomware* affects the Rule of Two's application in all procurements.

IV. Analysis of *Kingdomware* and How the Rule of Two Applies to Procurements

Although *Kingdomware* addressed the VA Act Rule of Two, the decision supports arguments that the Small Business Act Rule of Two applies in domestic procurements to require set-asides. Since an open

¹¹⁰ 10 U.S.C. § 2304(a)(1)(A) (2011) (“obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the Federal Acquisition Regulation . . .”).

¹¹¹ 10 U.S.C. § 2304(a)(1) (2011). “‘Full and open competition’ is obtained when ‘all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.’” Dep’t of the Army—Request for Modification of Recommendation, B-290682.2, 2003 WL 103408 at *4 (Jan. 9, 2003) (citing 10 U.S.C. § 2302(3)(D)).

¹¹² 10 U.S.C. § 2304(a)(1)(A) (2011) (citing subsections (b), (c), and (g) of 10 U.S.C. § 2304 (2011)).

¹¹³ 10 U.S.C. § 2304(b) (2011).

¹¹⁴ 10 U.S.C. § 2304(b)(2) (2011).

The head of an agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding concerns other than small business concerns in furtherance of sections 9 and 15 of the *Small Business Act* (15 U.S.C. 638, 644) and concerns other than small business concerns . . .

Id. (emphasis added).

¹¹⁵ 10 U.S.C. § 2304(f)(2)(D) (2011).

¹¹⁶ *Id.* (exemption from justification and approval for procurement under section 8(a) of the Small Business Act (15 U.S.C. § 637a)).

FAR case may result in future changes to this issue, the following section provides helpful insight to the relevant statutory interpretation.¹¹⁷ First, the plain meaning of 15 U.S.C. § 644(j) supports mandatory set-asides in all procurements meeting the Rule of Two. Second, even if ambiguity exists in the Act, *Chevron* deference supports mandating set-asides in all procurements where the Rule of Two is met. Finally, *Kingdomware* affects the GAO *Aldevra* decision to result in mandatory set-asides in all procurements meeting the Small Business Act Rule of Two.

A. The Plain Meaning of the Small Business Act Results in Mandating Set-Asides in All Procurements Meeting the Rule of Two

The *Kingdomware* decision emphasized the plain meaning of the statute. This section analyzes how *Kingdomware*'s statutory construction analysis affects the Rule of Two.

1. The Plain Meaning of Section 644(j) Mandates Set-Asides in All Procurements

The *Kingdomware* decision established that a court (and the GAO) will afford a high degree of weight toward statutory construction to resolve how to apply the Rule of Two.¹¹⁸ Notably, the filings in *Kingdomware* focused on statutory construction as the main issue in deciding the mandatory nature of the VA Act Rule of Two.¹¹⁹ Similarly, the Small Business Act's Rule of Two requires assessing the plain reading of the underlying statute before addressing collateral policy or regulatory concerns, such as contracting inefficiency.¹²⁰

¹¹⁷ See *Defense Acquisition Regulations System Open FAR Cases as of 3/8/2019*, U.S. DEP'T OF DEFENSE, <https://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (last visited Mar. 11, 2019).

¹¹⁸ *Kingdomware*, 136 S. Ct. at 1976 (2016) (applying plain meaning to reason that 38 U.S.C. § 8127(d) unambiguously required the VA to use the Rule of Two before contracting under competitive procedures).

¹¹⁹ Reply Brief for Petitioner at *1, *Kingdomware Tech., Inc., v. United States*, 136 S. Ct. 1969 (2016) (No. 14-916), 2015 WL 2375829 (“The government does not dispute that this case presents a pure question of statutory construction.”).

¹²⁰ See *id.* at *9 (“It is a bedrock principle . . . that any ‘appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute.’”) (citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978)).

The plain language of 15 U.S.C. § 644(r) makes no reference to 15 U.S.C. § 644(j).¹²¹ Neither section refers to the other by expressly establishing an exception dependent on the other.¹²² Notably, 15 U.S.C. § 644(r) provides operative discretionary language (“may”), in contrast with 15 U.S.C. § 644(j) providing mandatory language (“shall”).¹²³ *Kingdomware*’s reasoning provided that usage of “shall” imposes a mandatory duty when the statute distinguishes between the terms “may” and “shall.”¹²⁴ Therefore, 15 U.S.C. § 644(j)’s plain meaning provides a mandate unaffected by 15 U.S.C. § 644(r)’s discretionary language.¹²⁵

Since the plain meaning of 15 U.S.C. § 644(j) mandates set-asides in all procurements meeting the Rule of Two, the next section analyzes how 15 U.S.C. § 644(r) affects set-asides.

2. *15 U.S.C. § 644(r) Does Not Affect Set-Asides Required by 15 U.S.C. § 644(j)*

Enactment of 15 U.S.C. § 644(j) provided statutory authority to ensure small business concerns receive a “fair proportion” of government contracts.¹²⁶ Analyzed in Section IIIA, *supra*, the Small Business Act’s “fair proportion” standard existed from the initial passage of the 1953 Small Business Act.¹²⁷ Prior-in-time enactment of 15 U.S.C. § 644(j) created a statutory mandate, and later-in-time enactment of 15 U.S.C. § 644(r) did not affect 15 U.S.C. § 644(j)’s priority, especially because neither section refers to the other.¹²⁸ Furthermore, the nature of 15 U.S.C. § 644(r) provides discretionary authority for promulgating FAR provisions that address multiple award schedule contracts.¹²⁹ The absence of any

¹²¹ Compare 15 U.S.C. § 644(r) (2016) with 15 U.S.C. § 644(j) (2016).

¹²² Compare 15 U.S.C. § 644(r) (2016) with 15 U.S.C. § 644(j) (2016).

¹²³ Compare 15 U.S.C. § 644(r) (2016) with 15 U.S.C. § 644(j) (2016). Note, “When a statute distinguishes between ‘may’ and ‘shall,’ it is generally clear that ‘shall’ imposes a mandatory duty.” *Kingdomware*, 136 S. Ct. at 1977 (2016) (citing *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359–60 (1895)).

¹²⁴ *Kingdomware*, 136 S. Ct. at 1977 (2016) (citing *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359–60 (1895) (“[w]hen a statute distinguishes between ‘may’ and ‘shall,’ it is generally clear that ‘shall’ imposes a mandatory duty.”)).

¹²⁵ *Id.*

¹²⁶ See 15 U.S.C. § 644(a)(1)(C) (2016); see also 15 U.S.C. § 644(a)(5) (2016).

¹²⁷ See *supra* text accompanying notes 81–93.

¹²⁸ Compare 15 U.S.C. § 644(r) (2016) with 15 U.S.C. § 644(j) (2016).

¹²⁹ See Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1331, 124 Stat. 2504, 2541 (Sept. 27, 2010).

mention within either 15 U.S.C. § 644(j) or 15 U.S.C. § 644(r) supports the overall point that the mandate of 15 U.S.C. § 644(j) remains in effect.¹³⁰ Each section exists independently of the other without affecting the overall structure of the Small Business Act.¹³¹

3. *The Small Business Act Section 644(r) Does Not Affect Section 644(j)*

An important point for *Kingdomware*'s application to the Small Business Act arises from the nature of the plain mandate at 15 U.S.C. § 644(j). Neither 15 U.S.C. § 644(j) nor 15 U.S.C. § 644(r) contains an express exemption to allow deviation from the statute's plain mandate.¹³² Because the Act requires agencies to apply the Rule of Two in all cases, it equally applies to multiple award contracts.¹³³ In the alternative, should the statute prove ambiguous, the next section addresses *Chevron* analysis.

B. Even if Ambiguity Exists in the Small Business Act, *Chevron* Deference Supports Mandatory Set-Asides in All Procurements Meeting the Rule of Two

Even if 15 U.S.C. § 644(r) affects the plain meaning of 15 U.S.C. § 644(j), *Chevron* deference supports mandatory set-asides in all procurements meeting the Rule of Two. Described earlier in Section I, *Chevron* deference arises when a tribunal defers to an agency's interpretation of a statute if the tribunal finds ambiguity in the statute.¹³⁴ In the context of the Small Business Act, the Small Business Administration (SBA) provided Federal Register comments upon the amendment adding 15 U.S.C. § 644(r).¹³⁵

¹³⁰ Compare 15 U.S.C. § 644(r) (2016) with 15 U.S.C. § 644(j) (2016).

¹³¹ See *Kingdomware*, 136 S. Ct. at 1976 (2016) (citing *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)). "If the statutory language is unambiguous and 'the statutory scheme is coherent and consistent'—as is the case here—'[t]he inquiry ceases.'" *Id.*

¹³² See *Kingdomware*, 136 S. Ct. at 1976 (2016).

¹³³ See *id.*

¹³⁴ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

¹³⁵ Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation, 78 Fed. Reg. 61114-01 (Oct. 2, 2013).

The SBA clearly announced that the addition of 15 U.S.C. § 644(r) did not change the mandatory requirement of a set-aside if the Rule of Two is met.¹³⁶ Rather than shifting analysis to the FAR provisions that depend on 15 U.S.C. § 644(r), the *Chevron* analysis properly begins with the agency interpretation of the statute.¹³⁷

The SBA's Federal Register comments provide the SBA's interpretation of the statute, and deserve priority before considering conflicting FAR provisions. Notably, the SBA stated that proceeding to 15 U.S.C. § 644(r)'s multiple award contract authority would be permissible only when the Rule of Two could not be determined through market research.¹³⁸ Thus, the SBA clearly announced the proper statutory interpretation requires mandatory set-asides.¹³⁹ Therefore, if a court views the Small Business Act as ambiguous, it should defer to the SBA's interpretation of the statute and require set-asides when the Rule of Two is met.

C. *Kingdomware* Affects the 2015 GAO *Aldevra* Decision and Results in Mandatory Set-Asides in Domestic Procurements Meeting the Rule of Two

The *Kingdomware* decision affects the analysis of the 2015 GAO *Aldevra* decision that denied a protest under the Small Business Act's Rule of Two.¹⁴⁰ Although the Army prevailed against that protest, *Kingdomware* occurred after the 2015 GAO *Aldevra* decision and applies to future cases involving the Small Business Act.¹⁴¹

The *Kingdomware* decision affects the 2015 GAO *Aldevra* decision by providing increased support to the position the SBA took before the

¹³⁶ *Id.* at 61122 (“[15 U.S.C. § 644(r)] will come into play only on a multiple award acquisition if the “rule of two” cannot be determined through market research prior to the issuance of a solicitation.”).

¹³⁷ See *Chevron*, 467 U.S. at 842 (1984) (providing *Chevron*'s two-step analysis).

¹³⁸ Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation, 78 Fed. Reg. 61114-01, 61122 (Oct. 2, 2013).

¹³⁹ *Id.* (“[15 U.S.C. § 644(r)] will come into play only on a multiple award acquisition if the “rule of two” cannot be determined through market research prior to the issuance of a solicitation.”).

¹⁴⁰ See 2015 GAO *Aldevra*, *supra* note 10.

¹⁴¹ Matter of *Aldevra*-Reconsideration, B-411752.2, 2016 WL 5846457 at *3 (Comp. Gen. Oct. 5, 2016) (specifically mentioning *Kingdomware*'s prospective nature in its dismissal).

GAO.¹⁴² The SBA had joined Aldevra’s position against the U.S. Army and the General Services Administration.¹⁴³ *Kingdomware* relied on consistency and coherency when analyzing the VA Act, which supports the SBA’s arguments to the GAO.¹⁴⁴ This reasoning supports the SBA’s “repeal by implication argument” that left the GAO unconvinced.¹⁴⁵ Furthermore, this reasoning differs from the Army’s protest response and the Army’s cited statutory construction authority.¹⁴⁶

A recent 2018 GAO decision, *American Relocation*, provided the GAO with an opportunity to address the issue of interpreting 15 U.S.C. § 644(j).¹⁴⁷ Different from the 2015 GAO *Aldevra* decision, the GAO in *American Relocation* dismissed the protest, rather than denying the protest on the merits.¹⁴⁸ In the 2018 *American Relocation* decision, the GAO noted that interpreting the provisions of 15 U.S.C. § 644(j) was irrelevant due to the contract size in *American Relocation*.¹⁴⁹

In dismissing the protest, the GAO reasoned that an internal SBA memorandum concerning the Supreme Court’s holding in *Kingdomware* was internal guidance that was not reviewable by the GAO in its bid protest function.¹⁵⁰ The GAO also noted that the classification code of the award at issue in *American Relocation* resulted in dismissing the protest, rather than denying the protest on the merits.¹⁵¹

¹⁴² Memorandum from Michael D. Tully—U.S. Government Services Administration to Ms. Paula A. Williams—U.S. Government Accountability Office, subject: B-411752.1 – Protest of Aldevra, LLC (16 Sep. 2015) at 1.

¹⁴³ *Id.* at 5–6. “GSA agrees with the Army’s position that it is not mandatory that schedule orders below the simplified acquisition threshold . . . be set aside for small business.” *Id.* at 3.

¹⁴⁴ See *Kingdomware*, 136 S. Ct. at 1976 (citing *Barnhart*, 534 U.S. at 450 (2002)). The inquiry ceases if “the statutory scheme is coherent and consistent” and the statutory language is unambiguous statutory. *Id.*

¹⁴⁵ See 2015 GAO *Aldevra*, *supra* note 10, at *4 (“According to SBA, a contrary interpretation would effectively repeal section 644(j) by implication. We disagree.”).

¹⁴⁶ Memorandum from Major Michael Pond—U.S. Army Legal Services Agency to Ms. Paula A. Williams—U.S. Government Accountability Office, subject: GAO Protest of Aldevra B-411752 (21 Aug. 2015) at 5 (citing *Ashland Sales & Serv. Co.*, B-401481, 2009 WL 318914 at *5 (Comp. Gen. Sep. 15, 2009)).

¹⁴⁷ See *American Relocation Connections, LLC*, B-416035 (Comp. Gen. May 18, 2018).

¹⁴⁸ *Id.* at *1.

¹⁴⁹ *Id.* at *6 (“any interpretation of the provisions of 15 U.S.C. § 644(j), which apply to procurements below the simplified acquisition threshold, is irrelevant to this protest.”).

¹⁵⁰ *Id.* (citing *LCPP, LLC*, B-413513.2 at *5 (Comp. Gen. Mar. 10, 2017)).

¹⁵¹ *Id.* at *7 n. 5 (citing 4 C.F.R. § 21.5(b)).

The above reasons support a conclusion that the logic of *Kingdomware* continues to affect the 2015 GAO *Aldevra* decision and results in mandatory set-aside in domestic procurements meeting the rule of two. Additionally, neither the COFC nor CAFC have provided additional decisions on the issue.

V. Conclusion

Kingdomware illustrates the need to correctly provide contracting advice, thereby minimizing bid protests and procurement delays. This article has clearly demonstrated that *Kingdomware* should apply to the Small Business Act. The case requires mandatory set-asides under the Small Business Act Rule of Two such that agencies should award domestic contracts to small businesses whenever the Rule of Two is met.

Contracting practitioners should not assume that the Small Business Act's 2010 amendment removes mandatory small business set-asides under multiple award contracts. Since contracting officers follow the FAR rather than interpret statutes, this article provides insight to a practice area that can result in protests and delay procurements notwithstanding contracting officer compliance with the FAR. Importantly, there is an open FAR case on this issue that may result in future changes to this issue.¹⁵² Finally, practitioners should heed *Kingdomware*'s effect on the 2015 GAO *Aldevra* decision to result in mandatory set-asides in all domestic procurements meeting the Rule of Two.

¹⁵² See *Defense Acquisition Regulations System Open FAR Cases as of 3/8/2019*, U.S. DEP'T OF DEFENSE, <https://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (last visited Mar. 11, 2019).

