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Articles

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The *Public Contract Law Journal* is published by the Section of Public Contract Law as a service to its members and associate members, and for the benefit of lawyers and laypersons involved in the practice of public contract and grant law at the federal, state, local, and international levels of government.

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STRENGTHENING THE PROHIBITION OF FORCED OR INDENTURED CHILD LABOR IN GOVERNMENT CONTRACTS: A CRITICAL ANALYSIS OF FAR SUBPART 22.15

*Miriam Amanze & Ama Eyo**

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I. INTRODUCTION

Presidential inaugurations in the United States bring opportunities to implement and strengthen policies that correspond with the new administration's goals and priorities. On January 20, 2021, President Joseph R. Biden was inaugurated as the forty-sixth President of the United States, ending the Trump era.[1] Hours after his inauguration, President Biden conveyed his change of vision by revoking many of the Trump administration's executive orders.[2] The Biden administration addressed a variety of social issues during the first 100 days in office, namely COVID-19, unemployment, inequality, and racial discrimination as underscored by the Black Lives Matter movement.[3] Importantly, the Biden administration is also dedicated to strengthening the prohibition of child labor in the U.S. federal supply chain.

The Biden administration's intent to use government contracts to build resilient, diverse, and secure supply chains to ensure economic prosperity and national security in the United States can be gleaned from its implementation of Executive Order 14017.[4] While there is no explicit mention of child labor concerns, President Biden has signalled through the Order an intention to use the government supply chain to achieve a range of sustainable goals.[5]

This is not the first time that President Biden has shown commitment to advancing sustainable goals through the government supply chain. An earlier example occurred during his tenure as vice president under the Obama administration, when two significant anti-slavery executive orders were executed and subsequently implemented into the U.S. federal procurement framework established under the Federal Acquisition Regulation (FAR).[6] These executive orders, which attempted to address anti-slavery practices in the U.S. federal supply chain, include Executive Order No. 13673 on fair pay and safe

1. BBC News, *Full Transcript of Joe Biden's Inauguration Speech*, BBC News (Jan. 20, 2021), https://www.bbc.com/news/world-us-canada-55656824 [https://perma.cc/J4A4-QCSP].

2. *See generally 2021 Joseph R. Biden Jr. Executive Orders*, Fed. Reg., https://www.federalregister.gov/presidential-documents/executive-orders/joe-biden/2021 [https://perma.cc/HP7B-F4QD] (last visited Jan. 25, 2021).

3. *Covid-19: Biden Sets Ambitious Pandemic Goals for First 100 Days*, N.Y. Times (Dec. 9, 2020), https://www.nytimes.com/live/2020/12/08/world/covid-19-coronavirus [https://perma.cc/9HCU-VSL5]; Josh Wingrove & Nancy Cook, *Biden Went Big in His First 100 Days, and Now Comes the Hard Part*, Bloomberg (Apr. 22, 2021), https://www.bloomberg.com/news/features/2021-04-22/biden-tackled-covid-economy-in-first-100-days-now-comes-border-crisis-and-more [https://perma.cc/QV64-JUSW].

4. America's Supply Chains, 86 Fed. Reg. 11,849 (Feb. 24, 2021).

5. *Id.*

6. Exec. Order No. 13673, 79 Fed. Reg. 45,309 (Aug. 5, 2014); Exec. Order No. 13627, 77 Fed. Reg. 60,029 (Oct. 2, 2012). For discussions on these executive orders and their implementation into the FAR, *see* Cameron S. Hamrick & Roger V. Abbott, *The "Fair Pay and Safe Workplaces" Regulations and Guidance Constitute an Unreasonable Use of Federal Authority*, 46 Pub. Cont. L. J. 217, 219–21 (2017); Andrew C. Fillmore, *Thanks, Obama! "Fair Pay and Safe Workplaces" Come at the Cost of Mandatory Pre-Dispute Employment Arbitration*, 7 Y.B. Arb. & Mediation 237, 237–39 (2015); Ashley Winters, *Regardless of Potential Scrutiny, the Arbitration Clause of the Fair Pay and Safe Workplaces Executive Order (2014) Should Not Have a Resounding Impact*, 31 Ohio St. J. on Disp. Resol. 179, 180 (2016).

workplaces (set forth in FAR Subpart 22.20)[7] and Executive Order No. 13627 on strengthening protections against trafficking in persons (set forth in FAR Subpart 22.17).[8]

Despite tackling slavery and exploitative practices in these executive orders, significant issues remain, especially in relation to child labor concerns in the U.S. federal supply chain. This is because, while FAR Subpart 22.15 (introduced from the 1999 Executive Order 13126 made by the Clinton administration) prohibits the acquisition of products produced by forced or indentured child labor in the U.S. federal procurement regime, fundamental questions persist regarding the use and treatment of child laborers in U.S. government contracts.[9]

This article advances suggestions on how the Biden administration and federal procuring agencies can strengthen Subpart 22.15 to ensure that federal contracting officers enforce laws relating to child labor in the procurement process and, therefore, achieve human rights protection for children. This is particularly important as the United Nations (UN) has called for an increased protection of children from child labor.[10] This article asserts that strengthening Subpart 22.15 will also support the United States in achieving several targets in the UN Sustainable Development Goals.[11] For example, Target 8.7 of the UN goals, which concerns immediate and effective measures to eradicate forced labor, "end[s] modern slavery and human trafficking and secure[s] the prohibition and elimination of the worst forms of child labor," and Target 12.7 focuses on sustainable contracting practices.[12]

An additional reason for strengthening child labor rules in the FAR relates to the impact of the COVID-19 pandemic and its implication for child laborers. This is because "[a]s economic contraction reduces opportunities in the labour markets for parents, it can push their children into hazardous and

7. Exec. Order No. 13673, 79 Fed. Reg. 45,309 (Aug. 5, 2014); FAR 22.20; *see* Ken M. Kanzawa, *Legal and Practical Issues in Implementing Executive Order 13673: Fair Pay and Safe Workplaces*, 44 Pub. Cont. L. J. 417, 430–31 (2015).

8. Exec. Order No. 13627, 77 Fed. Reg. 60,029 (Oct. 2, 2012); Tara Woods, *Utilizing Supply Chain Transparency Measures to Combat Trafficking in Persons: A Comparative Analysis of the U.S. and Swedish Systems*, 48 Pub. Cont. L. J. 423, 428 (2019) (The objective of this EO was to "increase stability, productivity, and certainty in federal contracting by avoiding the disruption and disarray caused by the use of trafficking . . . resulting in investigative and enforcement actions" against suppliers tainted by trafficking practices prohibited in the FAR).

9. *See* Exec. Order No. 13126, 64 Fed. Reg. 32,383 (June 16, 1999).

10. *See 2022 Theme: "Universal Social Protection to End Child Labour*,*"* United Nations, https://www.un.org/en/observances/world-day-against-child-labour [https://perma.cc/EC27-3XVP] (last visited Feb. 5, 2023); *UN Global Compact Announces New 2021 Action Pledge to Help End Child Labour*, United Nations, https://www.unglobalcompact.org/news/4683-01-21-2021 [https://perma.cc/85DT-W64A] (last visited Feb. 6, 2023).

11. *See* G.A. Res. 70/1, at 3 (Sept. 25, 2015) (hereafter SDGs).

12. *Id.* at 20 (For example, Target 8.7 states that governments should "[t]ake immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms."); *id.* at 22 (Target 12.7 states that governments should "[p]romote public procurement practices that are sustainable, in accordance with national policies and priorities.").

exploitative work."[13] While Subpart 22.15 prohibits forced or indentured child labor in federal contracts, federal contracts are still at risk of being performed using child labor, particularly in light of the ravaging effects of COVID-19. By strengthening Subpart 22.15 now, as advocated in this article, the U.S. federal government will protect children engaged in producing goods during or after this global emergency.

Underlying this inquiry are two questions. First, how adequate is Subpart 22.15 in prohibiting child labor in the U.S. federal supply chains? Second, how can such inadequacies be remedied? The answers to these questions will be addressed by analyzing the regulation through the lens of the contracting process, beginning with the regulation's scope and coverage, and provisions relating to procurement planning, solicitation, tendering, contract awards, and contract management. Throughout the analysis, this article will highlight appropriate provisions that effectively prohibit child labor and examine inadequate provisions by focusing on three key perspectives: the provision of legal certainty,[14] comprehensive scope and coverage,[15] and significant limitations or loopholes that hinder the effectiveness of Subpart 22.15.[16] While many labor and anti-trafficking regulations in the FAR have been extensively discussed in academic literature, the prohibition of forced or indentured child labor under Subpart 22.15 has been discussed minimally.[17] Thus, assessing the

13. Int'l La. Org., Covid-19 and Child Labour: A Time of Crisis, A Time to Act 9 (2020); *see also* Int'l Lab. Org., Covid-19 Impact on Child Labour and Forced Labour: The Response of the IPEC + and Flagship Programme 4, 10 (2020).

14. *See* Miriam Amanze et al., *Tackling Human Trafficking in Governments Supply Chains: Legal Certainty and Effectiveness Issues Under the Australian Commonwealth Procurement Rules Model*, 50 Fed. L. Rev. 479, 481 (2022); *see also* Mark Fenwick & Stefan Wrbka, Legal Certainty in a Contemporary Context: Private and Criminal Law Perspectives 1–2 (2016); James Maxeine, *Some Realism about Legal Certainty in Globalization of the Rule Law*, 31 Hous. J. Int'l L. 27, 32 (2008); John Braithwaie, *Rules and Principles: A Theory of Legal Certainty*, 27 Aust. L. J. Legal Phil. 47, 50, 52 (2002).

15. Arwel Davies, *Government Procurement*, *in* Bilateral and Regional Trade Agreements: Commentary and Analysis 274–307 (Lester S. Nicholas & Bryan Mercurio eds., 2009). Davies points out that a procurement scope and coverage consist of factors such as (1) the type of entities covered; (2) procurement threshold; (3) subject matter of the procurement; and (4) exceptions to the non-discrimination principle. These elements of FAR Subpart 22.15 scope and coverage are considered in Part III below.

16. *Loophole*, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/loophole [https://perma.cc/6Y7X-VD93] (last visited Feb. 26, 2023). The *Cambridge Dictionary* defines loophole as "a small mistake in an agreement or law that gives someone the chance to avoid having to do something." In the context of this paper, a loophole refers to gaps or mistakes that affects the effectiveness of Subpart 22.15 in preventing the supply of products produced by forced or indentured child labor to federal procuring agencies. A non-procurement example of loopholes is discussed by Antonia J. Broughton, *A Workplace Exception: Exploring the Legal Loophole That Allows for Warrantless GPS Tracking of Government Employees' Personal Vehicles*, 31 Touro L. Rev. 743 (2015), which discussed the legal loophole that allowed government employers to track an employee's personal vehicle during working days.

17. The following articles discuss the lack of labor protection in federal contracting, with some reference to child laborers: Meghan McGuirk, *Lacking Labor Protections in the U.S. Procurement System: A Comparative Analysis of European Labor Protections in Government Procurement*, 48 Pub. Cont. L. J. 355 (2019); Nicole Fleury, *Offering the Carrot to Complement the Stick: Providing Positive Incentives in Public Procurement Frameworks to Combat Human Trafficking*, 48 Pub. Cont. L. J. 397 (2019).

inadequacies that exist under Subpart 22.15 provisions on the prohibition of forced or indentured child labor and its potential remedies will provide useful insights and significantly contribute to the existing literature on government contracting.

Next, Part II of this article discusses the regulation of government contracts and sustainable contracting under the FAR and introduces the federal legislation that aims to address child labor concerns in the U.S. federal supply chains. Part III of this article analyzes the procurement procedures under Subpart 22.15, discusses significant limitations to Subpart 22.15, and recommends changes that will strengthen the inadequate provisions highlighted. Finally, Part IV encourages the U.S. government to lead by example in addressing the regulatory and administrative deficiencies that hinder the effective prohibition of acquisitions tainted by child labor.

II. CONTEXT AND BACKGROUND: U.S. FEDERAL GOVERNMENT CONTRACTS REGIME, LABOR EXPLOITATION, AND CHILD LABOR IN THE SUPPLY CHAIN

A. The U.S. Government Contracts Regime

As the largest single global purchaser, the U.S. federal government annually procures approximately $500 to $600 billion worth of goods, works, and services.[18] This significant fiscal expenditure requires a regulatory regime that is efficient, effective, and simple and that can be uniformly applied by all procuring agencies.[19] For this reason, U.S. government contracts have been the subject of great attention from policymakers, procuring agencies at federal and state levels, non-governmental institutions, and academics.[20]

The U.S. federal procurement system is governed by the FAR and agency regulations.[21] In the context of exploring the prohibition of child labor in the FAR, Part 22 of the FAR is crucial to the subject matter, with the relevant regulation being Subpart 22.15, as it contains the prohibition of acquisition of products produced by forced or indentured child labor. Since the issuance of Executive Order 13126 in 1999, Subpart 22.15 has not been revised to keep

18. Christopher Yukins, *The U.S. Federal Procurement System: An Introduction*, *in* GW Law Faculty Publications & Other Works 69 (2017); *Federal Contract Spending: Five Trends in Five Charts*, Bloomberg Gov't (Jan. 5, 2021), https://about.bgov.com/news/federal-contract-spending-five-trends-in-five-charts-2 [https://perma.cc/N3HR-E9JM]. In 2020, the U.S. federal government spent over $681 billion procuring goods and services due to the COVID-19 pandemic. For more data on federal procurement spending, see www.usaspending.gov [https://perma.cc/2FT8-RP75].

19. FAR 1.101; S. Arrowsmith, The Law of Public and Utilities Procurement 1 (2014).

20. Khi V. Thai, *Public Procurement Re-examined*, 1 J. Pub. Procurement 1, 10 (2001); Cynthia Walker, *Setting up a Public Procurement System: The Six Steps Method*, *in* Pub. Procurement: The Continuing Revolution 6 (Sue Arrowsmith & Martin Trybus eds., 2003).

21. FAR 1.301; Olessia Smotrova-Taylor, *Get Started in Government Contracting*, *in* How to Get Government Contracts: Have a Slice of the 1 Trillion Dollar Pie 29–35 (2012). In addition to complying with the FAR, each federal procuring agency has its own set of regulations that it abides by.

up with societal and legal developments that will "better serve the American people" and global citizens.[22] The lack of U.S. federal attention to Subpart 22.15 underscores the urgency for updated solutions; this article encourages revisions that will bring the provision in line with current debates and developments.[23]

B. Sustainable Contracting and Labor Exploitation

Government contracts have been used to promote objectives beyond the acquisition of goods, works, and services.[24] Many countries use government contract activities to support various goals including the protection of the rights of workers involved in the government supply chain.[25] This advancement of environmental, economic, and social agenda, including those related to addressing human rights concerns through government contracts, is referred to by many names, including sustainable procurement, green procurement, and environmentally responsible public procurement.[26]

At an international level, sustainable contracting is so important that a specific UN Sustainable Development Goal target, SDG 12.7.1, calls for the promotion of public procurement practices that are sustainable in accordance with national policies and priorities by 2030.[27] This is an issue of significant

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22. *See* James F. Nagel, History of Government Contracting, 511–18 (1999); Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Pub. Procurement L. Rev. 103, 108 n.29 (2002); Yukins, *supra* note 18.

23. See *infra* Part III.

24. Peter Kunzlik, *International Procurement Regimes and the Scope for the Inclusion of Environmental Factors in Public Procurement*, *in* The Environmental Performance of Public Procurement: Issues of Policy Coherence 193–219, (2003); Jolien Grandia & Joanne Meehan, *Public Procurement as a Policy Tool: Using Procurement to Reach Desired Outcomes in Society*, 30 Int'l J. Pub. Sector Mgmt. 302, 303 (2017).

25. Olga Martin-Ortega, Opi Outhwaite & William Rook, *Buying Power and Human Rights in the Supply Chain: Legal Options for Socially Responsible Public Procurement of Electronic Goods*, 19 Int'l J. of Hum. Rights 341, 341 (2015); Don Wells, *How Ethical Are Ethical Purchasing Policies?*, 2 J. Acad. Ethics 119, 122 (2004); Stephen J. New, *Modern Slavery and the Supply Chain: The Limits of Corporate Social Responsibility?*, 20 Supply Chain Mgmt. 697, 697–707 (2015); Louise Shelly, *Human Trafficking as a Form of Transnational Crime*, *in* Human Trafficking 22 (Maggy Lee ed., 2011).

26. *See* Christopher McCrudden, *Using Public Procurement to Achieve Social Outcomes*, 28 Nat. Res. F. 257, 257 (2004); Craig Carter & Marianne Jennings, *Social Responsibility and Supply Chain Relationships*, Transp. Rsch. Part E: Logistics & Transp. Rev. 37, 38 (2002); Lin Li & Ken Geiser, *Environmentally Responsible Public Procurement (ERPP) and Its Implications for Integrated Product Policy (IPP)*, 13 J. Cleaner Prod. 705, 706 (2005); Lutz Preuss, *Addressing Sustainable Development Through Public Procurement: The Case of Local Government*, Supply Chain Mgmt.: An Int'l. J. 213, 214 (2009); Katriina Parikka-Alhola, *Promoting Environmentally Sound Furniture by Green Public Procurement*, 68 Ecological Econ. 472, 472 (2008); Laurie Nijaki & Gabriela Worrel, *Procurement for Sustainable Local Economic Development*, 25 Int'l J. Pub. Sector Mgmt. 133, 134 (2012); Miriam Mbah, *The Future of Sustainable Procurement in UK Public Procurement Regulation: An Analysis of the Green Paper on Transforming Public Procurement*, Int'l Learning Lab on Pub. Procurement & Hum. Rts. (May 2021), https://www.humanrightsprocurementlab.org/blog-1/the-future-of-sustainable-procurement-in-uk-public-procurement-regulation-an-analysis-of-the-green-paper-on-transforming-public-procurement-miriam-mbah-may-2021 [https://perma.cc/EZ2T-HM7K].

27. G.A. Res. 2015, *supra* note 11; Joyce Thomson & Tim Jackson, *Sustainable Procurement in Practice: Lessons from Local Government*, J. Env't Plan. & Mgmt. 421, 428 (2005); Stephen

concern in the specific case of human rights violations in government supply chains, which are expected to "prevent, investigate, punish and redress [business-related human rights abuses] through effective policies, legislation, regulations and adjudication."[28] Governments have gone to extra lengths to ensure that they do not engage in business with criminals, thereby facilitating criminal schemes and increasing the risk of government contracts being tainted by unethical and illegal practices.[29] This was the case even during the unprecedented COVID-19 pandemic.

Several international organizations encourage governments to prevent, mitigate, or address trafficking practices that could occur through government contracts. For example, the UN, through its Guiding Principles on Human Rights, encourages governments to promote "respect for human rights by business enterprises with which they conduct commercial transactions."[30] Other international organizations such as the International Labour Organization[31] and the Organisation for Security and Co-operation in Europe (OSCE), argue that governments (including the United States) have an inescapable obligation to eliminate exploitative practices adopted by their suppliers.[32]

Regarding the U.S. approach to sustainable contracting and prevention of labor exploitation, under Article II of the Constitution and the Federal Property and Administrative Services Act 1949, U.S. presidents are permitted to issue executive orders to oversee various aspects of federal contracts including suppliers' behaviors in such contracts.[33] As a result, several executive orders that advance the federal government's economic, environmental, and social policies have been issued and implemented into the FAR.[34] Regarding

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Brammer & Helen Walker, *Sustainable Procurement in the Public Sector: An International Comparative Study*, Int'l J. of Operations and Prod. Mgmt. 452, 457 (2011).

28. Rep. of the Off. of the High Comm'r, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework*," at 3, U.N. Doc. A/HRC/17/31 (2011) [hereinafter UNHRC].

29. UN Off. on Drugs and Crime, Global Report on Trafficking in Persons 2020, at 4 (2020).

30. UNHRC, *supra* note 28. It notes that states "should promote respect for human rights by business enterprises with which they conduct commercial transactions." *Id.* at 8. For in-depth discussions on the legal status of the UN Guiding Principles, see Rep. of the Off. of the High Comm'r, Frequently Asked Questions About the Guiding Principles on Business and Human Rights, at 8, U.N. Doc. HR/PUB/14/3 (2014).

31. The following ILO Conventions and Recommendations are relevant to the exploitation of workers: International Labour Organisation, Forced Labor Convention, 1930, No. 29; International Labour Organisation, Forty-Hour Week Convention, 1935, No. 47; International Labour Organisation, Convention Concerning Minimum Age for Admission to Employment, 1973, No. 138; International Labour Convention, Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999, No. 182.

32. OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, Ending Exploitation—Ensuring that Businesses Do Not Contribute to Trafficking in Human Beings: Duties of States and the Private Sector 42, 47, 93, 97 (2014), https://www.osce.org/secretariat/126305 [https://perma.cc/AQA6-2TFW].

33. 40 U.S.C. §§ 121, 701; *see also* Daniel P. Gitterman, *The American Presidency and the Power of the Purchaser*, 43 Presidential Stud. Q. 225, 225–51 (2013).

34. Khi Thai & David Drabkin, *US Federal Government Procurement: Structure, Process and Current Issues*, *in* Pub. Procurement 89–104 (Louise Knight et al. eds., 2007).

economic policies, FAR Part 19 promotes small business programs by requiring federal entities to set aside specified contracts for small and disadvantaged businesses (SDBs) owned largely by minorities such as women, Black Americans, Hispanic Americans, and other minorities in America.[35] Another economic policy promoted by the FAR is the Buy American regime, which is implemented in FAR Part 25, following the Buy American Act of 1933.[36] This policy essentially limits procuring agencies from buying foreign goods or services, and promotes the acquisition of products produced or manufactured in full or in part in the United States.[37] Similarly, FAR Part 23 promotes environmental policies of the federal government.[38] For example, Executive Order 13693 on "planning for federal sustainability in the next decade" requires federal agencies to continue protecting the environment by adopting measures such as mandatory life cycle costing, drug-free workplace, renewable energy, and environmentally friendly evaluation criteria.[39]

Social policies are regulated mainly under FAR Part 22.[40] Implementing these FAR provisions shows that the federal government is not politically neutral in matters involving human and labor rights violations. However, these regulations require a thorough analysis to determine their application and impact. This article focuses primarily on FAR Subpart 22.15, which prohibits the use of forced or indentured child labor in the U.S. federal supply chain.

C. Child Labor in the U.S. Supply Chain and Early Prohibition Under Federal Law

Child labor is the employment of a child[41] whose work is "mentally, physically, socially or morally dangerous" and "interferes with their schooling."[42] While

35. FAR Part 19 details the procedures for awarding contracts to small businesses. FAR 19.201; FAR 19.501; 13 C.F.R. § 124.103 (2022). This initiative was initially met with criticisms as outlined in the case of *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). *See* K. Morgan, *Government Contracting in the 21st Century*, 14 Preventive L. Rep 30, 30–40 (1995).

36. FAR 25.000; 41 U.S.C. §§ 8301–8305.

37. Yukins, *supra* note 18; Paul H. Gantt & William H. Speck, *Domestic v. Foreign Trade Problems in Federal Government Contracting: Buy American Act and Executive Order*, 7 J. Pub L. 378, 382–83 (1958); Laurence A. Knapp, *The Buy American Act: A Review and Assessment*, 61 Colum. L. Rev 430, 430–31 (1961).

38. FAR 23.000.

39. Exec. Order No. 13693, (*revoked by* Exec. Order No. 13834). Executive Order (EO) 13693 was signed March 19, 2015. *Id.* This Executive Order replaced Executive Order 13423 on strengthening federal environmental, energy, and transportation management and Executive Order 13514 on federal leadership in environmental, energy, and economic performance, improving the environment and encouraging a sustainable mode of production. *Id.*; *see also* Exec. Order No. 13423; Exec. Order No. 13514.

40. FAR Subpart 22.3 regulates contract work hours and safety standards. FAR 22.3. Subpart 22.15 governs the prohibition of forced or indentured child labor. FAR 22.15. Subpart 22.17 addresses trafficking in persons, and Subpart 22.20 requires federal entities to provide fair pay and safe workplaces to persons involved in the government supply chain. FAR 22.17; FAR 22.20.

41. "Child" is defined by the UN and ILO as a "person under eighteen years." Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, art. 3, Dec. 12, 2000, 2237 U.N.T.S. 319; Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *supra* note 31, art. 3.

42. *What Is Child Labour*, Int'l Lab. Org., https://www.ilo.org/ipec/facts/lang--en/index.htm [https://perma.cc/8VR4-6CXR] (last visited June 29, 2021); *see also* Per Miljeteig, *Introduction:*

it is recognized that the ideas of childhood and child-appropriate activities vary across national borders and not all work carried out by a child is child labor, this definition of child labor is consistent with the U.S. definition of "oppressive child labor" under the Fair Labor Standards Act (FLSA).[43]

Globally, there are approximately 160 million child labor victims, with "16.8 million more children aged 5 to 11 in child labour in 2020, than in 2016".[44] The International Labour Organisation (ILO) notes that this figure is likely to increase due to the COVID-19 pandemic and, thus, makes the issue a persistent problem that should be addressed.[45] While various national legislation and international conventions have sought to abolish child labor, this criminal activity continues to be reported, especially within government suppliers' practices, including within the U.S. procuring agencies.[46] Thus, the passing of laws and rules such as Executive Order 13126 and its implementation as FAR Subpart 22.15 is itself evidence that child labor exists in the U.S. supply chains. Also, evidence shows that suppliers use child laborers in sourcing or mining minerals, working in farms, fisheries, sewing apparels, and carrying materials to a construction site.[47] For example, in Bangladesh, many in the workforce producing licensed apparel for the U.S. Department of Defense were children.[48] Further, over 150 goods produced by child labor in seventy-seven countries are listed in the U.S. Department of Labor (DoL) list of goods produced by forced labor and child labor, and thirty-four products

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Understanding Child Labour, 6 Childhood 6, 5–12 (1999) (discussing the complexities of regulating child labor laws).

43. Miljeteig, *supra* note 42, at 6. The ILO states that helping around the house, work placements, and earning money outside school hours and during holidays are not categorized as child labor if the work does not affect the child's physical and mental development and interfere with the child's schooling. *What Is Child Labour*, *supra* note 42. "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being. Fair Labor Standards Act, 29 U.S.C. § 203 (1938).

44. Int'l Lab. Off. & U.N. Children's Fund, Child Labour: Global Estimates 2020, Trends and the Road Forward 8 (2021).

45. *Id.*

46. *Id.*; *see also* Andrew J. Samet, *Keynote Address: Child Labor and the New Millenium*, 21 Whittier L. Rev. 69, 73–76 (1999).

47. Nat Burke, Policy Report: Creating Markets for Child-Friendly Growth: Addressing Child Labor Through G20 Public Procurement 3, 10 (2014); Eric V. Edmonds & Nina Pavcnik, *Child Labor in the Global Economy*, 19 J. Econ. Persp. 199, 199–204 (2005).

48. Ian Urbina, *U.S. Flouts Its Own Advice in Procuring Overseas Clothing*, N.Y. Times (Dec. 22, 2013), https://www.nytimes.com/2013/12/23/world/americas/buying-overseas-clothing-us-flouts-its-own-advice.html [https://perma.cc/PG43-ZG4C].

from twenty-five countries are listed on Executive Order 13126 list of products produced by forced or indentured child labor ("the List").[49]

The possibility that federal agencies procure products produced by child labor has led to federal laws that seek to eradicate this form of slavery from the U.S. supply chain. For example, the Walsh-Healey Act requires government suppliers to adhere to rules relating to child labor when producing and supplying specified goods to federal procuring agencies.[50] Despite the early prohibition of child labor in this manner, the Act has been assessed as inadequate as it fails to comprehensively tackle this practice across the U.S. global supply chain because its sole focus is on goods produced within the United States, Puerto Rico, and the Virgin Islands.[51]

In addition to the Walsh-Healey Act and the FLSA, FAR Subpart 22.15 is another significant provision that seeks to tackle child labor in the federal government supply chain. In Part III below, this article turns attention to the analysis of Subpart 22.15, with a clear focus on examining provisions that lack legal certainty, create loopholes, and hinder the elimination of child labor from the U.S. supply chain.

III. THE ANALYSIS OF SUBPART 22.15: SCOPE, PROCUREMENT PROCESS, AND PROCEDURES

To effectively tackle child labor and other exploitative practices, the federal government must implement provisions that cover the entire contracting process from planning to contract management.[52] Adopting this cradle to grave approach arguably reduces the likelihood of federal agencies awarding contracts to suppliers that produce goods, works, or services tainted by inhumane and human rights violations. This section of the article focuses on the cradle to grave approach by analyzing Subpart 22.15 procedures under the four key stages of the contracting process: procurement planning, solicitation of bids, contract award, and contract management.[53] Throughout the analysis, the article focuses on the adequacy of Subpart 22.15 in prohibiting federal agencies from procuring products tainted by forms of child labor. As noted in

49. U.S. Dep't of Lab.'s Bureau of Int'l Lab. Affs., 2020 List of Goods Produced by Child Labor or Forced Labor (2020) [hereinafter 2020 List of Goods]; U.S. Dep't of Lab.'s Bureau of Int'l Lab. Affs., 2020 List of Products Produced by Forced or Indentured Child Labor (2020) [hereinafter 2020 List of Products].

50. 41 C.F.R. § 50-201.1 (2022); *see also* 41 U.S.C. §§ 6501–6511. The Act requires government suppliers to adhere to "to specifically prescribed representations and stipulations . . . pertaining to . . . the use of child labor or convict labor on the contract . . . for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000." *Id.*

51. 41 U.S.C. §§ 6501–6511.

52. Claire O'Brien et al., *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions*, Int'l Learning Lab. (July 19, 2016), https://www.oecd.org/governance/procurement/toolbox/search/Public-Procurement-and-Human-Rights-A-Survey-of-Twenty-Jurisdictions-Final.pdf [https://perma.cc/NKP7-42XN].

53. Nigel Caldwell et al., *The Purchasing Process in Public Procurement*, *in* Public Procurement: International Cases and Commentary 149 (Louis Knight et al. eds., 2007).

Part I, to determine the subpart's adequacy, issues relating to legal certainty, the comprehensiveness of subpart's scope and coverage, and loopholes that hinder the effectiveness of the subpart's procedures will be examined. However, before progressing with these matters, the article reviews the scope and coverage of Subpart 22.15.

A. Scope and Coverage of Subpart 22.15

The prohibition of acquisitions of products produced by forced or indentured child labor under Subpart 22.15 shows that the U.S. government is committed to eradicating unlawful and unethical practices from the federal government supply chains. Subpart 22.15 contributes to this goal by seeking to limit the likelihood of procuring agencies acquiring products produced under conditions that violate children's human rights. This section of the article examines provisions relating to the scope and coverage of Subpart 22.15 and highlights significant limitations of the definition of forced or indentured child labor, covered acquisitions, and the title of the regulation.

1. Definition of Forced or Indentured Child Labor

As noted earlier, the prohibition under Subpart 22.15 is specifically limited to goods produced by forced or indentured child labor. Underpinning the issue of the scope and coverage of Subpart 22.15 is the question of the definition of forced or indentured child labor. This concern is reflected in FAR 22.1501, which provides:

> [A]ll work or service-
>
> (1) exacted from any person under the age of 18 under the menace of any penalty for its non-performance and for which the worker does not offer himself voluntarily; or
>
> (2) [p]erformed by any person under the age of 18 pursuant to a contract the enforcement of which can be accomplished by process or penalties.[54]

The above definition reflects four salient elements of forced or indentured child labor: (1) age, (2) work or services, (3) involuntary labor, and (4) menace of penalty. The elements of forced or indentured child labor are a combination of the elements of child labor (age and work or services)[55] and the elements of forced labor (involuntary and menace of penalty).[56] The combination of forced labor and child labor to arrive at the subpart's prohibition of forced or

54. FAR 22.1501.

55. *See* discussions *supra* Part II.C (definition of child labor); *What Is Child Labour*, *supra* note 42.

56. ILO, Forced Labor Convention, 1930, No. 29; *id.* art. 2(1) (defining forced labor as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily"). ILO, C29 Forced Labour Convention, art. 2(1), (June 6, 1930) (entered into force May 1, 1932). According to the ILO, this definition consists of three elements (involuntariness, work or service, and the menace of any penalty), which must all be present to constitute the term forced labour. *See What Is Forced Labour*, *Modern Slavery and Human Trafficking*, Int'l Lab. Org., http://www.ilo.org/global/topics/forced-labour/definition/lang--en/index.htm [https://perma.cc/4J8H-23D5] (last visited June 1, 2021).

indentured child labor is severely inadequate when it comes to legal certainty, comprehensive coverage, and clarity.

The definitions of the first three elements—age, work/service, and involuntariness—are not in dispute because they are clearly outlined by the FAR. However, "menace of penalty" is problematic because it is not defined in Subpart 22.15 and, thus, ambiguous. The regulation fails to provide concrete examples of actions considered as "menace of penalty." This omission in the subpart creates legal uncertainty because it does not indicate when a contractor's practice or actions could be deemed as a penalty and affect the classification of a product as that produced by force or indentured labor. For example, while nonpayment, physical violence, and threats toward child laborers are easily classified as menaces of penalty, more subtle mistreatment, such as reducing working hours to limit the amount earned, threats of dismissal, or other covert discriminatory actions, are not as readily identifiable. Stakeholders may resist reporting contractors' rudimentary standards of decency to the DoL because of this unclear definition and, therefore, may prevent those products manufactured using forced or indentured labor from being added to the list of products.[57]

Additionally, the limited coverage of forced and indentured child labor in Subpart 22.15 fails to comprehensively confront all forms of economic exploitation of children by federal contractors. The government should take a broader approach to the acquisition of goods produced or manufactured by "child labor," rather than limiting child exploitation to only forced or indentured child labor. If widened to cover to child labor more broadly, Subpart 22.15 will include several forms of child labor practices, leading to a thorough attack on this form of economic exploitation in the U.S. federal supply chain. This solution will contribute to the U.S. prohibition of all forms of child labor, even those outside the field of government contracting, including "work that is likely to harm the health, safety or morals of children."[58]

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57. *Principles for International SweatFree Federal Government Procurement* (SweatFree Communities, Working Draft, 2009).

58. Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *supra* note 31, art. 3, defined worst forms of child labor as:

> (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
>
> (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
>
> (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
>
> (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

The federal government has considered the widening Subpart 22.15's prohibition of child labor, as evidenced by the subpart's current scope being consistent "with other federal legislation that prohibit child labor" as described by the DoL.[59] However, this mere consideration is unsatisfactory. The replacement of "forced or indentured child labor" with "child labor" defined more broadly does not shape current law for the better because U.S. federal legislation already widely prohibits child labor.

For example, the FLSA prohibits importing goods produced or manufactured by child labor, which is arguably a similar agenda pursued by Subpart 22.15.[60] Significantly, the FLSA protects children by setting conditions under which they are employed or, in certain circumstances, prohibiting their employment altogether.[61] The term "oppressive child labor" is used in the FLSA to describe children's employment. This term does not have the same meaning as forced or indentured child labor. Oppressive child labor is "a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer . . . in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health of well-being."[62] This definition, consistent with that in the ILO Worst Forms of Child Labor convention, differs from the definition of forced or indentured child labor because it does not require the elements of involuntariness or penalties. If consistency with federal law was the main criteria for prohibiting forced or indentured labor, then the FLSA's term and definition should have been adopted. Prohibiting all forms of child labor will not create inconsistencies in federal child labor laws.[63] Rather, it will contribute to the elimination of child labor from the supply chain and generally in society.

2. Coverage—Excluded Acquisitions

Another issue with Subpart 22.15 concerns goods that are subject to the subpart's specific procurement procedures. Subpart 22.15 makes it clear that its

59. U.S. Dep't of Lab., Frequently Asked Questions: Executive Order 13126 of 1999 (1999), https://web.archive.org/web/20170212061114/https://www.dol.gov/ilab/reports/pdf/EOFAQS_2014.pdf [https://perma.cc/256Y-ERPZ]. The Office of Child Labor, Forced Labor, and Human Trafficking (OCFT) in the Bureau of International Labor Affairs (ILAB) confirmed under question eleven that the DoL prohibited products made by forced or indentured child labor because it is consistent with current U.S. law.

60. 29 U.S.C. § 212(a).

61. *Id.* § 212; William G. Whittaker, Cong. Rsch. Serv., RL31501, Child Labor in America: History, Policy and Legislative Issues 8 (2005), https://ecommons.cornell.edu/handle/1813/78676 [https://perma.cc/DKH2-XPC6].

62. 29 U.S.C. § 203(1)–(2).

63. World Day Against Child Labour, United Nations, https://www.un.org/en/observances/world-day-against-child-labour/background [https://perma.cc/6C84-CCY8] (last visited Feb. 27, 2023) (defining child labor as "work carried out to the detriment and endangerment of a child, in violation of international law and national legislation. It either deprives children of schooling or requires them to assume the dual burden of schooling and work.").

procurement procedures apply to goods that "exceed the micro-purchase threshold" of $3,500 and that are found on "the list" ("List") of products requiring contractor certification as to forced or indentured child labor.[64] Thus, there are two exclusionary measures that affect the comprehensive coverage of Subpart 22.15: the exclusion of acquisitions by threshold and exclusions resulting from goods not found on the List.

Regarding the exclusion by threshold, Subpart 22.15 should comprehensively cover all acquisitions irrespective of the contract value. This is because Executive Order 13126's objective is to prevent procuring agencies from buying products produced or manufactured by forced or indentured child labor, which should include products below the micro-purchase threshold.[65] Additionally, excluding micro-purchase contracts from the scope of Subpart 22.15 might encourage procuring agencies to split contracts into lots, thereby avoiding compliance with the provisions of Subpart 22.15. By delineating a threshold, the government may be protecting the administrative resources of procuring agencies as micro-purchase acquisitions are easily acquired and insignificant to the volume of goods procured under the FAR.[66] Despite the potential administrative advantage of the micro-purchase threshold, the requirement for certification that a supplier will not supply products manufactured by child labor as discussed in Part III B and D is not rigorous and so should be adapted to cover micro-purchase contracts. Thus, to comprehensively eliminate child labor from the federal supply chain, all federal acquisitions should be targeted by Subpart 22.15.

The second exclusionary measure affecting Subpart 22.15's scope and coverage relates to the exclusion of goods or products, which do not appear on

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64. FAR 22.1501. The List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor is published by the Department of Labor (DoL). U.S. Dep't of Lab., List Required by Executive Order 13126 (2022); *see also* FAR 22.1503-4. For discussions on the contract award certification, see Part III.D.1 above. As of March, 25, 2019, there are thirty-four products from twenty-five countries on the List. U.S. Dep't of Lab., List Required by Executive Order 13126 (2022). The List has been subject to various amendments since its first publication. For example, in 2010, the DoL included bricks, cotton, electronics, and toys produced in China to the List. *Id.* Furthermore, in May 2011, charcoal from Brazil was removed from the List following a rigorous consultation and inspection of data. Notice of Final Determination Revising the List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor Pursuant to Executive Order 13126, 76 Fed. Reg. 31,365 (May 31, 2011), https://www.federalregister.gov/documents/2011/05/31/2011-13342/notice-of-final-determination-revising-the-list-of-products-requiring-federal-contractor [https://perma.cc/8VSV-XWNB]; Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor, 83 Fed. Reg. 5771 (Feb. 9, 2018).

65. Exec. Order No. 13126, 64 Fed. Reg. 32,383 (June 16. 1999).

66. *See* FAR 13.203. Goods under the micro-purchase threshold are procured using the simple acquisition procedure. It allows greater flexibility to the procuring entity by allowing such procurement to be carried out without opening the contract to competition through the publication of the contract notice. Such procedure is afforded to micro-purchase goods because the administrative cost of carrying out proper procedure does not create value for money when compared to the actual contract value. As such, it is argued that goods acquired through this procedure are recurring products such as office stationeries (depending on the quantity) or toiletries. Ralph C. Nash & John Cibinic, *Simplified Acquisition: Keep It Simple*, 10 Nash & Cibinic Rep. 4 (1996).

the List, even if there are credible allegations of forced or indentured child labor used in producing or manufacturing the goods in whole or in part.

Essentially, the absence of a product from the List does not mean that the product is not produced or manufactured by forced or indentured child labor. On the contrary, an omission of a product from the List only signifies that the DoL does not have a "reasonable basis" for believing that the said product should be listed.[67] For example, the DoL's refusal to add carpets from India on the List, despite strong evidence of "a significant prevalence of forced labor and child labor" for such carpets, did not mean that such carpets were not manufactured using forced or indentured child labor.[68] Such refusal from the DoL suggests that indisputable evidence of forced or indentured child labor (e.g., unchallenging evidence of penalties employed to force children to work) is required to satisfy the reasonableness test. Proving the element of "force" may be challenging because it requires strong evidence without any guidance of what constitutes a penalty. The DoL's standard makes it difficult for goods to be added to the List, which means that unlisted goods produced by forced or indentured labor could still be supplied to federal procuring entities.

As a result, the Subpart 22.15 (EO 13126) list should be replaced with another list produced by the federal government.[69] Authorized by the Trafficking Victims Protection Reauthorization Act of 2005 (TVPRA) and developed by the Bureau of International Labor Affairs (ILAB), the "list of goods . . . produced by forced labor or child labor" adopts a zero-tolerance approach, resulting in 155 goods from 77 countries.[70] In addition to a large number of goods on the TVPRA list, the List appears to follow a less stringent and objective standard, as it requires evidence relating to the nature, date, source of information, collaborative reports, and data for a product to appear on the List.[71] The replacement of EO 13126 list with the TVPRA list will result in more goods being subject to Subpart 22.15 procedures and should significantly contribute to the elimination of child labor from the supply chain.

3. Subpart 22.15's Title

A further concern relates to the imprecise title of Subpart 22.15, labeled the "prohibition of acquisitions of products produced by forced or indentured

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67. Frequently Asked Questions, *supra* note 59.

68. U.S. Department of Labor, Notice of Final Determination Regarding the Proposed Revision of the List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor Pursuant to Executive Order 13126, 81 Fed. Reg. 68,062 (Mar. 10, 2016); Kara Siddharth, *Tainted Carpets: Slavery and Child Labor*, *in* India's Hand-made Carpet Sector (FXB Center for Health and Human Rights: Harvard School of Public Health, 2014); Steven H. Tenzer, *Harvard Study Finds Abuses in India's Carpet Industry*, Harv. Crimson (Feb. 3, 2014), https://www.thecrimson.com/article/2014/2/3/Harvard-study-india-child-labor-carpets [https://perma.cc/T7TF-53RW].

69. 2020 List of Products, *supra* note 49.

70. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109–64, 105(b)(2)(C); 2020 List of Goods, *supra* note 49.

71. Paul C. Rosenthal & Anne E. Hawkins, *Applying the Law of Child Labor in Agricultural Supply Chains: A Realistic Approach*, 21 Univ. Cal. Davis J. Int'l L. & Pol'y 157, 167 (2014).

child labor."[72] This title lacks legal certainty because it does not represent the procedures under Subpart 22.15 and, thus, is misleading. A literal interpretation of the title suggests that Subpart 22.15 is a regulation that automatically prohibits procuring agencies from procuring products manufactured by forced or indentured child labor. However, this interpretation is incorrect because Subpart 22.15's procedures are designed to ensure contracting officers follow a rigorous procedure that reduces the possibility of goods produced by forced or indentured child labor from being supplied to federal procuring agencies. The title should reflect its purpose and intention. For example, government could amend the title to "mitigating the acquisitions of products manufactured by forced or indentured child labor." This updated title would provide more clarity and precision.

B. Subpart 22.15 and Procurement Planning

Procurement planning signifies the beginning or foundation of any contracting exercise and is a crucial stage of the contracting process. Planning effectively leads to better risk identification and management, provides a well-developed specification, and allows procuring agencies to be proactive throughout the rest of the procurement process.[73] The planning stage generally requires procuring agencies to carry out market analysis, due diligence, and risk assessments, develop the technical specification, and prepare the procurement documents needed for soliciting bids. Under the FAR, procurement planning is regulated under FAR Part 5, which governs the publication of procurement opportunities, and FAR Part 7, which governs acquisition planning. The following subsection discusses limitations affecting the planning stage, with specific focus on the planning due diligence and the solicitation documents.

1. Planning Due Diligence

Contracting officers (COs) are required to carry out due diligence by checking the proposed acquisition against the list of products manufactured by forced or indentured child labor.[74] This due diligence serves as an "alert that there is a reasonable basis to believe that such product may have been mined, produced or manufactured by forced or indentured child labor."[75] This may then enable procuring agencies to apply the rest of the procedures under Subpart 22.15.

This level of due diligence may slow the elimination of forced or indentured child labor from the U.S. supply chain because the due diligence is tailored toward the listed end product. This means that if the listed product is used in making the end product, then Subpart 22.15 would not apply. For example, the listed products of cassiterite, tungsten ore, and coltan from Congo procured as an end product would give rise to Subpart 22.15 procedures. However, if

72. FAR 22.1503.
73. Khi V. Thai, International Handbook of Public Procurement 11–12 (2009).
74. FAR 22.1503(a).
75. *Id.*

the same listed product from the listed country is used in producing or manufacturing an end product (e.g., mobile phones which use coltan to make the capacitors), the final product would fall outside Subpart 22.15. The subpart's focus on end products creates a loophole, which may result in procuring agencies acquiring end products produced (in part) by forced or indentured child labor. To mitigate this issue, Subpart 22.15 should apply to all listed products, irrespective of whether the agency is procuring the listed product as an end product or as a product used to manufacture the end product.

This recommendation is not without flaw because it could create the effect of an increased administrative workload for COs. The listed products are not "consumer friendly" and could be "meaningless to the ordinary American consumer."[76] Also, contracting officers, arguably, may not be knowledgeable on the use of listed products in producing end products and, therefore, would be required to carry out a higher level of due diligence on each acquisition to determine if a listed product could be used in an end product. The U.S. government should create a supplementary list outlining end products that are manufactured using materials or minerals found on the List be provided to contracting officers. This would mean that end products such as mobile phones, laptops, and other electronic appliances, for example, if made with coltan from the listed country, will appear on the supplementary list and give rise to the application of Subpart 22.15 procedures.

2. Solicitation (Procurement) Documents

Where an acquisition exceeds the micro-purchase threshold, FAR 22.1505 stipulates that the solicitation document for that acquisition should include FAR 52.222-18, "Certification Regarding Knowledge of Child Labor for Listed End Products."[77] FAR 52.222-18 states:

> The Government will not make award to an offeror unless the offeror, by checking the appropriate block, certifies to either paragraph (c)(1) or paragraph (c)(2) of this provision.
>
> (1) The offeror will not supply any end product listed in paragraph (b) of this provision that was mined, produced, or manufactured in a corresponding country as listed for that end product.
>
> (2) The offeror may supply an end product listed in paragraph (b) of this provision that was mined, produced, or manufactured in the corresponding country as listed for that product. The offeror certifies that it has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture such end product. On the basis of those efforts, the offeror certifies that it is not aware of any such use of child labor."[78]

76. Kimberley-Joy Lockley, *Ending America's Reliance on Child Labor: Closing the Loophole in § 212*, at 9 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213423 [https://perma.cc/3X6X-WF44].

77. FAR 22.1505.

78. FAR 52.222-18.

The inclusion of FAR 52.222-18 at the planning stage is advantageous for many reasons. First, it demonstrates the government's stance on the use of forced or indentured child labor within its supply chain from the outset, as procuring agencies will not award a contract without a certification. Second, it indirectly creates a self-elimination process whereby potential bidders seeking to compete in the procurement opportunity for a listed end product who engage in forced or indentured child labor will exclude themselves from the tendering process. Finally, the certification prompts potential bidders to, at a minimum, investigate the existence or extent of this illegal practice within their operations.

While the inclusion of FAR 52.222-18 at the planning stage is advantageous, the clause does not stipulate when the certification will be required from the offeror (contractor). Rather, it states that "the Government will not make award to an offeror."[79] Potential suppliers are not informed of when to submit the certification. This omission creates uncertainty, and, for this reason, FAR 52.222-18 lacks legal certainty.

C. Subpart 22.15 and Tendering or Solicitation of Bids

The tendering or solicitation stage in the contracting process presents numerous opportunities for tackling forced or indentured child labor. This is because the information presented in the solicitation document is used to assess potential suppliers' eligibility and capability, including excluding contractors that do not meet the requirements for participating further in the tendering exercise. As COs must assess potential suppliers' capabilities and capacity to perform the contract in a manner that satisfies the qualification standards outlined in FAR Part 9, they can use this stage to explore issues related to their concerns around suppliers' use of child labor in the contract.[80]

The qualification procedure under FAR Part 9 requires COs to determine the "responsibility" of potential suppliers by considering their financial resources, performance records, integrity and business ethics, technical capability, and legal standing.[81] Contractors that do not meet the agency's responsibility determination should be excluded from the procurement process.[82] Relevant to the issue of child labor is the "integrity and business ethics" ground under FAR Part 9's qualification standards; this arguably relates to suppliers' reputation of complying with laws (e.g., labor laws) and adoption of unethical practices in their operations and supply chains.[83] The provision requires that the assessment of contractors' integrity and business ethics should focus both

79. *Id.*

80. John B. Warnock, *Principles or Practical Responsibility: Sixty Years of Discussion*, 41 Pub. Cont. L. J. 881, 881 (2012).

81. FAR 9.104-1.

82. Yukins, *supra* note 18.

83. Christopher R. Hedon, *Responsible Responsibility: A Renewed Case for Considering a Prospective Contractor's Compliance with Labor and Employment Law Prior to Contract*, 48 Pub. Cont. L. J. 593, 593–614 (2019); Danielle Bereznay, *History Repeating: Déjà Vu of Failed Labor Law Regulations in Government Contracting*, 47 Pub. Cont. L. J. 269 (2018); Christopher Yukins & Michal Kania,

on past conduct and current ability to meet the contract.[84] In the past, illegal practices such as fraud, corruption, conflicts of interest, bribery, and other related offences had taken the front seat, while other practices such as child labor, forced labor, and other exploitative practices were not given significant considerations as qualification requirements.[85]

Despite the generic consideration of a potential supplier's responsibility under FAR Part 9, neither FAR Subpart 9.1 nor Subpart 22.15 has no explicit reference to child labor. This omission presents a loophole that enables contractors to escape the determination of irresponsibility. Despite the omission of child labor from the FAR responsibility determination, engaging in such practices should lead to an exclusion under the business and ethics disqualification ground.[86] Such exclusion should only be made if the contractor violated child labor laws or if there was an administrative order against the contractor for engaging in forced or indentured child labor.[87] Without judicial and administrative decisions, which are difficult to obtain due to the geographical span of the crime and the vulnerability of the victims, contractors that continue to perform government contracts through forced or indentured child labor escape exclusion as a result of the loophole in Subpart 22.15.

To improve the effectiveness of Subpart 22.15, when assessing integrity and business ethics, COs should consider contractors' past or present slavery practices (including forced or indentured child labor). Such consideration should include the review of credible reports alleging that the contractor has engaged in forced or indentured child labor.[88] Additionally, procuring agencies should require potential contractors to submit a solicitation certification alongside their bid.[89] Doing so has the advantage of encouraging contractors who want to contract with the federal government to assess forced or indentured labor practices within their operations before bidding for a government contract. It also enables COs to assess the business ethics of potential contractors by automatically excluding those unable to provide the certification. Slavery practices such as forced or indentured labor should "have no place" in the federal

Suspension and Debarment in the U.S. Government: Comparative Lessons for EU's Next Steps in Procurement, (GWU Legal Studies Research Paper No. 2019-39).

84. Robert F. Meunier & Trevor B. Nelson, *Is It Time for A Single Federal Suspension and Debarment Rule?*, 46 Pub. Cont. L. J. 553–56 (2017); Kara Sacilotto & Craig Smith, *Suspension and Debarment: Trends and Perspectives*, 48 Procurement Law. 3, 3–10 (2012).

85. Gabriella M. Racca & Robert C. Perin, *Corruption as a Violation of Fundamental Rights: Reputation Risk as a Deterrent Against the Lack of Loyalty*, *in* Integrity and Efficiency in Sustainable Public Contracts: Balancing Corruption Concerns in Public Procurement Internationally 36 (2014); Schooner, *supra* note 22, at 103–05; Christopher Yukins et al., *A Comparative View of Debarment and Suspension of Contractors in Brazil and in the USA*, 66 Admin. & Const. L. Rev., 61, 70 (2017).

86. Hedon, *supra* note 83.

87. *Id.*

88. Examples of credible reports are reports from the ILO, UN, Human Rights Watch, and other authoritative organizations.

89. *See infra* Part III.B(2).

acquisition of goods or services as it affects the integrity and reputation of the federal government.[90]

D. Subpart 22.15 and Contract Awards

Following the determination of responsibility and evaluation of bids, the contractor that meets the procuring agency's requirements may be selected for contract award. However, before the contract is signed, procuring agencies may enter negotiations or require further documentation from the chosen contractor. Under Subpart 22.15, where the acquisition relates to a product found on the List, contracting officers must execute two measures relating to contract award. First, they must obtain a contract award certification from suppliers and, second, include child labor provisions as part of the contract clauses.[91]

1. Contract Award Certification

As mentioned in Part III.B.2, contracting officers must obtain a certification from the successful contractor.[92] The certification, which is the same as that contained in FAR 52.222-18, must be submitted to the CO before the contract award, thereby addressing the lack of legal certainty that exists in the clause. The contract award certification provides contractors with a choice of an absolute or qualified certification. An absolute certification means that the contractor "will not supply any end product on the List."[93] Consequently, there is an outright declaration that in no circumstance will such product be supplied to the procuring agency. In contrast, a qualified certification means that the contractor commits to making "a good faith effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture any end product."[94] In essence, before making a qualified certification, contractors must carry out some due diligence to determine whether forced or indentured child labor is present in the production or manufacturing of the end product.

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90. Yukins & Kania, *supra* note 83.
91. FAR 22.1503; FAR 22.1505.
92. FAR 22.1503(c)1–2:

> It will not supply any end product on the List that was mined, produced, or manufactured in a country identified on the List for that product, as specified in the solicitation by the contracting officer in the Certification Regarding Knowledge of Child Labor for Listed End Products;
>
> (2) (i) The offeror may supply an end product listed in paragraph (b) of this provision that was mined, produced, or manufactured in the corresponding country as listed for that product. The offeror certifies that it has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture such end product.
>
> (ii) On the basis of those efforts, the offeror certifies that it is not aware of any such use of child labor.

93. FAR 22.1503(c).
94. FAR 22.1503(c)(2)(i).

While the use of absolute certification is desirable and an advantageous means of prohibiting child labor from the federal government supply chain, a qualified certification weakens the federal government's prohibition because certifying in good faith is the weakest form of due diligence[95] as it raises debateable issues. For example, determining what is meant by a "good faith effort" is incredibly subjective and can only be applied on a case-by-case basis. Thus, it is likely that contractors with multi-tier global supply chains will rely heavily on qualified certification because it places a lesser burden on them and presents them with opportunities to potentially escape liability when any listed end product produced by forced or indentured child labor is incidentally supplied to procuring agencies. Further, with the current lack of contractors' transparency and insufficient government resources to carry out in-depth due diligence on contractors' practices, a qualified certification presents a loophole for suppliers and does not adequately address forced or indentured child labor.

Despite the limitation in a qualified certification, the general requirement of a contract award certification is an advantageous measure for ensuring that contractors do not supply products produced by forced or indentured child labor. This is because under FAR 22.1504(a), the certification creates a legal obligation that is subject to remedial measures against the contractor.[96] Additionally, engaging in forced or indentured child labor could lead to investigations by "the agency's Inspector General, the Attorney General, or the Secretary of the Treasury."[97]

2. Contract Clauses

In addition to the contract award certification measure, procuring agencies can insert a clause into the contract that will address situations where a contractor has supplied products manufactured by forced child labor. According to FAR 22.1505, FAR 52.222-19 must be included in all contracts "for the acquisition of supplies that are expected to exceed the micro-purchase thresholds."[98] FAR 52.222-19 essentially outlines the excluded countries and their contract thresholds. It requires suppliers to cooperate with authorities to "enforce laws prohibiting the manufacture or importation of products mined, produced or manufactured by forced or indentured child labor" by providing access, records, documents, persons, or premises required to conduct investigations,

95. International Labor Rights Forum, *Government Procurement and the Rights of Workers in Contractors' Supply Chains*, Int'l Lab. Rights Forum, Feb. 25, 2015, https://laborrights.org/sites/default/files/publications/Procurement_Worker_Rights_2_9_15.pdf [https://perma.cc/4V77-453K].

96. FAR Subpart 22.1504(a)(1) states that the "Government may impose remedies" if "[t]he contractor has submitted a false certification regarding knowledge of the use of forced or indentured child labor." FAR 22.1504(a)(1). The remedies available to procuring agencies under Subpart 22.15 are discussed in part E below.

97. FAR 22.1503(e).

98. FAR 22.1505(b).

detailed grounds for violating the clause, and the remedies to the procuring entity for such violations.[99]

If FAR 52.222-19 is breached, it will arguably lead to contractual remedies or criminal prosecution. This argument is supported by the Supreme Court ruling in *United States v. Winstar Corp.*[100] where the court ruled that the "ordinary principles of contract construction and breach" apply to federal contracts.[101] Practically, this has led to the enforcement of the FAR provisions against contractors that import goods mined, produced, or manufactured, wholly or in part, under forced child labor.[102] Thus, contractual remedies such as damages, withhold orders, and costs for re-tendering the goods should be available to the government when a breach of the FAR rules occurs. Additionally, where the contractor fails to cooperate with an investigation as required under FAR 52.222-19, it is a violation of the clause, leading to remedies such as termination of the contract and suspension of payment.[103] Some of these remedies also apply to the violation of Subpart 22.15.

E. Subpart 22.15 and Contract Management

Contract management plays a vital role in the success of a contract because it requires procuring agencies to monitor contract performance and assess risks or issues affecting contract performance.[104] This means that any measure that addresses issues arising after contract award and during contract performance can be used a contract management tool. Thus, measures relating to administration, audits, site visits, quality control, capacity building, sanctions, and remedies are examples of such contract management tools and are detailed in subchapter G of the FAR.[105]

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99. FAR 52.222-19(b).

100. United States v. Winstar Corp., 518 U.S. 839, 869–70. (1996).

101. *Id.* at 871.

102. U.S. Dep't Of State, Trafficking In Persons Report: June 2020, at 523 (2020). According to the report, DHS enforces the law that prohibits the importation of goods mined, produced, or manufactured, wholly or in part, under forced labor conditions, including forced child labor. DHS received fifty-three allegations and issued six Withhold Release Orders within the reporting period for shipments of goods on grounds they were produced by forced labor. Sarah Robitaille, *Is the FAR Enough? The Persistent Problem of Human Trafficking in Government Contracts*, 51 Pub. Cont. L. J. 4, 645, 664–65 (2022).

103. FAR 52.222-19(c)(2) ("The Contractor has failed to cooperate, if required, in accordance with paragraph (b) of this clause, with an investigation of the use of forced or indentured child labor by an Inspector General, Attorney General, or the Secretary of the Treasury.").

104. *Contract Management Guide*, Chartered Inst. of Procurement & Supply, https://www.cips.org/documents/CIPS_KI_Contract%20Management%20Guidev2.pdf [https://perma.cc/RP4S-RKXE] (last visited July 8, 2021).

105. FAR Subpart G contains provisions relating to contract administration, auditing, quality assurance and contract management. *See* FAR 42.1; *see also* FAR 42.2; FAR 46.4; M. Ernita Joaquin & Thomas J. Greitens, *Contract Management Capacity Breakdown? An Analysis of U.S. Local Governments*, 72 Pub. Admin. Rev. 807, 807–16 (2012); William G. Resh & John D. Marvel, *Loopholes to Load-Shed: Contract Management Capacity, Representative Bureaucracy, and Goal Displacement in Federal Procurement Decisions*, 15 Int'l Pub. Man. J. 525, 528 (2012); Barbara S. Romzek & Jocelyn M. Johnston, *Effective Contract Implementation and Management: A Preliminary Model*, 12 J. Pub. Admin. Res. & Theory 423, 427 (2002).

1. Violation of Subpart 22.15

Under Subpart 22.15, four grounds give rise to sanctions against contractors that supply products tainted by forced or indentured labor. The first ground of violation occurs when contractors submit false certifications "regarding knowledge of the use of forced or indentured child labor for listed end products."[106] Where a contractor fails to cooperate with child labor investigations as stipulated under FAR 52.222-19, a violation occurs. Additionally, a contractor violates Subpart 22.15 if forced or indentured child labor is used in the mining, production, and manufacturing process.[107] Finally, where a contractor supplies an "end product or components" produced "wholly or in part" by forced or indentured child labor, such contractor has violated Subpart 22.15.[108]

False certifications concerns arise when an absolute certification was submitted to the procuring agency. This is based on the argument that an absolute certification merely requires a contractor to state that it will not supply an end product produced by forced or indentured child labor. In contrast to a qualified certification, it will be challenging to argue that a contractor provided a false certification as procuring agencies would need credible evidence that show that the contractor did not make a "good faith effort" or was aware of forced or indentured child labor being used in the production or manufacture of the product before issuing the certification.[109]

The third and fourth grounds are advantageous and noteworthy because they outrightly prohibit contractors from engaging in the illegal and inhumane treatment of child workers.[110] For example, a literal interpretation of the third ground suggests that contractors who use forced or indentured child labor to produce goods have violated the subpart even if such goods are not supplied to the procuring agency.[111] Thus, this prohibition will widely affect all contractors performing contracts within the scope and coverage of Subpart 22.15.

Similarly, the fourth ground is directed explicitly at contractors who supply goods produced by forced or indentured child labor products. Thus, where a supply violates the third ground, it has automatically violated the fourth and final ground. Despite the comprehensive coverage of violation grounds, procuring agencies will require strong evidence of the contractor manufacturing products through forced or indentured labor to assert that the contractor has violated the third and fourth grounds. This problem is escalated in contracts

106. FAR 22.1504(a)(1).
107. FAR 52.222-19.
108. *Id.*
109. *See supra* Part III.D.1.
110. The second ground of failing to cooperate with investigations is also noteworthy and was discussed in Part III.D.2.
111. FAR 22.1504(a)(3) ("The contractor uses forced or indentured child labor in its mining, production, or manufacturing processes.").

performed outside the United States because of shortages of resources in monitoring such contracts.[112]

2. Remedies

When a violation of Subpart 22.15 occurs, procuring agencies are entitled to terminate the contract when it is in their best interests, as emphasised in *United States v Corliss.*[113] Additionally, procuring agencies may issue suspension and debarment orders against contractors, in accordance with procedures under FAR 9.407.[114] The suspension of suppliers is a "serious action to be imposed on the basis of adequate evidence, pending the completion of an investigation or legal proceedings."[115] This makes suspension an interim remedy utilised when further investigation is required to determine a final remedy to be imposed on a contractor. The period of suspension for violating Subpart 22.15 is subject to the discretion of the suspending officers. However, the suspension period will terminate either when the contract is terminated or when debarment is imposed.

In contrast to suspensions, debarment in public procurement is often termed the "death penalty" sanction because it disengages contractors from competing in future government procurement opportunities for three years, thereby limiting future earnings and profits.[116] Irrespective of the sanction imposed on contractors for violating Subpart 22.15, the contractor will face severe financial and reputational consequences.[117] Thus, these remedies are proportionate to the severity of human rights violations that occur when forced or indentured child labor is used by contractors in their productions, operations, and supply chains.

3. The Prohibited Party—Contractors/Offerors

The term "contractor" or "offeror" is used in conformity to the language adopted under Subpart 22.15. According to FAR 22.1503 and 22.1504, the terms "contractor" and "offeror" are used (interchangeably) to describe the entity that must submit a contract award certification.[118] Interestingly, both terms are undefined in Subpart 22.15, and the term "contractor," while used predominantly throughout the FAR, is not defined in the FAR. However, the definition of an "offeror" is drawn from FAR 2.101 and refers to the bidder.[119]

112. FAR 22.1503(f). An enforcement agency includes an Inspector General, the Attorney General, or the Secretary of the Treasury.

113. United States v. Corliss Steam Engine Co., 91 U.S. 321, 321 (1875).

114. FAR 22.1504(b).

115. FAR 9.407.

116. FAR 9.4; Yukins, *supra* note 18. For general discussions on debarment, see Sope Williams-Elegbe, *Debarment in Africa: A Cross-Jurisdictional Evaluation*, 3 Pub. Procurement L.Rev. 71, 71–90 (2016).

117. *See* Williams-Elegbe, *supra* note 116, at 71–90.

118. *See* FAR 22.1503-4. For discussions on the contract award certification, see Part III.D.1 above.

119. "Offeror" means offeror or bidder. FAR 2.101.

While the terms may be interpreted to mean the entity awarded a public contract, they note that the use of terms in this manner is more than semantics because the literal interpretation of a contractor or offeror excludes subcontractors. This lack of explicit reference to subcontractors hinders the effectiveness or comprehensive prohibition of forced or indentured child labor from the U.S. federal supply chain.[120] This interpretation could mean that subcontractors in countries with little or no national prohibition of forced or indentured child labor may engage in this prohibited practice when producing goods (in whole or in part) for the federal contractors. Further, this loophole not only hinders the effectiveness of Subpart 22.15, but also provides a plausible defense that would allow contractors to limit their liability when an end product is produced partly by forced or indentured labor.

For example, if a contractor is awarded a contract to supply laptops to the Department of Justice (DoJ), it can outsource the production of the hardware parts to a subcontractor who engages in forced or indentured child labor. The parts tainted by forced or indentured child labor are shipped to the contractor for assembling, packaging, and delivery to the DoJ. In this example, while the end product supplied to the procuring agency was not produced by forced or indentured labor by the contractor, it is still tainted by this practice as a result of the subcontractor who is not subject to Subpart 22.15 procedures. Thus, while the contractor's lack of knowledge could be a plausible defence, forced or indentured child labor continues to exist in the federal government supply chain.

To remedy this, Subpart 22.15 should be reframed to explicitly prohibit both contractors and subcontractors from supplying products by forced or indentured child labor. Such prohibition is not revolutionary as FAR Subpart 22.17 on the prohibition of trafficking includes both contractors and subcontractors. Alternatively, procuring agencies should require their contractors to request similar contract award certifications from their subcontractors and submit to the agency before such end product is supplied. To effectively and comprehensively eliminate child labor from the government supply chain, all federal suppliers must be prohibited from engaging in this practice.

IV. CONCLUSION

In conclusion, the 1999 Executive Order 13126 issued by President Clinton and now implemented as Subpart 22.15 is a step in the right direction in addressing the acquisition of products manufactured by forced or indentured child labor. However, as the discussions show, some weaknesses remain, which raises the need for the Biden administration to introduce changes to strengthen Subpart 22.15. Specifically, weaknesses relating to legal certainty,

120. In addition to the literal interpretation of the term offeror, the authors believe that subcontractors are excluded from Subpart 22.15 due to the approach adopted in similar anti-slavery FAR provisions. For example, Subpart 22.20 explicitly includes subcontractors. Further discussion on Subpart 22.20 is outside the scope of this paper. *See* Hamrick & Abbott, *supra* note 6, at 221.

the subpart's scope and coverage, and significant loopholes that hinder the effectiveness of eliminating child labor exist in Subpart 22.15. Until the United States addresses such inadequate provisions, its federal government supply chain will continue to be tainted by child labor.

In addition to the weaknesses outlined in this article, Subpart 22.15 contains notable provisions that attempt to tackle forced or indentured child labor. Such provisions include rules on carrying out due diligence against the DoL list of products manufactured by forced or indentured labor; rules on inserting the certification requirement in all solicitations; rules on requesting certification before contract award; and rules on inserting a clause that requires contractors to comply with investigations. Despite these advantageous provisions, critical limitations outlined in this paper show the importance of strengthening Subpart 22.15 into a regulation that can adequately tackle all forms of child labor in the government's supply chains. The strengthening of Subpart 22.15 as advocated by the authors will contribute to eliminating child labor from the supply chain. Additionally, such strengthening of Subpart 22.15 could lead to other countries adopting similar provisions in their regulated procurement frameworks.

EQUITABLE LIMITATIONS ON GOVERNMENT COUNTERCLAIMS FOR COMMON-LAW FRAUD

*Thomas E. Daley III & Richard P. Rector**

ABSTRACT

In the past, when asserting a common-law fraud counterclaim in the U.S. Court of Federal Claims, the government has argued that it was entitled to rescission of a contract "tainted" by fraud and disgorgement of all monies paid under the contract. The government's requests did not merely seek disgorgement of profits, but, rather, sought to recover all amounts paid under the contract, while also retaining the work provided by the contractor.

A recent U.S. Supreme Court decision, however, forecloses such a recovery for a common-law fraud claim. In *Liu v. Securities and Exchange Commission*, the Supreme Court explored the limitations on the use of disgorgement as an equitable remedy and explained that, when disgorgement is ordered as an equitable remedy, a court must deduct legitimate expenses from the amount that is to be disgorged. As discussed in this article, the principles articulated in *Liu* apply equally to a common-law fraud claim in the Court of Federal Claims and, in most cases, preclude disgorgement of amounts that exceed a contractor's profit.

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I. INTRODUCTION

In *Liu v. Securities and Exchange Commission*, the U.S. Supreme Court explored the limitations on the use of disgorgement as an equitable remedy.[1] The Supreme Court explained that, when disgorgement is ordered as an equitable remedy, a court must deduct legitimate expenses from the amount that is to be disgorged.[2] This decision is significant because a failure to deduct legitimate expenses from the amount that is to be disgorged would provide the prevailing party with a windfall by allowing that party to recover all monies paid under the contract, while also retaining all the benefits provided under the contract.

When the U.S. government asserts a common-law fraud counterclaim in the U.S. Court of Federal Claims (COFC) and requests rescission and disgorgement as remedies, the government is requesting equitable relief. As such, the government's request is subject to the traditional limitations on equitable relief, including those discussed in *Liu*. Yet, in the past, the government has asserted, and the COFC has entertained, requests for disgorgement of all monies paid under a contract because of common-law fraud, regardless of the expenses incurred by the contractor in connection with performance of the contract.[3]

This article begins with a discussion of common-law fraud, rescission and disgorgement, and the Supreme Court's decision in *Liu*. The article then explains that, when the government requests rescission and disgorgement as

1. Liu v. Sec. & Exch. Comm'n., 140 U.S. 1936, 1940 (2020).
2. *Id.* at 1949–50.
3. *E.g.*, Coast-To-Coast Fin. Corp. v. United States, 60 Fed. Cl. 707, 710–11 (2004).

remedies for a common-law fraud counterclaim, the government is requesting equitable relief. Next, this article asserts that, because the government is requesting equitable relief, that relief is subject to the traditional limitations on equitable relief, including the limitations discussed in *Liu*. The COFC, therefore, should reject requests for disgorgement of all monies paid under a contract as a remedy for common-law fraud, unless the wrongdoer did not incur any legitimate expenses in connection with the contract.

II. BACKGROUND

As discussed below, the Supreme Court's decision in *Liu*, although rendered in the context of a U.S. Securities and Exchange Commission (SEC) civil enforcement action, is relevant to the litigation of issues involving federal contracts because the government, when asserting a common-law fraud counterclaim in the COFC, has sometimes requested rescission of the contract and disgorgement of all monies paid under the contract.[4]

A. Common-Law Fraud

Common-law fraud occurs when there is a knowing or reckless misrepresentation of a material fact that deceives a party and induces the party to act, which causes the deceived party to suffer an injury.[5] It is a subsection of tort law.[6] Common law claims are rooted in law created by court decisions, as opposed to being devised by statute. That said, the COFC lacks jurisdiction over tort claims asserted by contractors *against* the government,[7] including common-law fraud claims.[8]

However, when these claims are brought *by* the government, COFC possesses jurisdiction for and can hear tort cases, including common-law fraud claims, under 28 U.S.C. § 1503.[9] Indeed, the U.S. Court of Claims, the

4. *Id.*

5. *See* Square One Armoring Servs. Co. v. United States, 152 Fed. Cl. 536, 545 (2021).

6. Elizabeth W. Fleming & Rebecca Clawson, *Fraud Counterclaims in the Court of Federal Claims: Not So Fast, My Friend*, 46 Procurement Law. (2011) ("Fraud is an action in tort for damages at the common law."); *see also* Schweitzer v. United States, 82 Fed. Cl. 592, 595 (2008) (stating that common-law fraud claims sound in tort).

7. *See* 28 U.S.C. § 1491(a)(1) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States . . . in cases *not* sounding in tort." (emphasis added)); *see also* Brown v. United States, 105 F.3d 621, 623 (Fed. Cir. 1997) ("The Court of Federal Claims is a court of limited jurisdiction. It lacks jurisdiction over tort actions against the United States." (citations omitted)).

8. *See, e.g.*, Nesselrode v. United States, 127 Fed. Cl. 421, 434 (2016).

9. *See* 28 U.S.C. § 1503 ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court."); *see also* Barrett Refin. Corp. v. United States, 242 F.3d 1055, 1062 (Fed. Cir. 2001) (discussing the claims, including tort claims, that the government may bring under 28 U.S.C. § 1503); Tenn. Mech. Inst., Inc. v. United States, 145 Ct. Cl. 344, 351 (1959) ("Hence, under 28 U.S.C. [§] 1503, the Court of Claims can grant a judgment to the United States on a counterclaim based upon a plaintiff's tortious conduct."); Erie Basin Metal Prods., Inc. v. United States, 123 Ct. Cl. 433, 436–37 (1952) (interpreting 28 U.S.C. § 1503 as empowering the Court of Claims to hear any claims that the United States government may assert against the plaintiffs that are suing it).

predecessor to the U.S. Court of Appeals for the Federal Circuit, stated that, under 28 U.S.C. § 1503, "the [g]overnment may set up a counterclaim even though . . . it states a claim of a type (*e.g.* tort) of which we would not have jurisdiction if sought to be maintained by a plaintiff."[10] Additionally, COFC decisions have found that government common-law fraud counterclaims are not subject to the six-year statute of limitations set forth in 28 U.S.C. § 2501.[11]

The government may raise a common-law fraud counterclaim independent of other fraud-related counterclaims that it may assert, such as counterclaims arising under the Special Plea in Fraud statute, 28 U.S.C. § 2514,[12] or the False Claims Act, 31 U.S.C. §§ 3729–31.[13] To succeed on a common-law fraud counterclaim, the government must prove:

> (1) a representation of a material fact, (2) the falsity of that representation, (3) the intent to deceive or, at least, a state of mind so reckless as to the consequences that it is held to the equivalent of intent (scienter), (4) a justifiable reliance upon the misrepresentation by the party deceived, which induces him to act thereon, and (5) injury to the party deceived resulting from reliance on the misrepresentation.[14]

The government must "prove the elements of its common law fraud counterclaim by clear and convincing evidence in order to prevail on the merits."[15] Moreover, the mere presence of fraud is not sufficient to satisfy the requirements of common-law fraud.[16] Rather, the government must demonstrate that the fraud is a "but-for cause of the outcome to satisfy the requirements of common-law fraud."[17]

10. Cont'l Mgmt., Inc. v. United States, 527 F.2d 613, 616 n.2 (Ct. Cl. 1975); *see also* Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536, 539 (1946) (holding that Congress intended to grant set-off and counterclaim jurisdiction to the Court of Claims, so that the U.S. government could have all its disputes adjudicated in one suit); Frantz Equip. Co. v. United States, 122 Ct. Cl. 622, 628–29 (1952) (citing *McElrath v. United States*, 102 U.S. 426, 439–40 (1880)).

11. *See* LW Constr. of Charleston, LLC v. United States, 139 Fed. Cl. 254, 282 (2018) ("[T]his court, in line with these previous decisions, including the recent unpublished Federal Circuit *Strand* decision, agrees that the statute of limitations set forth in 28 U.S.C. § 2501 does not bar, in and of itself, the government from proposing its common law fraud counterclaim, which, as discussed further below, is permitted by the exception in 28 U.S.C. § 2415(f) (2012).").

12. *See* Long Island Savs. Bank, FSB v. United States, 503 F.3d 1234, 1244 (Fed. Cir. 2007) (distinguishing between common law fraud claims and fraud claims brought under 28 U.S.C. § 2514).

13. *See*, *e.g.*, Oasis Int'l Waters, Inc. v. United States, 134 Fed. Cl. 405, 448 (2016) (discussing a government counterclaim arising under the False Claims Act).

14. Jasmine Int'l Trading & Servs., Co. W.L.L. v. United States, 120 Fed. Cl. 577, 582–83 (2015); *see also* Unigene Lab'ys, Inc. v. Apotex, Inc., 655 F.3d 1352, 1359 (Fed. Cir. 2011); Square One Armoring Servs. Co. v. United States, 152 Fed. Cl. 536, 545 (2021) (citing Unigene Lab., Inc. v. Apotex, Inc., 655 F.3d 1352, 1359 (Fed. Cir. 2011)); *LW Constr. of Charleston*, LLC, 139 Fed. Cl. at 285 (quoting *Jasmine Int'l Trading & Servs., Co. W.L.L.*, 120 Fed. Cl. at 582–83).

15. *LW Constr. of Charleston, LLC*, 139 Fed. Cl. at 284 (citing Madison Servs., Inc. v. United States, 94 Fed. Cl. 501, 510 (2010)).

16. Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348, 1371 (Fed. Cir. 2013) (citing Godley v. United States, 5 F.3d 1473, 1476 (Fed. Cir. 1993)).

17. *Id.*; *see also Jasmine Int'l Trading*, 120 Fed. Cl. at 583 (stating that "the Federal Circuit held that but-for causation is required to establish a common-law fraud claim" (citing *Kellogg Brown & Root Servs., Inc.*, 728 F.3d at 1371)).

When asserting a common-law fraud counterclaim, the government may assert that the contract is void *ab initio*.[18] The treatment of contracts as void *ab initio* "is, of course, a legal fiction. In reality, an agreement, under which the parties performed, did exist prior to the court's decision that it is void."[19]

The Federal Circuit has stated that "the general rule is that a government contract tainted by fraud or wrongdoing is void *ab initio*."[20] In other words, when "there exists the type of severe legal infirmity that would preclude the parties' exchange of promises from giving rise to an enforceable agreement," the contract at issue "may be adjudged void *ab initio*."[21] In order for a government contract "to be tainted by fraud or wrong doing and thus void *ab initio*, the record must show some causal link between the fraud and the contract."[22] As discussed below in Section II.B.2, when arguing that a contract is void *ab initio* due to common-law fraud, the government has, in the past, asserted that the contract should be subject to rescission and disgorgement.[23]

The Armed Services Board of Contract Appeals (ASBCA) and the Civilian Board of Contract Appeals (CBCA) do not have jurisdiction over government fraud counterclaims arising under the Special Plea in Fraud statute or the False Claims Act.[24] The Boards, however, may address fraud counterclaims when the counterclaims do not require the Boards to make factual findings of fraud and do not assert a government "claim."[25] Due to these limitations, "[w]hen litigation is commenced before a board in a case that the [g]overnment believes involves fraud, the agency will frequently try to obtain a fraud judgment against the contractor in U.S. district court."[26] We do not address further the jurisdiction of the ASBCA and CBCA over government counterclaims, as this article focuses on government common-law fraud counterclaims brought under 28 U.S.C. § 1503, which does not apply to the Boards.[27]

18. *See* Veridyne Corp. v. United States, 83 Fed. Cl. 575, 581 (2008) ("The law on contracts void *ab initio* implicates the doctrine of federal common law fraud.").

19. Mass. Mun. Wholesale Elec. Co. v. Town of Danvers, 577 N.E.2d. 283, 5 (1991).

20. Godley v. United States, 5 F.3d 1473, 1476 (Fed. Cir. 1993) (citing J.E.T.S., Inc. v. United States, 838 F.2d 1196, 1200 (Fed. Cir. 1988)); Long Island Savs. Bank, FSB v. United States, 503 F.3d 1234, 1246 (Fed. Cir. 2007) ("[T]hat a government contract is 'tainted from its inception by fraud' and is thus 'void ab initio' . . . .").

21. *Jasmine Int'l Trading*, 120 Fed. Cl. at 583; *see also* Hume v. United States, 21 Ct. Cl. 328, 330 (1886) (stating that a contract "founded on fraud . . . is void at common law"), *aff'd*, 132 U.S. 406 (1889); LW Constr. of Charleston, LLC v. United States, 139 Fed. Cl. 254, 298 n.25 (2018) (explaining the general rule that a contract tainted with fraud is "void *ab initio*"); *Long Island Savs. Bank*, *FSB*, 503 F.3d at 1245 (affirming the general rule that government contracts contaminated by fraud are void ab initio).

22. *Long Island Savs. Bank*, *FSB*, 503 F.3d at 1250.

23. *See*, *e.g.*, Coast-To-Coast Fin. Corp. v. United States, 60 Fed. Cl. 707, 710–11 (2004).

24. *See* Laguna Constr. Co. v. Carter, 828 F.3d 1364, 1368 (Fed. Cir. 2016).

25. *See id.* at 1369 ("Here, the Board did not have to make any factual findings of fraud because it relied on Mr. Christiansen's July 2013 criminal conviction. And, the government's defense is not a 'claim' that requires a decision by the contracting officer. Therefore, the Board properly exercised jurisdiction over the government's affirmative defense.").

26. Michael J. Schaengold et al., *Choice of Forum for Federal Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals/Edition III*, Briefing Papers, Feb. 2019, at 9.

27. *See* 28 U.S.C. § 1503 (discussing the COFC's jurisdiction).

B. Rescission and Disgorgement

When pursuing a common-law fraud claim, rescission and disgorgement are possible remedies. Indeed, as discussed below, the government has repeatedly requested that contracts allegedly tainted by fraud be subject to rescission and disgorgement.

1. Defining Rescission and Disgorgement

In the legal context, the words "rescission" and "rescind" have their "ordinary use" definitions, meaning to abrogate, annul, or revoke.[28] "Rescission has the effect of voiding a contract from its inception, *i.e.*, as if it never existed."[29] In other words, rescission provides "a power of avoidance."[30]

The Federal Circuit has explained that rescission "is an equitable doctrine which is grounded on mutual mistake, fraud, or illegality in the formation of a contract."[31] Rescission is available "only when one or more of these circumstances is present."[32] Additionally, rescission ordinarily will not be invoked when money damages will adequately remedy a contract claim.[33]

Generally, there are two types of rescission: (1) legal rescission and (2) equitable rescission.[34] Legal rescission occurs when "one of the parties to the contract unilaterally cancels the contract because the other party committed a material breach of the agreement or because of some other valid reason,"[35] or when the rescission is effected by the agreement of the parties.[36] Conversely, equitable rescission occurs when a party requests that a court

28. 26 Williston on Contracts § 68:3 (4th ed. 2022).

29. Dow Chem. Co. v. United States, 226 F.3d 1334, 1345 (Fed. Cir. 2000).

30. Nebco & Assocs. v. United States, 23 Cl. Ct. 635, 642 (1991).

31. *Dow Chem. Co.*, 226 F.3d at 1345 (citing Roseburg Lumber Co. v. Madigan, 978 F.2d 660, 665 (Fed. Cir. 1992); Am. Sci. & Eng'g, Inc. v. United States, 663 F.2d 82, 87 (Ct. Cl. 1981); Pac. Architects and Eng'rs, Inc. v. United States, F.2d 734, 742 (Ct. Cl. 1974); Eden Isle Marina, Inc. v. United States, 113 Fed. Cl. 372, 483 (2013) (referring to rescission as an equitable remedy).

32. *Dow Chem. Co.*, 226 F.3d at 1345 (citations omitted); *see also* Canpro Invs. Ltd. v. United States, 130 Fed. Cl. 320, 340 (2017) (stating that rescission is an equitable remedy that may not be invoked when money damages will adequately compensate the litigant (citation omitted)).

33. *Eden Isle Marina, Inc.*, 113 Fed. Cl. at 483 (quoting *Dow Chem. Co.*, 226 F.3d at 1345).

34. Alexandra P. Everhart Sickler, *The Truth Shall Set You Free: Explaining Judicial Hostility to the Truth in Lending Act's Right to Rescind a Mortgage Loan*, 12 Rutgers J. L. & Pub. Pol'y 463, 506 (2015); 29 Samuel Williston, A Treatise On The Law Of Contracts § 73:15 (4th ed. 2021). Some commentators have questioned the utility of this distinction. *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 555–56 (2016) ("Whatever sharp edge might exist between the remedies in theory is considerably blurred in practice, and American scholars have tended to reject the entire distinction between the two kinds of rescission as pointless."). Other commentators have argued that a distinction between legal and equitable rescission should be maintained. *See id.* at 556 n.120 ("It is not obviously absurd, however, to have two forms of rescission, one inside the system of equitable remedies and one outside of it.").

35. Megan Bittakis, *The Time Should Begin to Run When the Deed Is Done: A Proposed Solution to Problems in Applying Limitations Periods to the Rescission of Contracts*, 44 U.S.F. L. Rev. 755, 758 (2010); *see also* Williston, *supra* note 34, § 73:15 ("[I]n a legal rescission, one party unilaterally cancels the contract in response to a material breach on the part of the other party or for other valid reasons.").

36. Everhart Sickler, *supra* note 34, at 506.

rescind or nullify the contract.[37] The nature of the rescission, therefore, will turn on the circumstances under which the rescission occurs.

The government's request for rescission of a contract due to common-law fraud often has been accompanied by a request for disgorgement.[38] Disgorgement "is a form of '[r]estitution measured by the defendant's wrongful gain.'"[39] It requires the wrongdoer to "give up 'those gains . . . properly attributable to the [wrongdoer's] interference with the claimant's legally protected rights.'"[40] Courts have described disgorgement as "an equitable remedy that provides 'a method of forcing a defendant to give up the amount by which he was unjustly enriched.'"[41]

As further discussed below in Section II.C, in *Liu*, the U.S. Supreme Court explained that disgorgement is an equitable remedy under which a wrongdoer is required to give up the net profits earned through the fraudulent activity.[42]

2. The Government's Requests for Rescission and Disgorgement When Asserting Common-Law Fraud Counterclaims

Previously, when asserting a common-law fraud counterclaim at the COFC, the government has argued that it was entitled to rescission of a contract "tainted" by fraud and disgorgement of all monies paid under the contract because of the presence of fraud.[43]

For example, in *Kellogg Brown & Root Services, Inc. v. United States*,[44] the government asserted a common-law fraud claim arising from the receipt of kickbacks by employees of Kellogg Brown & Root Services, Inc. (KBR) from employees of KBR's subcontractor Tamimi Global Company (Tamimi) under KBR's LOGCAP III contract.[45] Under that contract, KBR had executed a subcontract referred to as "Master Agreement 3" with Tamimi, against which KBR issued "work release orders" to Tamimi.[46] One of the task orders under KBR's LOGCAP III contract that Tamimi supported as a subcontractor was

37. Bittakis, *supra* note 35, at 758.; *see also* Williston, *supra* note 34, § 73:15 (stating that equitable rescission refers to the situation when one of the parties to the contract asks the court to nullify the contract).

38. *See infra* Section II.B.2.

39. Kokesh v. S.E.C., 137 S. Ct. 1635, 1640 (2017) (alteration in original) (quoting Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. a (2010)).

40. *Id.* (omission in original) (quoting Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 39, § 51 cmt. a).

41. *In re* Pre-Filled Propane Tank Antitrust Litig., 893 F.3d 1047, 1058 (8th Cir. 2018) (quoting FTC v. Bronson Partners, LLC, 654 F.3d 359, 372 (2d Cir. 2011)).

42. *See generally* Liu v. Sec. & Exch. Comm'n, 140 U.S. 1936, 1950 (2020) (citation omitted).

43. *See*, *e.g.*, Jasmine Int'l Trading & Servs., Co. W.L.L. v. United States, 120 Fed. Cl. 577, 582 (2015) ("Defendant raises a counterclaim for common-law fraud, contending that Jasmine's contracts are void or voidable and that the [g]overnment is entitled to rescission and disgorgement of all sums paid to Jasmine under the 0931 Contract, the 0007 Contract, and the 0050 Contract because the contracts 'were tainted by bribery, conflict of interest, and fraud.'"); *see also* Brief of the Defendants at 14, *Jasmine Int'l Trading*, 120 Fed. Cl. 577 (2015).

44. Defendant's Amended Answer and Counterclaims at 15, Kellogg Brown & Root Servs., Inc. v. United States, 99 Fed. Cl. 488 (2011), *aff'd*, 728 F.3d 1348 (Fed. Cir. 2013).

45. *Id.*

46. *Id.* at 18.

known as "Task Order 59."[47] In total, KBR paid Tamimi $466,290,328.00 for work performed under Master Agreement 3.[48]

Before the COFC, the government presented a common-law fraud counterclaim and sought rescission and disgorgement of Master Agreement 3 and Task Order 59.[49] Regarding Master Agreement 3, which had a value of $466,290,328.00, the government argued that it was

> entitled to the rescission of the portion of the LOGCAP III contract involving all work performed by KBR through its Master Agreement 3 subcontract with Tamimi, inasmuch as that subcontract was tainted by kickbacks and it would be contrary to public policy for the [g]overnment to pay for such unlawfully awarded work. The [g]overnment is also entitled to disgorgement of all sums paid to KBR as compensation related to the tainted subcontract.[50]

The government also asserted that the kickbacks tainted KBR's Task Order 59 and that it was "entitled to disgorgement of all fees paid to KBR pursuant to Task Order 59."[51]

The "kickback scheme" that the government asserted "tainted" Master Agreement 3 involved kickbacks totaling $45,000.00.[52] The COFC described the kickback scheme as follows:

> In November 2002 Tamimi's vice-president and chief of operations, Mohammad Shabbir Khan, offered Mr. Hall [of KBR] a kickback, stating that they could "'make a lot of money together.'" Def.'s Am. Answer & Countercls. Filed Mar. 15, 2011, ¶ 114 ("Countercls."). At that time Mr. Hall did not accept money from Mr. Khan, but he also did not report the kickback offer to anyone. However, eventually, both Messrs. Hall and Holmes [of KBR] did accept kickbacks from Mr. Khan.
>
> Beginning in late 2002 through the end of 2003, Messrs. Hall and Holmes received a combined $45,000.00 in cash kickbacks from Mr. Khan. "Mr. Hall understood that the money was being provided so that Tamimi would remain in KBR's good graces and continue to get DFAC contracts from KBR." *Id.* ¶ 115. In 2003 Messrs. Hall and Holmes each accepted $5,000.00 in cash that Mr. Khan delivered to them at an airport in Kuwait. Mr. Khan also gave Mr. Hall an automated teller machine (ATM) card to withdraw cash from a bank account into which Mr. Khan had deposited another $5,000.00. Mr. Hall used the ATM card to withdraw $3,500.00 in cash. Mr. Holmes withdrew the remaining $1,500.00. Mr. Holmes accepted an additional $10,000.00 in cash from Mr. Khan, which Mr. Holmes gave to his secretary. Towards the end of 2003, Mr. Hall accepted $20,000.00 from Mr. Khan, which purportedly was to be used as an investment in a "Golden Corral" restaurant. However, Mr. Hall made no such investment, and Mr. Khan did not request that the money be paid back.[53]

Because of the $45,000.00 in kickbacks, the government requested "rescission of Master Agreement 3 and disgorgement of all funds previously paid to

47. *Id.*
48. *Id.*
49. *Id.* at 24.
50. *See id.* at 24–25.
51. *Id.*
52. *See* Kellogg Brown & Root Servs., Inc. v. United States, 99 Fed. Cl. 488, 491 (2011), *aff'd*, 728 F.3d 1348 (Fed. Cir. 2013).
53. *Id.*

Tamimi under this agreement."[54] Therefore, the government was seeking disgorgement of $466,290,328.00 due to $45,000.00 in kickbacks.[55] Ultimately, the COFC concluded that the government had "failed to establish the requisite causation element of common law fraud,"[56] but not until after it had denied KBR's motion to dismiss the government's common-law fraud counterclaim.[57] The U.S. Court of Appeals for the Federal Circuit affirmed the COFC's determination regarding liability for common-law fraud and did not address the proper measure of damages for such a claim.[58]

Similarly, in *Jasmine International Trading & Service, Co. W.L.L. v. United States*,[59] the government argued, under a common-law fraud theory, that it was "entitled" to rescission of two contracts and multiple purchase orders issued under a blanket purchase agreement (BPA), as well as to "disgorgement of all sums paid to" the contractor under the two contracts and the purchase orders.[60] The value of the contracts and purchase orders totaled $6,774,093.00.[61] The government asserted that it was entitled to "disgorgement of all sums paid" because the contracts and purchase orders "were tainted by bribery, conflict of interest, and fraud."[62] Specifically, the contractor's chief executive officer had promised to pay a government official "$1 million in exchange for the award of [g]overnment contracts."[63] Although the contractor never paid the government official the one million dollars, it did pay the government official $1,200.00 and the government official's sister $60,000.00.[64] Based on the contractor's promise to pay $1,000,000.00 and the $61,200.00 in actual payments, the government asserted that it was entitled to recover the total value of the contracts and purchase orders, $6,774,093.00.[65]

The COFC in *Jasmine International Trade & Service, Co.* found that the government's common-law fraud counterclaim "suffice[d] to meet the pleading requirement for but-for causation" as required for common-law fraud.[66] The Court stated that "[w]hether or not the alleged fraud was, in fact, the but-for

54. *Id.* at 514.

55. *Id.*

56. Kellogg Brown & Root Servs., Inc. v. United States, 103 Fed. Cl. 714, 779 (2012), *aff'd in part, rev'd in part*, 728 F.3d 1348 (Fed. Cir. 2013).

57. Kellogg Brown & Root Servs., Inc. v. United States, 99 Fed. Cl. 488, 517 (2011) ("Plaintiff's motion to dismiss Count V of defendant's counterclaims for disgorgement of all moneys paid to plaintiff related to Task Order 59 is denied."), *aff'd*, 728 F.3d 1348 (Fed. Cir. 2013).

58. *See* Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348, 1371–72 (Fed. Cir. 2013).

59. Jasmine Int'l Trading & Servs., Co. W.L.L. v. United States, 120 Fed. Cl. 577, 577 (2015).

60. *Id.* at 582.

61. Defendant's Amended Answer to Plaintiff's Fifth Amended Complaint, and Counterclaims at 19–20, *Jasmine Int'l Trading & Servs.*, 120 Fed. Cl. 577 (2015).

62. *Jasmine Int'l Trading & Servs.*, 120 Fed. Cl. at 582.

63. *Id.* at 583 (quoting the Government's amended answer).

64. *Id.*

65. *See id.* at 582–83 ("Defendant raises a counterclaim for common-law fraud, contending that Jasmine's contracts are void or voidable and that the [g]overnment is entitled to rescission and disgorgement of all sums paid to Jasmine under the 0931 Contract, the 0007 Contract, and the 0050 Contract . . . .").

66. *Id.* at 586.

cause of the awards to Plaintiff is a matter to be determined following trial."[67] However, the case settled prior to trial.[68]

Another case in which the government asserted that it was entitled to all monies paid under a contract is *Gulf Group General Enterprises Co. W.L.L. v. United States*.[69] There, the government sought "disgorgement of all monies the United States paid for calls issued under the camp package BPA, plus costs," because the calls allegedly "were obtained by plaintiff through bribery, conflict of interest, and fraud."[70] The COFC did not determine the appropriate remedy for the government's common-law fraud counterclaim, as the COFC concluded that the government had not established liability.[71]

A request for rescission and disgorgement is often premised on the idea that it would be "unjust" to allow a person who made a misrepresentation "to retain the fruits of a bargain" induced by fraud.[72] Indeed, the idea behind the government's requests for disgorgement of all monies paid under allegedly fraud-tainted contracts appears to be that, but for the fraud, the contracts would never have existed at all (*i.e.*, the contracts should be rescinded).[73] The government reasons that, because the contracts never would have existed, the government never would have paid the contractors any money under the contracts.[74] The government, therefore, asserts that it should be entitled to recover all the money that it would not have paid but for the fraud (i.e., all amounts paid under the contracts allegedly tainted by fraud).[75]

This argument, however, overlooks that the contractors may have satisfactorily performed all the work the government required under the contracts, and that the contractors may have incurred legitimate expenses in doing so. Likewise, it fails to recognize that the government may have received benefits in the form of the contractors' work, and that the government may intend to retain, and continue to use, those benefits notwithstanding the fraud. The legitimacy of the government's argument is further addressed later in Section III.B.1.

67. *Id.*

68. *See* Stipulation of Dismissal, *Jasmine Int'l Trading & Servs.*,120 Fed. Cl. 577 (2015).

69. Gulf Grp. Gen. Enters. Co. W.L.L. v. United States, 114 Fed. Cl. 258, 267 (2013).

70. *Id.*

71. *Id.* at 356 ("In sum, the defendant has failed to prove that forfeiture is warranted under the Special Plea in Fraud statute or that the commission of common law fraud related to any of the four above-captioned cases warrants rescission and disgorgement.").

72. Roseburg Lumber Co. v. Madigan, 978 F.2d 660, 665–66 (Fed. Cir. 1992) (quoting Morgan Roofing Co., 54 Comp. Gen. 497, 498 (1974)).

73. *See* Veridyne Corp. v. United States, 83 Fed. Cl. 575, 581 (2008) ("The thrust of defendant's argument is that, but for plaintiff's alleged fraud in its estimate of performance costs for anticipated work as presented in its proposal, Mod 0023 either would have been subject to competitive bidding or never executed at all.").

74. *Id.*

75. *Id.* at 581–82.

C. The Supreme Court's Decision in Liu

In June 2020, the U.S. Supreme Court issued its opinion in *Liu v. Securities and Exchange Commission*,[76] in which the Supreme Court analyzed whether disgorgement was an equitable remedy.[77]

In *Liu*, Charles Liu and Xin Wang solicited nearly $27 million from investors that Mr. Liu and Ms. Wang had represented would go toward the construction of a cancer-treatment center.[78] Mr. Liu and Ms. Wang, however, spent nearly $20 million on ostensible marketing expenses and salaries.[79] Ultimately, the SEC investigated and brought a civil action against Mr. Liu and Ms. Wang in federal district court.[80] The district court found in favor of the SEC, and, as part of the remedy, the district court "ordered disgorgement equal to the full amount petitioners had raised from investors, less the $234,899 that remained in the corporate accounts for the project."[81] Mr. Liu and Ms. Wang appealed, and the U.S. Court of Appeals for the Ninth Circuit affirmed.[82]

The U.S. Supreme Court granted certiorari to determine whether 15 U.S.C. § 78u(d)(5) permits the SEC to seek a disgorgement award that goes "beyond a defendant's net profits from wrongdoing."[83] The statute at 15 U.S.C. § 78u(d)(5) states that, in any action brought by the SEC, the SEC "may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors."

When analyzing whether disgorgement was an equitable remedy, the Supreme Court observed that it had previously "described 'disgorgement of improper profits' as 'traditionally considered an equitable remedy.'"[84] The Supreme Court further stated that "a remedy tethered to a wrongdoer's net unlawful profits, whatever the name, has been a mainstay of equity courts."[85] The Supreme Court noted that disgorgement restores the status quo, thereby "situating the remedy squarely within the heartland of equity."[86] The Supreme Court also stated that a "foundational principle" of disgorgement is that it "'would be inequitable that [a wrongdoer] should make a profit out of his

76. Liu v. Sec. & Exch. Comm'n, 140 U.S. 1936 (2020).
77. *Id.* at 1942.
78. *Id.* at 1941.
79. *Id.*
80. *Id.* at 1942.
81. *Id.* (citation omitted).
82. *Id.*
83. *Id.* (citation omitted).
84. *Id.* at 1943; *see also id.* at 1943 n.2 (citing to cases that "expressly" characterize disgorgement as an equitable remedy).
85. *Id.* at 1943 (citation omitted); *see also id.* at 1942 ("Equity courts have routinely deprived wrongdoers of their net profits from unlawful activity, even though that remedy may have gone by different names." (citations omitted)); *id.* ("[E]quity practice long authorized courts to strip wrongdoers of their ill-gotten gains, with scholars and courts using various labels for the remedy.").
86. *Id.* at 1943 (citing Tull v. United States, 481 U.S. 412, 424 (1987)).

own wrong.'"[87] Thus, the Supreme Court concluded that the SEC could seek disgorgement of profits under 15 U.S.C. § 78u(d)(5).[88]

The Supreme Court also addressed the limitations that courts have imposed on disgorgement, so as "to avoid transforming [disgorgement] into a penalty outside their equitable powers."[89] Specifically, the Supreme Court stated that, in the past, "courts limited awards to the net profits from wrongdoing, that is, 'the gain made upon any business or investment, when both the receipts and payments are taken into the account.'"[90] Stated differently, "courts consistently restricted awards to net profits from wrongdoing after deducting legitimate expenses."[91]

Regarding the SEC's disgorgement award issued by the district court and affirmed by the U.S. Court of Appeals for the Ninth Circuit, the Supreme Court noted that the district court failed to deduct expenses incurred for lease payments and cancer-treatment equipment from the amount to be disgorged by Mr. Liu and Ms. Wang.[92] The Supreme Court reiterated that "[c]ourts may not enter disgorgement awards that exceed the gains 'made upon any business or investment when both the receipts and payments are taken into the account'" and that "courts must deduct legitimate expenses before ordering disgorgement."[93] The Supreme Court stated that, on remand, the Ninth Circuit should determine whether the lease and equipment expenses should be deducted from the disgorgement award.[94]

When discussing how equity courts traditionally dealt with disgorgement, the Supreme Court identified one exception to the principles discussed above.[95] That exception applies when the claimed expenses are "dividends of profit under another name," *i.e.*, when a claimed expense, such as an unreasonably high salary paid to the perpetrator of the fraud, is not a legitimate

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87. *Id.* (quoting Root v. Ry. Co., 105 U.S. 189, 207 (1882)).

88. *Id.* at 1945. In doing so, the Supreme Court distinguished its opinion in *Kokesh v. Securities & Exchange Commission*, in which the Supreme Court concluded that "SEC disgorgement" in an enforcement action brought under 28 U.S.C. § 2462 was a "penalty within the meaning of § 2462." Kokesh v. Sec. & Exch. Comm'n, 137 U.S. 1635, 1643 (2017). The Supreme Court found that the SEC disgorgement was a penalty because, in actions brought under § 2462, the disgorged funds were not provided to the victims of the fraud, and SEC disgorgement "is imposed as a consequence of violating a public law and it is intended to deter, not to compensate." *Id.* at 1644. In *Liu v. Securities & Exchange Commission*, the Supreme Court stated that the SEC disgorgement in *Kokesh* "seemed to exceed the bounds of traditional equitable principles." *Liu*, 140 U.S. at 1946. The Supreme Court in *Liu* distinguished *Kokesh* by stating that *Kokesh* decided whether a disgorgement order in an SEC enforcement action constitutes a penalty for purposes of 28 U.S.C. § 2462, while *Liu* was addressing whether "the SEC may seek 'disgorgement' in the first instance through its power to award 'equitable relief' under 15 U.S.C. § 78u(d)(5), a power that historically excludes punitive sanctions." *Id.*

89. *Liu*, 140 U.S. at 1944 (citation omitted).

90. *Id.* at 1945 (quoting Rubber Co. v. Goodyear, 76 U.S. 788, 804 (1870)).

91. *Id.* at 1946.

92. *Id.* at 1950.

93. *Id.* at 1949–50 (quoting *Goodyear*, 76 U.S. at 804).

94. *Id.* at 1950 (citation omitted).

95. *See id.* at 1945–46.

business expense.[96] To utilize that exception, a court must ascertain "whether expenses are legitimate or whether they are merely wrongful gains 'under another name.'"[97] If a court finds that the exception applies, the court is not required to deduct those expenses from the disgorgement award.[98]

III. ANALYSIS

As discussed above in Section II, when asserting common-law counterclaims related to government contracts, the government has sometimes requested rescission and disgorgement as remedies and has requested that the contractor repay all the monies paid under the contract. As discussed below, the government's request for rescission and disgorgement of a contract allegedly tainted by fraud is a request for equitable relief. Although equity is "flexible," it "is confined within the broad boundaries of traditional equitable relief."[99] Thus, in most cases, the COFC should reject requests that a contractor repay all monies paid under a contract due to common-law fraud because such an award usually would exceed the traditional bounds of a rescission and disgorgement award.

A. When Requested in Connection with a Common-Law Fraud Counterclaim, Rescission and Disgorgement Are Equitable Remedies.

To determine whether the government's requested remedies of rescission and disgorgement constitute equitable relief, a court would need to analyze whether the remedies "fall[] into 'those categories of relief that were *typically* available in equity.'"[100] In doing so, courts should examine the "true character" of the action, not the label given to the action by the parties.[101] Courts, therefore, "must look to the remedy sought and determine whether it is legal or equitable in nature."[102]

The common-law fraud principles applied in the United States today are derived from English courts.[103] Those principles were aptly summarized in a decision in 1898 as follows:

96. *See id.* (quoting *Goodyear*, 76 U.S. at 803).

97. *Id.* at 1950 (quoting *Goodyear*, 76 U.S. at 803).

98. *Id.* at 1945–46, 1949–50.

99. Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 322 (1999).

100. *Liu*, 140 U.S. at 1942 (emphasis in original) (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993).

101. St. Bernard Par. Gov't v. United States, 142 Fed. Cl. 504, 543 *recons. denied*, 143 Fed. Cl. 676 (2019).

102. *In re* Tech. Licensing Corp., 423 F.3d 1286, 1287 (Fed. Cir. 2005).

103. *See* Browning v. Nat'l Cap. Bank of Washington, 13 App. D.C. 1, 16 (1898) (stating that "the [fraud] principle thus stated [by the U.S. Supreme Court] appears to be strictly in accordance with the rulings of the English courts upon this subject"); *see also* William H. Kuehnle, *On Scienter, Knowledge, and Recklessness Under the Federal Securities Laws*, 34 Hous. L. Rev. 121, 167 (1997) ("The majority of American common law on fraud is consistent with *Derry* and the English law . . . .").

> According to the decisions of those [English] courts, made in many cases, if a party undertakes positively to assert that to be true which he does not know to be true, and which he has no sufficient or reasonable grounds for believing to be true, in order to induce another to act upon the faith of the representation, and the representation is acted upon and it turns out to be false, and the person who has acted upon the representation has been deceived to his damage, he is entitled to maintain an action for the deception. For whoever pretends to have positive knowledge of the existence of a particular fact, or state of things, when in truth he knows nothing about it, does in reality make a wilful [sic] representation which he knows to be false; and if such representation is made in order that another may rely upon it, and act upon it, and it is acted upon, and damage results therefrom, the person making the representation is in principle guilty of wilful deception and fraud.[104]

As explained by the U.S. Court of Claims, "[u]nder the common law, fraud vitiated the contract and allowed, in the absence of any equitable considerations at least, recovery of actual damages sustained as a result of the fraud."[105] For example, in an early American common-law fraud case involving the sale of "diseased sheep," the court explained that the plaintiff was "entitled to such damages as necessarily and naturally flow from the [fraudulent] act of the defendants."[106] The common-law, therefore, "did not permit recovery of money paid on a contract induced by fraud, unless actual monetary damage was sustained as a result of the fraud."[107]

English courts of equity, however, developed a rule providing that a contract induced by fraud is "void."[108] Early decisions from courts in the United States followed this rule,[109] with Samuel Williston, author of the well-known treatise *Williston on Contracts*, remarking in 1911 that "the redress which

104. *Browning*, 13 App. D.C. at 16.

105. Paisner v. United States, 150 F. Supp. 835, 838 (Ct. Cl. 1957) (Whitaker, J., dissenting); *see also Browning*, 13 App. D.C. at 15 ("[W]here a representation of a fact, susceptible of actual knowledge, is recklessly made, the party making it being indifferent how the truth of the matter really stands, and damage results, the party should be held liable."); Seth E. Lipner, *From the Professor: Assessing Damages in Bond Cases*, 24 PIABA B. J. 97, 101 (2017) ("At common law, the typical measure of damages for fraud-in-the-inducement in the sale of a chattel is the (inflated) price paid for the object minus the actual value of that object on the date of the purchase").

106. Jeffrey v. Bigelow & Tracy, 13 Wend. 518, 523 (N.Y. App. Div. 1835) ("That damage is not the mere difference between a diseased sheep and a healthy one, but the damage sustained by communicating the disease to the plaintiff's flock.").

107. *Paisner*, 150 F. Supp. at 839.

108. *See* Carter v. Boehm, 97 E.R. 1162, 1164 (King's Bench 1766) ("The keeping back such circumstance is a fraud, and therefore the policy is void."); *see also* Becker, Moore & Co., Inc. v. U.S. Fid. & Guar. Co., 74 F.2d 687, 688 (2d Cir. 1935) ("[I]t has been settled law for more than a century and a half, that such collateral misrepresentations, though honestly made, will avoid a policy." (citations omitted)); Robert B. Thompson, *The Measure of Recovery Under Rule 10b-5: A Restitution Alternative to Tort Damages*, 37 Vand. L. Rev. 349, 366 n.63 (1984) ("Courts of equity usually granted the rescission and restitution remedy since law courts were slower to recognize fraud in the inducement." (citing 5 A. Corbin, Contracts § 992, § 1102 (1964)).

109. *See, e.g.*, Monad Eng'g Co. v. Stewart, 78 A. 598, 600 (Del. 1910) ("It is a well-known principle of law that fraud avoids a contract."); Crooker v. White, 50 So. 227, 228 (Ala. 1909) ("Misrepresentation constituting fraud which will authorize the rescission in equity of a contract must relate to a fact material to the interests of the other party."); U.S. Waterworks Co., Ltd. v. Borough of Du Bois, 176 Pa. St. 439, 442 (1896) (indicating that rescission could be effected "by a court of equity").

equity gives for fraud is rescission."[110] More recently, tribunals have consistently referred to rescission as an equitable remedy for fraud.[111] In fact, the U.S. Court of Appeals for the Federal Circuit has stated that rescission "is an equitable doctrine which is grounded on mutual mistake, fraud, or illegality in the formation of a contract."[112]

As further stated by the Federal Circuit, "[b]ecause rescission is essentially an equitable remedy, it will not ordinarily be invoked where money damages—in this case damages for breach of contract—will adequately compensate a party to the contract."[113] The Federal Circuit's position that rescission should not be invoked when money damages adequately compensate the party is consistent with "the traditional rule that courts will not grant equitable relief when money damages are adequate."[114] The refusal to provide equitable relief, including rescission, when money damages adequately remedy a claim makes sense, as money "damages are always the default remedy for breach of contract."[115]

When the government requests rescission as a remedy for common-law fraud related to a government contract, the government's request for rescission is not a request for monetary damages; in asking that the court rescind the contract, the government is asking for a return to the status quo before the fraudulent action occurred.[116] This is a request for equitable rescission, as opposed to legal rescission, because the government is requesting that the court rescind the contract due to common-law fraud.[117] Thus, when the

110. Samuel Williston, *Liability for Honest Misrepresentation*, 24 Harv. L. Rev. 415, 427 (1911); *see also* C. C. Langdell, *The Northern Securities Case and the Sherman Anti-Trust Act*, 16 Harv. L. Rev. 539, 552 (1903) ("It is undoubtedly a common thing for a court of equity to rescind a transaction between two persons which has been procured by the fraud of one of them, *i.e.*, to compel the tort-feasor to restore what he has received from the person defrauded, upon the latter's restoring to him what he gave in exchange, equity thus restoring both parties to the situation that they were in when the fraudulent transaction took place.").

111. *See, e.g.*, Larionoff v. United States, 533 F.2d 1167, 1181 (D.C. Cir. 1976) (discussing Tucker Act jurisdiction and stating that "[r]escission is an equitable remedy" (citing Richardson v. Morris, 409 U.S. 464, 465 (1973)); Kenney, AGBCA No. 79-119, 80-2 BCA ¶ 14,650 ("[R]escission is an equitable remedy not governed by the terms of the contract."); *cf.* Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L. J. 405, 408 n.8 (1959) ("Equity will grant rescission of a contract induced by the same type of fraud . . . ." (quoting Green, *Fraud, Undue Influence and Mental Incompetency*, 43 Colum. L. Rev. 176, 177–79 (1943)).

112. Dow Chem. Co. v. United States, 226 F.3d 1334, 1345 (Fed. Cir. 2000) (citing Roseburg Lumber Co. v. Madigan, 978 F.2d 660, 665 (Fed. Cir. 1992); Am. Sci. & Eng'g, Inc. v. United States, 663 F.2d 82, 87 (Ct. Cl. 1981); Pac. Architects and Eng'rs, Inc. v. United States, F.2d 734, 742 (Ct. Cl. 1974)).

113. *Dow Chem. Co.*, 226 F.3d at 1345.

114. *See* Alliant Techsystems, Inc. v. United States, 178 F.3d 1260, 1271 (Fed. Cir. 1999).

115. Securiforce Int'l Am., LLC v. United States, 879 F.3d 1354, 1361–62 (Fed. Cir. 2018) (quoting United States v. Winstar Corp., 518 U.S. 839, 885 (1996) (plurality opinion)).

116. See Rumley v. United States, 285 F.2d 773, 776 (Ct. Cl. 1961); *see also* First Fed. Sav. Bank of Hegewisch v. United States, 52 Fed. Cl. 774, 797 (2002) ("The remedy of rescission allows a party to seek disaffirmance of a contract and the return to the status quo that existed before the transaction was executed." (quoting First Hartford Corp. Pension Plan & Trust v. United States, 42 Fed. Cl. 599, 616 (1998)).

117. Bittakis, *supra* note 35, at 758.

government requests that a contract be rescinded because of common-law fraud, the government is requesting that the COFC award equitable relief.[118]

In the context of a common-law fraud claim, the government's request for rescission often is paired with a request for disgorgement.[119] Rescission, on one hand, "contemplates a return by the parties to the status quo,"[120] while disgorgement "is a form of '[r]estitution measured by the defendant's wrongful gain.'"[121] In cases at the COFC, the government has premised its requests for disgorgement on the idea that allowing the contractor to keep the monies it was paid for work performed under an allegedly tainted contract would allow the contractor to be unjustly enriched and would allow the contractor to profit from its wrongdoing.[122]

Similarly, early disgorgement remedies were based on the concept that a wrongdoer should not be allowed to profit from its wrongdoing.[123] Likewise, the argument that a contractor should not be allowed to be unjustly enriched "is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another."[124] As the U.S. Supreme Court has explained, a remedy measured by a wrongdoer's gain "has been a mainstay of equity courts."[125] Indeed, the U.S. Supreme Court acknowledged that disgorgement is "traditionally considered . . . equitable."[126] Thus, the government's request for disgorgement, which typically is paired with a request for equitable rescission and asserts that the contractor should not be allowed to benefit from a contact it allegedly obtained through fraud, is a request for equitable relief.

In sum, when the government requests rescission and disgorgement as remedies for its common-law fraud claim under a government contract, it is requesting equitable relief.

B. The COFC Generally Should Reject Requests for Disgorgement of Amounts That Exceed the Contractor's Net Profit.

For the reasons set forth below, in most cases, a rescission and disgorgement award that requires a contractor to repay all monies paid under a contract

118. *See, e.g.*, Gulf Grp. Gen. Enters. Co. W.L.L. v. United States, 114 Fed. Cl. 258, 267 (2013).

119. *See* Section II.B.2 *supra*.

120. *Rumley*, 285 F.2d at 776; *see also First Fed. Sav. Bank of Hegewisch*, 52 Fed. Cl. at 797 ("'The remedy of rescission allows a party to seek disaffirmance of a contract and the return to the status quo that existed before the transaction was executed.'" (quoting *First Hartford Corp. Pension Plan & Trust*, 42 Fed. Cl. at 616 (1998)).

121. Kokesh v. S.E.C., 137 S. Ct. 1635, 1640 (2017) (alteration in original) (quoting Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. a (2010)).

122. *See, e.g.*, Defendant's Amended Answer and Counterclaims at 24, Kellogg Brown & Root Servs., Inc. v. United States, 99 Fed. Cl. 488 (2011), *aff'd*, 728 F.3d 1348 (Fed. Cir. 2013).

123. *See* Liu v. Sec. & Exch. Comm'n, 140 S. Ct. 1936, 1943 (2020) (quoting Root v. Ry. Co., 105 U.S. 189, 207 (1882)).

124. Kamdem-Ouaffo v. PepsiCo Inc., 657 F. App'x 949, 953 (Fed. Cir. 2016) (quoting *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (2012)).

125. *Liu*, 140 U.S. at 1943.

126. *Id.* at 1940 n.1 (omission in original) (quoting Tull v. United States, 481 U.S. 412, 424 (1987)).

should be rejected because it typically would exceed the traditional bounds of a rescission and disgorgement award.

1. A Rescission and Disgorgement Award Must Take into Account the Wrongdoer's Legitimate Expenses.

Courts have discretion when fashioning equitable relief.[127] However, when granting equitable relief, courts are guided by the traditional use of the equitable remedy,[128] and the court's discretion "must be exercised consistent with traditional principles of equity."[129] Equitable relief, therefore, "is confined within the broad boundaries of traditional equitable relief."[130] In fact, the U.S. Supreme Court has stated that "[e]quitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery . . . ."[131] This limitation on equitable relief has been applied by the U.S. Court of Claims, which explained that the "general principles of equity are applicable in a suit by the United States to secure the cancelation of a conveyance or the rescission of a contract."[132]

Traditional principles of equity provide that, when the equitable remedies of rescission and disgorgement are requested under a common-law fraud theory, courts may not enter disgorgement awards that exceed the wrongdoer's net profits, after accounting for legitimate business expenses.[133] Yet the government, when asserting that a contractor obtained a contract through fraud, has on multiple occasions, requested repayment of all monies paid under the contract.[134] These requests generally should be rejected because "[c]ourts may not enter disgorgement awards that exceed the gains 'made upon any business or investment, when both the receipts and payments are taken into the account.'"[135] The COFC, therefore, must "deduct legitimate expenses" when

127. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 495 (2001).

128. Angel Reyes & Benjamin Hunter, *Does the FTC Have Blood on Its Hands? An Analysis of FTC Overreach and Abuse of Power after* Liu, 68 Buff. L. Rev. 1481, 1500 (2020) ("In modern American law, the use of equitable remedies is based on their traditional, historical use.").

129. eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 394 (2006); *see also* Fed. Trade Comm'n v. AMG Cap. Mgmt., LLC, 910 F.3d 417, 435 (9th Cir. 2018) (O'Scannlain, J., concurring) (discussing the "Supreme Court's repeated admonitions that the equitable powers of federal courts must be hemmed in by tradition").

130. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 322 (1999).

131. Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 105 (1945).

132. Pan Am. Petroleum & Transp. Co. v. United States, 101 Ct. Cl. 114, 137 (1944) (citations omitted).

133. Liu v. Sec. & Exch. Comm'n, 140 U.S. 1936, 1949–50 (2020).

134. *See, e.g.*, Defendant's Amended Answer and Counterclaims at 15, 25, Kellogg Brown & Root Servs., Inc. v. United States, 99 Fed. Cl. 488 (2011) (seeking "disgorgement of all moneys paid to KBR for direct costs, indirect costs, fixed fees, and award fees related to any work release upon Master Agreement 3"), *aff'd*, 728 F.3d 1348 (Fed. Cir. 2013); Veridyne Corp. v. United States, 83 Fed. Cl. 575, 581 (2008) (stating that the government sought to recover "the $31,134,931.12 it paid pursuant to" the contract due to fraud); Section II.B.2 *supra*.

135. *Liu*, 140 U.S. at 1950.

ordering disgorgement as an equitable remedy.[136] As the U.S. Supreme Court has explained, failing to deduct legitimate expenses when ordering disgorgement "would be 'inconsistent with the ordinary principles and practice of courts of chancery.'"[137]

Additionally, ordering disgorgement of all monies paid under a contract, regardless of legitimate expenses, would result in a windfall for the government. When applying the common law, federal courts have, for many years, attempted to "to develop and establish just and practical principles of contract law for the federal government."[138] Notably, in the cases discussed above, the government has not offered to return the goods or services provided under the contract at issue, to the extent that doing so is even possible, when requesting rescission and disgorgement. Instead, in its request for a return to the purported status quo, the government would be seeking to keep all the work provided under the contract, while also recovering all the monies paid under the contract. This result would run afoul of the traditional equitable limitations of disgorgement and would result in a windfall to the government because the government would essentially be receiving goods and services at no cost.[139] This windfall could be significant if the government, for example, were allowed to recover $466,290,328.00 as a remedy for a common-law fraud counterclaim based on $45,000.00 in kickbacks, as the government attempted to do in *KBR*.[140]

Moreover, failing to deduct legitimate expenses before ordering disgorgement would impermissibly transform equitable remedies (rescission and disgorgement) into penalties. For instance, as noted, the government in *KBR* sought disgorgement of $466,290,328.00 based on $45,000.00 in kickbacks.[141] The government argued it was entitled to $466,290,328.00 because "it would be contrary to public policy for the government to pay for such unlawfully awarded work."[142] The government, at least in *KBR*, appears to have been improperly using a common-law fraud counterclaim to punish conduct that contravened public policy.[143]

The "basic function" of rescission, however, "is manifest in the requirement that one who seeks rescission return any benefits that he received from the misrepresenting party; rescission does not seek to punish the defendant but merely to force him to return his profits."[144] Indeed, the U.S. Court of Claims has stated that, "while the perpetrator of the fraud has no standing to

136. *See id.*

137. *Id.* at 1949–50 (quoting Tilghman v. Proctor, 125 U.S. 136, 145–46 (1888)).

138. Nat'l Presto Indus., Inc. v. United States, 338 F.2d 99, 111 (Ct. Cl. 1964).

139. See *Liu*, 140 U.S. at 1950.

140. *See* Kellogg Brown & Root Servs., Inc. v. United States, 99 Fed. Cl. 488, 491 (2011), *aff'd*, 728 F.3d 1348 (Fed. Cir. 2013).

141. *See id.*

142. Defendant's Amended Answer and Counterclaims at 15, *Kellogg Brown & Root Servs., Inc.*, 99 Fed. Cl. at 488, *aff'd*, 728 F.3d at 1348.

143. *Id.*

144. Brian Barnes, *Against Insurance Rescission*, 120 Yale L. J. 328, 344 (2010).

rescind, he is not regarded as an outlaw."[145] The U.S. Supreme Court also has stated that disgorgement is not intended to be a penalty.[146] That rescission and disgorgement are not penalties makes sense, as "equity never 'lends its aid to enforce a forfeiture or penalty.'"[147] Thus, a rescission and disgorgement award requiring repayment of all monies paid under the contract, regardless of the costs incurred during performance or the value the government received from such performance, would exceed the purpose of those equitable remedies and transform rescission and disgorgement into penalties.

If the government intends to seek a remedy for fraud that punishes the wrongdoer, it must do so through an action at law.[148] For example, the government could seek to penalize the wrongdoer for its fraud by bringing a counterclaim under the False Claims Act, which expressly contemplates civil penalties and treble damages.[149] In fact, the government has sought damages equal to the entire value of the contract under the False Claims Act.[150] The government, therefore, has remedies other than a common-law fraud counterclaim that it can use to punish fraud.

Finally, one counterargument that could be made regarding the above analysis is that *Liu* involved the SEC's ability to request "equitable relief" under 15 U.S.C. § 78u(d)(5) and, therefore, does not apply to common-law counterclaims brought by the government under 28 U.S.C. § 1503.[151] The Supreme Court's decision in *Liu*, however, was not limited to equitable relief sought

145. Pan Am. Petroleum & Transp. Co. v. United States, 101 Ct. Cl. 114, 137 (1944).

146. *See* Liu v. Sec. & Exch. Comm'n, 140 U.S. 1936, 1949 (2020). Moreover, even if disgorgement could be used as a penalty, the government's request in *KBR* for disgorgement of $466,290,328.00 based on $45,000.00 in kickbacks would still be problematic. The Eighth Amendment to the U.S. Constitution prohibits "excessive fines," and courts have construed the Eighth Amendment as applying "to civil penalties that are punitive in nature." United States v. Aleff, 772 F.3d 508, 512 (8th Cir. 2014). A punitive civil penalty or "punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332, 1340 (Fed. Cir. 2009) (quoting United States v. Bajakajian, 524 U.S. 321, 334 (1998)). Requiring disgorgement of $466,290,328.00 because of $45,000.00 in kickbacks seemingly would amount to a grossly disproportionate forfeiture that violates the Eighth Amendment.

147. *Liu*, 140 U.S. at 1941 (quoting Marshall v. Vicksburg, 82 U.S. 146, 149 (1872)); Mertens v. Hewitt Assocs., 508 U.S. 248, 270 (1993) ("As this Court has long recognized, courts of equity would not . . . enforce penalties or award punitive damages . . . .").

148. *See* Tull v. United States, 481 U.S. 412, 422 (1987) ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not . . . equity." (citing Curtis v. Loether, 415 U.S. 189, 197 (1974)); Thomas L. Casagrande, *Permanent Injunctions in Trade Secret Actions: Is a Proper Understanding of the Role of the Inadequate at Law/Irreparable Harm Requirement the Key to Consistent Decisions?*, 28 AIPLA Q. J. 113, 138 (2000) ("Legal remedies include damage awards designed to compensate plaintiffs (compensatory damages) and punish defendants (punitive damages).").

149. *See* 31 U.S.C. § 3729(a).

150. *See, e.g.*, United States v. R.J. Zavoral & Sons, Inc., No. 12-668, 2014 WL 5361991, at *15 (D. Minn. Oct. 21, 2014) ("Based on these facts, where the benefit of the Section 8(a) program is to benefit small businesses controlled by socially and economically disadvantaged individuals, the [g]overnment is entitled to argue to the jury that it received no value under the Contract and that the proper measure of damages is the amounts paid to Defendants.").

151. *See Liu*, 140 U.S. at 1940.

under 15 U.S.C. § 78u(d)(5). Rather, the decision analyzed the traditional bounds of disgorgement when sought as an equitable remedy, including in cases that did not arise under 15 U.S.C. § 78u(d)(5).[152] Thus, the principles discussed in *Liu* apply to equitable disgorgement requests generally, including the government's requests for disgorgement that are brought in the COFC under 28 U.S.C. § 1503.

In sum, when awarding rescission and disgorgement as equitable relief for a common-law fraud counterclaim, the COFC must deduct legitimate business expenses from the award. In most cases, doing so will result in the government receiving disgorgement awards that are less than the total amount of money paid under the contract.

2. The Court of Claims Decision in *K & R Engineering Co.* Does Not Provide a Basis for Requiring, as a Result of Common-Law Fraud, a Contractor to Repay All Amounts Paid Under a Contract.

In the past, the government has relied on a Court of Claims' decision from 1980, *K & R Engineering Co. v. United States*,[153] when requesting disgorgement of all monies paid under the contract because of common-law fraud.[154]

In *K & R Engineering Co. v. United States*, the government "counterclaimed to recover the amount it already paid plaintiff under" three contracts.[155] The government alleged that the contracts were awarded in violation of the "conflict-of-interest statute," 18 U.S.C. § 208(a), because a government employee and two officers of a company entered into an agreement whereby the government employee would be paid twenty-five percent of all profits earned under the contracts awarded by the government employee to the company.[156] The Court of Claims determined that the arrangement between the government employee and the contractor violated the conflict-of-interest statute.[157]

Regarding the government's counterclaim, the Court of Claims stated that "[e]ffective implementation of the conflict-of-interest law requires that once a contractor is shown to have been a participant in a corrupt arrangement, he cannot receive or retain any of the amounts payable thereunder."[158] According to the Court of Claims, "[t]he policy underlying the conflict-of-interest statute requires that the contractor be required to disgorge the amounts received under the tainted contract."[159] The Court of Claims concluded that, under the "federal conflict-of-interest law," a contractor which "has participated in an illegal conflict-of-interest situation is not entitled to retain the amounts received under the tainted contract."[160]

152. *See id.* at 1942–46.
153. *See* K & R Eng'g Co., Inc. v. United States, 616 F.2d 469, 470 (Ct. Cl. 1980).
154. *See* Veridyne Corp. v. United States, 83 Fed. Cl. 575, 582 (2008).
155. *K & R Eng'g Co.*, 616 F.2d 469, 476.
156. *Id.* at 472.
157. *See id.*
158. *Id.* at 476.
159. *Id.*
160. *Id.* at 477.

As reflected in the above quotations, the court in *K & R Engineering Co.* was addressing a counterclaim arising under a statute prohibiting conflicts of interest in the award of government contracts.[161] The government did not assert a common-law fraud counterclaim; indeed, the term "common law" does not appear in the decision, and there is no discussion of the elements of common-law fraud.[162] Nor did the court in *K & R Engineering Co.* purport to adhere to the traditional limitations of equity, as is required when awarding equitable relief.[163] The Court of Claims was not focused on returning the parties to the status quo, as the court does when awarding equitable rescission, or ensuring that the contractor did not profit from its wrongdoing, as the court does when ordering disgorgement. Instead, the Court of Claims specifically focused on the conflict-of-interest statute, its "[e]ffective implementation," and "policy considerations."[164] Thus, *K & R Engineering Co.* is distinguishable from common-law fraud counterclaims because, in that case, the government was not asserting a common-law fraud counterclaim.

Moreover, effective implementation of a statute and the policy considerations around deterring fraud cannot override the traditional limitations on the equitable remedies of rescission and disgorgement.[165] In *K & R Engineering Co.*, the Court of Claims did not deduct legitimate expenses from the government's award because requiring repayment of all money paid under the contract would, in the Claims Court's view, protect "the integrity of the federal procurement process."[166] As discussed above in Section III.B.1, however, a court must deduct legitimate expenses when ordering disgorgement, regardless of whether doing so furthers the goal of protecting the procurement process. Additionally, the Court of Claims reasoned that requiring the company to repay all amounts paid under the contracts would punish contractors that engaged in fraud.[167] But, as discussed above, disgorgement cannot be used to punish.[168]

161. *See* Kellogg Brown & Root Servs., Inc. v. United States, 99 Fed. Cl. 488, 515 (2011) ("In *K & R Engineering* the Court of Claims held that the plaintiff violated the conflict-of-interest statute, *see id.* at 474, and rejected the plaintiff's argument that such a violation should not preclude contract enforcement when the government was not adversely affected by the conflict of interest, *id.* at 475."), *aff'd*, 728 F.3d 1348 (Fed. Cir. 2013).

162. *See generally K & R Eng'g Co.*, 616 F.2d at 469.

163. *See id.* at 475.

164. *Id.* at 476.

165. *See* Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 105 (1945) ("Equitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery . . . .").

166. *K & R Eng'g Co.*, 616 F.2d 469, 476.

167. *Id.* ("To deny the government recovery of amounts paid under such tainted contracts would reward those contractors who can conceal their corruption until they have been paid."). The current version of the conflict-of-interest statute, 18 U.S.C. § 208 (2018), provides that any person who violates section 208(a) "[s]hall be subject to the penalties set forth in section 216 of this title." 18 U.S.C. § 208(a) (2018). That section provides that a person who engages in the prohibited conduct "shall be subject to a civil penalty of not more than $50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater." 18 U.S.C. § 216(b) (2018). Thus, the statute provides a basis for requiring a wrongdoer to disgorge all compensation received because of the prohibited conduct.

168. *See supra* Section III.B.1.

The Court of Claims' decision in *K & R Engineering Co.*, therefore, does not provide a basis for expanding a disgorgement award beyond the traditional limitations of equity, and its continued vitality—especially after *Liu*—is unclear.[169]

3. Applying the Traditional Limitations of Equity When Assessing Government Common-Law Fraud Counterclaims Will Not Result in Wrongdoers Profiting at the Government's Expense

An argument could be made that, when the COFC finds that the government has succeeded on its common-law fraud counterclaim, a decision denying disgorgement of all monies paid under the contract would lead to the contractor profiting at the government's expense.

Disgorgement, however, specifically addresses the concern that a wrongdoer should not profit at another's expense.[170] Only "legitimate" expenses incurred by the wrongdoer are to be deducted from the amount that the wrongdoer is required to pay.[171] In *Liu*, for example, the Supreme Court indicated that, on remand, the court may require the wrongdoers in that case to disgorge costs incurred in connection with "ostensible marketing expenses and salaries," while the wrongdoers might not be required to disgorge costs incurred for "lease payments and cancer-treatment equipment."[172] A contractor, therefore, would not be able to retain profits on its fraudulently obtained contract, and the government, under a common-law fraud counterclaim, would be able to recover all monies paid under the contract except for monies that went toward items or services that have "value independent of fueling a fraudulent scheme."[173]

Furthermore, the Supreme Court has long held that a wrongdoer may not retain "dividends of profit under another name."[174] Accordingly, if a contractor unreasonably inflates its expenses to reduce the amount it is required to disgorge because of common-law fraud, a court could look behind the contractor's representation that it incurred certain expenses and require disgorgement of unreasonable expenses. The equitable remedy of disgorgement does not permit a wrongdoer "to diminish the show of profits by putting in unconscionable claims for personal services or other inequitable deductions."[175]

169. *See* Veridyne Corp. v. United States, 83 Fed. Cl. 575, 586 (2008) ("The case law, properly read, does not support defendant's argument that the appropriate remedy for any contract that is void *ab initio* is forfeiture of monies already paid or the denial of recovery in *quantum meruit* or *quantum valebat.*").

170. Liu v. Sec. & Exch. Comm'n, 140 U.S. 1936, 1943 (2020) (stating that a "foundational principle" of disgorgement is that it "'would be inequitable that [a wrongdoer] should make a profit out of his own wrong'" (quoting Root v. Railway Co., 105 U.S. 189, 207 (1882)).

171. *Id.* at 1949–50 (quoting Rubber Co. v. Goodyear, 76 U.S. 788, 804 (U.S. 1870)).

172. *See id.* at 1950.

173. *See id.*

174. *Goodyear*, 76 U.S. at 803.

175. *Liu*, 140 U.S. at 1945 (quoting *Root*, 105 U.S. at 203).

The Supreme Court also "has carved out an exception when the 'entire profit of a business or undertaking' results from the wrongful activity.'"[176] If a contractor obtains a contract through fraud, and does not incur any legitimate expenses in connection with performance of the contract, the contractor, under a rescission and disgorgement theory, would be required to disgorge all monies paid under the fraudulently obtained contract.[177] Application of "that exception requires ascertaining whether expenses are legitimate or whether they are merely wrongful gains 'under another name.'"[178] Consequently, the exception may not apply if the contractor incurred legitimate expenses when providing goods or services to the government under the contract obtained through common-law fraud.

IV. CONCLUSION

Considering the U.S. Supreme Court's decision in *Liu v. Securities and Exchange Commission*,[179] it would be inappropriate to order, as a remedy for a common-law fraud counterclaim, disgorgement of all monies paid under a contract obtained through fraud, unless the contractor did not incur any legitimate expenses in performance of the contract. The COFC, when crafting equitable relief, must be mindful of the traditional limitations on disgorgement as discussed in *Liu* and other binding precedent.

Moreover, a common-law fraud counterclaim is not a panacea for all the adverse effects of fraud, as the equitable remedies of rescission and disgorgement are only intended to restore the status quo and ensure that the wrongdoer does not profit at the counterparty's expense. When pursuing alleged fraud by a contractor, the government has multiple options other than a common-law fraud counterclaim (*e.g.*, the False Claims Act) that it can use to punish and penalize the perpetrators of fraud. Equitable relief, however, is not to be used as a vehicle for punishment or to provide the government with a windfall.

176. *Id.* (quoting *Root*, 105 U.S. at 203).

177. *See id.* at 1950 ("It is true that when the 'entire profit of a business or undertaking' results from the wrongdoing, a defendant may be denied 'inequitable deductions' such as for personal services." (quoting *Root*, 105 U.S. at 203)).

178. *Id.* (quoting *Goodyear*, 76 U.S. at 804).

179. *Liu*, 140 U.S. at 1936.

OSTENSIBLE WHAT? SUBCONTRACTING GONE WRONG

*Will Jamison**

ABSTRACT

Contractors must analyze the relationship between the small business prime contractor and large business subcontractors in the context of total small business set-asides. For contracts for other than manufactured products, the "Ostensible Subcontractor Rule" states that if a large business subcontractor is performing the "primary and vital" requirements of a contract or order, or if the prime contractor is "unusually reliant" upon its subcontractor for contract performance, the prime and subcontractors will be treated as a joint venture. If the subcontractor is a large business, the small business prime loses its status as a small business and is ineligible for contract award. In addition, in all set-aside contracts, the Limitations on Subcontracting rule prohibits a small business prime from paying more than fifty percent of the amount paid to it by the government to non-similarly situated subcontractors (eighty-five percent for construction and seventy-five percent for specialty trades). This article aims to orient contractors to the Ostensible Subcontractor Rule and Limitations on Subcontracting clause given their impact on the performance of the contract.

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I. INTRODUCTION

Imagine you are a government contractor and you pick up the phone after hearing it ring.

> Salesperson: "Hey! Acme, Inc., a small business, just called and they want to partner on a new small business set-aside. They need us to perform a big part of the work, and we can't bid directly because it's a set-aside. I'm going to send you the solicitation now."

> You: "We need to consider the Ostensible Subcontractor Rule before we commit to anything."

> Salesperson: "The what!? This is a huge contract. We want to win!"

It is common for conversations that involve the "Ostensible Subcontractor Rule"[1] to begin like this. The Ostensible Subcontractor Rule is one of many rules designed to prevent large businesses from reaping the benefits of contracts reserved for small businesses.[2] The Ostensible Subcontractor Rule has an admirable purpose in reserving certain benefits for small businesses, but it is nuanced, confusing, and difficult to apply. These roadblocks are exacerbated when agencies outside of the Small Business Administration (SBA) solicit for set-asides. In the author's experience, contractor personnel and government contracting professionals frequently do not understand the

1. 13 C.F.R. § 121.103(h)(2) (2022).
2. *See* Fischer Bus. Sols., LLC, SBA No. SIZ-5075 (Oct. 7, 2009).

Ostensible Subcontractor Rule. Further, they lack the same objectives as the SBA. Because the SBA has ultimate authority to make determinations regarding the Ostensible Subcontractor Rule,[3] small and large businesses may be totally transparent about their relationships and may even be performing the contract with the blessing of the SBA (which just wants the contract to be performed). However, the SBA can swoop in, find the Ostensible Subcontractor Rule applies, and leave the contract with no one to perform the work (as it was improperly awarded). This also creates liability concerns for the contractor.[4]

While the Ostensible Subcontractor Rule only applies to contracts for "other than manufactured products," contractors must comply with the Limitations on Subcontracting clause in *all* contracts in addition to being cautious about the Non-Manufacturer exception to this rule.[5] The Limitations on Subcontracting clause and its exception apply in addition to, not instead of, the Ostensible Subcontractor Rule in the case of contracts for other than manufactured products.[6] This rule states that a small business prime "will not pay more than [fifty percent] of the amount paid by the government to it to firms that are not similarly situated."[7] In other words, if the contract is for supplies, the prime may not subcontract more than fifty percent of the cost to manufacture the product (excluding the cost of materials) to non-similarly situated entities. Contractors must consider both rules when dealing with small business set-asides. Finally, these rules have gone through several recent changes, complicating how to apply these rules.[8]

This article begins with a brief synopsis of relevant small business contracting concepts. Then, it provides an in-depth analysis of the Ostensible Subcontractor Rule, the Limitations on Subcontracting clause, and the information contractors need to navigate these rules.

II. IN THE BEGINNING: SMALL BUSINESS CONTRACTING

When contracting with the federal government, businesses must identify themselves as either other than small (i.e., large) or small.[9] The SBA explains the purpose of this identification:

> To help provide a level playing field for small businesses, the government limits competition for certain contracts to small businesses. Those contracts are called 'small business set-asides,' and they help small businesses compete for and win

3. *See* § 121.103(h)(2); *see also* FAR 19.102(a)(1) (stating that the "SBA establishes small business size standards").
4. *See* 31 U.S.C. § 3729(a); *see also* 15 U.S.C. § 632(w).
5. FAR 52.219-14.
6. § 121.404(d).
7. § 125.6(a)(1)–(2); *see also* 15 U.S.C. § 657s(a)(1)–(2).
8. This article reflects changes to the rules through 87 Fed. Reg. 10,327 (Feb. 24, 2022).
9. *Contracting Guide: Basic Requirements*, U.S. Small Bus. Admin., https://www.sba.gov/federal-contracting/contracting-guide/basic-requirements (last visited Feb. 10, 2023) [https://perma.cc/2A54-D9AG].

federal contracts. There are two kinds of set-aside contracts: competitive set-asides and sole-source set-asides.[10]

In addition, small businesses may further certify that they fit into certain socio-economic categories, including disadvantaged, HUBZone, woman-owned, veteran-owned, and service-disabled veteran owned.[11] The FAR does not prescribe how to determine size or socio-economic status, as the rules for such determinations are in 13 C.F.R. Part 121.[12] To be "small," a contractor must satisfy the size standard for the North American Industry Classification System (NAICS) code selected for the contract.[13] For each NAICS code, size is determined by measuring either a company's annual receipts (i.e., revenue) or number of employees.[14]

A. Affiliation

As part of the size determination process, the SBA aggregates the employees or annual receipts of the offeror and its affiliates.[15] This "affiliation rule" aims to prevent large businesses from buying or creating a subsidiary—no matter the number of employees or revenue of the subsidiary—that would qualify as a small business.[16] The SBA wants true small businesses competing for set-asides. SBA regulations define an "affiliate" as an entity that "controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists."[17] The SBA weighs "factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships."[18] "Control may be affirmative or negative."[19] In making a size determination, the SBA assesses the "totality of the circumstances."[20] The procedures the SBA considers in making this determination can be found in 13 C.F.R. Part 121.[21]

B. Joint Ventures

A "joint venture" (JV) of two or more businesses may also compete for government contracts, including set-asides.[22] A JV is a separate entity for the purposes of government contracting and must have its own name, a Commercial

10. *Id.*
11. *E.g.*, 13 C.F.R. §§ 124.504(a), 126.100, 127, 128.
12. *See* FAR 19.102(a)(1).
13. *See* 13 C.F.R. § 121.402; *see* FAR 19.102(a)(1).
14. 13 C.F.R. § 121.103(a)(6).
15. § 121.103(a)(5).
16. § 121.103(a)(1).
17. *Id.*
18. § 121.103(a)(2).
19. § 121.103(a)(3) ("[N]egative control includes, but is not limited to, instances where a minority shareholder has the ability . . . to prevent quorum or otherwise block action . . . .").
20. § 121.103(a)(5).
21. *See* § 121.103.
22. *See* § 125.8(a).

And Government Entity (CAGE) code, and SAM registration.[23] All parties to a JV must be small to qualify for a set-aside, and the affiliation rule applies in this context as well.[24] However, there is an exception to this rule that allows JVs comprised of large and small businesses to qualify for a set-aside if they have a mentor-protégé agreement (MPA).[25] This article discusses MPAs in greater detail in III.C.vi below.

III. OSTENSIBLE SUBCONTRACTOR RULE

A. Introduction to the Ostensible Subcontractor Rule

When a small business decides to pursue a set-aside as the prime contractor and anticipates engaging subcontractors, it must carefully consider the size of its subcontractors and the type of work they will be performing. In set-aside contracts for other than manufactured products, the small business prime contractor could be deemed to be a JV and, thus, affiliated with any of its subcontractors that are determined to be ostensible subcontractors.[26] Such affiliation could cause the small business prime contractor to lose its small business size status and become ineligible for contract award.[27] Specifically:

> An ostensible subcontractor is a subcontractor that is not a similarly situated entity, as that term is defined in § 125.1 of this chapter, and performs primary and vital requirements of a contract, or of an order, or is a subcontractor upon which the prime contractor is unusually reliant. All aspects of the relationship between the prime and subcontractor are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontracted work), agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement), and whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.[28]

The key factors for evaluating whether a subcontractor is an ostensible subcontractor include (i) whether the prime contractor and subcontractor are "similarly situated,"[29] (ii) whether the subcontractor is performing the "primary

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23. § 121.103(h); *Joint Ventures*, U.S. Small Bus. Admin., https://www.sba.gov/federal-contracting/contracting-assistance-programs/joint-ventures (last visited Mar. 9, 2023) [https://perma.cc/H46R-DZ38].

24. §§ 125.8(h), 121.103(h).

25. § 121.103(h)(1)(ii).

26. Jim R. Moye, *Common Sense Ain't Common: How One Government Regulation Stifles Small Business Growth*, 12 Rutgers J.L. & Pub. Pol'y 360, 370 (2015). Ideogenics LLC v. United States, 138 Fed. Cl. 672, 705 (2018) ("'[I]t is possible to find a violation of the ostensible subcontractor rule[,] even when a prime contractor will utilize multiple subcontractors.'").

27. Moye, *supra* note 26, at 379.

28. § 121.103(h)(2).

29. "Similarly situated" is defined at 13 C.F.R. § 125.1 and requires the subcontractor to (i) "[have] the same the small business program status as the prime contractor" (e.g., HUBZone, WOSB, etc.), and (ii) "be small for the NAICS code that the prime contractor assigned to the subcontract the subcontractor will perform." This is discussed in greater detail in Section IV.

and vital" requirements of the contract *or* order, and (iii) whether the prime contractor is "unusually reliant" upon its subcontractor for performance.[30]

1. Similarly Situated

A subcontractor is "similarly situated" when it "has the same small business program status as the prime contractor."[31] In other words, the subcontractor must be (i) small under the applicable NAICS and (ii) have the same status as that which qualified the prime contractor for the award (HUBZone, veteran-owned, etc.).[32] Regarding factor (ii), the Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) recently updated this definition to clarify that if a contract is simply a small-business set-aside (i.e., no socioeconomic status associated with the award), then any small business concern qualifies, without regard to socioeconomic status.[33]

2. Contracts vs. Orders

The Ostensible Subcontractor Rule applies to both the contract and specific orders.[34] The rule states, "An ostensible subcontractor is a subcontractor that is not a similarly situated entity . . . and performs primary and vital requirements of a contract, or of an order . . . ."[35] Therefore, the Ostensible Subcontractor Rule is relevant to each order within a contract, and performance of a single order can violate the Ostensible Subcontractor Rule.

3. Manufacturing and Supply Contracts

The Ostensible Subcontractor Rule does not apply to contracts classified as manufacturing or supply contracts.[36] In these types of contracts, only the Limitations on Subcontracting clause and Nonmanufacturer Rule apply. The reason for this is:

> In classifying the procurement as a manufacturing/supply procurement, the procuring agency must have determined that the "principal nature" of the procurement was supplies. As a result, any work done by a subcontractor on the services portion of the contract cannot rise to the level of being "primary and vital" requirements of the procurement, and therefore cannot be the basis o[f] affiliation as an ostensible subcontractor.[37]

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30. § 121.103(h)(2).

31. § 125.1.

32. *Id.*

33. Revision of Limitations on Subcontracting, 86 Fed. Reg. 44,233, 44,235–44,236 (Aug. 11, 2021) (to be codified at FAR 19.001) (clarifying the definition of a similarly situated subcontractor).

34. § 121.103(h)(2).

35. *Id.*

36. Invisio Commc'ns., Inc., SBA No. SIZ-6084 (Dec. 9, 2020) ("OHA has repeatedly held that the ostensible subcontractor rule does not apply to procurements for manufactured products.") (citing, *e.g.*, HWI Gear, Inc., SBA No. SIZ-6072 (Sept. 16, 2020); Superior Optical Labs, Inc., SBA No. SIZ-6068 (Aug. 27, 2020); ProActive Techs., Inc., SBA No. SIZ-5772 (Aug. 24, 2016); Marwais Steel Co., SBA No. SIZ-3884 (Feb. 10, 1994)).

37. Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determination, 76 Fed. Reg. 82,222, 82,225 (Feb. 11, 2011) (to be codified at 13 C.F.R. pts. 121, 124).

4. Primary and Vital vs. Unusually Reliant

Sections III.B and III.C contain a detailed analysis of both the primary and vital and unusually reliant tests, respectively. From the author's experience, some contractors conduct a single analysis of these tests because contractors use the same facts for both.[38] However, it is important to know that "primary and vital" and "unusually reliant" are two separate, independent tests.[39] The rule is written in the disjunctive rather than conjunctive, and violating either causes a violation of the Ostensible Subcontractor Rule.[40] As stated by the SBA, "the '[O]stensible [S]ubcontractor R]ule' may be violated when *either* the prime contractor does not perform the 'primary and vital requirements of the contract,' *or* the prime contractor is 'unusually reliant' on subcontractors."[41]

Importantly, contractors must do these analyses must before responding to a solicitation, as analysis of the relevant factors may impact how a prime and subcontractor can work together, and how the proposal will be drafted.

Lastly, the tests to make these determinations are "intensely fact specific," so there is no bright-line rule.[42] One must analyze "the specific requirements of each solicitation and an individual offeror's response to those requirements."[43] The factors discussed below will help guide contractors through each unique solicitation and identify potential concerns.

B. Primary and Vital

The SBA defines "primary and vital" as those requirements "associated with the principal purpose of the acquisition."[44] In determining the principal purpose, case law and SBA Office of Hearing & Appeals (OHA) rulings have identified two straightforward factors to review. First, contractors should examine the requirements associated with the "bulk of the effort, or contract dollar value."[45] This involves, for example, analyzing the percentage of employees, labor costs, and labor hours (i.e., time) associated with each portion of the contract.[46] Sensibly, the portion of the contract that costs the most or takes the most time to complete is associated with the primary and vital requirement. Second, contractors should use the NAICS code assigned to the solicitation.[47] FAR 19.102(b)(1) states, "The contracting officer [(CO)] shall determine the appropriate NAICS code by classifying the product or service being acquired

38. This assumption is based off of the author's personal experience.
39. Ideogenics LLC v. United States, 138 Fed. Cl. 672, 702 (2018).
40. *Id.*
41. *Id.*
42. C.E. Garbutt Constr. Co., SBA No. SIZ-5083 (Nov. 2, 2009).
43. *Id.*
44. Competitive Innovations, LLC, SBA No. SIZ-5369 (Sept. 17, 2012) (citing Santa Fe Protective Servs., Inc., SBA No. SIZ-5312 (Jan. 10, 2012)).
45. Kupono Gov't Servs., LLC, SBA No. SIZ-5967 (Oct. 23, 2018) (citing Soc. Sols. Int'l, Inc., SBA No. SIZ-5741, at *27 (May 17, 2016)); iGov Techs., Inc., SBA No. SIZ-5359 (Jun. 13, 2012).
46. *See Kupono*, SBA No. SIZ-5967.
47. FAR 19.301-1(a).

in the one industry that best describes the principal purpose of the supply or service being acquired."[48]

In addition, COs shall consider "qualitative factors, such as the relative complexity and importance of requirements."[49] *Kupono* serves as a good example of evaluating qualitative factors. In *Kupono*, the Department of Energy's National Training Center (NTC) issued a solicitation containing four contract line item numbers (CLINS).[50] In determining the principal purpose, OHA paid particular attention to the language used in the solicitation.[51] In finding a training CLIN was the primary and vital requirement of the contract, OHA first noted most "of the RFP is devoted to discussing [training]."[52] In other words, if a particular requirement takes up the bulk of discussion in a solicitation, that weighs in favor of it being the primary and vital requirement. Second, the solicitation stated the procurement's "overall objective [is] to acquire a contactor to support the mission of the [NTC]."[53] OHA then referred to the mission statement of the NTC, which was to conduct training.[54] OHA reasoned that if NTC's mission was to conduct training, and the solicitation stated its objective was to support the mission of NTC, it weighed in favor of the primary and vital requirement being that most closely associated with training.[55]

One drawback of using these qualitative factors is that they cannot be relied upon without considering the entirety of the solicitation. OHA has stated, "Not all the requirements identified in a solicitation can be primary and vital, and the mere fact that a requirement is a substantial part of the solicitation does not make it primary and vital."[56]

For example, in *Tinton Falls Lodging Realty*, the solicitation called for offerors to arrange and manage lodging for personnel attending training at a particular location.[57] The scope of work required the successful contractor to ensure all personnel had lodging in the local area, to arrange for transportation to and from the training, and handle all related administrative tasks.[58] No training dates or lodging occupancy rates were guaranteed, so the contractor had to be on call to make or cancel reservations.[59] The awardee ultimately intended to subcontract eighty percent of the lodging to a large business, and a disappointed offeror filed a size protest.[60] The cost for lodging was by far

48. FAR 19.102(b).
49. *Soc. Sols.*, SBA No. SIZ-5741, at *27.
50. *Kupono*, SBA No. SIZ-5967.
51. *See id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. Competitive Innovations, LLC, SBA No. SIZ-5369 (Sept. 17, 2012) (citing Santa Fe Protective Servs., Inc., SBA No. SIZ-5312 (Jan. 10, 2012)).
57. Tinton Falls Lodging Realty, LLC v. United States, 800 F.3d 1353, 1357 (Fed. Cir. 2015).
58. *Id.* at 1355.
59. *Id.*
60. *Id.* at 1356.

the most expensive part of the contract, meaning most funds would ultimately flow to a large business.[61] However, on review, the SBA said the primary and vital aspect of the contract was logistics (e.g., arranging the lodging and transportation), despite the fact the NAICS code for the contract was "721110 ('Hotels (except Casino Hotels)')."[62] In other words, the NAICS code and the largest and most expensive part of the contract were for hotel rooms, but the SBA determined the primary and vital requirements of the contract were for logistics.[63] The Court's rationale was that the lodging and transportation needs of the government could change frequently and with little notice, and the contractor had to respond appropriately and ensure lodging and transportation were provided.[64] Therefore, "even though no management and coordination tasks are expressly identified, there is no question that the solicitation requires management and coordination . . . ."[65] The Court, agreeing with and citing the Area Office's determination, stated the "contract requires the contractor to monitor, control, record[,] and report the changing needs of [the government] for lodging and transportation. [Therefore], the primary and vital element of the solicitation was the coordination of lodging, transportation, and other services . . . ."[66]

1. Recommendations Regarding Analyzing the Primary and Vital Factors

The lesson from *Tinton Falls* is that no single factor is determinative. Rather, each factor must be analyzed. There are four important questions to ask: (1) What is the NAICS code?; (2) Where are the majority of labor hours spent?; (3) What comprises the majority of the solicitation?; and (4) What comprises the majority of our response?

Warren Buffet once said, "There is nothing like writing to force you to think and get your thoughts straight."[67] Just as one might do a risk assessment, contractors should put these factors on paper and analyze each one. Not only does this help the team think through the issues but it also records the company's thought process if an issue arises in the future. Between employee turnover and the simple passage of time, it is important to ensure those working on the contract in the future understand why a decision was made.

In addition to analyzing each factor, ask the government. During the question and answer portion of the solicitation response, ask: "What is the primary and vital aspect of the contract per 13 C.F.R. § 121.103(h)(2)?"

Lastly, contractors often state assumptions they have made in their solicitation response. For set-asides, state what the company believes is the primary and vital requirement and make that an assumption of the response.

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61. *Id.* at 1362.
62. *Id.* at 1357–61.
63. *Id.* at 1357.
64. *Id.* at 1362.
65. *Id.*
66. *Id.* at 1362–63.
67. *See* Mary Buffett & David Clark, The Tao of Warren Buffett 70 (2006).

C. Unusually Reliant

The Ostensible Subcontractor Rule also considers if the prime is "unusually reliant" on its subcontractors.[68] To determine whether the prime contractor is unusually reliant, there are four "key factors" identified by the seminal SBA ruling on the subject, *DoverStaffing*.[69] The four factors are: (1) the proposed subcontractor is the incumbent contractor and is ineligible to compete for the procurement; (2) the prime contractor plans to hire the large majority of its workforce from the subcontractor; (3) the prime contractor's proposed management previously served with the subcontractor on the incumbent contract; and (4) the prime contractor lacks relevant experience and must rely upon its more experienced subcontractor to win the contract.[70] Each factor is discussed below.[71]

1. Factor 1: The Proposed Subcontractor Is the Incumbent Contractor and Is Ineligible to Compete for the Procurement

This factor is self-explanatory: the SBA reviews proposed subcontractors to see if they were the incumbent on the previous contract.[72] This factor is simply a "red flag," alerting the government that the incumbent may be using a small business as a subterfuge to continue performing a previously held contract. This can occur when an incumbent contract holder grows out of its small business status and is no longer eligible for award when the contract is recompeted.[73]

As it is only a "red flag," the presence of this factor alone is insufficient to cause a violation of the Ostensible Subcontractor Rule.[74] It alerts the SBA that the remaining factors need to be analyzed. For example, if a contractor hires employees from the incumbent or plans to subcontract a large percentage of the work to the incumbent, it begins to look as if the prime is simply passing through the work. This occurred in *Modus Operandi*, in which a prime contractor (Modus Operandi) intended to use a single subcontractor (the incumbent contract holder).[75] There, ten of the twenty employees assigned to the contract would be employees of the prime, and the remaining ten employees would be hired from the incumbent.[76] OHA ultimately found *Modus Operandi* was unusually reliant on its subcontractor,[77] not because the prime was using

68. *See* Ideogenics LLC v. United States, 138 Fed. Cl. 672, 682 (2018) (citing DoverStaffing, Inc., SBA No. BIZ-5300 (Dec. 14, 2011)).
69. *See id.*
70. *See id.* (citing Charitar Realty, SBA No. SIZ–5806 (Jan. 25, 2017)).
71. *See id.*
72. *See id.*
73. *See* Automation Precision Tech., LLC, SBA No. SIZ-5850, at *8 (Sept. 6, 2017).
74. Montech Inc., SBA No. SIZ-6100 (May 26, 2021) ("The first factor alone, though, is not sufficient to find violation of the ostensible subcontractor rule."); *e.g.*, Ingenesis, Inc., SBA No. SIZ-5436 (Jan. 28, 2013).
75. Modus Operandi, Inc., SBA No. SIZ-5716 (Feb. 19, 2016).
76. *Id.* at *11.
77. *Id.* at *33.

the incumbent as a subcontractor, but because of the extent to which it relied on the incumbent for its workforce.[78]

2. Factor 2: The Prime Contractor Plans to Hire the Large Majority of Its Workforce from the Subcontractor

Factor 2 is focused on determining whether the prime can perform the contract. The logic behind the rule is that if the prime cannot show it is providing employees for the contract, it cannot be performing primary and vital functions.[79] In other words, the prime is considered reliant on a subcontractor if it must hire most of the personnel to perform the contract. From the SBA's perspective, it is indicative of an attempt to sidestep the rule.[80] Essentially, the prime is saying, "We can't subcontract the work, so let's just 'hire' the subcontractor's employees."

Executive Order (EO) 14,055, "Nondisplacement of Qualified Workers Under Service Contracts" requires successor contractors in service contracts to hire the predecessor contractor's employees.[81] Upon implementation, this rule and its predecessor further complicated the unusually reliant analysis and led to SBA OHA rulings that made a distinction between hiring managerial and non-managerial personnel.[82]

SBA rulings break down hiring of subcontractor personnel into three categories of hiring: (1) non-managerial, (2) managerial, and (3) en masse.[83] First, hiring non-managerial personnel from a subcontractor is not viewed as strong evidence of being unusually reliant.[84] For example, in *Elevator Service Inc.*, the Department of Veteran's Affairs (VA) solicited a contract to maintain elevators.[85] The winning contractor intended to use six to eight elevator maintenance personnel to perform the physical work.[86] The prime contractor intended to hire six (all or almost all) of the elevator maintainers from a subcontractor.[87] These maintainers would report to a manager from the prime.[88] The OHA found this was not indicative of unusual reliance, stating, "[t]he

78. *See id.* at *26–27.

79. *See* Four Winds Servs., Inc., SBA No. SIZ-5260, at *10, *14 (July 18, 2011).

80. *See id.* at *16, *19.

81. Nondisplacement of Qualified Workers Under Service Contracts, 87 Fed. Reg. 42,552 (July 15, 2022) (to be codified at 29 C.F.R. pt. 9). This EO is the successor to EO 13495 which was implemented at FAR 52.222-17 until revoked by President Trump. *See* Nondisplacement of Qualified Workers Under Service Contracts, 74 Fed. Reg. 6103 (Feb. 4, 2009); FAR 52.222-17; Federal Acquisition Regulation: Revocation of Executive Order on Nondisplacement of Qualified Workers, 85 Fed. Reg. 27,087 (May 6, 2020).

82. Ideogenics LLC v. United States, 138 Fed. Cl. 672, 682 (2018) ("'[T]he hiring of incumbent non-managerial personnel cannot be considered strong evidence of unusual reliance.'"); Pro. Sec. Corp., SBA No. SIZ-5548 (April 14, 2014) (holding that the EO does not apply to managerial personnel, and does not mandate that a successor contractor will rely upon the incumbent for its entire workforce).

83. *See e.g.*, *Pro. Sec. Corp.*, SBA No. SIZ-5548.

84. *See* Spiral Sols. & Techs., Inc., SBA No. SIZ-5279, at *28 (Sept. 15, 2011).

85. Elevator Serv., Inc., SBA No. SIZ-5949 (Aug. 10, 2018).

86. *Id.* at *14.

87. *Id.* at *27.

88. *Id.*

hiring of an incumbent subcontractor's employees does not in itself establish unusual reliance, particularly when the managerial personnel remain under the supervision and control of the prime contractor."[89] Second, hiring managerial personnel alone is insufficient to establish unusual reliance where the prime has sufficient experience on its own to win.[90] Thus, hiring managerial personnel is viewed as a factor of being unusually reliant, but it is weighed against the prime's experience.[91] Third, a prime may still run afoul of unusually reliant when it proposes to rely on a subcontractor for virtually all staffing, including both managerial and non-managerial employees, and without contributing the prime contractor's own employees or other value to the project beyond its small business status.[92] In other words, the prime is viewed as unqualified to perform if it must hire *en masse* and otherwise contribute little skill or knowledge to performance.[93] This is what occurred in *Modus Operandi*, discussed above, where the prime intended to hire fifty percent of its workforce from a subcontractor.[94]

An exception to this rule occurs when there is "a limited pool of eligible employees that could be utilized," and the prime must hire employees from an incumbent or other subcontractor.[95] This occurred in *Montech*, in which a small business proposed to hire a majority of its workforce for a contract from the incumbent.[96] Despite this, the OHA found the contractor was required to hire personnel with high-level security clearances—something necessary to perform the contract—and comply with a collective bargaining agreement.[97] Therefore, "[i]n light of these restrictions, [the prime] had a limited pool of eligible employees that could be utilized . . . and more extensive reliance upon [the] incumbent workforce would not have been improper."[98]

3. Factor 3: The Prime Contractor's Proposed Management Previously Served with the Subcontractor on the Incumbent Contract

This factor may seem duplicative of Factor 2, but the analysis here is about who has ultimate management responsibility. The focus is on ensuring the prime contractoris overseeing and managing the contract and has not given this authority to a subcontractor.[99] For example, in *National Sourcing*, a prime contractor proposed to have the incumbent contractor provide "mid-level leaders," who would report to a program manager from the prime.[100] OHA found this arrangement "cannot support the conclusion that [the subcontractor]

89. *Id.* at *25 (citing J.W. Mills Mgmt., LLC, SBA No. SIZ-5416 (Nov. 29, 2012)).
90. *See* Spiral Sols. & Techs., Inc., SBA No. SIZ-5279, at *67 (Sept. 15, 2011).
91. *See id.*
92. Pro. Sec. Corp., SBA No. SIZ-5548, at *11 (Apr. 14, 2014).
93. Modus Operandi, Inc., SBA No. SIZ-5716, at *11–12 (Feb. 19, 2016).
94. *Id.* at *24.
95. Montech, Inc., SBA No. SIZ-6100 (May 26, 2021).
96. *Id.*
97. *Id.*
98. *Id.*
99. Nat'l Sourcing, Inc., SBA No. SIZ-5305 (Dec. 7, 2011).
100. *Id.*

could control the contract when [the prime] itself will employ the program manager, who will have complete control over contract performance."[101] In other words, the SBA wants to ensure the prime has ultimate control over performance.

Furthermore, hiring employees from a subcontractor (Factor 2) is often weighed against this factor.[102] In *Elevator Service Inc.*, while almost all the physical work would be performed by individuals hired from the incumbent subcontractor, OHA found this was not indicative of unusual reliance, stating, "The proposed project managers are all [prime] employees, who will have ultimate control over the contract, not [subcontractor employees]."[103] The fact that the prime was hiring multiple employees from the subcontractor was weighed against the fact that control was maintained by the prime.[104]

4. Factor 4: The Prime Contractor Lacks Relevant Experience and Must Rely upon Its More Experienced Subcontractor to Win the Contract

This factor is used "in evaluating all aspects of the relationship" between the prime and subcontractor.[105] Like the other factors, the SBA is simply using this factor to judge a prime's reliance on its subcontractors. If experience is totally lacking or minimal, the obvious question is, "How can the prime be performing this contract without relying on a subcontractor?" Stated directly, "[w]hen a prime contractor relies almost totally upon the experience of other firms to establish its relevant experience, that is probative evidence it is unusually reliant upon its subcontractor to perform the contract in question."[106]

There is no bright-line rule to determine what level of experience is enough, but it is clear that the contractor must have *some* experience relevant to the solicitation, and that experience needs to be clearly stated in the proposal.[107] OHA easily finds a violation of the Ostensible Subcontractor rule when the prime has no experience.[108] "In *B&M Construction*, *Inc.*, OHA upheld a determination that the contractor violated the ostensible subcontractor rule because its proposal did not present *any* relevant past experience."[109] "In *Bama Company*, OHA upheld a determination the contractor was other than small because its proposal failed to state *any* of its own relevant past experience and instead cited only to its subcontractor's experience."[110]

101. *Id.*
102. *See* Elevator Serv. Inc., SBA No. SIZ-5949, at *11–*12 (Aug. 10, 2018).
103. *Id.* at 28*.
104. *See id.*
105. *Id.*
106. DoverStaffing, Inc., SBA No. SIZ-5300 (Dec. 14, 2011); *see also* Educ. & Training, LLC, SBA No. SIZ-5192 (Feb. 8, 2011) (holding that a protested concern's reliance on other entities to establish relevant experience is probative evidence that it is unusually reliant on a large subcontractor to perform the contract at issue).
107. *Cf.* Warrior Serv. Comp., LLC v. United States, 149 Fed. Cl. 594, 603, 613–614 (2020).
108. *Id.*
109. *Id.*
110. Bama Comp., SBA No. SIZ-4819, at *5 (Nov. 9, 2006).

When it comes to what level of experience is sufficient, the determination is made on a "sliding scale" corresponding to the complexity of the solicitation.[111] For example, in a commercial item procurement, it is easier to find that previous commercial item experience is similar to a new commercial item acquisition.[112] This occurred in *J.W. Mills Management, LLC*, where the OHA overruled an area office's determination of unusual reliance.[113] The solicitation asked the contractor to "provide information about three projects within the preceding five years that were similar in scope and magnitude to the instant procurement."[114] The prime submitted information about two projects it had completed, but it also submitted information of three relevant experiences of its subcontractor.[115] The OHA found that this was sufficient, stating, "[t]he procurement in question, however, is a relatively straightforward "commercial items" acquisition . . . [and] [i]t is thus not apparent why [assistance from the sub] would be necessary to enable [the prime] to perform this contract."[116] In other words, OHA's rationale was that for less complex contracts (e.g., commercial item procurements), a prime is less likely to need to rely on a subcontractor.

On the other side of the spectrum is *Warrior Serv. Co, LLC*.[117] In this case, the VA solicited for home oxygen delivery services, including "all supplies, materials, equipment, transportation of equipment, equipment services, labor, supervision, patient education, safety management, and infection control . . . [and] new patient set-ups and initial set-ups for oxygen systems; follow up visits; set-ups for CPAP and BiPap; equipment monitoring, maintenance, and repair; and patient education."[118] The solicitation required ten years of home oxygen delivery services.[119] A small business that had approximately six years of experience in durable medical equipment delivery—but no experience in home oxygen medical equipment—responded to the solicitation.[120] The small business intended to subcontract with a large company that had extensive home oxygen experience.[121] Both the area office and OHA found a violation of the Ostensible Subcontractor Rule, specifically the reliance of the prime on its subcontractor.[122] At the U.S. Court of Federal Claims, the small business argued it had demonstrated experience in delivery of various types of medical equipment, including complicated medical equipment.[123] The prime contractor argued that:

111. *See* J.W. Mills Mgmt., LLC., SBA No. SIZ-5416 (Nov. 29, 2012).
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. Warrior Serv. Co., LLC v. U.S., 149 Fed. Cl. 594 (2020).
118. *Id.* at 597.
119. *Id.*
120. *Id.* at 611.
121. *Id.* at 599.
122. *Id.* at 603–04.
123. *Id.* at 611.

> [A]bsent the government [being] able to show some sort of reason why oxygen tanks are so terribly special that they need to be treated completely differently than everything else that the government is buying within the durable medical goods spectrum, the government's position is not justifiable even on the lack of experience issue . . . [because the prime is] working on much more complicated issues . . . .[124]

The court disagreed, stating: "The Solicitation, however, require[s] . . . [i]ndividuals who are duly recognized as credentialed/licensed Registered Respiratory Therapist (RRT) or Certified Respiratory Therapist (CRT) . . . These requirements imply that home oxygen delivery services are 'so terribly special' . . . ."[125] This shows that the more complex or specialized a contract, the more directly related experience must be to qualify as "relevant experience" necessary to substantiate the prime is not unusually reliant.[126]

5. Bringing the Factors Together (and a Surprise Factor 5).

In making a size determination, the SBA considers the "totality of the circumstances."[127] As a result, the four factors are simply guidelines, not exhaustive.[128] The SBA is required to make findings regarding "[a]ll aspects of the relationship between the prime and subcontractor,"[129] and two or more firms may be affiliated "even though no single factor is sufficient to constitute affiliation."[130] As a result, the SBA can still find unusual reliance even if none of the four factors alone is sufficient.

Like primary and vital, this makes it impossible to provide a bright-line rule for contractors to use when they contemplate prime/subcontractor relationships. Nevertheless, there is a common theme: prior to the solicitation, the prime must have the capability to substantially perform the material aspects of the contract (i.e., it must be qualified).[131] Some hiring may occur to sharpen skills or increase the workforce.[132] However, significant hiring, in either scale or in setting up a new capability, will be scrutinized.[133] Contractors should review the Contractor Performance Assessment Reporting System (CPARS) and build a record that shows capability prior to the solicitation. Ultimately, "the determination of what capabilities are necessary to perform a contract, or whether the awardee has such capabilities, are matters of contractor

124. *Id.*

125. *Id.* (internal emphasis and quotations omitted).

126. *Id.* at 609–10.

127. *Id*. at 607.

128. *Id.* at 608. Prior to *DoverStaffing*, the seminal ruling was Taylor Consultants, Inc., SBA SIZ-4775 (Apr. 7, 2006). The OHA in *Taylor Consultants* noted that "[t]he Seven Factors Test [wa]s an earlier way of encapsulating what is now understood to be the totality of the circumstances." *Id.* at *12. But the OHA further noted that the "seven factors are now almost [forty] years old; they are neither exclusive nor exhaustive." *Id.*

129. 13 C.F.R. § 121.103(h)(2) (2022).

130. § 121.103(a)(5).

131. *See* Warrior Serv. Co., LLC v. U.S., 149 Fed. Cl. 594 (2020).

132. *See* Modus Operandi, Inc., SBA No. SIZ-5716 (Feb. 19, 2016).

133. *See id.* at *11.

responsibility, and thus are the province of the [CO].”[134] This means the contractor must prove its experience to the CO in its solicitation response.

Lastly, contractors may consider one other factor when attempting to determine if it will run afoul of the unusually reliant criterion: “‘[W]hen these [four] factors are present, violation of the ostensible subcontractor rule is more likely to be found if the proposed subcontractor will perform 40% or more of the contract.’”[135] While not named a factor, it is a tangible consideration that may be used to guide determinations.

However, merely limiting the subcontractor to performing only forty percent of the work is not enough. Consider the scenario in *DoverStaffing*, in which DoverStaffing submitted a response stating that it would perform fifty-one percent of the work, Subcontractor One (the incumbent) would perform forty percent, and Subcontractor Two would perform nine percent.[136] In other words, *DoverStaffing* tried to contract around the Ostensible Subcontractor Rule by having a subcontractor perform forty percent of the work. Despite this, the OHA found DoverStaffing was unusually reliant on Subcontractor One based on an analysis of the four factors.[137] This shows that there are limits on contractor’s ability to use contract language to defeat an Ostensible Subcontractor Rule violation, and that the forty percent rule is not dispositive.

To avoid violating the Ostensible Subcontractor Rule, contractors should scrutinize relationships between a small-business prime and large-business subcontractors. Further, contractors should apply the factors discussed above. While the factors are not dispositive, they will help identify potential issues.

6. Mentor-Protégé Joint Ventures

There is no “silver bullet” that magically resolves all Ostensible Subcontractor Rule issues. However, the closest solution is forming a JV with a mentor-protégé agreement. Only small businesses are eligible for award of a small business set-aside.[138] This rule applies to JVs as all parties to a JV must be small to qualify for a set-aside.[139] However, the SBA rules allow large and small businesses with a mentor-protégé agreement (MPA) to qualify for a set-aside if they are a JV.[140] This arrangement would eliminate most Ostensible Subcontractor Rule concerns.

The SBA’s Mentor-Protégé program helps eligible small businesses (protégés) partner with more experienced contractors (mentors) to gain experience and capacity in government contracting. To participate, the small business and large business must have an MPA which spells out the assistance to

134. J.W. Mills Mgmt., LLC., SBA No. SIZ-5416 (Nov. 29, 2012).
135. Ideogenics LLC v. United States, 138 Fed. Cl. 672, 682 (2018).
136. DoverStaffing, Inc., SBA No. SIZ-5300, at *3 (Dec. 14, 2011).
137. *Id.*
138. 13 C.F.R. § 125.8 (2022).
139. *Id.*
140. 13 C.F.R. § 125.9(d) (2022).

be provided by the large business to the small business, including, for example, financial assistance or assistance in developing compliance protocols.[141]

While a full discussion of the requirements for an MPA is beyond the scope of this article,[142] there are a few important considerations. First, MPAs must be submitted to and approved by the SBA.[143] Additionally, a large business may only have up to three protégés.[144] Further, the agreement may have a term of up to six years.[145] If the initial term is for less than six years, it may be extended by mutual agreement for an additional amount of time that would total no more than six years from inception.[146] Finally, the parties must submit a report every year to the SBA showing how the mentor is actually assisting the protégé.[147] The SBA will not approve an MPA if it "determines that the assistance to be provided is not sufficient to promote any real developmental gains to the protégé, or if SBA determines that the agreement is merely a vehicle to enable the mentor to receive small business contracts."[148] This is just another confirmation that the large business must actually help the small business develop, not just use it to obtain small business contracts.

Once a small business has an approved MPA, it may create a JV with its large business mentor. This requires an agreement that complies with 13 CFR 125.8(b).[149] There is one major caveat to this arrangement: The small business protégé must perform "at least [forty percent] of the work performed by the [JV]."[150]

A non-small business that is interested in helping a small business grow should start the process early. It takes time to identify a partner and have the process approved by the SBA. The SBA states that it takes 105 days to approve a mentor-protégé agreement.[151] This must be approved before applying to become a JV.[152] Waiting until a solicitation is issued may not allow enough time to start the process. Even if it is not interested in formalizing the relationship today, a large company can identify small business partners, educate them on the opportunity, and prepare the paperwork in an effort to expedite the process with the SBA.

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141. *Id.*

142. Additional information regarding the SBA Mentor-Protégé program and developing an MPA can be found on the SBA's website. *See generally SBA Mentor-Protégé program*, Small Bus. Admin., https://www.sba.gov/federal-contracting/contracting-assistance-programs/sba-mentor-protege-program (last visited Apr. 21, 2022) [https://perma.cc/B3DV-FY37].

143. 13 C.F.R. § 125.9.

144. § 125.9(b)(3)(ii).

145. § 125.9(e)(5).

146. *Id.*

147. § 125.9(e)(1)(i).

148. § 125.9(e)(3)

149. *See* § 125.8(b)–(c).

150. § 125.8(c)(1).

151. SBA, *SBA Mentor-Protégé program*, https://www.sba.gov/federal-contracting/contracting-assistance-programs/sba-mentor-protege-program (last visited Apr. 21, 2022).

152. *Id.*

IV. LIMITATIONS ON SUBCONTRACTING

In addition to the Ostensible Subcontractor Rule, contractors must also consider the Limitations on Subcontracting clause. Confusingly and frustratingly, when the Ostensible Subcontractor Rule applies, the Limitations on Subcontracting clause *is in addition to* the Ostensible Subcontractor Rule.[153] The Ostensible Subcontractor Rule determines size,[154] while Limitations on Subcontracting clause sets the value of work the prime must perform.[155] A common misconception—both in government and industry—is that if a prime satisfies this fifty percent requirement from the Limitations on Subcontracting clause, then it meets the required standard without any issues. This is wrong. Affiliation and the Ostensible Subcontractor Rule are not determined solely by the value of work performed.[156] Thus, a Prime could satisfy the Limitations on Subcontracting clause requirement but fail the Ostensible Subcontractor Rule. As a caveat, the Ostensible Subcontractor Rule does not apply to manufacturing or supply contracts, but the Limitations on Subcontracting clause applies to manufacturing, supply, and services contracts.[157]

The Limitations on Subcontracting clause is provided in FAR 52.219-14.[158] It states that a small business prime may "not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated."[159] While not stated in the FAR, 13 C.F.R.125.6(a)(2)(i) states certain direct costs may be excluded from this calculation, including "[o]ther direct costs . . . to the extent they are not the principal purpose of the acquisition and small business concerns do not provide the service, such as airline travel . . . cloud computing services, or mass media purchases."[160] As always, the rules for construction are different, and FAR 19.505(b)(iii)–(iv) sets the thresholds at eighty-five percent (general construction) and seventy-five percent (special trade), respectively.[161]

Payments to a similarly situated subcontractor count towards the fifty percent requirement (i.e., it is counted the same as if the prime had performed the work).[162] "Similarly situated" has the same definition as discussed in III.A.i.[163]

The Limitations on Subcontracting clause applies to all small business set-asides above the Simplified Acquisition Threshold (SAT), and to contracts below the SAT for 8(a), HUBZone, Service-Disabled Veteran-Owned, and Woman-Owned small business set-asides.[164] The rule does not apply to a

153. 13 C.F.R. § 121.404(g)(3)(ii).
154. § 121.102(a); § 121.103(h)(2).
155. FAR 52.219-14.
156. *See* § 121.103(h)(1)–(2); FAR 52.219-14.
157. § 121.402(b)(2); FAR 52.219-14.
158. The Limitations on Subcontracting clause was created pursuant to 15 U.S.C. § 657s(a)(1) and 13 C.F.R. § 125.6.
159. § 125.6(a)(1)–(2); *see also* 15 U.S.C § 657s(a)(1)–(2).
160. § 125.6(a)(1).
161. FAR 19.505(b)(1)(iii)–(iv).
162. *Id.*
163. *Id.*
164. 15 U.S.C. § 657s(e)(2)(c)–(f); FAR 19.505(a).

HUBZone contractor if it waives the price evaluation preference.[165] When a contract combines services and suppliers, "the contracting officer shall select the appropriate NAICS code" that best describes the principal purpose of the product or service being acquired.[166] That NAICS decision determines the portion of the contract to which the Limitations on Subcontracting clause applies.[167] For example, when a NAICS code for services is assigned, the fifty percent limitation applies only to the services portion of the contract.[168] When a contract is assigned a NAICS code for supplies, the fifty percent limitation applies only to the supply portion of the contract.[169]

The applicable period to make these calculations is either the base term, and each subsequent option year, or by order.[170] The CO is required to select which period will be used.[171]

A. Non-Manufacturer Rule

For acquisitions of supplies, there is an exception to the Limitations on Subcontracting clause called the Nonmanufacturer Rule (NMR).[172] The NMR addresses situations when a small business prime is awarded a contract for the acquisition of supplies, but it does not manufacture some or all the supplies.[173] The NMR only applies to procurements with "a manufacturing or supply NAICS code, or the Information Technology Value Added Resellers (ITVAR) exception to NAICS code 541519."[174] It does *not* apply to a services contract or the supply portion of a services contract.[175]

The NMR allows the prime to meet the fifty percent requirement from the Limitations on Subcontracting clause by obtaining products from other small business *manufacturers*.[176] In other words, the prime need not manufacture fifty percent of the value of the supplies, but it must buy items it does not manufacture from small business manufacturers in order to meet the fifty percent threshold. The rule is designed to prevent a small business prime from subcontracting all the work to large businesses.[177] To utilize the NMR, the small business prime must:

> (1) be small under the applicable NAICS; (2) not exceed 500 employees; (3) be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; (4) take ownership or possession of the items with its personnel,

165. FAR 19.507(e)(2).
166. 13 C.F.R. § 125.6(4)(b)(v).
167. FAR 19.505(b)(1)(i)–(iv).
168. FAR 19.505(b)(1)(i).
169. FAR 19.505(b)(1)(ii).
170. FAR 19.505(b)(2)(i)–(ii).
171. *Id*.
172. 13 C.F.R. §§ 121.406(a)(2), (b); FAR 52.219-33.
173. §§ 121.406(a)(2), (b); FAR 52.219-33
174. 13 C.F.R. § 121.406(b)(3).
175. § 121.406(b)(4).
176. Kupono Gov't Servs., LLC, SBA No. SIZ-5967 (Oct. 23, 2018).
177. *See* Small Business Government Contracting and National Defense Authorization Act of 2013 Amendments, 81 Fed. Reg. 34,243, 34,246 (May 31, 2016).

equipment, or facilities in a manner consistent with industry practice; and (5) supply the end item of a small business manufacturer, processor or producer made in the United States.[178]

While each element is important, the last element deserves particular attention. It must be broken down into two sub-requirements: "small business manufacturer, processor or producer," and "made in the United States."[179]

For products, "there can be only one manufacturer of the end item being acquired. The manufacturer is the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired . . . ."[180] The rule focuses on the size of the manufacturer, not the supplier to the prime. As such, the prime could reasonably buy the product from a business of any size, so long as the actual manufacturer of the product is small.[181] Conversely, buying product from a small business is not sufficient; the manufacturer must also be small.

This rule often comes into play in the acquisition of name-brand-only or National Stock Number-specific procurements (NSN).[182] This is a requirement that agencies rarely know about, but it has dire consequences. It means a small business prime could dutifully perform a contract with the government fully aware of the product's source (e.g., name brand only), but violate the NMR. Without a waiver, the SBA could find a violation of the NMR and Limitations on Subcontracting. This could result in contract termination, leave the government without a source of supply, and the contractor potentially owing damages.[183] This emphasizes the tension between the SBA and agencies, and the importance of understating SBA rules.

1. Multiple Item Acquisitions

For "multiple item acquisitions" (MIA), the end product that the prime supplies is a kit or other combination of items.[184] This rule clarifies that the fifty percent requirement is the value of items that comprise the deliverable, and there is no requirement that the entire deliverable be manufactured by a small business.[185] In other words, a non-manufacturer is compliant with the Limitations on Subcontracting clause and NMR if fifty percent of the value of items

178. 13 C.F.R. § 121.406(b)(1)(i)–(iv).

179. § 121.406(b)(1)(iv). Per FAR 25.401, the Trade Agreements Act is not applicable to small business set asides. As a result, the Buy American rule applies. *See* FAR 25.1. Part one of a two-part test to determine if a product complies with the Buy American rule is the product must be "manufactured in the United States." FAR 25.101(a). If a product is not manufactured in the United States, it cannot comply with the Buy American rule. *Id.* The Buy American rule is beyond the scope of this article, but all products must be evaluated for compliance with the rule for set-aside contracts above the micro-purchase threshold. *Id.*

180. § 121.406(b)(2).

181. *See id.*

182. *See* FAR 52.211-6.

183. False Claims Act, 31 U.S.C. § 3729(a)(3).

184. § 121.406(a)(2), (d)(1)–(3).

185. § 121.406(d)(1).

that make up an MIA comes from small business *manufacturers*.[186] For example, in a contract for a $100,000 kit, if $50,000 of the items in that kit come from small business manufacturers, the prime is compliant. If more than fifty percent of the estimated contract value is comprised of items manufactured by other than small concerns, a waiver is required from the SBA.[187]

This rule is distinguished from NMR because clarifies that contractors do not have to evaluate each item in an MIA for compliance with the NMR.[188] For example, if a solicitation is for a kit comprised of ten items, compliance with NMR is analyzed at the kit level, not the component level.

2. Waiver

The second exception to the NMR is a class or individual waiver.[189] When a waiver exists, the item(s) may come from a large business.[190] When a waiver is present in an MEIA, the fifty percent requirement still exists, but the calculation is reduced by the amount of the waiver.[191] For example, suppose a procurement is for ten items that cost ten dollars each (i.e., a $100 procurement) and a waiver exists for one of the ten dollar items. The method to apply the waiver is to first calculate the fifty percent value, and second, apply the waiver amount.[192] Under this example, the fifty percent value is fifty percent. Apply the waiver amount at this stage (the dollar), and now only forty dollars of items must come from small business manufacturers (i.e., fifty dollars minus a ten dollar waiver equals forty dollars).

B. Enforcement

The SBA updated the Limitations on Subcontracting clause in a way that suggests greater enforcement is on the way. In a rule effective December 30, 2019, "contracting officers [now] have the discretion to request information from contractors to demonstrate compliance with limitations on subcontracting clauses . . . [including] invoices, copies of subcontracts, or a list of the value of tasks performed."[193] Possible increased enforcement is buttressed by audit findings issued by the Department of Defense Inspector General in 2022 that specifically called out deficiencies regarding the Limitations on Subcontracting clause.[194] Therefore, contractors should review the Limitations

186. *Id.*
187. 13 C.F.R. 121.406(d)(2).
188. *Id.*
189. § 121.406(b)(5)(i)–(ii).
190. *Id.*
191. § 121.406(d)(2).
192. *See id.*
193. 84 Fed. Reg. 65,647, 65,652, 65,664 (Nov. 29, 2019).
194. U.S. Dept. of Def. Inspector Gen., Report No. DODIG-2022-069, Audit of Department of Defense Small Business Subcontracting Requirements i (2022), https://www.dodig.mil/reports.html/Article/2960412/audit-of-department-of-defense-small-business-subcontracting-requirements-dodig/ (stating that "DoD contracting personnel actions for ensuring compliance with established subcontracting limitations . . . were not effective") [https://perma.cc/3X89-YCEA].

on Subcontracting clause, scrutinize existing contracts for compliance, and implement procedures to ensure ongoing compliance in the future.

V. CONCLUSION

The Ostensible Subcontractor Rule and Limitations on Subcontracting clause are important rules designed to ensure small businesses benefit from set-aside contracts. If a violation of either rule is discovered during contract performance, it could have significant consequences, including, for example, contract termination. As a result, in all set-aside solicitations, an evaluation of all factors must be conducted before issuing submitting a bid or proposal. Due to the nuanced nature of these rules, attention to detail and analysis of multiple factors is required. This article seeks to guide contractors through that process, so both the government and contractor can have a successful and mutually beneficial relationship.

SPACE RACE 2.0: HOW LAUNCHING AN ACQUISITION SYSTEM FOCUSED ON OTHER TRANSACTION AUTHORITY CAN ACHIEVE AND MAINTAIN U.S. SUPERIORITY IN THE MOST CONSEQUENTIAL WARFIGHTING DOMAIN

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I. INTRODUCTION

> In the long haul, our safety as a nation may depend upon our achieving 'space superiority.' Several decades from now the important battles may not be sea battles or air battles, but space battles, and we should be spending a certain fraction of our national resources to ensure that we do not lag in obtaining space supremacy.[1]

Following the Soviet Union's launch of the Sputnik satellite in 1957, a first in the history of mankind,[2] the United States found itself standing at a strategic crossroads: would it allow its Cold War adversary to become the world's leader in space, or would it rapidly develop its own space program to challenge the Soviet Union in this new frontier? The United States chose the latter way forward, and over the next twelve years executed a focused and determined strategy that culminated with it becoming the first (and only) country to put a human being on the moon—thereby winning the Space Race against the Soviet Union.[3] Although this storyline is well known by anyone who has studied basic American history, less is known about the innovative acquisition authority that fueled investments necessary for the United States to prevail.

This acquisition authority, known as Other Transaction (OT) authority, originated with the National Aeronautics and Space Act of 1958.[4] The Act established the National Aeronautics and Space Administration (NASA) and

1. Bernard A. Schriever, Major Gen., U.S. Air Force, Speech at the Astronautics Symposium: ICBM—A Step Towards Space Conquest (Feb. 19, 1957).

2. *Sputnik and the Dawn of the Space Age*, Nat'l Aeronautics & Space Admin., https://history.nasa.gov/sputnik.html (last visited Mar. 15, 2023) [https://perma.cc/QLC5-6QQZ].

3. *See The Space Race*, History (Feb. 21, 2020), https://www.history.com/topics/cold-war/space-race [https://perma.cc/M5TU-VGMN].

4. *OT Authority History*, Other Transaction (OT) Guide, Def. Acquisition Univ., https://aaf.dau.edu/aaf/ot-guide/history/#:~:text=The%20National%20Aeronautics%20and%20Space,)%20(See%20Myth%202 (last visited Jan. 31, 2023) [https://perma.cc/9PH4-VB8B].

gave it authority to enter into "other transactions" with "any firm, association, corporation, or educational institution" as "may be necessary in the conduct of its work and on such terms as it may deem appropriate."[5] Such a broad grant of acquisition authority reflected a belief within Congress that the United States must become the world's leader in space to maintain its prosperity and security. To ensure this national imperative was realized, Congress treated U.S. space programs as "vital and non-negotiable" during the Space Race—prioritizing space technological development with limited regard to cost and accepting failures as a predicate to achieving success with space missions.[6]

Following the Space Race, however, Congress's interest in funding space initiatives progressively waned. For example, U.S. government expenditures on NASA as a percentage of total U.S. government spending decreased eight-fold from its pinnacle in 1965 (4.44%) to 2020 (0.48%).[7] Although concerning by itself, the deprioritization of space investment by the United States has been made exponentially worse by China's and Russia's aggressive development of space capabilities during the same period.[8] In recent years, such development has been achieved primarily by the Chinese Communist Party (CCP), which views space capabilities as critical to increasing China's military

5. National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, §§ 202(a), 203(b)(5), 72 Stat. 426 (prior to 1959 amendment).

6. *See* Ellen Pawlikowski et al., *Space: Disruptive Challenges, New Opportunities, and New Strategies*, Strategic Studs. Q., Spring 2012, at 27, 30 (describing such congressional sentiment within the broader context of space competition between the U.S. and Soviet Union during the 1960s and 1970s).

7. *See Space Data Insights: NASA Budget, 1959-2020*, Space Found., https://www.thespacereport.org/uncategorized/space-data-insights-nasa-budget-1959-2020 (last visited Dec. 27, 2022) [https://perma.cc/J62M-YSHE]. To be clear, increasing federal investments in the United States Space Force (USSF) since its creation in December 2019 have mitigated the impact of reduced federal investments in NASA. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 263, §§ 4101, 4201, 4301, 136 Stat. 2395 (2022) (authorizing a combined $24.85 billion in procurement; research, development, test, and evaluation; and operation and maintenance funding for the USSF). However, federal investment in the USSF for Fiscal Year (FY) 2023 still represents only 0.40% of annual U.S. government spending—putting combined investment in NASA and the USSF for FY 2023 well below 1% of annual U.S. government spending. *See id.*; *Fiscal Data: How Much Has the U.S. Government Spent This Year*, U.S. Dep't of Treasury, https://fiscaldata.treasury.gov/americas-finance-guide/federal-spending (last visited Dec. 29, 2022) (explaining mandatory, discretionary, and supplemental expenditures by the U.S. government totaled $6.27 trillion in FY 2022) [https://perma.cc/AM8X-CSXS]; Jeff Foust, *Fiscal Year 2023 Omnibus Bill Provides $25.4 Billion for NASA*, Space News (Dec. 20, 2022), https://spacenews.com/fiscal-year-2023-omnibus-bill-provides-25-4-billion-for-nasa (explaining NASA's budget for FY 2023 is $25.4 billion (or 0.41% of total U.S. government expenditures in FY 2022)) [https://perma.cc/8J6K-NZAP].

8. *See* Charlie Campbell, *From Satellites to the Moon and Mars, China Is Quickly Becoming a Space Superpower*, Time (July 17, 2019), https://time.com/5623537/china-space [https://perma.cc/25ED-AEJL] (describing China's extensive development of space capabilities since the turn of the twenty-first century); Bruce McClintock, *The Russian Space Sector: Adaptation, Retrenchment, and Stagnation*, 10 Space & Def. 1, 5–7 (2017), https://www.rand.org/content/dam/rand/pubs/external_publications/EP60000/EP67235/RAND_EP67235.pdf [https://perma.cc/UQ8T-BJCF] (describing Russia's substantial investment in the development of space capabilities following the end of the Space Race and until 1990, when government funding shortages began to limit the further advancement of Russian space programs).

power and influence in international affairs.[9] Along with robustly funding China's national space programs,[10] the CCP has worked diligently to develop and leverage China's private space industry for government purposes.[11] As a result, private investment in Chinese space companies—whose operations are influenced, if not outright controlled, by the CCP—now exceeds that of any other country.[12]

The diverging prioritization of space investment between the United States and its current near-peer rivals has endangered the United States' position as the predominant global space power. This reality presents significant risks for U.S. national security given the pivotal role played by space capabilities in modern warfare and the ubiquitous reliance on these capabilities for use of modern technology.[13] Accordingly, the United States once again finds itself standing at a strategic crossroads. Does it allow China or Russia to gain decisive military advantages in space that would alter the balance of power across all warfighting domains, and endanger the functioning of national governments and economies? Or does it rapidly acquire the space technology, systems, and weaponry needed to achieve space superiority and thereby assure U.S. and allied security interests?

This ongoing battle for space superiority is Space Race 2.0, and to prevail in it the United States must leverage the acquisition authority used to win the original Space Race against the Soviet Union. Specifically, Congress must equip the USSF with stand-alone OT authority, and mandate its use within an alternative acquisition system, to enable rapid acquisition of the cutting-edge

9. *See* Namrati Goswami, *Waking Up to China's Space Dream*, The Diplomat (Oct. 15, 2018), https://thediplomat.com/2018/10/waking-up-to-chinas-space-dream [https://perma.cc/J8F4-YKXA] (describing the CCP's development of "asymmetric capabilities" to take advantage of the U.S. military's overt dependence on space assets in future armed conflicts and to "enhance the national rejuvenation of the Chinese nation" on the global stage).

10. *See* U.S.–China Econ. & Sec. Review Comm'n, China's Pursuit of Space Power Status and Implications for the United States 3 (2019) ("Beijing consistently invests high levels of funding and political will to its space program, which has driven its steady progress in achieving important milestones.").

11. *See* The State Council, Guiding Opinions of the State Council on Innovating the Investment and Financing Mechanisms in Key Areas and Encouraging Social Investment (2014) (enabling private investment in Chinese space companies); State Council, Opinions of the General Office of the State Council on Promoting the Deep Development of Military-Civil Fusion in the National Defense Science and Technology Industry (2017) (calling for joint military-civilian development of reusable launch vehicles, nuclear-powered space equipment, and remote sensing satellites).

12. *See* Michael Sheetz, *China Increases Private Investment in Emerging Private Space Industry*, CNBC (Oct. 10, 2018), https://www.cnbc.com/2018/10/10/china-increases-investment-in-emerging-private-space-industry.html [https://perma.cc/U2LA-S27W] (describing private investment in China's commercial space industry); *see also* Lingling Wei, *China's Xi Ramps Up Control of Private Sector. 'We Have No Choice But to Follow the Party,'* Wall St. J. (Dec. 10, 2020), https://www.wsj.com/articles/china-xi-clampdown-private-sector-communist-party-11607612531 [https://perma.cc/YAN6-CDNJ] (describing measures used by the CCP to exercise state control over private industry).

13. *See* James Black, *Our Reliance on Space Tech Means We Should Prepare for the Worst*, Def. News (Mar. 12, 2018), https://www.defensenews.com/space/2018/03/12/our-reliance-on-space-tech-means-we-should-prepare-for-the-worst [https://perma.cc/DV8T-RX28].

space technology, systems, and weaponry needed to counter space threats from near-peer rivals.[14] Additionally, to ensure the benefits of this system are fully realized, Congress must protect acquisition speed by requiring congressional reporting on OT policies and the USSF must develop space acquisition professionals capable of effectively utilizing OT authority through an intensive training program with academia, internships with the commercial space industry, and career specialization.

In support of these proposals, this article explores in Part II the ways in which the United States, like much of the world, is now completely reliant upon space to function—and how such overreliance has created significant vulnerabilities for U.S. and global security. Also discussed in Part II are ways in which China and Russia are aggressively developing military space capabilities, the likelihood that both countries will violate international law using these capabilities, and the pressing need for the United States to harness innovation from within the commercial space industry to achieve space superiority. Part III explores the unique attributes of space, how these attributes make acquisition the primary warfighting capability in space, and reasons why the Federal Acquisition Regulation (FAR) and its Department of Defense (DoD) supplements are ill equipped to meet the needs for military space acquisitions. Part IV discusses how an OT-focused acquisition system is better equipped to meet these needs, challenges with implementing this new system, and actions Congress and the USSF can take to mitigate or eliminate those challenges.

II. THE UNPRECEDENTED NATIONAL SECURITY CHALLENGE OF SPACE

A. Global Dependence on Space in the Twenty-First Century

Although few humans have ever traveled to space, most of the world's governments, businesses, and societies are now dependent upon this enigmatic domain to function. This dependence is primarily a result of point, navigation, and timing (PNT) capabilities provided by the U.S. Global-Positioning Satellite (GPS) system, and to a lesser degree other satellite systems. PNT capabilities have, in many respects, revolutionized transportation—making them critical components of the modern global transportation system.[15] For example, PNT capabilities allow national aviation agencies to precisely track

14. The scope of this alternative acquisition system should include the items, components, and processes, as well as the underlying software, necessary for the USSF to acquire cutting-edge space technology, systems, and weaponry. At a minimum, this would include related research, experimentation, prototyping, production, and maintenance efforts. Such an acquisition system is consistent with what should be the myopic focus of the USSF—rapidly acquiring the space technology, systems, and weaponry necessary to achieve space superiority—and the service's lean operational construct, which are both discussed later in this article. Of note, this alternative acquisition system should not cover the procurement of generic supplies or generic contracting support services by the USSF—which would remain subject to the FAR-based procurement system.

15. Dan Glass, *What Happens If GPS Fails?*, The Atlantic (June 13, 2016), https://www.theatlantic.com/technology/archive/2016/06/what-happens-if-gps-fails/486824 [https://perma.cc/ZHS5-2C7B].

the thousands of aircraft flying at any given time, enabling greater safety in commercial air travel.[16] PNT capabilities also provide truck and ship operators with the quickest routes to precise locations, allowing businesses to meet just-in-time demand for the goods of global commerce.[17] Furthermore, PNT capabilities behind applications like Siri and Google Maps generate real-time driving directions that are often habitually used for personal transportation, potentially to the detriment of basic human navigation skills.[18]

However, global dependence on PNT capabilities extends well beyond transportation. PNT capabilities synchronize computer networks and cell phone towers, allowing governments, businesses, and individuals to efficiently share data and communicate.[19] They also facilitate high-speed market transactions within the global financial system, including credit card payments, ATM withdrawals, and securities trades on investment exchanges.[20] And of perhaps greatest significance, PNT capabilities are utilized by advanced militaries when taking human life[21] and protecting the safety of their nation's citizens from missile attacks.[22] All told PNT capabilities from the space domain are now essential to the proper functioning of governments, economies, societies, and advanced militaries—making their uninterrupted use critical to protecting both U.S. and global security.

B. Overreliance on Space Has Created Vulnerabilities for U.S. National Security

Despite the tremendous PNT (and other) capabilities provided by the space domain, global dependence on space has not come without a price. It has created centers of gravity[23] in satellite systems and associated computer networks that, if attacked, could place entire countries in a technological blackout and

16. Robert Silk, *All Commercial Aircraft in U.S. Will Soon Have GPS Technology*, Travel Wkly. (Dec. 17, 2019), https://www.travelweekly.com/Travel-News/Airline-News/Commercial-aircraft-GPS-technology [https://perma.cc/CD8J-VHME].

17. Glass, *supra* note 15.

18. *See* Brad Plumer, *Have We Become Too Reliant on GPS? This Satellite Expert Thinks So*, Vox (Apr. 10, 2016), https://www.vox.com/2016/4/10/11379698/gps-navigation-brain-problems [https://perma.cc/5V38-XHTC] (arguing that overreliance on PNT capabilities for personal transportation has caused deleterious effects for basic human navigation skills).

19. Glass, *supra* note 15.

20. *Id.*

21. *See* Lynn E. Davis et al., RAND Corp., Armed and Dangerous? UAVs and U.S. Security, 1–2 (2014) (discussing how the U.S. military now routinely utilizes PNT capabilities to track the movements and activities of enemy targets, maneuver remotely piloted aircraft to strike those targets without endangering American pilots, and employ precision-guided munitions to limit collateral damage during such strikes).

22. *See Protecting America's Global Positioning System: Military Use of GPS*, U.S. Dep't of Def., https://www.defense.gov/Spotlights/Protecting-GPS (last visited Mar. 18, 2022) [https://perma.cc/4BCD-REUF] (discussing how the United States military relies upon PNT capabilities to detect, monitor, and neutralize over-the-horizon intercontinental ballistic missile and hypersonic missile attacks against the U.S. homeland and U.S. interests).

23. In U.S. joint military doctrine, a center of gravity (COG) is "the source of power that provides moral or physical strength, *freedom of action*, or will to act." Dep't of Def., Joint Pub. 5-0, Joint Planning, GL-6 (2020) (emphasis added). Here, satellite systems and associated computer networks are a COG that enable a military force to coordinate attacks, navigate, and communicate. If these systems and networks are attacked, a military's freedom of action is degraded.

leave their militaries unable to coordinate attacks, traverse a foreign country, or communicate. As the predominant global space power, the United States is uniquely vulnerable to this threat—a vulnerability which near-peer rivals, like China and Russia, are actively working to exploit.[24] In fact, exploitation of U.S. dependence on space is now part of China's and Russia's respective military strategies. As Secretary of Defense Lloyd Austin stated in written testimony to the Senate Armed Services Committee: "Chinese and Russian military doctrines . . . indicate that they view space as critical to modern warfare and consider the use of counterspace capabilities as both *a means of reducing U.S. military effectiveness and for winning future wars.*"[25]

In line with their military doctrines, China and Russia are investing heavily in capabilities to deny the United States (and other rivals) access to the strategic advantages provided by space. For example, both countries have developed and successfully tested ground-based anti-satellite (ASAT) weapons to enable attacks on critical satellite systems like GPS.[26] These weapons include missiles, lasers that can blind or damage optical sensors on satellites in low earth orbit (LEO), and electromagnetic and signal jamming technologies capable of disrupting satellite operations.[27] In addition, China and Russia are rapidly developing space-based ASAT weapons, including missiles, projectiles, and satellites with robotic arms.[28] These weapons allow either country to attack the United States' vital satellites (and other space assets) from hundreds of miles above Earth—and outside the range of traditional U.S. defenses.[29] Moreover, China and Russia have greatly improved their respective cyberspace capabilities as a means to attack computer networks relied upon to control satellites.[30]

24. *See* Air & Space Intel. Ctr., Competing in Space 20 (2018).

25. U.S. Senate Armed Serv. Comm., Advance Policy Questions for Lloyd J. Austin Nominee for Appointment to be Secretary of Defense 56 (2019).

26. *See* Jon Harper, *China, Russia May Soon Field More Capable Counterspace Weapons, DIA Says*, Fed Scoop (Apr. 12, 2022), https://fedscoop.com/china-russia-may-soon-field-more-capable-counterspace-weapons-dia-says [https://perma.cc/2WC6-EMGV]; *see generally* Carin Zissis, *China's Anti-Satellite Test*, Council on Foreign Rel. (Feb. 22, 2017), https://www.cfr.org/backgrounder/chinas-anti-satellite-test [https://perma.cc/JSV6-J2GC] (discussing China's development and testing of ASAT weapons); *see also* Hanneke Weitering, *Russia Has Launched an Anti-Satellite Missile Test, US Space Command Says*, Space.com (Dec. 16, 2020), https://www.space.com/amp/russia-launches-anti-satellite-missile-test-2020 [https://perma.cc/VVF8-8YKP] (discussing Russia's development and testing of ASAT weapons).

27. Michael P. Gleason & Peter L. Hays, Ctr. for Space Pol'y & Strategy, Space Agenda 2020: A Roadmap for Assessing Space Weapons 5 (2020).

28. *See* A.B.A. Standing Comm. on L. & Nat'l Sec., *Defending America's Place in Space: Future Threats and Rules*, YouTube (Jan. 27, 2019), https://www.youtube.com/playlist?list=PLMbsJ5y3W20DU1rHBRBvhzHokM7zfrDzc [https://perma.cc/L4YE-69YV]; Jonathan O'Callaghan, *Russia Accused of Firing 'Anti-Satellite Weapon' From One of Its Satellites in Space*, Forbes (July 24, 2020), https://www.forbes.com/sites/jonathanocallaghan/2020/07/24/worrisomerussia-accused-of-firing-a-projectile-in-space-from-one-of-its-satellites/?sh=5df7494465a5 [https://perma.cc/S5SR-LFHF].

29. Kevin Pollpeter et al., China Aerospace Stud. Inst., China's Space Narrative 14 (2020).

30. *Id.* at 15; Sandra Erwin, *U.S. Space Force to Step Up Protection of Satellite Ground Systems in the Wake of Russia's Cyber Attacks*, SpaceNews (May 19, 2022), https://spacenews.com/u-s-space-force-to-step-up-protection-of-satellite-ground-systems-in-the-wake-of-russias-cyber-attacks.

Employment of these capabilities by either country could potentially degrade the United States' ability to control its satellites—and the world's ability to utilize their critical functions—all without firing a shot.[31]

While developing capabilities to deny space's strategic advantages to rivals, China, in particular, has sought to exploit those same advantages for its own gain. This is perhaps best seen by China's prodigious launching of satellites in recent years. Between 2018 and 2020 China launched more satellites into orbit than any other country.[32] These launches have greatly enhanced China's intelligence, surveillance, and reconnaissance (ISR) abilities as many Chinese satellites with high-powered optical sensors now orbit Earth—allowing China to better monitor the activities of rival militaries and more timely respond to perceived acts of aggression.[33] In addition, these launches allowed for the 2020 completion of China's satellite constellation named Beidou, which provides PNT capabilities as an alternative to those provided by GPS and, according to the CCP, "better meets the demands of [China's] national security."[34] With its completion of Beidou and ongoing construction of up to 1,000 supporting ground stations, China will soon provide superior PNT capabilities in Southeast Asia than those currently provided by GPS.[35]

This PNT imbalance will not only bolster China's ongoing anti-access/area-denial operations[36] in the South China Sea, which utilize PNT capabilities, but could also prove decisive during a potential armed conflict between China and the United States in the region.[37] Specifically, China would be free to attack defenseless GPS satellites with its ASAT weapons and, in so doing, likely succeed in degrading the United States' ability to "fight, communicate, target, precision-strike, or maneuver" on foreign battlefields.[38] Under these conditions, the United States would struggle to prevail in an armed conflict

31. Pollpeter, *supra* note 29, at 14; Erwin, *supra* note 30.

32. William J. Broad, *How Space Became the Next 'Great Power' Contest Between the U.S. and China*, N.Y. Times (Jan. 24, 2021), https://www.nytimes.com/2021/01/24/us/politics/space-war-takeaways-us-china.html [https://perma.cc/3YK9-YCLV].

33. Christian Brose, The Kill Chain: Defending America in the Future of High-Tech Warfare 33 (2020).

34. Namrati Goswami, *The Economic and Military Impact of China's BeiDou Navigation System*, The Diplomat (July 1, 2020), https://thediplomat.com/2020/07/the-economic-and-military-impact-of-chinas-beidou-navigation-system [https://perma.cc/43UT-SGWN].

35. *Id.*

36. Anti-access refers to "those actions and capabilities, usually long-range, designed to prevent an opposing force from entering an operational area." U.S. Dep't of Def., Joint Operational Access Concept Version 1.0. at i (2012). Area Denial refers to "those actions and capabilities, usually of shorter range, designed not to keep an opposing force out, but to limit its freedom of action within the operational area." *Id.*

37. Pollpeter, *supra* note 29, at 56.

38. *See* Jordan Wilson, U.S.-China Econ. & Sec. Rev. Comm'n, China's Alternative to GPS and its Implications for the United States 7 (2017) (describing China's ability to attack GPS satellites because it has a separate PNT satellite system in Beidou); *see also* Charles Pope, *Kendall, Brown, Raymond Outline Changes Necessary to Defend the Nation, the Need to Go Fast and Succeed*, U.S. Air Force (Mar. 10, 2022), https://www.af.mil/News/Article-Display/Article/2963003/kendall-brown-raymond-outline-changes-necessary-to-defend-the-nation-the-need-t [https://perma.cc/KMJ3-NB2X] (describing quoted remarks made by Gen. John Raymond, Chief of Space Operations, USSF).

against China in Southeast Asia. This disturbing (and plausible) reality would endanger the United States' ability to protect its strategic interests and allies in the region, thereby placing regional security—and consequently U.S. national security—at risk.

China's and Russia's intense focus on developing military space capabilities demonstrates a belief shared by both countries that the space domain will play a decisive role in future armed conflicts.[39] Commenting on this fact, Dr. William Roper, former Assistant Secretary of the Air Force for Acquisitions, Technology, and Logistics, declared during recent congressional testimony: "Why fight a nation's stealth fighters, aircraft carriers, or brigade combat teams if you can defeat satellites that guide their maneuver, communications, and weapons? Why fight their military at all if their critical economic veins flow through space?"[40] If China or Russia were ever to achieve space superiority,[41] it could disrupt the ability of the United States to conduct military operations, participate in the global economy, or carry out basic government functions. To avert these staggering outcomes, it is imperative that Congress and the DoD make the rapid development and acquisition of military space capabilities a leading defense priority.

C. China's and Russia's Violations of International Law Will Likely Extend to Space

As China and Russia continue to develop their military space capabilities, it is unlikely that they will use these capabilities within the confines of international law. The Outer Space Treaty (OST), signed in 1967, remains the foundational body of international law governing the exploration and use of space.[42] Among the OST's provisions are a guarantee for the free exploration and use of space by all States, a requirement for the execution of all activities in space in accordance with the United Nations (U.N.) Charter, and prohibitions on claims of sovereignty over celestial bodies.[43] Like the United States and vast majority of countries, China and Russia are parties to the OST.[44] However, this does little to assuage concerns with China's and Russia's intentions

39. Of note, China has gone so far as publicly expressing this sentiment—publishing in a 2013 space operations report that, "Whoever is the strongman of military space will be the ruler of the battlefield . . . ." *See* Pollpeter, *supra* note 29, at 56.

40. *See China in Space: A Strategic Competition: Hearing Before the U.S.-China Econ. & Sec. Rev. Comm'n* (2019) (statement of William Roper, Assistant Sec'y of the Air Force for Acquisition, Tech., & Logistics).

41. According to USSF doctrine, space superiority is "a relative degree of control in space of one force over another that would permit the conduct of its operations without prohibitive interference from the adversary while simultaneously denying their opponent freedom of action in the domain at a given time." U.S. Space Force, Spacepower: Doctrine for Space Forces 30 (2020).

42. *See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, U.N. Off. for Outer Space Affs., https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html (last visited Feb. 8, 2023) [https://perma.cc/4Y9K-T432].

43. *See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies arts. I–III, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

44. See *id.* art. XVII.

in space as both countries routinely violate international law when deemed necessary to further their respective national interests.

China, for example, openly engages in land reclamation activities in the South China Sea in an attempt to expand its sovereign jurisdiction, despite a ruling by the Permanent Court of Arbitration that its expansive jurisdictional claims have no basis in international law.[45] These activities have produced artificial islands, particularly in the Paracel and Spratly Island chains, which now house Chinese military assets including anti-ship cruise missiles, long-range surface-to-air missiles, and fighter aircraft.[46] China regularly uses these military assets to challenge and deter foreign transit through international waters and airspace, in an effort to consolidate control over the South China Sea and legitimize its expansive jurisdictional claims through the creation of customary international law.[47] Given wide-spread global reliance on the South China Sea, which each year services nearly twenty-five percent of global shipping[48] and twelve percent of global fishing,[49] it is likely that China will continue its military expansion in the region as both a means of advancing its own economy and gaining greater leverage over the economies of other countries.

Russia, on the other hand, continues to openly violate the sovereignty of its neighboring countries in direct contravention of the U.N. Charter.[50] Examples of this behavior include Russia's invasion of Georgia in 2008, and subsequent recognition of two pro-Russia breakaway countries;[51] its invasion of Ukraine in 2014, and subsequent annexation of Ukraine's Crimea region;[52] and its full-scale invasion of Ukraine in 2022, which was originally designed

45. *See* In re. South China Sea Arbitration (Phil. v. China), Award, 2013 PCA Case Repository 19, ¶ 1203 (July 12).

46. *See* Luis Martinez, *Why the US Navy Sails Past Disputed Artificial Islands Claimed by China*, ABC News (May 6, 2019), https://abcnews.go.com/amp/Politics/us-navy-sails-past-disputed-artificial-islands claimed/story?id=60993256 [https://perma.cc/8BAB-A8RS].

47. *See* Oriana Mastro, *Military Confrontation in the South China Sea: Contingency Plan Memorandum No. 36*, Council on Foreign Rels. (May 21, 2020), https://www.cfr.org/report/military-confrontation-south-china-sea [https://perma.cc/83US-ZS99] (discussing how Chinese control of the South China Sea would be a "significant step toward displacing the United States from the Indo-Pacific region," and how China seeks to use international legal arguments to advance its territorial claims in the region); *see also* Statute of the International Court of Justice art. 38, ¶ 1, June 26, 1945, 33 U.N.T.S. 933 (recognizing customary international law (CIL) as one of the three principal sources of international law); Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, ¶ 27 (June 3) (explaining the two elements of CIL are (1) state practice and (2) *opinio juris*—a belief by the state that a general practice is accepted under international law).

48. Todd Moulton, *Preventing War in the South China Sea*, J. Indo-Pac. Affs. (Aug. 1, 2022), https://www.airuniversity.af.edu/JIPA/Display/Article/3111133/preventing-war-in-the-south-china-sea/#sdendnote8sym [https://perma.cc/5C2B-EXRK].

49. *See* Mastro, *supra* note 47.

50. *See* U.N. Charter art. 2, ¶ 4 (prohibiting "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" by all U.N. members).

51. Sarah Pruitt, *How a Five-Day War with Georgia Allowed Russia to Reassert Its Military Might*, History (Sept. 4, 2018), https://www.history.com/news/russia-georgia-war-military-nato [https://perma.cc/8FK8-JXSM].

52. Steven Pifer, *Crimea: Six Years After Illegal Annexation*, Brookings Inst. (Mar. 17, 2020), https://www.brookings.edu/blog/order-from-chaos/2020/03/17/crimea-six-years-after-illegal-annexation [https://perma.cc/R9KS-EKLE].

to overthrow the country's pro-Western government.[53] Through these illegal uses of military force, Russia—a member of the U.N. Security Council, like China—has unlawfully expanded its territorial boundaries and eroded those of other countries from the former Soviet Union. As a result, Russia has significantly improved its strategic positioning and ability to influence the geopolitical landscape on the European continent.[54]

Given China's and Russia's demonstrated unwillingness to abide by international law, and the distinct strategic advantages offered by space, it is all but certain that both countries will exploit the space domain in illegal ways that further their respective national interests. China, in fact, has gone so far as publicly comparing its interests in space to its illegal territorial claims on Earth—with senior Chinese space officials likening the Moon and Mars to island chains in the South China Sea.[55] These public statements, when evaluated alongside China's aggressive development of military space capabilities and routine violations of international law, leave little doubt that China will continue its illegal territorial expansion into outer space. If left unchecked, such expansion may allow China to establish "specially managed zones" that limit the maneuverability of the United States and its allies within the space domain.[56] This outcome would prove harmful to future U.S. space efforts—and catastrophic for global security.

D. The Commercial Space Industry Is Indispensable to Achieving Space Superiority

Despite China's and Russia's aggressive pursuits in space, the U.S. government has not prioritized development of space capabilities in the half-century following the end of the Space Race.[57] Meanwhile, private sector investment in space has exploded since the turn of the 21st century, with no end in sight.[58]

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53. Dan Bilefsky et al., *The Roots of the Ukraine War: How the Crisis Developed*, N.Y. Times (Mar. 11, 2022), https://www.nytimes.com/article/russia-ukraine-nato-europe.html [https://perma.cc/3LQZ-DPLR].

54. Russia's illegal annexation of Crimea in 2014 provides perhaps the best example of this phenomenon. Through this illegal annexation, Russia commandeered a key port in the Crimean city of Sevastopol that provides it with access to the Mediterranean Sea. *See* Annabelle Timsit et al., *Why Crimea is So Important in the Russia-Ukraine War*, Wash. Post (Aug. 18, 2022), https://www.washingtonpost.com/world/2022/08/18/crimea-russia-ukraine-war [https://perma.cc/VH2G-NPXQ]. The headquarters of Russia's Black Sea Fleet is now based in Sevastopol, and Russia used this strategic location in 2022 to conduct a wartime naval blockade that halted trade at Ukrainian ports during its full-scale invasion of the country. *Id.*

55. *See* Progressive Mgmt., China in Space: A Strategic Competition? 2019 Comprehensive Analysis of Chinese Scientific and Military Spaceflight Programs, Surveillance Systems, Human and Moon Missions, Exploration Ambitions 8 (2019) (referencing one Chinese space official's declaration that "[i]f we regard space as the Earth, then . . . Mars is the Spratly Islands or reefs"); Goswami, *supra* note 9 (referencing another Chinese space official's statement that, "[t]he universe is an ocean, the moon is the Diaoyu Islands, Mars is Huangyuan Island" and explaining China's desire to establish outposts on the Moon and Mars).

56. *See* Goswami, *supra* note 9.

57. *See* Andrew Chatzky et al., *Space Exploration and U.S. Competitiveness*, Council on Foreign Rels. (Sept. 23, 2021), https://www.cfr.org/backgrounder/space-exploration-and-us-competitiveness [https://perma.cc/XF36-HS2X].

58. *See* Michael Sheetz, *An Investor's Guide to Space, Wall Street's Next Trillion-Dollar Industry*, CNBC (Dec. 13, 2019), https://www.cnbc.com/2019/11/09/how-to-invest-in-space-companies

Exciting (and potentially lucrative) business opportunities in space tourism and space-based internet services, as well as the prospect of advancements in manufacturing and medicine from a zero-gravity environment, have driven enormous sums of private funding to, and growth from within, the U.S. commercial space industry ("commercial space industry").[59] This has led to remarkable innovations in space technology, including the creation of reusable launch vehicles (for space tourism);[60] lower-cost LEO satellites (for space-based internet and communications);[61] and on-orbit repair, refueling, and debris management systems.[62] Often this commercial space technology is "dual use," meaning it can also be used for military purposes with limited or no modifications required.[63] However, even for military-specific space requirements, like space-based weaponry, non-traditional suppliers in the commercial space industry are where the United States must turn to harness the innovation engine "redefining possible" within the space domain. Accomplishing this will require the USSF to cultivate close relationships with these suppliers and utilize a procurement method that incentivizes them to compete for USSF requirements.

These relationships will not only provide access to advanced military space capabilities, but also eliminate national security risks created by outsourcing space support to foreign countries. It bears noting that these risks are not simply theoretical—as evidenced by Russia's attempted coercion of the United States during the Evolved Expendable Launch Vehicle (EELV) program.[64] EELV was created by Congress in 1995 to ensure the affordability and reliability of military space launches, and to address concerns with the potential export and proliferation of Russian missile expertise to hostile countries following the collapse of the Soviet Union.[65] It eventually led to a licensing agreement between the United States and Russia, whereby the U.S. agreed to purchase Russian-made RD-180 rocket engines for exclusive use in its Atlas V launch vehicle.[66] When the United States imposed economic sanctions on Russia in 2014 for its illegal invasion of Ukraine, the Russian Deputy Prime Minister, who oversaw export licenses for the RD-180, announced that Russia

-complete-guide-to-rockets-satellites-and-more.html [https://perma.cc/45AQ-52TS] (discussing how most Wall Street analysts project the commercial space industry will be worth several trillion dollars between 2030 and 2040).

59. *See* Matthew Weinzierl & Mehak Sarang, *The Commercial Space Age Is Here*, Harv. Bus. Rev. (Feb. 12, 2021), https://www.hbs.edu/faculty/Pages/item.aspx?num=612664-5 [https://perma.cc/HL8A-KLPU]; Andrea Thompson, *Medicine in Space: What Microgravity Can Tell Us About Human Health*, Sci. Am. (Aug. 7, 2019), https://www.scientificamerican.com/article/medicine-in-space-what-microgravity-can-tell-us-about-human-health [https://perma.cc/VHC8-ADVL].

60. *See* Albert Defusco, *Affordable Access to Low Earth Orbit*, 4(4) Def. Sys. Info. Analysis Ctr. J., Fall 2017, at 6–7.

61. *Id.*

62. See Linda Slapakova, Strategic and Legal Implications of Emerging Dual-Use ASAT Systems, NATO Legal Gazette, Dec. 2021, at 179–80.

63. *Id.*

64. Stephen M. McCall, Cong. Rsch. Serv., R46211, National Security Space Launch 1 (2020).

65. *Id.* at 8.

66. *Id.*

would "no longer deliver [RD-180] engines to the United States" without "guarantees that [they] are used only for launching civilian payloads."[67]

Congress responded to this attempted coercion by creating the National Security Space Launch (NSSL) program, which authorized the United States Air Force (USAF) (and now the USSF) to partner with the commercial space industry, using OT authority, to develop new space transport prototypes.[68] The NSSL program has since yielded four launch vehicles—two provided each by the United Launch Alliance and SpaceX—that have been used to launch U.S. military satellites into orbit and perform deliveries to the International Space Station, free from foreign influence.[69] Although NSSL's successes in utilizing OT authority highlight the tremendous results possible with military-commercial engagement, the risks of outsourcing key elements of spacepower to foreign countries, which led to the program's creation, should not be forgotten. Hence, Congress should apply lessons learned from both the NSSL and EELV programs to Space Race 2.0 by directing the USSF to partner with the commercial space industry—and not foreign powers—for the acquisition of cutting-edge space technology, systems, and weaponry.

III. SPACE IS DIFFERENT AND REQUIRES A DIFFERENT ACQUISITION SYSTEM

A. Unique Attributes of the Space Warfighting Domain

The indispensable role of the commercial space industry is only one way in which the space warfighting domain fundamentally differs from the traditional warfighting domains of land, sea, and air. Other differences include cost, the role of non-traditional suppliers, the primacy of technology, and future strategic implications. Collectively, these differences warrant the creation of a military space acquisition system outside the FAR.

Cost is perhaps the most significant difference in the space warfighting domain. The vast expense of space technology and space travel serves as a barrier to operating in this domain for all but the wealthiest countries.[70] With few countries able to fund their own advanced space programs, the ability of the United States to deter China's and Russia's space militarization efforts becomes that much more important. Further complicating this task is the reluctance of many countries to recognize space as a warfighting domain,[71] which inhibits the United States from relying upon allies for military support

67. *Id.* at 9.

68. *Id.* at 2.

69. Catherine Thorbecke, *SpaceX and ULA Score Multi-Million Dollar Military Launch Contract*, ABC News (Aug. 10, 2020), https://abcnews.go.com/Business/spacex-ula-score-multi-million-dollar-miliary-launch [https://perma.cc/N3LQ-ACZY].

70. *See* Chatzky et al., *supra* note 57.

71. *See generally* Theresa Hitchens, *US, Allies Agree on Threats in Space but Struggle with Messaging*, Breaking Def. (Sept. 11, 2020), https://breakingdefense.com/2020/09/us-allies-agree-on-threats-in-space-but-struggle-with-messaging [https://perma.cc/ETR5-VCHT] (discussing European countries that have not accepted a need to develop offensive space capabilities).

in space to the same extent it can in traditional warfighting domains, or even with cyber operations.

Another pronounced difference with the space warfighting domain is the role of non-traditional suppliers. Unlike in the traditional warfighting domains, technological innovation in the space warfighting domain is led by non-traditional suppliers, including small startup companies.[72] One example of such a non-traditional supplier is Lunewave, a privately-held small business with less than 50 employees.[73] Founded by two college professors, Lunewave manufactures high-powered radar sensor systems and antennas for a variety of commercial industries, including space, automotive, and telecommunications.[74] In 2021, the company received a $1.7 million Small Business Innovation Research (SBIR) contract[75] from the USSF to develop a satellite antenna capable of monitoring the positioning of multiple satellites simultaneously.[76] The SBIR contract was awarded at a USSF "Pitch Day" event, which allowed small businesses to "pitch" their innovative ideas for solving military space requirements in a Shark Tank-like competition.[77] Through the event, the USSF targeted the non-traditional suppliers, like Lunewave, that are driving innovation within the commercial space industry and often produce "dual use" technology.[78] For the United States to outpace China's and Russia's development of military space capabilities, and enable victory in Space Race 2.0, the USSF must continue to engage with these non-traditional suppliers.[79] Therefore, relationships with non-traditional suppliers should not be the exception in a military space acquisition system—but the standard.

Further differentiating the space warfighting domain is the primacy of technology. Although technology plays an important role in all warfighting

72. William Shelton et al., Rand Corp., A Clean Sheet Approach to Space Acquisition in Light of the New Space Force 2 (2021).

73. Lunewave, Inc., Linkedin, https://www.linkedin.com/company/lunewave (last visited Dec. 2, 2022) [https://perma.cc/8TGN-GMHQ].

74. *See generally* Lunewave, Inc., https://lunewave.com (last visited Dec. 2, 2022) [https://perma.cc/XU5Y-BR63].

75. The SBIR program authorizes federal investments to assist small businesses with research and development efforts, with the goal of strengthening the competitive free enterprise system and the U.S. economy. *See* 15 U.S.C. § 638. There are three phases to the SBIR program, generally referred to as: Concept Development (Phase I), Prototype Development (Phase II), and Commercialization (Phase III). *See Small Business Set-Asides vs. SBIR/STTR Programs*, Def. Acquisition Univ., https://aaf.dau.edu/aaf/contracting-cone/far-19-v-sbir (last visited Nov. 22, 2022) [https://perma.cc/484Z-P2F5]. The contract awarded to Lunewave was a SBIR Phase II contract. *See* Sandra Erwin, *Space Force Awards $32 Million in Contracts to Startups and Small Businesses*, Space News (Aug. 20, 2021), https://spacenews.com/space-force-awards-32-million-in-contracts-to-startups-and-small-businesses [https://perma.cc/J7DY-XQFE].

76. Erwin, *supra* note 75.

77. *Id.* Shark Tank is a long-running TV show where "hopeful entrepreneurs" pitch their business ideas to a panel of accomplished business executives with the goal of receiving investments to start, grow, or save their businesses. *Shark Tank*, CNBC, https://www.cnbc.com/shark-tank (last visited Dec. 7, 2022) [https://perma.cc/VD4L-9TGD].

78. Slapakova, *supra* note 62.

79. David Vergun, *New Program Helps Dual-Use Hardware Startups Accelerate Product Development*, Dep't of Def. News (Sept. 13, 2021), https://www.defense.gov/News/News-Stories/Article/Article/2772358 [https://perma.cc/BLK5-6V45].

domains, it is a prerequisite for securing military advantages in space. Complex launch vehicles capable of escaping Earth's gravitational pull are required to even enter—and compete in—space. Once there, spacesuits and atmospheric control systems are needed to survive space's harsh conditions. Moreover, advanced spacecraft, satellites, and weaponry capable of operating hundreds of miles above Earth, and with limited maintenance, are required to identify and neutralize threats to space assets from rival countries. These space assets, and in particular satellites, in turn provide capabilities that are routinely relied upon in the traditional warfighting domains—such as enhanced command and control of military forces, 24/7 ISR, and precision targeting for land-, air-, and sea-based missile strikes.[80] Accordingly, the country that most rapidly acquires advanced military space capabilities gains significant advantages not just in the space warfighting domain, but across all warfighting domains.

Lastly, and perhaps most importantly, the space warfighting domain is differentiated from traditional warfighting domains by its greater strategic implications for establishing the international order. As space technology, systems, and weaponry continue to develop, it appears inevitable that spacepower will revolutionize warfare much like airpower did beginning with World War II.[81] Although military capabilities from space largely support other warfighting domains today, near-peer rivals are rapidly developing space-based weapons, including lasers and hypersonic missiles, that are capable of striking targets on Earth from "the new high ground in modern warfare."[82] With continued development of these weapons and corresponding defense systems, spacepower will increasingly play a decisive role in deciding terrestrial conflicts—and others occurring far beyond the Earth's surface. The outcomes of these conflicts will likely determine which countries get to benefit from the endless opportunities provided by space, such as the creation of colonies and mineral resources on other planets—and which countries get left behind.

B. The FAR Does Not Meet U.S. Needs for Military Space Acquisitions

To be effective, a military space acquisition system must account for the unique attributes of the space warfighting domain. Specifically, it must enable rapid, agile, and threat-informed acquisitions that are not constrained by cost efficiency measures, socioeconomic policies, or rigid procedural requirements.[83] In addition, it must allow the USSF to have a close, trusting, and collaborative relationship with non-traditional suppliers in the commercial space industry so that advanced military space capabilities can be developed and acquired.[84] The FAR, which was instituted in 1984 and today governs the vast majority

80. Broad, *supra* note 32.
81. Michael Kelly, *The Air-Power Revolution*, The Atlantic (Apr. 1, 2002), https://www.theatlantic.com/magazine/archive/2002/04/the-air-power-revolution/302462 [https://perma.cc/32MY-HGWL].
82. Gleason & Hays, *supra* note 27, at 3.
83. *See* Shelton et al., *supra* note 72, at 61.
84. *Id.*

of government procurements, does not meet these needs for military space acquisitions.[85]

1. Misalignment of Priorities

On a foundational level, the FAR's priorities are incongruent with those required for military space acquisitions. The vision of the FAR, "to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives,"[86] seeks to satisfy numerous competing priorities. According to Professor Steven Schooner of the George Washington University Law School, a leading scholar in the field of federal procurement, these priorities are: competition, integrity, transparency, efficiency, best value, customer satisfaction, wealth distribution, risk avoidance, and uniformity.[87] By attempting to "prioritize everything," the FAR, in practice, "prioritizes nothing"—a fact which often leads to suboptimal procurement outcomes for the U.S. government.[88] However, when it comes to military space acquisitions, these suboptimal outcomes are experienced with even greater frequency as many of the priorities embedded in FAR-based procurement undermine the needs of these distinct acquisition efforts.

Take, for example, the priorities of "risk avoidance" and "best value." The development of cutting-edge space technology, systems, and weaponry is research and development (R&D) intensive. It requires a tolerance for risk or even failure as various prototypes are created, tested, and rebuilt when they fail to achieve performance objectives.[89] In addition, it requires a willingness to spend large sums of money to fund these innovative efforts, which often succeed only after extensive trial and error. These needs of military space acquisitions are in direct conflict with the prioritization of "risk avoidance" and "best value" under the FAR.

To be clear, the FAR does acknowledge that risk in federal procurement can never fully be eliminated. Specifically, an update to the FAR states that the federal acquisition system must transition its focus from "risk avoidance" to "risk management."[90] But this transformation in the FAR's approach to risk is rooted in achieving efficient operations,[91] not in prioritizing intelligent risk taking—a prerequisite for developing cutting-edge space technology, systems, and weaponry. Moreover, the FAR's revised approach of "risk management" does not rectify structural incentives to avoid risk within the federal acquisition system. When contracting officials exercise discretion by utilizing new vendors, innovative technologies, or novel procurement techniques, they often receive scrutiny and adverse career consequences if their decision leads

85. FAR 1.101.
86. FAR 1.102.
87. Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Pub. Procurement L. Rev. 103, 103–04 (2011).
88. *See id.* at 118.
89. Shelton et al., *supra* note 72, at 3.
90. FAR 1.102-2.
91. *See id.*

to failing results.[92] This frequently leads contracting officials to take less risk than allowed by law with their procurement strategies,[93] an outcome that does not seek to manage risk, but to reduce it as much as possible.

However, accepting increased risk and cost is precisely how the United States has conquered some of its most difficult national security challenges. During the Cold War, for example, "gigantic contracts with fat margins" were awarded to assist then Brigadier General Bernard Schriever with developing an intercontinental ballistic missile (ICBM) capable of delivering a nuclear weapon to the Soviet Union within minutes.[94] Along the way, Schriever "repeatedly blew up rockets and missile prototypes on the launch pad," and yet his efforts were protected from bureaucrats and others who sought to kill the ICBM program.[95] In less than eight years, Schriever and his team successfully developed four ICBMs (Thor, Atlas, Titan, and Minuteman) and also laid the technical foundation for America's future missions to space and the moon,[96] all because innovation was prioritized ahead of "risk avoidance" and achieving the "best value."

Furthermore, the prioritization of "uniformity" under the FAR does not comport with the distinct nature of military space acquisitions. The FAR aims to create a uniform procurement system with all federal agencies following the same laws, rules, and practices so (1) companies are not required to learn new rules in order to do business with different agencies, (2) government buyers are easier to train, and (3) such buyers are able to work for various agencies during their careers.[97] Because the commercial space industry has not historically contracted with the federal government and provides specialized services and products, reason one for uniformity is of minor concern. Moreover, reasons two and three should not apply to the USSF, which requires a specialized acquisition workforce and institutional expertise to acquire the innovative space technology, systems, and weaponry necessary to counter dangerous space threats.

Finally, the prioritization of "wealth distribution" under the FAR conflicts with the national security imperative of prioritizing performance in military space acquisitions. In pursuing "wealth distribution," the FAR establishes set-asides at varying cost thresholds for small businesses and sometimes specifically for service-disabled veteran-, minority-, and women-owned small

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92. *See* Steven Kelman, Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance 26 (1990) (discussing the adverse scrutiny contracting officials receive for failed risk-taking); Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law Through The Principal-Agent Model*, 40 Pub. Cont. L.J. 63, 77 (2010) (discussing the reduced willingness of contracting officials to utilize new vendors, innovative technologies, or novel procurement techniques due to such adverse scrutiny).

93. *See* Kelman, *supra* note 92.

94. *See* Brose, *supra* note 33, at 43; Walter J. Boyne, *The Man Who Built the Missiles*, Air & Space Forces Mag. (Oct. 1, 2000), https://www.airandspaceforces.com/article/1000bennie [https://perma.cc/64J3-4NCE].

95. *See* Brose, *supra* note 33.

96. *Id.*

97. Schooner, *supra* note 87, at 118.

businesses.[98] These socioeconomic policies are appropriate for many types of federal acquisitions and can help level the playing field for small businesses and historically disadvantaged business owners interested in performing federal contract work. However, they are not appropriate for military space acquisitions—an area where the United States should be myopically focused on developing and acquiring the most cutting-edge military space capabilities, as quickly as possible.

2. Structural Delays in Procurement

To fulfill other priorities like "competition," "integrity," and "transparency," the FAR mandates inefficient procedures for advertising federal procurement opportunities. In addition, FAR-based procurement provides avenues for contractors to pursue redress when they believe requirements outlined in the FAR are not followed by federal government representatives. The result is lengthy procurement timelines that undermine the effectiveness of military space acquisition efforts.

Driving delay from the outset are the FAR's mandatory synopsis and solicitation requirements. Due to their complex nature, military space acquisition efforts are expensive—most extend well into the millions and even billions of dollars.[99] Under the FAR, when a federal agency advertises a procurement requirement that is categorized as R&D and exceeds the Simplified Acquisition Threshold (SAT) (currently set at $250,000), it must draft a synopsis of the requirement, post the synopsis on the federal procurement website (SAM.gov) for at least fifteen days, and provide at least forty-five days for interested companies to provide their bids or proposals.[100] All told the FAR allocates at least sixty days for a process that must move faster for military space acquisitions.[101]

98. FAR 19.501.

99. DOD Faces Challenges and Opportunities with Acquiring Space Systems in a Changing Environment: Hearing Before the H. Subcomm. on Strategic Forces of the H. Comm. on Armed Servs., 117th Cong. 8–9 (2021) (statement of Jon Ludwigson, Dir., Contracting & Nat'l Sec. Acquisitions, Gov't Accountability Off.).

100. FAR 13.105; FAR 5.203(e).

101. FAR 5.203(a), (e). To be clear, the FAR does provide situation-specific authorities aimed at reducing the time it takes to reach contract award. For example, a contracting officer may use a combined synopsis and solicitation procedure when acquiring commercial products or services. *See* FAR 12.603. In addition, a synopsis period is not required when using a Broad Agency Announcement (BAA) to acquire basic or applied research, or advanced technology, component, or prototype development. *See* FAR 35.015(f) (describing the lack of a solicitation requirement for a BAA); *see also* DFARS 235.016 (listing the types of R&D activities authorized under a BAA). However, these authorities are limited to specific situations which do not satisfy the full spectrum of needs for military space acquisitions. First, although "dual use" technology is prevalent within the commercial space industry, modifications to this technology, the creation of new technology (e.g., space-based military weaponry), and related services are vital to enabling USSF operations. *See* John Venable, *U.S. Space Force*, The Heritage Found., Index of U.S. Military Strength 455 (Dakota L. Wood ed., 2022). These modifications, new technologies, and services are "non-commercial" in nature because they are generally developed only for the U.S. government and are not available to the public. *Cf.* FAR 2.101 (describing the definition of a "commercial product" and "commercial service"). Therefore, the authority to use a combined synopsis/

Compounding the delay experienced with FAR-based procurement are bid protest disputes. Under the FAR, an "interested party" may object to alleged error committed by the U.S. government during (1) a solicitation, (2) the cancellation of a solicitation, (3) the award or proposed award of a contract, or (4) the termination of a contract due to improprieties in its award.[102] An "interested party," which is defined by the FAR as an "actual or prospective bidder whose direct economic interest would be affected by award or failure to award the contract," may file a written objection (known as a "bid protest" or "protest") with the relevant agency, the U.S. Government Accountability Office (GAO), and the U.S. Court of Federal Claims (COFC) concerning the alleged error.[103] If the protest is filed at the agency or GAO within prescribed timelines, the "interested party" is normally entitled to a stay of contract award or suspension of contract performance until the protest—regardless of its merit—is resolved.[104] At the COFC, a temporary restraining order and preliminary injunction, which also prevent award of a contract, are available.[105]

As a result of these structural delays, U.S. government requirements—including those critical to protecting national security—can be held hostage by litigation taking months or even years to run its course.[106] A particularly

solicitation procedure for commercial products or services would not apply to these types of procurements. Second, getting technology into the hands of the warfighter—and thus realizing its advantages—requires production, and ideally production at scale. The production of technology, and related management support and upgrades, are outside the scope of permissible activities in a BAA. *See* DFARS 235.016 (describing the Budget Activities authorized for use in a BAA); *see also* Dep't of Def., DoD 7000.14-R, Fin. Mgmt. Reg. Vol. 2B, at 5-5 (2022) (providing definitions for the DoD's Budget Activities). Accordingly, the authority to avoid using a synopsis period under a BAA would not apply to these types of procurements.

102. FAR 33.101.

103. *Id.*

104. *See* FAR 33.103(f)(1) (detailing that a pre-award protest filed with an agency precludes contract award, pending resolution of the protest, unless "urgent and compelling circumstances" or the best interests of the U.S. government warrant proceeding with contract award and an individual above the contracting officer approves this determination); FAR 33.103(f)(3) (detailing that a protest filed with an agency within ten days after contract award or five days after an offered debriefing date (whichever is later) suspends contract performance, pending resolution of the protest, unless "urgent and compelling circumstances" or the best interests of the U.S. government warrant continued performance and an individual above the contracting officer approves this determination); *see also* FAR 33.104(b) (explaining that a pre-award protest filed with the GAO precludes contract award, pending resolution of the protest, unless an agency's Head of Contracting Activity (HCA) finds that "urgent and compelling circumstances" exist which significantly affect U.S. interests and do not permit waiting for a GAO decision, and award is likely to occur within thirty days of this finding); FAR 33.104(c) (explaining that a protest filed with the GAO within ten days after contract award or five days after an offered debriefing date (whichever is later) suspends contract performance, pending resolution of the protest, unless the HCA determines either "contract performance will be in the best interests of the United States" or "urgent and compelling circumstances" exist which significantly affect U.S. interests and do not permit waiting for a GAO decision).

105. *See* R. Ct. Fed. Cl. 65.

106. Understanding this fact, some contractors now consider bid protests a part of their business strategy, leveraging them as a tool to secure additional revenue from the U.S. government. For example, an incumbent contractor may benefit by filing a protest (regardless of its merit) when another contractor is selected to provide supplies or services formerly provided by the incumbent. *See* Mark Arena et al., RAND Corp., Assessing Bid Protests of U.S. Department

egregious example is Amazon's protest of a ten-billion-dollar DoD cloud computing contract in 2019.[107] The contract, named Joint Enterprise Defense Infrastructure (JEDI), was protested by Amazon at the COFC on the basis that its award to Microsoft was influenced by then President Donald Trump's alleged bias against Amazon and its CEO at the time, Jeff Bezos.[108] After twenty months of litigation, the DoD announced its cancellation of JEDI due to changing "mission needs."[109] Today, the DoD still lacks enterprise-wide cloud computing, an essential service that businesses and individuals—to include U.S. military members in their personal capacity—regularly use.[110] This technological shortfall has prevented the DoD from developing vital capabilities like Joint All-Domain Command and Control (JADC2), which is critical to ensuring U.S. success in a potential armed conflict with a near-peer rival.[111]

3. Rigid Intellectual Property Requirements

In addition to lengthening procurement timelines, the FAR (and its DoD supplements) create disincentives for companies considering technology or software development contracts with the DoD. As previously discussed, robust R&D is critical to developing and acquiring the advanced military space capabilities needed to win Space Race 2.0. However, rigid intellectual property (IP) requirements triggered by DoD contracts often dissuade non-traditional

of Defense Procurements 59–60 (2018). If the protest is filed at GAO within prescribed timelines, performance under the replacement contract typically may not occur until the litigation is resolved. *See id.* at 61–63. This often creates a "gap" in the provision of supplies or services between the end of the incumbent's contract and the date on which GAO reaches a decision—a "gap" federal agencies frequently seek to fill by awarding "follow-on bridge contracts" to the incumbent contractor. *See id.* at 62.

107. Lauren Feiner & Amanda Macias, *Pentagon Cancels $10 Billion JEDI Cloud Contract That Amazon and Microsoft Were Fighting Over*, CNBC (July 6, 2021, 3:25 PM), https://www.cnbc.com/2021/07/06/pentagon-cancels-10-billion-jedi-cloud-contract.html [https://perma.cc/5Q4K-YXZ2].

108. See *id.*

109. *Id.*

110. Brose, *supra* note 33, at 60. Of note, the DoD may finally be on the path to acquiring enterprise-wide cloud computing. In December 2022, the DoD announced the award of Joint Warfighting Cloud Capability (JWCC) contracts to Amazon Web Services, Google, Microsoft, and Oracle as a replacement for its scuttled JEDI effort. *See* U.S. Dept. of Def., *Department of Defense Announces Joint Warfighting Cloud Capability Procurement* (Dec. 7, 2022), https://www.defense.gov/News/Releases/Release/Article/3239378/department-of-defense-announces-joint-warfighting-cloud-capability-procurement [https://perma.cc/X3KF-8PKW]. According to the DoD, JWCC will enable the acquisition of "commercial cloud capabilities and services . . . at the speed of mission, at all classification levels, from headquarters to the tactical edge." *Id.* Although JWCC's success remains to be seen, this much is clear: the litigation associated with JEDI led to a delay in the DoD's acquisition of a mission-essential service (enterprise-wide cloud computing) that lasted over three years. *See* Jordan Novet, *Microsoft Snags Hotly Contested $10 Billion Defense Contract, Beating Out Amazon*, CNBC (Oct. 25, 2019), https://www.cnbc.com/2019/10/25/microsoft-wins-major-defense-cloud-contract-beating-out-amazon.html [https://perma.cc/4GVB-GUYL] (explaining that the DoD's award of the JEDI contract to Microsoft occurred on October 25, 2019).

111. *See* John Hoehn, Cong. Rsch. Serv., IF11493, Joint All-Domain Command and Control (JADC2) 1 (2022) (describing JADC2 as a DoD concept to connect sensors from all military services into a single cloud-based network in order to expedite decision making during military operations).

suppliers—like those leading innovation within the commercial space industry—from competing altogether.[112] Of particular concern is a structure of IP entitlements the U.S. government receives when an "item, component, or process" (ICP) or a computer software program developed under a DoD contract is non-commercial—meaning, generally, that it was developed specifically for the U.S. government and is not available to the public.[113]

When a non-commercial ICP is developed exclusively with U.S. government funds under a DoD contract, the U.S. government is entitled to "Unlimited Rights."[114] With "Unlimited Rights," the U.S. government may use the ICP's underlying technical data for essentially any legal purpose.[115] Conversely, when a non-commercial ICP is developed with a mix of U.S. government and private funds under a DoD contract, the U.S. government is entitled to "Government Purpose Rights" (GPR), which generally last for five years.[116] During the GPR period, the U.S. government may not use the ICP's underlying technical data for commercial purposes but may still modify, release, reproduce, perform, display, or disclose such data within the U.S. government without restriction.[117] It may also release or disclose such data outside the U.S. government for a "U.S. government purpose,"[118] i.e., a non-commercial reason.[119] After the GPR period ends, the U.S. government's interest in the ICP converts to the broader "Unlimited Rights" standard.[120]

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112. *See* Industry and Agency Concerns over Intellectual Property Rights: Hearing Before the H. Subcomm. on Tech. & Procurement Pol'y of the H. Comm. on Government Reform, 107th Cong. 8–9 [hereinafter Intellectual Property Hearing] (statement of Jack Brock, Managing Dir., Acquisition & Sourcing Mgmt, Gov't Accountability Off.).

113. *Cf.* FAR 2.101 (describing the definition of a "commercial product" and "commercial service"); DFARS 252.227-7014(a)(14) (describing the definition of "other than commercial computer software"). Note that a recent update to the FAR (and DFARS) replaced all references to "non-commercial" with "other than commercial." *See, e.g.*, FAR 52.213-4; DFARS 252.227-7013. This editorial change was made to achieve consistent language throughout the FAR and did not change the substantive meaning of any provision. *See* Federal Acquisition Regulation: Revision of Definition of "Commercial Item," 86 Fed. Reg. 61,017-38 (Dec. 6, 2021). For the sake of clarity and ease of comprehension, this article continues to use the term "non-commercial."

114. DFARS 252.227-7013(b)(1). There are eight additional circumstances in which the U.S. government is entitled to unlimited data rights in "items, components, or processes" under a DoD contract. *See id.* The most common of these additional circumstances include "studies, analyses, test data, or similar data" produced for the contract, when specified as an element of performance; "form, fit, and function data"; and technical data "necessary for installation, operation, maintenance, or training purposes." *Id.*

115. *See* DFARS 252.227-7013(a)(16) (describing "Unlimited Rights" as the ability for the U.S. government to "use, modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.").

116. *See* DFARS 252.227-7013(a)(10) (defining "developed with mixed funding" as development "accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract"); *see also* DFARS 252.227-7013(b)(2) (explaining that five years is the default period for GPR).

117. DFARS 252.227-7013(a)(13).

118. *See* DFARS 252.227-7013(a)(12) (describing a "Government purpose" as "any activity in which the U.S. government is a party," including "cooperative agreements with international or multi-national defense organizations," "sales or transfers by the U.S. government to foreign governments or international organizations," and competitive procurements).

119. DFARS 252.227-7013(a)(12)–(13).

120. DFARS 227.7203-5(b)(3).

When a non-commercial ICP is developed exclusively with private funds under a DoD contract, "Limited Rights" are triggered.[121] With "Limited Rights," the ICP's underlying technical data generally may not be shared outside the U.S. government without permission from the contractor that created the ICP.[122] However, exceptions to this general prohibition exist and their applicability is solely within the discretion of the U.S. government.[123] These exceptions permit reproduction, release, or disclosure of technical data outside the U.S. government when (1) it is necessary for emergency repair and overhaul, (2) the recipient is a U.S. government support contractor in the performance of a U.S. government contract, or (3) the recipient is a foreign government and the action is both is in the interest of the United States and required for evaluation or informational purposes.[124]

For non-commercial computer software developed under a DoD contract, the structure of IP entitlements is similar, with one notable difference. Similar to the allocation of technical data rights for non-commercial ICPs, the exclusive or partial use of U.S. government funds to develop non-commercial computer software under a DoD contract triggers "Unlimited Rights" or GPR, respectively.[125] However, when such software is developed exclusively with private funds under a DoD contract "Restricted Rights" are triggered.[126]

"Restricted Rights" implicate limitations on the U.S. government's use of non-commercial computer software that go beyond those found with "Limited Rights" for non-commercial ICPs. For example, the U.S. government must use the software on only one computer terminal at a time.[127] And when the software is transferred within the U.S. government, the transferring agency must destroy all copies of it when the transfer is complete.[128] But even with these additional restrictions, the U.S. government retains the ability with "Restricted Rights" to share (or authorize the sharing of) non-commercial computer software with third parties in certain situations and to unilaterally determine when those situations apply. Examples of situations when such sharing is authorized include (1) when use of non-commercial computer software by another contractor or subcontractor is required to perform emergency

121. DFARS 252.227-7013(b)(3).

122. *See* DFARS 252.227-7013(a)(14).

123. *Id.*

124. *Id.* When using one of these exceptions, the DoD must take action to restrict the recipient's further reproduction, release, or disclosure of the technical data (usually through a non-disclosure agreement (NDA)) and notify the contractor owning "Limited Rights" in the technical data of the disclosure. *Id.* However, once disclosure outside the U.S. government has occurred, a contractor has already lost control and is relying upon a theoretically unlimited number of third parties (including, potentially, competing contractors) to use its technical data for only authorized purposes. Further, violations of an NDA must be discovered and then enforced through litigation that is often lengthy and expensive.

125. *See* DFARS 252.227-7014(a)(16) (for "Unlimited Rights"); DFARS 252.227-7014(a)(12) (for GPR).

126. *See* DFARS 252.227-7014(b)(3).

127. *See* DFARS 252.227-7014(a)(15)(i).

128. *See* DFARS 252.227-7014(a)(15)(ii).

repairs on it,[129] and (2) when U.S. government support contractors, in conjunction with their government support work, need to use, modify, reproduce, perform, display, release, or disclose non-commercial computer software to a person authorized to receive software with "Restricted Rights."[130]

For industry, the implication of the aforementioned IP entitlement structures is that doing business with the DoD entails losing full control over the technology and software it develops. This is a disincentive, and oftentimes a non-starter, for companies that consider IP necessary for their future growth and survival.[131] Making matters worse are industry concerns about the U.S. government's ability to protect IP from unauthorized disclosure and resulting harms to a company's competitive advantage.[132] It bears noting that these concerns are not unfounded—as many examples of such unauthorized disclosure exist. One making national headlines recently is the Department of Energy's apparent inability to safeguard a breakthrough battery technology capable of powering a house for over thirty years on a single charge.[133] This technology, which was developed with over fifteen million dollars in taxpayer funds, and its underlying IP were inadvertently transferred to a Chinese manufacturing company that has since become the world's top manufacturer of these cutting-edge batteries[134] (and has undoubtedly shared this IP with the CCP). Examples like this[135] generate concern for any company considering technology or software development work with the U.S. government. However, for startups and other non-traditional suppliers in the commercial space industry—whose "lifeblood" is IP and continuous technological development—these concerns are further magnified.

The Defense Federal Acquisition Regulation Supplement (DFARS) attempts to address these challenges by providing some narrow authorities to negotiate technical data rights in DoD contracts. For example, a contracting

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129. *See* DFARS 252.227-7014(a)(15)(vi).

130. *See* DFARS 252.227-7014(a)(15)(vii). In an effort to prevent misuse of a contractor's computer software when it is shared with a third party, the DFARS mandates that the U.S. government use NDAs and contract clauses limiting further disclosure of government-furnished information. *See* DFARS 252.227-7014(a)(15)(vi)–(vii). It also states generically that the U.S. government "shall not permit the Government support contractor to decompile, disassemble, or reverse engineer the software . . . ." *Id.* However, the same problem exists for industry here as with the sharing of non-commercial ICP outside the U.S. government—the loss of control over IP and the negative effects this can have on a company's future business outlook.

131. U.S. Gov't Accountability Off., GAO-17-644, Military Acquisitions: DOD Is Taking Steps to Address Challenges Faced by Certain Companies 19 (2017).

132. L. Elaine Halchin, Cong. Rsch. Serv., RL34760, Other Transaction (OT) Authority 4 (2011).

133. *See* Courtney Flatt & Laura Sullivan, *The U.S. Made a Breakthrough Battery Discovery—Then Gave the Technology to China*, Nat'l Pub. Radio (Aug. 3, 2022), https://www.npr.org/2022/08/03/1114964240/new-battery-technology-china-vanadium [https://perma.cc/ZS6B-LUF5].

134. *Id.*

135. To be clear, the DoD has also committed unauthorized disclosures of IP. For example, the COFC awarded $1.2 million in damages to a government contractor after it found the USAF repeatedly released its proprietary information about a conveyor system used to assemble aerial bombs to unauthorized recipients—including the contractor's own competitors. *See* Spectrum Scis. & Software, Inc. v. United States, 98 Fed. Cl. 8 (2011).

officer may lengthen the nominal five-year GPR period for technical data underlying a non-commercial ICP developed with mixed funding.[136] As a result, the U.S. government's receipt of "Unlimited Rights," and its concomitant ability to use technical data for commercial purposes, are delayed—thereby enhancing the contractor's profit potential. Additionally, the DFARS permits a contracting officer to accept lesser U.S. government rights in technical data in return for other consideration from the contractor.[137] However, the DFARS also mandates that a contracting officer acquire at least "Limited Rights" in technical data[138] or "Restricted Rights" in non-commercial computer software for the U.S. government.[139] By requiring these minimums or "floors," the DFARS unnecessarily limits the ability of contracting officers to negotiate and shuts the door for defense contracting on companies unwilling to relinquish control over their IP. This, in turn, precludes the DoD from partnering with many innovation-minded tech companies.[140]

Further complicating matters is the fact that these narrow authorities to negotiate IP rights under the DFARS often go unused. Two primary reasons for this phenomenon exist. First, as previously discussed, structural incentives within the federal acquisition system often reward "risk avoidance," not intelligent risk-taking, by contracting officials.[141] As a result, rather than negotiating for alternative IP frameworks, DoD contracting officials often adhere to the standard allocation of IP rights under the DFARS[142]—to avoid the risk of future IP deficiencies, and the blame for them. Second, DoD contracting officials generally receive inadequate training in technical data rights and the effective formulation of data rights strategies.[143] Both are required to protect future use of technology and software by the DoD, and the latter is perhaps the most underappreciated. Extensive planning and coordination with program managers, legal advisors, and end users is required to ensure matters shaped by data rights received in a particular technology or software—like the flexibilities available for follow-on production—are addressed prior to the solicitation of a development contract.[144] Without adequate training in managing this process, or in the topic of data rights itself, DoD contracting officials are often unclear about the mechanics of making an alternative data

136. DFARS 227.7103-5.

137. *Id.*

138. DFARS 227.7103-5(d)(1).

139. DFARS 252.227-7014(a)(15).

140. *See*, *e.g.*, U.S. Gov't Accountability Off., *supra* note 131, at 9 (explaining that in a study of twelve non-traditional companies, nine (or seventy-five percent) cited concerns with the allocation of IP rights as a challenge to pursuing DoD contracting opportunities).

141. *See* Yukins, *supra* note 92.

142. Intellectual Property Hearing, *supra* note 112, at 2.

143. *See* U.S. Gov't Accountability Off., *supra* note 131, at 20–25, 29.

144. By example, the development and execution of a data rights strategy during the procurement of the Air Force's T-X (now T-7 Red Hawk) aircraft required tens of thousands of hours of work by contracting officials, in coordination with program managers, end users, and the Air Force Material Command Law Office, over the course of eighteen months. *See* Jeremiah Gertler, Cong. Rsch. Serv., R44856, Advanced Pilot Training (T-X) Program 12 (2018).

rights framework a reality or even when one is appropriate. This reality, along with the aforementioned structural incentives rewarding use of standard IP frameworks, reinforces the perception from within industry that IP allocation in defense contracting is a one-sided affair, in favor of the DoD.

4. Burdensome Cost Accounting Standards

Similar to rigid IP requirements, burdensome cost accounting standards (CAS) applicable to defense contracting are unsuitable for military space acquisitions. Under the FAR, U.S. government contracts and corresponding subcontracts are subject to CAS unless an exemption applies.[145] In total, nineteen CAS exist. The scope of CAS coverage is determined by the dollar value of the contract or subcontract at issue and whether any recent federal work has been performed by the contractor.[146] Full CAS coverage is triggered with award of a contract or subcontract valued at fifty million dollars or more, or an equivalent combined value of contracts and subcontracts awarded to a contractor in its preceding cost accounting period.[147] Conversely, a subset of full CAS coverage, called "modified" CAS, is triggered with award of a contract or subcontract valued at $7.5 million or more (but less than $50 million), and also applies to contracts or subcontracts valued below $7.5 million that are awarded to a contractor still performing under a "triggering" contract or subcontract.[148]

These standards, which began to take effect in 1972, establish a uniform cost accounting system wholly unique to the U.S. government that aims to create predictable and accurate cost allocation by contractors.[149] However, they also generate compliance burdens for companies by forcing them to maintain their accounting records in two separate ways—one for their work with the federal government and another for their commercial business operations.[150] These compliance burdens generate significant manpower and resource allocation requirements, which cause many non-traditional suppliers to eschew defense contracting opportunities entirely.[151] By example, "one non-traditional supplier determined that it would take fifteen to eighteen months and cost

145. *See* FAR 9903.201-1. Nine exemptions from CAS exist—the most relevant to military space acquisitions being "contracts and subcontracts with small businesses," "firm-fixed-price contracts or subcontracts awarded on the basis of adequate price competition without submission of certified cost or pricing data," and "contracts or subcontracts of less than $7.5 million, provided that, at the time of award, the business unit of the contractor or subcontractor is not currently performing any CAS-covered contracts or subcontracts valued at $7.5 million or greater." *Id.* Notably, these nine exemptions do not specifically cover contracts or subcontracts awarded on a cost-reimbursement basis, or those awarded to the wide swath of non-traditional contractors that do not meet the Small Business Administration's size standards. *Id.*

146. FAR 9903.201-2. When a contractor has more than one business unit, the determination of CAS coverage applies to each business unit individually. *Id.*

147. *Id.*

148. *Id.*; *see* FAR 9903.201-1; FAR 9903.201-2.

149. U.S. Gov't Accountability Off., GAO 20-266, Cost Accounting Standards: Board Has Taken Initial Steps to Meet Recent Legislative Requirements 1 (2020).

150. *Id.*

151. U.S. Gov't Accountability Off., *supra* note 131, at 15–16.

millions of dollars just to establish the separate cost accounting system needed to perform DoD contracting work."[152]

Given the prevalence of non-traditional suppliers within the commercial space industry and their indispensable role in achieving space superiority, the deterrence effect caused by burdensome and mandatory CAS is especially concerning. Although a CAS exemption does exist for small businesses,[153] no CAS exemption exists based solely on a company's status as a non-traditional supplier. Hence, non-traditional suppliers that do not (or no longer) meet the Small Business Administration's size standards[154] often must comply with, and experience the burdens of, all CAS triggered under a federal contract. As the commercial space industry continues its exponential growth, more and more of its non-traditional suppliers will likely acquire the limited amount of federal contract work necessary to trigger CAS. With CAS triggered, these suppliers will be less inclined to seek out further FAR-based procurement opportunities with the USSF. Accordingly, keeping CAS in place for military space acquisitions improperly prioritizes uniformity in cost accounting over the pressing need to develop and acquire cutting-edge military space capabilities.

5. Lack of Flexible Acquisition Models

Another misalignment between the FAR and the needs of military space acquisitions is the FAR's lack of flexible acquisition models accommodating collaboration from within industry. The FAR requires use of specific contract types, which include various versions of firm-fixed-price and cost-reimbursement contracts.[155] However, regardless of the contract type used, a U.S. government requirement must be awarded entirely to one contractor, or split into sub-requirements and the sub-requirements awarded individually to multiple contractors.[156] In either case, the U.S. government does not reap the benefits of collaboration from within industry unless two or more companies decide, on their own, to enter a joint venture and compete together for a government contract.[157]

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152. *Id.* at 16.

153. *See* FAR 30.201-1(a). In addition, exemptions now exist for the requirement to submit certified cost or pricing data under a Broad Agency Announcement, SBIR contract, or Small Business Technology Transfer (STTR) contract valued below $7.5 million. *See* Memorandum from John Tenaglia, Off. of Under Sec'y of Def., Class Deviation—Pilot Program for Streamlining Awards for Innovative Technology Projects 1–2 (2022).

154. These standards are generally met by manufacturing companies with 500 or fewer employees and non-manufacturing companies with average annual receipts under $7.5 million. *See Basic Requirements*, U.S. Small Bus. Admin., https://www.sba.gov/federal-contracting/contracting-guide/basic-requirements (last visited Oct. 5, 2022) [https://perma.cc/T8KF-6FMR].

155. *See* FAR 16.101.

156. See id.

157. An example is United Launch Alliance, which is a joint venture between Lockheed Martin Space and Boeing Defense, Space and Security. *See United Launch Alliance: Superior Capability, Superior Value*, Boeing Corp., https://www.boeing.com/space/united-launch-alliance (last visited Dec. 2, 2022) [https://perma.cc/QD4W-72UA].

By not allowing use of flexible acquisition models, the FAR stifles the U.S. government's ability to foster—and benefit from—industry collaboration in federal procurement. The innovation possible with such collaboration (and which goes unrealized with use of FAR-based procurement) is perhaps best shown with consortia, which operate under the umbrella of OT authority (hereinafter "OT consortia"). OT consortia, which are discussed in detail later in this article, allow federal agencies to admit an unlimited number of companies into a contractor pool (known as a "consortium") and harness their combined innovative talents towards solving important agency requirements.[158] Hence, by shutting the door on OT consortia and other flexible acquisition models, the FAR limits the ability of the U.S. government to achieve innovative solutions through its acquisition efforts. This is harmful to the success of federal R&D acquisitions writ large and devastating to those conducted by the USSF due to the primacy of technology in the space warfighting domain.

In sum, the FAR's attempt to satisfy numerous competing priorities is incongruent with the need to solely prioritize speed and innovation in military space acquisitions. Additionally, the structural delays, rigid IP requirements, and burdensome CAS inherent in FAR-based procurement undermine the USSF's ability to partner with non-traditional suppliers and rapidly acquire the cutting-edge military space capabilities necessary to achieve space superiority. Finally, the lack of flexible acquisition models under the FAR unnecessarily handcuffs the United States from leveraging industry-wide collaboration in Space Race 2.0. For these reasons, an alternative acquisition system for the USSF is required.

IV. EQUIPPING THE USSF WITH AN OT-FOCUSED ACQUISITION SYSTEM

A. OT Authority Best Meets U.S. Needs for Military Space Acquisitions

To effectively counter accelerating efforts by China and Russia to exploit, deny, and disrupt the strategic advantages of space, Congress must empower the USSF to rapidly acquire cutting-edge space technology, systems, and weaponry.[159] Current space procurement efforts under the FAR take too long to develop and deploy and often fail to meet stated objectives.[160] These deleterious outcomes for U.S. national security can be attributed, in large part, to the FAR and DFARS-based requirements discussed in Part III of this article, which slow acquisition speed and dissuade non-traditional suppliers (including those in the commercial space industry) from pursuing defense contracting opportunities. Use of OT authority does not implicate these requirements, providing flexibilities for federal agencies to efficiently partner

158. U.S. Gov't Accountability Off., GAO-22-105357, Other Transaction Agreements: DoD Can Improve Planning for Consortia Awards 11 (2022).

159. Dep't of the Air Force, Alternative Acquisition System for the United States Space Force 2 (2020).

160. *See id.*

with non-traditional suppliers and leverage their innovative talents. Therefore, "fixing" the broken military space procurement process will require Congress to remove it from the FAR, create stand-alone OT authority for the USSF, and mandate use of this new authority within an alternative acquisition system.[161]

Although Congress created OT authority over sixty years ago for NASA's use during the Space Race, it has been used in recent years, and with increasing frequency, for DoD acquisitions.[162] By statute,[163] the DoD may use OT authority for research,[164] experimental,[165] or prototype[166] projects. Qualifying prototype projects are those that are directly relevant to (1) "enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed," or (2) "improv[ing] . . . platforms, systems, components, or materials in use by the

161. Of note, this proposal is not without precedent as Congress has previously created alternative acquisition systems to advance vital security missions of federal agencies. For example, in 1995 Congress gave the Federal Aviation Agency (FAA) broad authority to develop and implement an "acquisition management system" (AMS) for the FAA. *See* Pub. L. No. 104-50, § 348, 109 Stat. 436, 460 (1995). Congress also gave the FAA Administrator discretion to utilize OT authority and other non-traditional acquisition methods "as may be necessary to carry out the functions of the Administrator and the [FAA]." 49 U.S.C. § 106(l)(6). Congress granted these authorities to accelerate the FAA's modernization of air traffic control technology deemed vital to protecting public safety. *See* Rand Allen & Christopher Yukins, *Bid Protests and Contract Disputes Under the FAA's New Procurement System*, 26 Pub. Cont. L.J. 135, 136–38 (1997). And in so doing, it created an alternative acquisition system for the FAA (in the AMS and its OT authority) that is significantly broader than the alternative acquisition system proposed in this article for the USSF. For instance, Congress did not limit use of non-FAR-based authorities to a subset of FAA acquisitions occurring within the AMS, like the proposed limitation on use of OT authority for USSF acquisitions involving space technology, systems, and weaponry. *See* Pub. L. No. 104-50, § 348, 109 Stat. 436, 460 (1995). In addition, Congress exempted the AMS from the Competition in Contracting Act (CICA), FAR, and other federal procurement laws and regulations—thereby foreclosing COFC and GAO jurisdiction over all FAA acquisitions. *See* Pub. L. No. 104-50, § 348(b), 109 Stat 436, 460–61 (1995). Rather than filing bid protest litigation at COFC or GAO, contractors must challenge FAA solicitations or awards through the FAA's Office of Dispute Resolution for Acquisitions (ODRA). *See* 49 U.S.C. § 40110(d)(4). Only after the FAA issues a final order implementing an ODRA recommendation may a contractor pursue redress outside the FAA—by filing an appeal of the order at the U.S. Court of Appeals level. *See* 14 C.F.R. § 17.43. This litigation framework is materially different from that found within the proposed acquisition system, which would leave USSF acquisitions not involving space technology, systems, or weaponry subject to the FAR and CICA—and thus the full breadth of GAO and COFC jurisdiction.

162. Rhys McCormick, Ctr. for Strategic & Int'l Studs., Department of Defense: Other Transaction Authority Trends 2 (2020).

163. *See* 10 U.S.C. § 4001(b)(5)–(6).

164. *See* 10 U.S.C. § 4021 (authorizing the DoD's acquisition of basic, applied, and advanced research projects that, to the maximum extent practicable, do not duplicate research conducted under existing programs within the DoD).

165. *See* 10 U.S.C. § 4023 (authorizing the DoD's acquisition of ordnance, signal, chemical activity, transportation, energy, medical, space-flight, telecommunications, and aeronautical supplies, including parts, accessories, and designs thereof, that the Secretary of Defense considers "necessary for experimental or test purposes in the development of the best supplies that are needed for the national defense.")

166. *See* 10 U.S.C. § 4022.

armed forces."[167] Additionally, a qualifying prototype project must satisfy one of four conditions, which emphasize participation in the project by entities that do not traditionally contract with the DoD.[168] Lastly, when a qualifying prototype project is awarded using "competitive procedures" and successfully completed, a follow-on production contract or transaction may be awarded to the project's participant(s) on a sole source basis.[169]

Recognizing the value of OT authority in developing new military technology, Congress has progressively given the DoD greater flexibility for its use.[170] In response, OT obligations within the DoD have soared—rising 712% between 2015 and 2019.[171] An examination of the requirements for use of OT authority versus FAR-based procurement reveals several reasons why the former can be a more effective option and why it should be the standard for military space acquisitions.

1. Does Not Attempt to Serve Numerous Competing Priorities

Unlike FAR-based procurement, the use of OT authority does not attempt to satisfy numerous competing priorities, allowing for focused prioritization of acquisition speed and innovation. An example of the tremendous results achievable with such focused prioritization is Operation Warp Speed (OWS), the U.S. government's coronavirus disease 2019 (COVID-19) vaccine development program. During OWS, the U.S. government leveraged OT authority to enter into an agreement with a private contract management firm, which in turn awarded vaccine development agreements to pharmaceutical companies belonging to a DoD consortium.[172] These vaccine development agreements were awarded in as few as three weeks as use of OT authority did not implicate the FAR's mandatory synopsis/solicitation timeframes and competition requirements.[173] Under this framework, the

167. 10 U.S.C. § 4022(a)(1).

168. *See* 10 U.S.C. § 4022(d)(1) (requiring the existence of one of the following four conditions for use of OT authority on a prototype project: (1) participation to a significant extent by at least one non-traditional defense contractor in the prototype project; (2) small businesses, non-traditional defense contractors, or nonprofit research institutions serving as all significant participants in the prototype project, other than the federal government; (3) funding of at least one-third of the prototype project by sources other than the U.S. government; or (4) the existence of exceptional circumstances, as determined by the senior procurement executive for the agency in writing, warranting use of OT authority for the prototype project).

169. *See* 10 U.S.C. § 4022(f). Of note, the statute does not define the term "competitive procedures," thereby leaving discretion for determining this standard's requirements to the DoD and its subordinate military service branches.

170. McCormick, *supra* note 162, at 9.

171. *Id*. at 1.

172. Sydney Lupkin, *How Operation Warp Speed's Big Vaccine Contracts Could Stay Secret*, Nat'l Pub. Radio (Sept. 29, 2020), https://www.npr.org/sections/healthshots/2020/09/29/917899357/how-operation-warp-speeds-big-vaccine-contracts-could-stay-secret [https://perma.cc/5WA9-79PG].

173. *See* David Adler, *Inside Operation Warp Speed: A New Model for Industrial Policy*, 5 Am. Affs. J. 3 (2021), https://americanaffairsjournal.org/2021/05/inside-operation-warp-speed-a-new-model-for-industrial-policy/#notes [https://perma.cc/3FPG-6Y9C].

U.S. government invested over eighteen billion dollars in vaccine development[174] and unleashed industry innovation on a grave threat to our country's safety, economy, and national security. The result: multiple vaccines to a novel coronavirus were developed in less than a year, a process which usually takes ten years for a single vaccine.[175] Like America's triumph in the original Space Race, General Schriever's creation of the ICBM, and the NSSL program's development of four launch vehicles, OWS exemplifies how solutions to complex national challenges may be rapidly achieved when the federal government does not restrain innovation with bureaucratic requirements or cost-efficiency measures. Mandatory use of OT authority and robust federal funding for military space acquisitions would allow the United States to achieve similar results in Space Race 2.0.

2. Avoids Structural Delays Inherent in FAR-Based Procurement

By avoiding structural delays inherent in FAR-based procurement, OT authority enables the acquisition speed necessary to outpace China's and Russia's ongoing development of military space capabilities. At the outset, use of OT authority allows a federal agency to reach award without complying with the FAR's synopsis and solicitation requirements. The possibilities available with such an expedited award process can be seen with the USSF's 2021 "Pitch Day" event, which allowed numerous startups and other non-traditional suppliers to "pitch" their proposals for meeting military space requirements.[176] Over the course of the two-day event, the USSF awarded nineteen SBIR Phase II contracts totaling thirty-two million dollars[177]—including, as previously discussed, Lunewave's satellite antenna development contract. Such rapid acquisition speed can also be achieved with OT acquisitions, and without the

174. Simi V. Siddalingaiah, Cong. Rsch. Serv., IN11560, Operation Warp Speed Contracts for COVID-19 Vaccines and Ancillary Vaccination Materials 2 (2020).

175. Alison Caldwell, How Were Researchers Able to Develop COVID-19 Vaccines So Quickly? The Steps That Produced the Most Rapid Vaccine Rollout in History, Univ. of Chi. (Feb. 5, 2021), https://news.uchicago.edu/story/how-were-researchers-able-develop-covid-19-vaccines-so-quickly [https://perma.cc/D4R4-QB7R].

176. *USSF SMC Hosts Upcoming Space Force Pitch Day in Spring 2021*, Space & Missile Sys. Ctr. Pub. Affs., U.S. Space Force (Aug. 20, 2020), https://www.losangeles.spaceforce.mil/News/Article-Display/Article/2319982/ussf-smc-hosts-upcoming-space-force-pitch-day-in-spring-2021 [https://perma.cc/UJ6S-3VPJ].

177. *See* Sandra Erwin, *Space Force Awards $32 Million in Contracts to Startups and Small Businesses*, SpaceNews (Aug. 20, 2021), https://spacenews.com/space-force-awards-32-million-in-contracts-to-startups-and-small-businesses [https://perma.cc/H5AU-L48D]. The SBIR Phase II award process is exempted from synopsis and solicitation requirements under the FAR. *See* U.S. Small Bus. Admin., Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Program Policy Directive 6, 19 (2020).

funding,[178] IP,[179] and other[180] limitations of the SBIR program. By comparison, the exclusive use of FAR-based procurement would have delayed award of all nineteen contracts by at least sixty days in order to satisfy mandatory synopsis and solicitation requirements.[181] In addition, companies would have been required to provide lengthy, tailored proposals for each contract opportunity they chose to pursue.[182] These delays and inefficiencies inherent in FAR-based procurement do not exist when using OT authority—making it the better choice for military space acquisitions.

Along with expediting the award process, use of OT authority generally avoids litigation-induced delays in contractor performance and resulting harms to U.S. government operations.[183] This is because OT authority does not implicate federal procurement statutes or regulations which, as a general rule, precludes GAO or COFC jurisdiction over challenges regarding its use.[184] Although exceptions to this general rule exist, they apply only in

178. As of October 2022, a federal agency may not use in excess of $295,924 in agency SBIR funds for a Phase I (Concept Development) award, or in excess of $1,972,828 in agency SBIR funds for a Phase II (Prototype Development) award, without receiving prior waiver approval from the SBA. *See About*, U.S. Small Bus. Admin., https://www.sbir.gov/about (last visited Feb. 8, 2023) [https://perma.cc/WJ4Q-98QH]. Such a cap does not exist under the SBIR program for a Phase III (Commercialization) award as a Phase III award may not use SBIR funds. *See* U.S. Small Bus. Admin., *supra* note 177, at 27. The aforementioned "caps" apply only to the use of agency SBIR funds. *Id.* Accordingly, an agency can supplement funding for a Phase I or Phase II award with other (non-SBIR) agency funds. *See* 15 U.S.C. § 638(aa)(5).

179. Contracts entered into under the SBIR program are governed by a unique SBIR technical data rights structure. *See* U.S. Small Bus. Admin, *supra* note 177, at 53–54. This structure includes a SBIR protection period of at least twenty years following contract award, during which time technical data generated under the SBIR contract may be utilized within the U.S. government, but generally may not be disclosed outside the U.S. government if such disclosure could undermine the small business's future commercialization of its technology. *See id.* Following the SBIR protection period, the U.S. government receives broader government-purpose rights in the technical data, which allows for internal U.S. government use and disclosure outside the U.S. government for a valid government purpose. *Id.*; *see supra* notes 116–119 and accompanying text.

180. As applied to space acquisitions, these include the SBIR program's focus on assisting small businesses and the competitive free enterprise system, rather than providing for streamlined and flexible acquisitions, and its related requirement for annual reporting to the Small Business Administration. *See* 15 U.S.C. § 638(a), (i).

181. *See* FAR 13.105; FAR 5.203(e).

182. *See* Geoff Orazem et al., *Why Startups Don't Bid on Government Contracts*, Bos. Consulting Grp. (Aug. 22, 2017), https://www.bcg.com/publications/2017/public-sector-agency-transformation-why-startups-dont-bid-government-contracts [https://perma.cc/UA3P-WHPB].

183. *See* Feiner & Macias, *supra* note 107; *see also supra* notes 107–111 and accompanying text.

184. *See* Sys. Architecture Info. Techs., B-418721, CPD ¶ 184, at 2 (Comp. Gen. June 2, 2020); Space Exploration Techs. Corp. v. United States, 144 Fed. Cl. 433, 442 (2019). It bears noting that OT acquisitions may—like any agency action—be subject to challenge in federal district court under the Administrative Procedures Act (APA). *See* 5 U.S.C. §§ 551–559. However, the viability of such review remains unsettled. *See Space Exploration Techs. Corp.*, 144 Fed. Cl. at 442–43, 446 (explaining that OT agreements may be appropriately heard in federal district courts under the APA); *but see* MD Helicopters Inc. v. United States, 435 F. Supp. 3d 1003, 1010 (D. Ariz. 2020) (finding lack of subject matter jurisdiction over a challenge to an OT agreement under the APA). The APA grants federal agencies a deferential standard, requiring courts to uphold action by a federal agency unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This traditional deference is at its highest where a court is reviewing action by a federal agency that required a high level of technical expertise, like

limited circumstances and are infrequently utilized.[185] Moreover, application of these exceptions in the proposed acquisition system could be reduced (with related congressional action) or would cease to exist based on the system's structure. As a result, USSF requirements vital to protecting U.S. national security would seldom be held hostage during protracted litigation; a risk that is ever-present when using FAR-based procurement.

By example, one exception to this general rule is a federal agency's failure to comply with statutory requirements for the use of OT authority. Such failure may create bid protest jurisdiction at the GAO under the rationale that a FAR-based procurement was impermissibly avoided.[186] However, Congress can—and should—limit the applicability of this exception for acquisitions occurring within the proposed acquisition system. Specifically, Congress should not statutorily define "space technology," "space systems," or "space weaponry" in its grant of stand-alone OT authority to the USSF—thereby giving the USSF wide discretion to determine which acquisitions fall within these categories. Such wide discretion would reduce industry's ability to successfully argue in bid protest litigation that an acquisition effort falls outside the scope of the USSF's stand-alone OT authority. Additionally, Congress should not statutorily devise different types of OT authority available for military space acquisitions—as seen today with the DoD's research, experimental, and prototype OT authorities.[187] By not subdividing the USSF's stand-alone OT authority in this manner, Congress can foreclose industry's ability to challenge military space acquisitions on the basis that requirements for a particular type of OT authority were not followed.[188]

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award of a prototype OT agreement. *See* Space Exploration Techs. Corp. v. United States, No. 2:19-cv-07927-ODW, 2020 U.S. Dist. LEXIS 245693, at *10 (C.D. Cal. Sept. 24, 2020).

185. *See The Basics: What Are OTs?*, Def. Advanced Rsch. Projects Agency, https://acquisitioninnovation.darpa.mil/what-are-ots (last visited Oct. 21, 2022) [https://perma.cc/YM5T-DSTH].

186. *See Sys. Architecture Info. Techs.*, CPD ¶ 184, at 2 (explaining the GAO has limited jurisdiction to hear protests when an agency violates statutory requirements for the use of OT authority, as this creates an improper OT agreement in lieu of a FAR-based procurement). Examples of such requirements can be seen within the DoD's authority to use a prototype OT agreement, which requires use of a qualifying project and satisfaction of one of several conditions. *See* 10 U.S.C. § 4022(a)(1) (discussing qualifying project requirements); 10 U.S.C. § 4022(d)(1) (discussing required conditions).

187. *See* 10 U.S.C. §§ 4021–4023.

188. If Congress is unwilling to grant the USSF stand-alone OT authority, and mandate use of this authority within an alternative acquisition system, another option to improve military space acquisitions is to make statutory requirements for use of the DoD's existing OT authorities non-binding guidance for the USSF. This would give the USSF wider discretion to use OT authority for research, experimentation, prototyping, and follow-on production. It would also reduce bid protest litigation because industry could no longer successfully argue that the USSF misused the DoD's existing OT authorities—as requirements for their use would be informative to, but not binding on, the USSF. However, unlike the proposed acquisition system, this option would not guarantee the exclusive use of OT agreements for military space acquisitions. For example, production contracts that are not "follow on" efforts from previous prototype OT agreements could not be acquired by the USSF using OT authority. *See* 10 U.S.C. § 4022(f) (constituting the sole statutory authorization for the DoD's use of OT authority for production). Furthermore, the increased flexibilities provided by this option for use of OT authority in research,

Another exception to the general rule that OT acquisitions avoid bid protest litigation concerns the use and operation of an OT agreement. Specifically, an OT agreement may inadvertently create bid protest jurisdiction if it (1) is used as part of a federal agency's process to determine the need for acquisition (and thus the need for a potential FAR-based procurement) and (2) operates to exclude one or more of its bidders from consideration for a follow-on production contract.[189] Under these circumstances, an OT agreement is considered "in connection with a procurement or a proposed procurement" under the Tucker Act—thus creating COFC jurisdiction over it.[190]

However, in the proposed acquisition system this exception would cease to exist. This is because the USSF would be statutorily required to use OT authority for all acquisition efforts (including production) that involve "space technology," "space systems," or "space weaponry," and would be given wide discretion to determine when these broad categories apply to a particular acquisition effort. As a result, OT agreements falling within these broad categories could exclude unsuccessful bidders from follow-on production opportunities and never be "in connection with a procurement or a proposed procurement," as those opportunities would—per congressional mandate—always involve the use of OT authority. Accordingly, COFC jurisdiction would be precluded in these situations.

3. Escapes Requirements That Reduce Industry Interest

In addition to avoiding structural delays, OT authority escapes FAR- and DFARS-based requirements that reduce interest from non-traditional suppliers in the commercial space industry. Without these requirements in place, the U.S. government can better access the innovative talent necessary to achieve space superiority. Requirements escaped with use of OT authority include, as previously discussed, minimum levels of technical data rights the U.S. government may agree to accept and specific processes for contractor cost accounting under federal contracts. When OT authority is used in place of FAR-based procurement, these topics may be fully negotiated on an agreement-by-agreement basis to best meet the needs of a particular acquisition effort. Consequently, exclusive use of OT authority for military space acquisitions would increase interest from the commercial space industry as concerns about IP allocation[191] and mandatory CAS[192] often deter the

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experimentation, prototyping, and follow-on production would not necessarily lead the USSF to utilize OT acquisitions for these efforts. As previously discussed, strong structural incentives exist with the federal acquisition system for contracting officials to avoid risk with their procurement decisions. *See* Yukins, *supra* note 92 and accompanying text. Because these incentives would not be reversed simply by making the DoD's existing OT requirements non-binding guidance for the USSF, it is likely that they would continue to lead USSF contracting officials to utilize FAR-based procurement for military space acquisitions.

189. *See* 28 U.S.C. § 1491(b)(1); Hydraulics Int'l v. United States, 161 Fed. Cl. 167, 176–77 (2022).

190. *Hydraulics Int'l*, 161 Fed. Cl. at 179 (quoting 28 U.S.C. § 1491(b)(1)).

191. Intellectual Property Hearing, *supra* note 112.

192. U.S. Gov't Accountability Off., *supra* note 131, at 15–16.

industry's non-traditional suppliers from competing for FAR-based procurements. This increased interest would improve the innovative solutions available to the USSF to combat dangerous threats emanating from, or otherwise utilizing, the space domain.

Another requirement escaped with use of OT authority is the FAR's mandate that an enumerated contract type be utilized for federal procurement. This mandate prohibits the use of many flexible acquisition models, like OT consortia, which can better foster innovation in U.S. government acquisitions.[193] As previously mentioned, OT consortia empower federal agencies to bring numerous companies across an industry together and harness their combined innovative talents towards solving important agency requirements.[194] OT consortia can vary in structure based on the specific needs of an acquisition initiative.[195] However, they are normally built around a common theme and include three components.[196] These components are: (1) a sponsoring federal agency; (2) a consortium management organization (CMO), selected by the agency;[197] and (3) a consortium, frequently comprised of private companies.[198]

The foundation of OT consortia is usually a "base OT agreement" between the sponsoring federal agency and the CMO.[199] This agreement is the product of negotiations between the agency and CMO, and often includes terms and conditions (e.g., IP rights and cost accounting requirements) that will govern future work performed by consortium members.[200] Once a "base OT agreement" is established, companies are admitted into a consortium at the discretion of the sponsoring federal agency and after paying required consortium management fees.[201] Thereafter, the sponsoring federal agency typically issues "calls" to the consortium's members (through the CMO) soliciting white papers that outline proposals for solving agency requirements.[202] In response to these "calls," consortium members may submit a white paper individually or agree to work with other consortium members and submit a joint-white paper.[203] After receiving white paper submissions, the sponsoring federal

193. U.S. Gov't Accountability Off., GAO 22-105357, Other Transaction Agreements: DoD Can Improve Planning for Consortia Awards 6 (2022).

194. *Id.* at 17.

195. McCormick, *supra* note 162, at 7.

196. U.S. Gov't Accountability Off., *supra* note 193, at 17.

197. A CMO is typically a nonprofit organization, although for-profit companies and academic institutions have also served as CMOs. *Id.* The sponsoring federal agency pays the CMO to provide acquisition support and administrative services, which can include functions such as performing market research, releasing requests for proposals to consortium members on behalf of the agency, and recruiting consortium members. *Id.*

198. *Id.* Although OT consortia frequently contain only private companies, this is not always the case. Academic institutions and non-profit institutions may also belong to a consortium, further enhancing the innovation potential of this flexible acquisition model. *Id.*

199. *Id.* at 12.

200. *Id.* at 17.

201. *Id.* at 15.

202. *Id.*

203. *Id.* at 13. The CMO may assist consortium members with their white paper submissions by providing related training or by reviewing draft submissions to ensure compliance with

agency may select one or more consortium members to perform the requirement, delivering funding and a statement of work to them (often through the CMO).[204]

An example of the innovation achievable with use of OT consortia is the USSF's Space Enterprise Consortium (SpEC). Established in 2017, SpEC is a consortium of approximately 600 commercial space companies, and mostly non-traditional suppliers, tasked with completing rapid space prototyping projects.[205] SpEC is managed by a CMO[206] and its members have developed innovative prototypes for various projects with important national security implications, such as the construction of a new GPS satellite and the expansion of tactical data links in LEO.[207] Based on its early successes, SpEC's budget was recently raised by Congress to twelve billion dollars over ten years.[208] In the future, SpEC will continue to improve space prototype development and serve as an important reminder of why OT authority should be utilized for all military space acquisitions.[209]

B. MATOCs: A Useful Tool, but Not the Answer for Military Space Acquisitions

It bears noting that use of multiple-award task order contracts (MATOCs)[210] under the FAR can, like use of OT agreements, shorten award timelines—thereby increasing acquisition speed for task order requirements. Therefore, exclusive use of MATOCs in an alternative acquisition system for the USSF is worthy of consideration. However, despite their advantages, MATOCs contain several limitations that make them a less effective solution for military space acquisitions than OT agreements.

Unlike typical FAR-based contracts, MATOCs are awarded to two or more contractors, who later compete for task orders (within the scope of the MATOC) issued by the federal agency.[211] Task order awards are subject to "fair

requirements in the sponsoring agency's "call." *Id*. If these services are provided, they are typically funded through consortium management fees. *Id.*

204. *Id.* at 9.

205. Nathan Strout, *Space Force Expects $1 Billion in Contracts in First Year of Space Enterprise Consortium Reloaded*, Def. News (Sept. 8, 2021), https://www.defensenews.com/battlefield-tech/space/2021/09/08/space-force-expects-1-billion-in-contracts-in-first-year-of-space-enterprise-consortium-reloaded [https://perma.cc/W67S-FUJX].

206. See id.

207. Nathan Strout, *US Space Force Changes Timeline for Hiring a Prototyping Consortium Manager*, C4ISRNet (Nov. 18, 2020), https://www.c4isrnet.com/battlefieldtech/space/2020/11/18/space-force-to-announced-new-prototyping-consortium-manager-by-end-of-year[https://perma.cc/W5K4-DBHH].

208. See id.

209. Given their demonstrated success, use of OT consortia (like SpEC) has skyrocketed. For example, between 2019 and 2021 sixty-five percent of the DoD's $37.3 billion in prototype OT obligations occurred within OT consortia. *See* U.S. Gov't Accountability Off., *supra* note 193, at 11.

210. MATOCs are also commonly referred to as multiple-award indefinite delivery, indefinite quantity (IDIQ) contracts. They were created by Congress in 1994 in an effort to streamline the government procurement process. *See* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994).

211. *See* FAR 16.504(c)(1)(i); *see also* FAR 16.505(a)(2).

opportunity" requirements under FAR Part 16,[212] not typical "full and open competition" requirements under FAR Part 6.[213] "Fair opportunity" requirements grant contracting officers "broad discretion" to develop "appropriate [task] order placement procedures"[214] and encourage use of minimal industry submission requirements—flexibilities not available under "full and open competition."[215] These flexibilities may allow contracting officers to process task order awards under MATOCs faster than contract awards, a fact which seemingly addresses one of the primary needs for military space acquisitions, increased acquisition speed.

In reality, however, task orders remain subject to FAR-based requirements that would undermine the ability of MATOCs to expedite acquisition timelines within an alternative acquisition system. For example, because task order awards must comply with "fair opportunity" requirements,[216] a federal agency's failure to follow those requirements may be subject to protest.[217] Hence, litigation risk can exist for each task order awarded under a MATOC—in addition to that existing for the MATOC itself, which remains subject to "full and open competition" requirements[218] and the full scope of bid protest jurisdiction at the GAO and COFC. Additionally, MATOCs remain subject to the rigid IP frameworks,[219] burdensome CAS,[220] and inflexible acquisition models[221] under the FAR and DFARS. These requirements, as previously discussed, often deter non-traditional suppliers from even competing for DoD contracting oppor-

212. FAR 16.505(b)(1)(i).

213. *See* FAR 6.1.

214. For example, contracting officers are authorized to exclusively use oral presentations from industry during the task order award process. *See* FAR 16.505(b)(1)(ii).

215. *Id.*

216. *Id.* These requirements increase in scope as the dollar value of a task order increases. *See* FAR 16.505(b)(1)(iii)(B). For example, a task order exceeding six million dollars requires a contracting officer to disclose all significant factors and sub-factors (including cost or price) that the agency expects to consider when evaluating task order proposals, and their relative importance. *See* FAR 16.505(b)(1)(iv). In addition, a task order exceeding this cost threshold triggers requirements for contracting officers to notify unsuccessful awardees and utilize the debriefing procedures specified in FAR 15.5. *See* FAR 16.505(b)(6). These requirements do not exist for task orders below six million dollars. *Id.*

217. *See* FAR 16.505(a)(10). The GAO may hear protests regarding the issuance or proposed issuance of a task order by the U.S. government. *See* FAR 16.505(a)(10)(ii). For a protest of a DoD task order to be heard by the GAO, the value of the task order must exceed twenty-five million dollars, or the protest must allege the task order improperly increases the scope, period, or maximum value of the contract. FAR 16.505(a)(10)(i). COFC may hear protests regarding the issuance or proposed issuance of a task order by the U.S. government, but only if certain criteria are met. *See* 41 U.S.C. § 4106(f)(1). Of note, protestors can block performance of critical requirements included in a task order for the pendency of litigation—as they can for similar requirements included in a contract. *See, e.g.*, FAR 16.505(a)(10)(ii) (explaining that protests of task orders at GAO follow the procedures specified in FAR 33.104); *supra* note 104 (describing FAR 33.104 requirements that, if met, normally result in a stay of contract award or suspension of contract performance).

218. These include, as previously discussed, the FAR's mandatory synopsis and solicitation requirements. *See* FAR 16.505(a)(10).

219. *See supra* Part III.B.3.

220. *See supra* Part III.B.4.

221. *See supra* Part II.B.5.

tunities. This deterrence effect, and the litigation risk retained by MATOCs as FAR-based procurements, make this contract vehicle an inferior choice for military space acquisitions than OT agreements.

C. Implementation Challenges

As with any systemic change effort, challenges exist to successfully implementing an OT-focused acquisition system for the USSF. The most significant of these challenges are (1) streamlining USSF OT policies to protect acquisition speed, (2) meaningfully developing space acquisition professionals to advance U.S. interests within the proposed acquisition system, and (3) achieving career specialization in military space acquisitions to build institutional expertise in the use of OT authority. Although not easy to overcome, these challenges do not outweigh the pressing need to implement an acquisition system capable of enabling victory in Space Race 2.0.

1. Streamlining USSF Policies for the Use of OT Authority

Adherence to federal agency policies affecting the use of OT authority can undermine the acquisition speed gained with the authority's lack of structural procurement delays. This can make the award process for OT agreements as long as (or longer than) the award process for FAR-based contracts.[222] Action is thus required to reduce unnecessary policy-driven delay within the proposed acquisition system. Specifically, Congress must require the USSF to file an annual report with the congressional defense committees delineating all of its policies for the use of OT authority and their underlying rationale.

Such mandatory congressional reporting would improve the efficiency and effectiveness of military space acquisitions in crucial ways. First, it would incentivize action by the Chief of Space Operations and the space acquisition executive[223] to limit USSF policies for the use of OT authority to those that are truly necessary. Second, it would provide a basis for follow-on oversight hearings should Congress believe the USSF is unnecessarily reducing the speed of military space acquisitions with its internal policies. And third, such mandatory congressional reporting would motivate USSF senior leaders to create a culture that rewards intelligent risk-taking by OT agreements officers and supporting acquisition law attorneys (hereinafter collectively "space acquisition professionals"). This culture would act to reverse the existing incentive structure within the federal acquisition system that rewards risk avoidance by contracting officials.

Although congressional reporting on USSF OT policies would require legislative action to implement, such reporting is not without similar precedent. The DoD is already required by statute to report information on use of its OT

222. Moshe Schwartz et al., Cong. Rsch. Serv., R45521, Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress 16 (2019).

223. The official title of the position is "Assistant Secretary of the Air Force for Space Acquisition and Integration." John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636, 1674 (2018).

authorities, making the proposed reporting requirement a logical extension of existing law.[224] Since passage of the Fiscal Year 2019 National Defense Authorization Act (NDAA), the Secretary of Defense (SecDef) has been required to submit recurring annual reports to the congressional defense committees detailing, for each OT agreement: all non-U.S. government participants, their dates of participation, the amount of the transaction, and "other related matters the [SecDef] deems appropriate."[225] Furthermore, similar congressional reporting requirements have existed in recent years for the DoD—including a requirement for the SecDef to submit a report evaluating proposals for modifying or expanding the DoD's OT authorities.[226] Accordingly, an annual report detailing USSF OT policies would not only improve military space acquisitions but be consistent with current and past congressional reporting requirements.

When instituting and executing this reporting requirement, however, it will be important for decisionmakers to understand that not all OT policies are superfluous. Some are valued added or even necessary—making their inclusion in an OT-focused acquisition system appropriate. Consider, for example, three recommendations made by the DoD Inspector General during a recent audit of OT consortia: (1) establish requirements to vet consortium members and identify which members meet applicable security requirements for future opportunities, (2) coordinate with the General Services Administration to more accurately capture data related to the use of consortia, and (3) ensure contracting personnel maintain documentation for major decisions affecting the award of OT agreements to specific consortium members.[227] Following these recommendations requires adding policies for the use of OT authority, but for sound reasons: to, respectively, promote operational security, gain necessary oversight over the number and dollar value of OT agreements awarded, and memorialize the rationale of OT agreements officers in the event of a future protest.[228] Such value-added OT policies are in stark contrast to others, like heightened approval levels and mandated use of FAR source selection procedures, which seek to mitigate risk but only slow the acquisition process and communicate institutional distrust of lower-level contracting officials.[229] For the proposed acquisition system to be effective, the USSF must avoid enacting policies with compliance burdens that outweigh associated benefits for military space acquisitions, while enacting others that strike the appropriate

224. *Id.*

225. *See* Inspector Gen., U.S. Dep't of Def., Audit of Other Transactions Awarded Through Consortiums 11 (2021) (describing the referenced congressional reporting requirement for the DoD's use of OT agreements for Fiscal Year 2019 through Fiscal Year 2021); National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 825(b), 135 Stat. 1541, 1831 (2021) (mandating the same congressional reporting for the DoD's use of OT agreements as a recurring annual reporting requirement).

226. *See* National Defense Authorization Act for Fiscal Year 2022 § 824.

227. Inspector Gen., *supra* note 225, at 29–32.

228. *Id.* at 29–33.

229. *See* Off. of Under Sec'y of Def. for Acquisition & Sustainment, U.S. Dep't of Def., Other Transactions Guide 38–39 (2018) [hereinafter OT Guide].

balance. Instituting a congressional reporting requirement on USSF OT policies would enable success in this endeavor.

2. Meaningfully Developing Space Acquisition Professionals

In addition to streamlining OT policies, the USSF must develop "experienced and capable government representatives" to advance U.S. interests in the proposed acquisition system.[230] Because complex topics like IP rights, CAS, and contract structure are fully negotiable in OT acquisitions, the U.S. government is at increased risk of not fulfilling its requirements when it uses OT authority in lieu of FAR-based procurement.[231] This increased risk is further magnified with the use of OT consortia due to their varying structures and the greater number of private entities involved.[232] Hence, the exclusive use of OT authority for military space acquisitions will require space acquisition professionals to possess a level of business acumen and judgment that enables them to "operate in the relatively unstructured environment of OTs."[233] To build these essential capabilities, the USSF must meaningfully develop current and future space acquisition professionals through robust training programs and industry internships.

Meaningful development of these professionals begins with embracing an innovative approach to training. Rather than working within the traditional framework of military schoolhouses, the USSF must partner with academia to create an intensive training program for space acquisition professionals.[234] This training program should cover (1) the panoply of issues negotiable in each OT agreement (e.g., IP rights, CAS, and contract structure), (2) advanced negotiation strategies, and (3) techniques for effectively drafting (or reviewing) OT agreements. Moreover, it should feature an instructor cadre of leading government procurement professors from academia and experienced space acquisition professionals to enable both academic study and application of training material through real-world case studies. Finally, it should be located at a prominent civilian academic institution with an established government procurement program to ensure space acquisition professionals benefit from the highest quality learning experience available.

Utilizing such a training program would yield several important benefits. On a foundational level, it would obviate the need to invest extensive time and resources towards creating a USSF schoolhouse for space acquisition professionals. In addition, it would provide these professionals with critical

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230. *See* Schwartz et al., *supra* note 222, at 17.

231. *See id.* at 16–17.

232. *See generally* Inspector Gen., *supra* note 225, at 19–20 (describing the need to train DoD agreements officers on how to effectively utilize OT authority with complex consortium agreements).

233. *See* OT Guide, *supra* note 229.

234. All USSF OT agreements officers and supporting acquisition law attorneys—military and civilian—should be required to attend this program. Attendance should also be made available to USSF program managers, who could similarly benefit from the instruction provided and leverage lessons learned to improve the effectiveness of military space acquisitions.

exposure to the commercial space industry. This is because government procurement programs within academia actively foster collaboration between the private sector and the U.S. government through industry discussion events, conferences, and related functions, at which issues of concern and potential solutions are openly discussed.[235] These engagement opportunities could be extended to the commercial space industry, thereby exposing space acquisition professionals to the concerns of the industry's non-traditional suppliers impacting military space acquisitions.[236] Finally, the proposed training program would produce highly capable space acquisition professionals. Learning from the best in both academia and the USSF acquisition community would enable these professionals to develop the requisite knowledge and practical skills to successfully operate within an OT-focused acquisition system. Military schoolhouses, which cannot leverage resources from academia or foster collaboration with industry to the same degree, would struggle to build these essential capabilities.

Partnering with academia to train space acquisition professionals would also align with the USSF's own revised approach to professional military education (PME). In a break with its fellow military service branches, the USSF has announced that it will partner with a civilian academic institution to provide PME programs for its mid- and senior-level officers, rather than creating a USSF schoolhouse, or utilizing an existing military schoolhouse, to provide such education.[237] These PME programs will be housed within the School of Advanced International Studies (SAIS) at Johns Hopkins University (JHU), and will occur at JHU's satellite campus in Washington D.C.[238] In addition, they will feature instructors from both SAIS and the USAF's schoolhouse (Air University), who will teach "multi-disciplinary, strategy-focused offerings in ethics and leadership, international security, and international public policy."[239] By electing to partner with a prominent academic institution to conduct officer PME programs, the USSF has recognized the value of leveraging resources from within academia to educate and develop its officer corps. It would be wise to execute a similar strategy for training and developing its space acquisition professionals, whose performance will greatly influence whether the United States prevails in Space Race 2.0.

Beyond an innovative approach to training, meaningful development of space acquisition professionals requires internships with the commercial space

235. *See, e.g.*, *The Greg and Camille Baroni Center for Government Contracting*, Geo. Mason Univ., https://business.gmu.edu/centers/center-government-contracting (last visited Dec. 14, 2022) [https://perma.cc/A9P6-C5RH].

236. The USSF should require detailed plans for the creation of such engagement opportunities prior to selecting an academic institution to host the proposed training program.

237. *Space Force to Partner with Johns Hopkins Univ.*, Sec'y of the Air Force Pub. Affs (Oct. 26, 2022), https://www.spaceforce.mil/News/Article/3199854/space-force-to-partner-with-johns-hopkins-university-sais-for-service-specific [https://perma.cc/SW2E-SUAT]. The USSF's PME programs for mid- and senior-level officers will also be made available to a select number of USSF civilians and officers from other military service branches. *Id.*

238. *Id.*

239. *Id.* at ¶ 6.

industry. These immersive experiences are critical to better understand the non-traditional suppliers that are leading the technological revolution within the space domain. They would also likely yield invaluable insights into how partnerships may be forged with the commercial space industry to develop and acquire advanced military space capabilities. Both of these knowledge areas are essential to the success of space acquisition professionals—and, by extension, the nascent USSF.

A useful starting point in developing an internship program for space acquisition professionals is the USAF's Education with Industry (EWI) program. EWI is a ten-month internship program with "top tier public and private companies" that allows a select group of mid-grade USAF officers to "embed with an industry team" and "develop the necessary competencies, skills, knowledge, and abilities" to "better partner with industry in the future."[240] An internship program for space acquisition professionals should utilize a similar construct as the USAF's EWI program—to include a similar duration, focus on gaining immersive experience, and limit on participation (to ensure reduced manning levels caused by the program do not negatively impact mission operations). However, it should also be tailored to the distinct needs of the USSF in Space Race 2.0. For example, internships should occur only with non-traditional suppliers in the commercial space industry. Additionally, work performed during internships should develop relevant skillsets such as negotiating, drafting, and reviewing contracts. Finally, implementation of the internship program should include a mandate that a certain percentage of graduates serve as instructors (for at least two years) within the aforementioned training program for space acquisition professionals. This mandate would ensure insights gained by the select number of internship participants are shared with all space acquisition professionals.

3. Achieving Career Specialization in Military Space Acquisitions

Along with streamlining OT policies and meaningfully developing space acquisition professionals, career specialization is required to effectuate the proposed acquisition system. Building institutional expertise in the use of OT authority will require space acquisition professionals to work in military space acquisitions for the duration of their careers. Although such career specialization is currently available for some space acquisition professionals, it is not available for all—a fact which will drive the need for certain force development changes.[241] The most significant of these changes will be needed for the military attorneys (known as judge advocates) providing legal advice within the proposed acquisition system. Achieving career specialization for these individuals will require organizational restructuring within the Department

240. *Education with Industry Program*, Air Force Inst. of Tech., https://www.afit.edu/CIP/page.cfm?page=1567 (last visited Oct. 28, 2022) [https://perma.cc/GBH7-H2Y8].

241. *Cf. Acquisitions*, U.S. Space Force, https://www.spaceforce.com/civilian-careers/acquisitions (last visited Mar. 12, 2023) [https://perma.cc/M6Q3-MJ2U]; *see* Brian D. Green, *Bring on the Space Marines!*, 33 AIR & SPACE L., no. 4, 2020, at 8, 10.

of the Air Force.[242] Specifically, it will require congressional action to create a USSF Judge Advocate General's (JAG) Corps.[243]

This congressional action is necessary because the USAF JAG Corps, which currently provides exclusive legal support to the USSF, utilizes a force development model for its judge advocates that discourages career specialization in specific areas of the law. USAF judge advocates are developed to become "generalists" with "broad experience . . . in the overarching legal domains of military justice, civil law, and operational law."[244] Although appropriate to develop staff judge advocates who advise commanders on issues across "the overarching legal domains,"[245] this generalist force development model is unsuitable to develop judge advocates who support the proposed acquisition system. It is also unlikely that the USAF JAG Corps would voluntarily deviate from this generalist force development model to allow a subset of its judge advocates to specialize in military space acquisitions. This is made evident by the USAF JAG Corps' past resistance to career specialization for judge advocates, including its vigorous opposition to the creation of a criminal litigation career track.[246] Accordingly, creation of a separate USSF JAG Corps is necessary to achieve career specialization for judge advocates supporting the proposed acquisition system.

Although a detailed framework for its structure is outside the scope of this article, a USSF JAG Corps should have a primary mission of supporting military space acquisitions.[247] Furthermore, it should be staffed by judge advocate and civilian attorney transfers from the USAF JAG corps to quickly develop

242. *See* U.S. Space Force, *About The United States Space Force*, https://www.spaceforce.mil/About-Us/About-Space-Force/#:~:text=The%20United%20States%20Space%20Force,the%20Department%20of%20the%20Navy [https://perma.cc/8LFA-8WEJ] (last visited March 22, 2023) ("The United States Space Force is a separate and distinct branch of the armed services, organized under the Department of the Air Force in a manner very similar to how the Marine Corps is organized under the Department of the Navy.").

243. *See* Green, *supra* note 241, at 8, 10. A USSF JAG corps should be comprised of judge advocates, civilian attorneys, and paralegals (both military and civilian). This construct reflects the need for military presence within a military organization, while also accounting for the institutional stability provided by federal civil servants. It is also consistent with the construct of existing JAG corps within the U.S. military.

244. *Id*. Of note, an exception to this development model for USAF judge advocates may be on the horizon with the recent, congressionally mandated creation of an Office of the Special Trial Counsel (OSTC) within all military departments. *See* National Defense Authorization Act for Fiscal Year 2022, §§ 851–852, 135 Stat. 1541, 1692–1695 (2021). Congress has mandated that judge advocates working within the OSTC be "well-trained, experienced, highly-skilled, and competent in handling covered offenses." *Id.* at 1695. These requirements clearly deviate from the current generalist force development model used for USAF judge advocates, and it remains to be seen whether they will cause judge advocates from across the military service branches to remain within the OSTC throughout their careers.

245. *See* Green, *supra* note 241, at 3.

246. *See* Cully Stimson, *A Career Litigation Track Is Necessary for Army and Air Force JAGS*, Daily Signal (May 12, 2016), https://www.dailysignal.com/2016/05/12/a-career-litigation-track-is-necessary-for-army-and-air-force-jags [https://perma.cc/5LEA-FSG9] (discussing the extensive congressional lobbying by the USAF, on behalf of the USAF JAG Corps, against the creation of a criminal litigation career track).

247. Such focused prioritization will likely require the USAF JAG Corps to continue providing legal support to the USSF in other areas—such as military justice (i.e., criminal law) and legal assistance.

initial operating capability. Thereafter, sustainment of a USSF JAG Corps should be accomplished using its own independent recruiting and accessions programs.[248] These programs should, to the greatest extent possible, target attorneys with relevant experience—such as those who have worked as legal advisors within the commercial space industry or as OT agreements officers within the DoD.[249] Such an approach to recruiting and accessions would increase the baseline knowledge of new USSF judge advocates and civilian attorneys supporting the proposed acquisition system. As a result, the USSF JAG Corps would be better able to meet the growing demand for legal support in Space Race 2.0.

Lastly, it bears noting that creation of a USSF JAG Corps is justified by compelling reasons other than achieving career specialization. First, it would be consistent with precedent for accommodating the legal needs of a specialized service within a military department—as seen with the existence of a Marine Corps' Judge Advocate Division within the Department of Navy.[250] Second, it would align with the USSF's responsibilities, which include "acquiring military space systems" and "developing military space professionals."[251] And third, it would comport with the emergence of space as "a new and indisputable warfighting domain" with distinct legal issues affecting military operations.[252] Legal issues like devising spacepower doctrine[253] that complies with the law of war and applying the U.N. Charter's limitations on the use of force[254] to space-based attacks are inherent to the military and thus require military legal counsel. Therefore, creation of a USSF JAG Corps under the leadership of a senior USSF judge advocate is appropriate. This organizational structure

248. Recruiting and accessions programs should exist for both judge advocate and civilian attorney positions within the USSF JAG corps.

249. Many contracting officials within the DoD are also licensed attorneys. This is particularly common within Air Force Materiel Command, the lead major command for acquisitions within the USAF. *See Air Force Materiel Command*, U.S. Dep't of the Air Force (Feb. 7, 2023), https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104481/air-force-materiel-command [https://perma.cc/T87T-6JSR].

250. *See generally* Claudette Roulo, *Why Are Marines Part of the Navy?*, U.S. Dep't of Def. (Feb. 21, 2019), https://www.defense.gov/News/Feature-Stories/story/Article/1763150/why-are-marines-part-of-the-navy [https://perma.cc/G2GE-5K59] (explaining the special, independent status of the Marines within the Department of the Navy).

251. Stephen M. McCall, Cong. Rsch. Serv., IF11495, Defense Primer: The United States Space Force 1 (Nov. 16, 2022). Other USSF responsibilities include "maturing the military doctrine for space power" and "organizing space forces to present to our Combatant Commands." *Id.*

252. *See Kendall, Brown, Raymond Tell Congress $194 Billion Budget Request Balances Risks, Quickens Transformation*, Sec'y of Air Force Pub. Affs. (Apr. 27, 2022), https://www.af.mil/News/Article-Display/Article/3012814/kendall-brown-raymond-tell-congress-194-billion-budget-request-balances-risks-q [https://perma.cc/PL7X-TFSG].

253. *See* Ashley Wright, *Space Force Releases 1st Doctrine, Defines "Spacepower" as Distinct Form of Military Power*, U.S. Space Force (Aug. 10, 2020), https://www.spaceforce.mil/News/Article/2306828/space-force-releases-1st-doctrine-defines-spacepower-as-distinct-form-of-milita [https://perma.cc/4CFF-MCKX].

254. *See* U.N. Charter, *supra* note 50.

would best meet the legal needs of the USSF and align with the structures of all other JAG Corps within the U.S. military.[255]

V. CONCLUSION

Chronic underfunding of U.S. space programs, global overreliance on capabilities from the space domain, and aggressive space militarization efforts by China and Russia have created Space Race 2.0—a race to achieve space superiority through the acquisition of cutting-edge space technology, systems, and weaponry. For the United States to prevail, Congress must equip the USSF with an acquisition system that is capable of efficiently harnessing the innovation engine of the commercial space industry to achieve U.S. security objectives in space. An OT-focused acquisition system would avoid inefficient procedures for advertising federal procurement opportunities, and largely avoid litigation-induced delays in contractor performance, which undermine the U.S. government's ability to achieve speed through its acquisition efforts. In addition, an OT-focused acquisition system would allow for flexibilities in the determination of IP rights, CAS, and contract structure that are necessary for the USSF to partner with—and leverage the innovative talents of—non-traditional suppliers in the commercial space industry. These benefits are not realized under the current FAR-based procurement system and would not be achievable with the exclusive use of MATOCs for military space acquisitions.

For this new acquisition system to be effective, however, Congress must institute mandatory congressional reporting by the USSF on its OT policies. This action is necessary to limit the USSF's enactment of superfluous OT policies, which slow acquisition speed, and to create a USSF culture that encourages intelligent risk taking in the execution of military space acquisitions. Furthermore, the USSF must meaningfully develop its space acquisition professionals through an intensive training program with academia and internships with the commercial space industry. These experiences are needed to arm space acquisition professionals with the requisite knowledge, practical skills, and insights to forge effective partnerships between the USSF and non-traditional suppliers in the commercial space industry. Finally, career specialization must be made available for all space acquisition professionals to develop institutional expertise in the use of OT authority. To ensure such specialization is available for USAF judge advocates, and to best meet the legal needs of the USSF as a warfighting organization, Congress must create a separate USSF JAG Corps. This new JAG Corps should be acquisition focused,

255. JAG Corps exist within all other U.S. military service branches: the USAF, U.S. Army, U.S. Navy, U.S. Marine Corps (referred to as the Judge Advocate Division), and U.S. Coast Guard. *See*, *e.g.*, U.S. Air Force, *A Tradition of Service: History of JAG*, https://www.airforce.com/careers/specialty-careers/jag/history [https://perma.cc/5LUU-K6K5] (last visited Mar. 22, 2023). These existing JAG Corps are all led by a senior judge advocate in the rank of General officer (or equivalent). *See id.* A similar model would be appropriate for a USSF JAG Corps.

initially comprised of judge advocate and civilian attorney transfers from the USAF JAG corps, and empowered to develop tailored recruiting and accessions programs to meet its unique workforce needs.

Failure to take these actions may cause the United States to fall further behind in Space Race 2.0 as China and Russia continue to gain military advantages in the space warfighting domain. These advantages, while significant today, may prove decisive across all warfighting domains tomorrow. As the "new high ground in modern warfare,"[256] space provides unique opportunities to degrade—and potentially defeat—the ability of adversaries to navigate or project military power in the traditional land, air, and sea warfighting domains. Although the full extent of space's impact on future wars is unknown, China's and Russia's increasing efforts to militarize space make this much clear: we would be wise to finally heed General Schriever's warning that our national security may one day depend upon our achieving space superiority.[257] Accordingly, it is imperative that the United States act now to secure its technological edge in space, which is necessary to achieve—and maintain—U.S. superiority in the most consequential warfighting domain.

256. Gleason & Hays, *supra* note 27, at 3.
257. *See* Schriever, *supra* note 1.

CONFRONTING COLLUSION WITH *QUI TAM*: WHY THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION SHOULD BOLSTER ITS LENIENCY PROGRAM WITH A WHISTLEBLOWER PROVISION

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ABSTRACT

Collusion permeates United States government procurement despite the strict statutory regime in place to confront it, specifically the Department of Justice (DoJ)Antitrust Division's Leniency Program. The United States should look to other existing statutory regimes that have been successful in detecting and prosecuting other actions to supplement the Leniency Program, such as the False Claims Act (FCA). By incorporating a whistleblower program like that of the FCA, complete with a monetary incentive, the DoJ can increase instances of detecting and prosecuting collusion in government contracts by simply modifying existing centers within the Antitrust Division to process whistleblower information and *qui tam* suits.

I. INTRODUCTION

In June 2021, a jury returned indictments against those intertwined in an international conspiracy involving a multi-million dollar Department of Defense (DoD) contract.[1] Guilty of "agree[ing] in advance which company would win certain security services contracts, and the price that each would bid for the contracts,"[2] Seris Security NV of Belgium and its executives now face potential jail time for their non-competitive actions.[3] The Department of Justice (DoJ) ordered a fine of fifteen million dollars.[4] Collusion of this type has long plagued American consumers and the U.S. government, with cartels exploiting billions of American taxpayer dollars each year.[5] This is especially true in

1. Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Belgian Security Services Company and Three Former Executives Indicted for Bid Rigging on U.S. Department of Defense Contracts (June 30, 2021) (on file with author); *see generally* United States v. Seris Security NV, No. 1:21-cr-00443-TSC (D.D.C. filed June 29, 2021) (citing to the indictment). This case is pending before the U.S. District Court for the District of Columbia.

2. Marino Donati, *Security Firm Accused of Rigging Bids for Defence Contracts*, Supply Mgmt. (July 1, 2021), https://www.cips.org/supply-management/news/2021/july/security-firm-accused-of-rigging-bids-for-defence-contracts [https://perma.cc/9D4E-ETEX].

3. U.S. Dep't of Just., *supra* note 1. The indictments from *United States v. Seris Security NV* followed a related conspiracy case in which a similar security company, G4S Secure Solution NV's (G4S), pled guilty to fixing prices and bid rigging.

4. Donati, *supra* note 2.

5. *See* Daniel Glad, Dir. of the Procurement Collusion Strike Force, Antitrust Div., Dep't of Just., Remarks at the American Bar Association Section of Public Contract Law's Public Procurement Symposium (Oct. 13, 2021).

U.S. government contracts, in which bid rigging and price fixing greatly limit competition among contractors and increase the prices of goods and services for agencies.[6] Collusive schemes are particularly burdensome given their surreptitious nature, making them extremely difficult to detect and investigate.[7] One of the primary methods for detecting and investigating cartels is through the DoJ's Antitrust Division's Leniency Program.[8] This program is a unique government investigatory tool that encourages conspirators to come forward and report their collusive schemes.[9] What exactly is their reward for reporting? The party that comes forward first receives immunity from prosecution by the Antitrust Division, avoiding fines and jail time.[10] However, as the program currently stands, only those actually involved in the scheme can report the collusion and receive immunity.[11] In other words, innocent employees who inadvertently uncover such schemes receive no benefits. Further, conspirators who fail to come forward first face criminal conviction, fines, and treble damages among other consequences for their illegal actions.[12]

Although the Antitrust Division's Leniency Program provides an important incentive to conspirators to self-report, more can be done to address detection challenges associated with enforcement of antitrust laws. Specifically, the government should adopt a whistleblower program,[13] like that adopted by the False Claims Act (FCA),[14] to buttress the Leniency Program. Under the FCA's whistleblower program, there is a monetary incentive for individuals, called

6. *See* U.S. Dep't of Just., Preventing and Detecting Bid Rigging, Price Fixing, and Market Allocation in Post-Disaster Rebuilding Projects 2 (2015).

7. *See* Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49 Wm. L. Rev. 1621, 1626 (2008) ("[C]onspiracies are most often exposed because an actual participant in the crime steps forward and confesses. In many instances, a confession marks the first time that antitrust authorities are aware that the crime had been committed.").

8. Richard Powers, Deputy Assistant Att'y Gen., Antitrust Div., Dep't of Just., Remarks as Prepared for Delivery at the 13th International Cartel Workshop (Feb. 19, 2020).

9. Dep't of Just., Frequently Asked Questions About The Antitrust Division's Leniency Program 1 (2023) (This source provides accurate, updated information about the Leniency Program.); *see also* Dep't of Just., Frequently Asked Questions About The Antitrust Division's Leniency Program 1 (2017) (The DoJ has rescinded and replaced this policy as of April 2022. This source provides background information on the Leniency Program generally.).

10. Dep't of Just., Frequently Asked Questions About The Antitrust Division's Leniency Program 2 (2023).

11. *Id.* at 7 ("An individual who has knowledge of illegal activity, but no personal involvement in that activity, may still report it to the Division and is encouraged to do so. Such an individual does not qualify for or need the protections of individual leniency, but may qualify for whistleblower protections under the Criminal Antitrust Anti-Retaliation Act of 2019 (CAARA))."

12. *See* Robert H. Porter, *Detecting Collusion*, 26 Rev. Indus. Org. 147, 148 (2005) (discussing "Sotheby's and Christie's conspiracy to raise fees to sellers at their auction houses" and the consequences thereof).

13. *The False Claims Act*, U.S. Dep't of Just. (Jan. 14, 2021), https://www.justice.gov/civil/false-claims-act ("[T]he FCA allows private citizens to file suits on behalf of the government (called "*qui tam*" suits) against those who have defrauded the government. Private citizens who successfully bring qui tam actions may receive a portion of the government's recovery.") [https://perma.cc/VD8F-PW9S].

14. 31 U.S.C. § 3729.

relators,[15] who report fraud and file suits on behalf of the government.[16] Such a monetary incentive is available to anyone—not just those involved in the fraud itself.[17] The existing *qui tam* program has been extremely effective in uncovering fraud.[18] Therefore, an analogous monetary incentive to the whistleblower program utilized in the FCA could buttress current enforcement efforts in the Leniency Program by increasing the incentives for and ultimately the instances of reporting.[19] Individuals encountering this kind of financial incentive to report wrongdoing could assist the government by monitoring the market or their place of work and reporting any collusion they encounter, thereby helping to identify antitrust violations to the DoJ.[20] These incentives may expedite the reporting timeline, as others not involved in the antitrust activity would have the opportunity to detect collusive actions and have a stake in the matter.[21] Further, this monetary incentive would help maintain the free and fair markets to which American taxpayers have a right, namely in the government contracts space.[22] Relatedly, such an incentive would bolster trust in the fairness of the procurement process. With "roughly one out of every ten dollars of federal government spending [being] allocated to government contracting," it is imperative that the DoJ look to new solutions to increase instances of reporting collusion to save billions of taxpayer dollars.[23]

This Note will first address the issue of collusion broadly and then narrow its focus to collusion in government procurement. Next, it will discuss the existing statutory regimes and programs that confront collusion: the Sherman Act, the DoJ Leniency Program, the Procurement Collusion Strike Force (PCSF), the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), and the Criminal Antitrust Anti-Retaliation Act (CAARA). Thereafter, this Note will assess the effectiveness of the Leniency Program and show that it has not been effective enough in combating collusion. Then, this Note will analyze the FCA, explain its purpose, and suggest how the gaps in

15. *See* Press Release, Off. of Pub. Affs., Dep't of Just., Justice Department Recovers Over $2.2 Billion from False Claims Act Cases in Fiscal Year 2020 (Jan. 14, 2021) (on file with author).

16. *See* U.S. Dep't of Just, *supra* note 13.

17. *See* Leslie, *supra* note 7, at 1626.

18. Brian M. Boynton, Acting Assistant Att'y Gen., Dep't of Just., Remarks at the Federal Bar Association *Qui Tam* Conference (Feb. 17, 2021).

19. *See* William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 Loy. L.A. L. Rev. 1799, 1855 (1996).

20. *See* Robert Connolly & Kimberly Justice, *All Aboard the Whistleblower Antitrust Express*, Glob. Competition Rev. (Oct. 23, 2017), https://globalcompetitionreview.com/all-aboard-the-antitrust-whistleblower-express [https://perma.cc/F322-DEUS].

21. *Id.*; *see* Leslie, *supra* note 7, at 1626.

22. Glad, *supra* note 5 ("[T]he Antitrust Division's mission is to promote and maintain competition in the American economy—including safeguarding taxpayer money spent in public procurement. When the markets function properly—with robust competition, free of the corrosive impact of collusion—consumers benefit with lower prices, varied options, and increased innovation. The same is true for the government itself when it is a customer, as it often is, spending hundreds of billions of taxpayer dollars each year to secure goods and services.").

23. Richard Powers, Deputy Assistant Att'y Gen., Antitrust Div., Dep't of Just., Remarks at the American Bar Association Public Contract Law Section's 2019 Procurement Symposium (Oct. 25, 2019).

DoJ's approach in the Leniency Program can be filled using a whistleblower-like regime like that found within the FCA. Finally, it will present a concrete solution: the DoJ should buttress the leniency program with a monetary incentive like that of the *qui tam* program found within the FCA. This final section will specifically discuss the manner in which the DoJ should go about carrying out this solution: revamping existing call centers.

II. BACKGROUND

Full and open competition is a fundamental keystone of government contracting.[24] Unfortunately, government contracting is susceptible to collusion, which directly impedes the full and open competition upon which a successful procurement program relies. Collusion in government procurement often arises in the forms of bid rigging and price fixing.[25]

A. Why Full and Open Competition?

Conducting a full and open competition using procedures considered "competitive" by the Federal Acquisition Regulation (FAR) is essential in U.S. government procurement.[26] With limited exceptions, the FAR calls for government procurement procedures to be free and fair to ensure innovative solutions at low prices by fostering competition.[27] Congress first established the full and open competition principle within the Competition in Contracting Act (CICA) in 1984, which it enacted as a precursor to the FAR itself.[28] CICA encourages all eligible contractors to submit bids or offers[29] to increase competition and provide the best price for the U.S. government and the American people.[30] Although a number of "noncompetitive" procedures satisfy CICA, this Note will focus on illegal instances of noncompetitive behavior within government procurement—specifically collusion.[31] The FAR's emphasis on and mandate for full and open competition demonstrates the importance of minimizing corruption in the procurement process. These values, which are foundational to our entire procurement system, are under threat by widespread collusion and fraud.

B. The Issue of Collusion

Collusion is a great concern in government procurement, and the U.S. government has sought to confront it through a number of statutory schemes

24. *See* FAR 6.101.

25. *See* Dep't of Just., *supra* note 6, at 2 (discussing Antitrust Division's prevention of bid rigging and price fixing in the context of Hurricane Katrina rebuilding contracts and other related government contracts).

26. *See* FAR 6.101.

27. *See* Kate M. Manuel, Cong. Rsch. Serv., R40516, Competition in Federal Contracting: An Overview of the Legal Requirements 2 (2011).

28. *Id.* at 5.

29. The government satisfies the full and open competition requirement most commonly by conducting a procurement using sealed bids or competitive proposals. *Id.* at 8.

30. *See id.* at 2.

31. *See id.* at 7.

and enforcement programs. At its most basic level, collusion involves "firms act[ing] in unison to raise the prices that they charge their customers, or to lower the price that they pay to acquire goods or services, or to otherwise inhibit competition."[32] When such firms act in unison, it is referred to as a "cartel."[33] As demonstrated by the enactment of the Sherman Antitrust Act of 1890,[34] the U.S. government has made it a priority to confront collusion in our markets by "prohibit[ing] agreements among competitors to fix prices, rig bids, or engage in other anticompetitive activity."[35] Americans expect full and open competition with government use of its taxpayer dollars, which is why the DoJ criminally prosecutes collusive actions like price fixing and bid rigging.[36]

Collusion is extremely difficult to detect because the bad actors often go to great lengths to conceal their illegal agreements with one another from the government.[37] When entities directly communicate with one another with regard to a collusive scheme, they engage in "explicit collusion."[38] Actors can also engage in collusion without direct communication by analyzing the actions of other firms and market outcomes.[39] This is referred to as "tacit collusion."[40] The government can detect collusion using direct or indirect evidence, namely "suspicious bid patterns, travel and expense reports, telephone records, and business diary entries."[41] Some indicators of collusion include "identical . . . individual line items or lump sum bids," prices well "above the agency's estimate for the value of the contract or way above comparable bids," subcontracting agreements with losing bidders, late changes to bids, unbalanced bids, and a large margin in price between the lowest offer and other bids.[42] Generally, if patterns in procurement seem to indicate that the actors knew of one another's prices and acted thereafter, then there is cause to suspect potential collusion .[43] It is important to note that these indicators in isolation do not prove collusion outright.[44] Rather, they serve as warnings that collusion may be occurring and call for further investigation. Criminal antitrust violations can only be assessed and prosecuted when proof of an illicit agreement comes to light, requiring an explicit agreement.[45] The Antitrust Division only "prosecute[s criminal] conspiracies between horizontal competitors to fix

32. Porter, *supra* note 12, at 148.
33. *See id.*
34. *See generally* 15 U.S.C. §§ 1–38.
35. Dep't of Just., *supra* note 6, at 2.
36. *See id.* at 1.
37. *See* Porter, *supra* note 12, at 150.
38. *Id.* at 147–48.
39. *Id.* at 148.
40. *Id.*
41. Dep't of Just., *supra* note 6, at 2.
42. *Id.* at 3.
43. *Id.*
44. *Id.* at 5.
45. *See id.*

prices, rig bids, or allocate markets."[46] Horizontal competitors are those firms that compete at an equal level.[47] It is easy for these firms to collude in choosing a winner, inflate prices, and limit competition because they bid simultaneously and are often repeat players in their field. For all of these reasons, collusion is extremely difficult to detect and prosecute.

C. Collusion in Government Procurement: Bid Rigging and Price Fixing

Collusion detrimentally impacts full and open competition—a pillar of U.S. government procurement.[48] If collusion were eliminated, the U.S. government estimates that it would save billions of dollars each year.[49] For example, in 2019, the U.S. government could have saved taxpayers $117 billion in detecting and eliminating collusive schemes.[50]

Two of the main ways in which cartels exploit the American taxpayer through the U.S. government procurement system are bid rigging and price fixing.[51] Bid rigging "is an agreement among competitors as to who will be the winning bidder" in a government contract.[52] It manifests in different forms, namely through bid suppression, complementary bidding, bid rotation, and market allocation.[53] Bid suppression involves "one or more competitors agree[ing] not to bid, or withdraw a previously submitted bid, so that a designated bidder will win."[54] Typically, the non-bidder in this situation becomes a subcontractor of the winning bidder or receives a payment for their actions.[55] Subcontracting is seen frequently throughout bid rigging schemes, as it results in lucrative rewards for those individuals who agree to lose the contract.[56] Relatedly, complementary bidding involves conspirators "submit[ting] token bids which are intentionally high or which intentionally fail to meet all of the bid requirements in order to lose a contract," creating a façade of competition.[57] Next, bid rotation involves repeated bid submissions by the same actors, with each actor in the group getting their chance to win a contract in a series of contracts.[58] Lastly, customer or market allocation occurs when "co-conspirators agree to divide up customers or geographic areas" and "will not bid or will submit only complementary bids when a solicitation for bids is made by a customer or in an area not assigned to them."[59]

46. Powers, *supra* note 23.
47. Robert L. Steiner, *Vertical Competition, Horizontal Competition, and Market Power*, 53 Antitrust Bull. 251, 251 (2008).
48. *See* FAR 6.101.
49. Glad, *supra* note 5.
50. *Id.*
51. *See* Dep't of Just., *supra* note 6, at 2.
52. *Id.*
53. *Id.* at 2–3.
54. *Id.* at 3.
55. *Id.* at 2.
56. *Id.* at 3.
57. *Id.* at 2.
58. *Id.* at 3.
59. *Id.*

A notable, classic example of bid rigging is *JTC Petroleum v. Piasa Motor Fuels, Inc.* from the Seventh Circuit, in which the road contractor defendants "had agreed not to compete with one another in bidding on local government contracts . . . ."[60] The result of this agreement was a cartel, created to eliminate competition for local government contracts in the road paving industry.[61] The Court declared such cartel to be *per se* violations of the Sherman Act.[62] As *JTC Petroleum Co.* demonstrates, bid rigging is an issue that greatly impacts U.S. government contracts because dishonest bid submissions limit competition and, as a result, exorbitantly inflate the cost of goods and services, such as the essential service of road paving.[63] The false appearance of competition denies the government and American taxpayers the full benefits of vigorous competition including better quality goods/services and innovation.[64] Cartels agree to keep the prices of the goods and services they provide at a high rate, which benefits them greatly in being paid a higher than market rate over a long period of time.[65]

Like bid rigging, price fixing is a common form of collusion that influences procurement, particularly in the case of purchase orders and direct purchases.[66] Price fixing occurs when competitors "agree to raise or fix prices they will charge for their goods or services, set a minimum price that they will not sell below, or reduce or eliminate discounts."[67] Some suspicious patterns that likely implicate price fixing occur when "competitors . . . announce their price increases at the same time for the same amount or have staggered price increases with some pattern, such as appearing to take turns going first."[68] Further, if actors "reduc[e] or eliminat[e] discounts at about the same time" or if actors' prices are generally the same and refuse to budge on their prices, price fixing may be at hand.[69]

A landmark case of price fixing is *United States v. Trenton Potteries*, in which the U.S. Supreme Court found that twenty-three companies agreeing upon the sale prices for government bathroom pottery had violated the Sherman Act.[70] The agreement among the companies "to fix and maintain uniform prices for the sale of sanitary pottery" was explicit and undisputed by the parties.[71] This outcome stood despite the companies' argument that such price fixing made the prices in question reasonable.[72] This holding underscores the importance of maintaining full and open competition in government con-

60. JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 777 (7th Cir. 1999).
61. *Id.* at 779.
62. *Id.* at 777, 779.
63. *See* Dep't of Just., *supra* note 6, at 1.
64. *See* Manuel, *supra* note 27, at 2.
65. *See* Dep't of Just., *supra* note 6, at 1.
66. *Id.* at 4.
67. *Id.*
68. *Id.*
69. *Id.*
70. United States v. Trenton Potteries Co., 273 U.S. 392, 394, 396 (1927).
71. *See id.* at 394.
72. *Id.* at 396.

tracting because, even though the agreed upon prices were arguably reasonable, the companies' price fixing was nonetheless a violation of the Sherman Act.[73] This case demonstrates how easily collusion can arise in the case of government contracts, particularly in the form of price fixing, and how the government does not tolerate such illegal conduct under the Sherman Act.

III. CONFRONTING COLLUSION: EXISTING STATUTORY REGIMES AND PROGRAMS

Though more can be done to increase instances of reporting, a sizable legal framework is in place to confront collusion. The U.S. government has a longstanding robust regime for addressing the issue of collusion through the Sherman Act of 1890.[74] Currently, the DoJ's Leniency Program, which the DoJ revamped in the 1990s and updated more recently in April 2022, is the primary way that the government fights collusion.[75] The Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement, Richard A. Powers, referred to the Leniency Program as the Antitrust Division's "most important prosecutorial tool for the last [twenty-six] years, particularly when it comes to international cartels."[76] Other entities and legal frameworks that address collusion today are the PCSF, ACPERA, and CAARA.

A. The Sherman Act

The Sherman Act[77] dictates that, when a collusive scheme is detected, it is a criminal *per se* violation of the law.[78] This means that collusive actions to bid rig or price fix are automatically deemed illegal.[79] Parties cannot explain away their actions by arguing they led to reasonable prices or left competition untouched.[80] Such a harsh determination under the Sherman Act seeks to encourage actors to engage in the market fairly. Any criminal violation of the Sherman Act is a felony, subject to ten years imprisonment with "a $1 million fine for individuals and a fine of up to $100 million for corporations."[81] If found guilty of collusion, delinquent individuals and corporations "may be ordered to make restitution to the victims for all overcharges," with the victims "seek[ing] civil recovery of up to three times the amount of damages

73. *See id.* at 394.
74. 15 U.S.C. §§ 1–38.
75. Powers, *supra* note 8; Press Release, Off. of Pub. Affs., Dep't of Just., Antitrust Division Updates Its Leniency Policy and Issues Revised Plain Language Answers to Frequently Asked Questions (Apr. 4, 2022) (on file with author).
76. Press Release, Off. of Pub. Affs., Dep't of Just., Department of Justice Applauds Congressional Passage of Reauthorization of the Antitrust Criminal Penalty Enhancement and Reform Act (June 26, 2020) (on file with author).
77. 15 U.S.C. §§ 1–38.
78. Dep't of Just., *supra* note 6, at 2.
79. *See id.*
80. *See id.*
81. *Id.*

suffered."[82] Further, the statute of limitations for each form of collusion is five years.[83] The U.S. government does not take to collusion lightly and expects "competitors to set prices honestly and independently" in the bidding process and beyond.[84]

B. DoJ Leniency Program

The DoJ primarily confronts the issue of detecting collusion through the Antitrust Division's Leniency Program[85] This program is an investigatory tool that "provides non-prosecution protection to the first organization or individual to self-report its participation in a criminal conspiracy."[86] The DoJ most recently updated the program in April 2022.[87] The Leniency Program is tailored to the unique nature of collusion, which is concealed from all but the parties involved, such that the first corporation or individual to come forward to the DoJ and admit their own involvement in an antitrust crime receives leniency for the crime in question.[88]

Notably, the conspirator also must cooperate in full with the DoJ after admitting their involvement or leniency will not be granted.[89] This first come, first served nature of the Leniency Program places the bad actors in a race with one another to report collusion, putting pressure on all conspirators involved to come forward in a timely manner.[90] Under the current program, only those within the scheme itself can come forward and report the collusion to receive some form leniency or "reward."[91] In other words, "an individual who has knowledge of illegal activity, but no personal involvement in that activity, may still report it to the Division and is encouraged to do so . . . [but] does not qualify for or need the protections of individual leniency."[92] For an individual to receive leniency under the program, the DoJ cannot have already received information about the criminal activity.[93] In addition to cooperating

82. *Id.*
83. *Id.*
84. *Id.* at 1.
85. Powers, *supra* note 8.
86. Dep't of Just., *supra* note 10, at 1.
87. Dep't of Just., *supra* note 75 ("The updated policy . . . now also requires that a corporate applicant promptly self-report after discovering its wrongful conduct and undertake remedial measures to prevent reoffending.").
88. Dep't of Just., *supra* note 10, at 1. The DoJ provides this leniency if the corporation or individual satisfies all of the requirements set forth by the Program.
89. *Id.* at 11 ("Cooperation obligations extend as far as the investigation requires. An applicant should be prepared to provide all facts known that relate to the illegal activity. An applicant must timely preserve, collect, and produce to the Antitrust Division all records related to that activity, regardless of where those records are located, and provide translations if requested.").
90. *Id.* at 2 ("Organizations are in a race with their co-conspirators—including their own employees, who may seek individual leniency and have whistleblower protections if they report to the Division—to secure a marker . . . [while] individuals are in a race with one another—both others at their employer and those at other organizations participating in the conspiracy.").
91. *See id.* at 7.
92. *Id.*
93. U.S. Dep't of Just., Antitrust Division Leniency Policy and Procedures (Apr. 2022) ("Leniency will be granted to an individual reporting their participation in illegal activity before

in full with the DoJ through the investigative process, the actor must not have "coerc[ed] another party to participate in the illegal activity and clearly was not the leader in or originator of the activity."[94]

DoJ offers different immunity conditions to corporations depending upon when the DoJ has received information and begun an investigation; such conditions were updated in April 2022.[95] The DoJ grants "Type A" leniency to corporations that self-disclose "before the Antitrust Division has begun an investigation," so long as at the time of the report "the Antitrust Division has not received information about the illegal activity from any other source."[96] Companies that meet these conditions receive non-prosecution agreements, providing immunity for the company and current directors, officers, and employees. If a corporation fails these to meet these conditions, the DoJ may grant "Type B" leniency.[97] The DoJ may grant this leniency should a corporation self-disclose before the DoJ has evidence that, "in [its] sole discretion, is likely to result in a sustainable conviction against" the corporation, and that "granting leniency to the applicant would not be unfair to others."[98] Under the April 2022 update for Type B corporate leniency, the DoJ's

the Antitrust Division has begun an investigation if: 1. At the time the individual reports the illegal activity, the Antitrust Division has not received information about the illegal activity from any other source; 2. The individual reports the wrongdoing with candor and completeness and provides timely, truthful, continuing, and complete cooperation to the Antitrust Division throughout its investigation; and 3. The individual did not coerce another party to participate in the illegal activity and clearly was not the leader or originator of that activity. Any individual who does not qualify for leniency under the Individual Leniency Policy will be considered for statutory or informal immunity or a non-prosecution agreement. The Antitrust Division will make such decisions on a case-by-case basis consistent with the Principles of Federal Prosecution.").

94. *Id.*

95. *See id.*

96. *Id.* ("Leniency will be granted to an organization that reports its participation in illegal activity before the Antitrust Division has begun an investigation if: 1. At the time the applicant reports the illegal activity, the Antitrust Division has not received information about the illegal activity from any other source; 2. The applicant, upon its discovery of the illegal activity, promptly reports it to the Antitrust Division; 3. The applicant reports its participation in the illegal activity with candor and completeness and makes a confession of wrongdoing that is truly a corporate act, as opposed to isolated confessions of directors, officers, and employees; 4. The applicant provides timely, truthful, continuing, and complete cooperation to the Antitrust Division throughout its investigation; 5. The applicant uses best efforts to make restitution to injured parties, to remediate the harm caused by the illegal activity, and to improve its compliance program to mitigate the risk of engaging in future illegal activity; and 6. The applicant did not coerce another party to participate in the illegal activity and clearly was not the leader or originator of that activity."). The second step, stressing prompt reporting, and the fifth step, stressing remediation, are new requirements under the 2022 update.

97. *Id.*

98. *Id.* ("Leniency will be granted to an organization that reports its participation in illegal activity but does not meet the criteria for Type A Corporate Leniency if: 1. At the time the applicant reports the illegal activity, the Antitrust Division does not yet have evidence against the applicant that, in the Antitrust Division's sole discretion, is likely to result in a sustainable conviction against the applicant; 2. The applicant, upon its discovery of the illegal activity, promptly reports it to the Antitrust Division; 3. The applicant reports its participation in the illegal activity with candor and completeness and makes a confession of wrongdoing that is truly a corporate act, as opposed to isolated confessions of directors, officers, and employees; 4. The applicant provides timely, truthful, continuing, and complete cooperation that advances the Antitrust Division's investigation; 5. The applicant uses best efforts to make restitution to injured parties, to remediate

"non-prosecution protection [of a corporation's] current directors, officers, and employees . . . for the illegal activity" is not guaranteed.[99] These changes, implicating new reporting requirements, indicate that corporations may have difficulty earning leniency from the DoJ.[100]

C. Procurement Collusion Strike Force (PCSF)

In addition to the Leniency Program, the DoJ recently created a strike force—known as the Procurement Collision Strike Force (PCSF)—to directly confront procurement collusion.[101] This initiative "leads a coordinated national response to combat antitrust crimes and related schemes in government procurement, grant, and program funding at all levels of government—federal, state, and local."[102] Launched in 2019, the PCSF is made up of "the Antitrust Division of the U.S. [DoJ], multiple U.S. Attorneys' Offices around the country, the Federal Bureau of Investigation (FBI), and the Inspectors General for multiple Federal agencies."[103] PCSF also has an international branch called "PCSF: Global" to combat procurement collusion involving the United States and American taxpayer dollars, but occurring outside the country.[104] To illustrate the kind of work being done by PCSF, see the bid rigging scheme described, *supra*, involving a multi-million dollar DoD contract and Belgium-based security company Seris Security NV.[105] PCSF detected this bid rigging and price fixing scheme, leading the defendants to be charged with a criminal violation of the Sherman Act.[106]

D. Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA)

APCERA complements the Leniency Program by further encouraging corporations to report their illegal involvement in antitrust cartels, limiting the

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the harm caused by the illegal activity, and to improve its compliance program to mitigate the risk of engaging in future illegal activity; 6. The applicant did not coerce another party to participate in the illegal activity and clearly was not the leader or originator of that activity; and 7. The applicant is the first to qualify for leniency for the illegal activity reported and the Antitrust Division determines that granting leniency to the applicant would not be unfair to others.").

99. *See id.* ("The Antitrust Division will consider including non-prosecution protection for current directors, officers, and employees of a Type B corporate leniency applicant, for the illegal activity. Such protection is not guaranteed and is at the Antitrust Division's sole discretion. Individuals seeking non-prosecution protection as part of a Type B application must admit their wrongdoing with candor and completeness and provide timely, truthful, continuing, and complete cooperation that advances the Antitrust Division's investigation.").

100. Andre Geverola, Valarie Hays & Elizabeth Porfido, *DOJ Policy Changes Raise Antitrust Leniency Questions*, Arnold & Porter (Oct. 18, 2022), https://www.arnoldporter.com/-/media/files/perspectives/publications/2022/10/doj-policy-changes-raise-antitrust-leniency-questi.pdf [https://perma.cc/5W54-YSVP].

101. *Procurement Collusion Strike Force*, U.S. Dep't of Just., https://www.justice.gov/procurement-collusion-strike-force (last visited Feb. 4, 2023) [https://perma.cc/2H89-AYZC].

102. *Id.*

103. *Id.*

104. *Id.*

105. *See* U.S. Dep't of Just., *supra* note 1.

106. *See id.*

damages that the government can seek against the reporting entity.[107] Specifically, APCERA limits civil damages to "actual damages" so long as the company "provides . . . timely and satisfactory cooperation."[108] This limit seeks to minimize the prospect of treble damages as a deterrent for reporting collusion in addition to incentivizing cooperation among the parties involved.[109] While treble damages serve an important deterrent role in other contexts, APCERA's limitation on damages strikes a balance that both encourages increased reporting and deters illegal conduct.[110]

E. Criminal Antitrust Anti-Retaliation Act (CAARA)

Enacted in 2020 and sponsored by Senator Charles "Chuck" Grassley, CAARA provides protection to employees who report their employers for involvement in antitrust violations.[111] Specifically, it "prohibit[s] employers from taking punitive actions against whistleblowers for reporting these violations to their employer or assisting a federal government investigation into a criminal antitrust violation."[112] Importantly for government procurement in which numerous levels of contractors and subcontractors are involved in any given contract, CAARA provides protection to "employees, contractors, subcontractors and agents of the employer."[113] This Act has served as an important tool for the Antitrust Division to lift pressure off employees in reporting criminal antitrust violations for fear of termination or otherwise.[114]

IV. EFFECTIVENESS OF THE LENIENCY PROGRAM: ROOM FOR IMPROVEMENT

Through the Leniency Program, the government has made great strides in combatting collusion. However, gaps in detection and execution of the Leniency Program remain because the U.S. government loses tens of billions of dollars to government procurement-related collusion each year.[115]

A. Current Strengths of the Leniency Program: Carrot and Stick Model

The Leniency Program's system of fining and deterring conspirators, in addition to offering leniency to those who come forward, has been relatively

107. *See* Press Release, Off. of Pub. Affs., Dep't of Just., ACPERA Roundtable Executive Summary (July 18, 2019) (on file with author).
108. *Id.*
109. *Id.*
110. Press Release, Off. of Pub. Affs., Dep't of Just., Department of Justice Applauds President Trump's Authorization of the Antitrust Criminal Penalty Enhancement and Reform Permanent Extension Act (Oct. 1, 2020) (on file with author).
111. Press Release, Off. of Pub. Affs., Dep't of Just., Justice Department Applauds Passage of the Criminal Antitrust Anti-Retaliation Act (Dec. 24, 2020) (on file with author).
112. Press Release, Off. of Pub. Affs., Dep't of Just., Antitrust Division Observes National Whistleblower Appreciation Day (July 30, 2021) (on file with author).
113. *Id.*
114. *See id.*
115. Glad, *supra* note 5.

effective in preventing collusion over the last few decades.[116] The DoJ has stressed that its Leniency Program is successful because it imposes "the threat of severe and significant sanctions," creates "a heightened fear of detection," and maintains "transparent and predictable enforcement policies."[117] The DoJ employs the most "severe and significant sanctions available for cartel activity" in order to deter future collusion for individual actors.[118] These sanctions are also employed with corporations.[119] The DoJ is extremely unforgiving to those individuals who fail to report illegal antitrust activity in a timely manner.[120] For example, "the division has prosecuted executives at the highest levels of their companies after their employers missed leniency by a matter of days or even hours."[121] This time-oriented mechanism creates immense pressure to report collusion quickly.[122]

The DoJ imposes large criminal fines to "punish companies by divesting some of their ill-gotten gains," as "corporate fines should be commensurate with the harm to U.S. consumers and businesses caused by cartels."[123] Further, if fines are severe enough, companies will not be able to ignore them in entering deals. In other words, these fines "cannot easily be written off as one of 'the costs of doing business,'" forcing actors to be conscious of their actions.[124] The potential for immense fines and jail time act as "sticks" for bad actors to come forward.[125] These "sticks" complement the "carrot" of leniency: the Program offers forgiveness to those actors who self-report in addition to maintaining the threat of fines and jail time for those bad actors who fail to self-report.[126] To maintain this balance between the carrot and stick, the Antitrust Division "has steadily expanded its arsenal to include traditional criminal enforcement tools such as informants, search warrants, subpoenas, consensual monitoring, audio and video tape recordings, and, more recently, undercover agents and

116. Caron Beaton Wells, *Leniency Policies: Revolution or Religion?*, *in* Anti-Cartel Enforcement in a Contemporary Age 1 (2015).

117. Powers, *supra* note 8.

118. *Id.*

119. *Id.*

120. Dep't of Just., *supra* note 10, at 1–2 ("Organizations and individuals that fail to seek leniency and are convicted of violating the Sherman Act face substantial penalties. Individuals face significant jail time. Organizations face substantial fines—the highest to date is $925 million. And they may be placed on probation, with terms potentially including a court-ordered monitor to ensure adequate compliance in the future.").

121. *See* Powers, *supra* note 8; *see also* Dep't of Just., *supra* note 1 (demonstrating high-level executives of national security companies facing conspiracy charges).

122. Lindsey Vaala et al., *DOJ Antitrust Division's Updates to Long-Standing Leniency Program Trigger Concern*, Vinson & Elkins (Apr. 11, 2022), https://www.velaw.com/insights/doj-antitrust-divisions-updates-to-long-standing-leniency-program-trigger-concern/ ("[T]he Leniency Program creates a 'race to the government' whereby companies and individuals seek to be the first to secure a 'marker' from the government. This race is an intentional construct designed to incentivize companies to self-report violations as soon as possible.") [https://perma.cc/5VEY-DM9R].

123. Powers, *supra* note 8.

124. *Id.*

125. *See id.* (noting that "the prospect of such fines is a major incentive to companies already engaged in these crimes to seek leniency").

126. *See* Vaala et al., *supra* note 122.

wiretaps to investigate cartels."[127] While the Leniency Program's carrot and stick model of deterring bad actors and rewarding those asking for forgiveness has proved to be relatively effective, it leaves much to be desired because of the estimated tens of billions of dollars at risk in leaving government procurement-related collusion undetected.

B. The Unknown: Surreptitious Actions Leave Much to Be Detected

Despite the strides that DoJ has made using the Leniency Program and other associated statutory tools to detect collusion, cartels that take advantage of the American people and government are the status quo in government procurement—to the tune of billions of taxpayer dollars.[128] In fact, eliminating bid rigging alone would reduce the cost of government contracts costs by nearly twenty percent.[129] Because the government spends hundreds of billions of dollars on government procurement costs each year, twenty percent is no small sum.[130]

Thus, the successes of existing amnesty programs such as this are overshadowed by the monstrous unknown: "The total harm inflicted by . . . price fixing [and other forms of collusion are] impossible to estimate accurately because, by definition, successful cartels are never detected."[131] While the U.S. government estimates that it loses tens of billions of dollars to government procurement-related collusion each year,[132] it is difficult to even know the true approximation given the surreptitious nature of the crime.[133] The U.S. government must do more to detect and prosecute cartels that take advantage of our nation's government procurement regime.

V. FILLING GAPS USING SIMILAR SCHEMES

While robust statutory schemes are in place to address collusion, the U.S. government's current approach is lacking.[134] One statute with marked success in terms of reporting is 31 U.S.C. §§ 3729—the False Claims Act (FCA).[135] With the DoJ "obtain[ing] more than $5.6 billion in settlements and judgments from civil cases involving fraud and false claims against the government

127. Powers, *supra* note 8.

128. *Fighting Bid Rigging in Public Procurement*, ORG. FOR ECON. COOP. & DEV., www.oecd.org/competition/bidrigging (last visited Jan. 30, 2022) [https://perma.cc/R8E6-T8QP].

129. *Id.*

130. *See id.*

131. Leslie, *supra* note 7, at 1626.

132. ORG. FOR ECON. COOP. & DEV., *supra* note 128.

133. *See* Leslie, *supra* note 7, at 1626.

134. *See generally* Kovacic, *supra* note 19, at 1855 (arguing "*qui tam* monitoring offers potential benefits, chiefly in the form of encouraging detection of welfare-reducing behavior—such as bid-rigging and product substitution—that might escape detection by other means or would be discovered only through comparatively more expensive devices such as audits and inspections").

135. *A Guide to the Federal False Claims Act*, WHISTLEBLOWER LAW COLLABORATIVE, https://www.whistleblowerllc.com/resources/whistleblower-laws/the-federal-false-claims-act (last visited Jan. 30, 2022) [https://perma.cc/KU7V-PTQG].

in . . . 2021," this statute and its *qui tam* whistleblower provision are instructive for the DoJ in how to increase reports of collusion in the Leniency Program.[136] This Section will discuss the basics of the FCA and its *qui tam* provision in addition to demonstrating why the statute has been so successful. Additionally, the Section will touch on the whistleblower program employed by the U.S. Securities and Exchange Commission (SEC), which is separate from the FCA, but nonetheless important to the legal landscape of whistleblower programs today.

A. Basics of the FCA

Enacted in 1863 by President Lincoln during wartime fraud, the FCA makes any person who submits a false claim against the government liable for fraud.[137] Although the FCA has been amended many times since its enactment, its main purpose of preventing fraud in U.S. government procurement remains.[138] Examples of actions that constitute fraud under the FCA include "charging the government for more than was provided, fraudulently seeking a government contract, submitting a false application for a government loan, demanding payment for goods or services that do not conform to contractual or regulatory requirements, requesting payment for goods or services that are defective or of lesser quality than were contracted for, submitting a claim that falsely certifies that the defendant has complied with a law, contract term, or regulation, [and] attempting to pay the government less than is owed."[139] Those who violate the FCA are liable for treble damages and other costly civil penalties.[140] The language in the FCA is extremely broad and encompassing, applying to procurement fraud outside the United States, as long as federal funding is involved, and to criminal cases as well as civil.[141]

B. Basics of the Qui Tam *Provision*

The FCA is particularly effective because of its *qui tam* provision. Meaning "in the name of the king," *qui tam* actions allow individuals called "relators" or "whistleblowers" to directly sue those parties who have committed fraud against the government on behalf of the government.[142] What is most unique about the *qui tam* provision is who can bring a lawsuit: anyone with evidence of fraud against the government.[143] These relators who bring suit are able to

136. U.S. Dep't of Just., *supra* note 13.
137. U.S. Dep't of Just., The False Claims Act: A Primer (2011), https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf [https://perma.cc/QHD3-J8KX].
138. *The False Claims Act*, Nat'l Whistleblower Ctr., https://www.whistleblowers.org/protect-the-false-claims-act/ (last visited Feb. 4, 2023) [https://perma.cc/5F6V-S27N].
139. *False Claims Act (Qui Tam) Whistleblower FAQ*, Nat'l Whistleblower Ctr., https://www.whistleblowers.org/faq/false-claims-act-qui-tam (last visited Feb. 4, 2023) [https://perma.cc/4RA4-PWG4] (semi-colons changed to commas for clarity).
140. Nat'l Whistleblower Ctr., *supra* note 138.
141. *Id.*
142. *Id.*
143. *Id.*

earn between fifteen to thirty percent of the total recovery.[144] Informing the government about the potential fraud does not meet the DoJ's threshold for relators to earn a percentage of the recovery; the relator must file a lawsuit, and the government must recover from the suit.[145] Such a monetary incentive for whistleblowers is a large part of why the FCA has seen such success in instances of reporting. Coupled with the opportunity for anyone to report this fraud, the monetary incentive provided by the FCA allows the government to locate fraud that it would not be able to otherwise.[146]

Relators cannot bring a suit if another party has already sued using the same evidence.[147] This rule encourages relators to come forward with their suit quickly, or else they will lose out on the opportunity to earn a percentage of recovery.[148] Further, relators must bring suit "within the later of the following two time periods: [s]ix years from the date of the violation of the Act; or [t]hree years after the government knows or should have known about the violation, but in no event longer than ten years after the violation of the Act."[149] Like the "first to file" rule found within the Leniency Program, this statute of limitation rule incentivizes timely filing of suits.[150] Additionally, the FCA contains protections and provides relief for employees who are discriminated against for their actions in pursuance of a claim.[151] This protection breaks down any barriers an employee may face in deciding to file a suit on behalf of the government. The FCA and its *qui tam* provision have proven to be extremely effective in detecting fraud and serves as a model for similar programs of its kind.[152]

C. Success of the FCA and Its Qui Tam *Provision*

The FCA has recovered billions of dollars for the government. In 2020 alone, the government recovered $2.2 billion from FCA suits of which over $1.6 billion can be attributed to suits filed on behalf of the government by whistleblowers.[153] Equally impressive is that, since 1986, individuals bringing *qui tam* suits "have brought in $46.5 [billion] to the U.S. Treasury through [fiscal year] 2020. Of that amount, $7.8 [billion] was paid in rewards for whistleblowers."[154] Specifically related to government procurement, "whistleblowers [since 1986] were responsible for [seventy-two percent] of the funds recovered in contracting or procurement fraud cases."[155] With this success in mind, *qui tam* lawsuits have only been increasing in numbers, with an average of

144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. Nat'l Whistleblower Ctr., *supra* note 138.
149. *Id.*
150. *See id.*
151. *Id.*
152. *See id.*
153. *Id.*
154. *Id.*
155. *Id.*

thirteen new cases filed every week.[156] One can only imagine the impact the FCA will continue to have in the decades to come. These statistics highlight how indispensable the FCA and whistleblowers are to the U.S. government in detecting fraud.

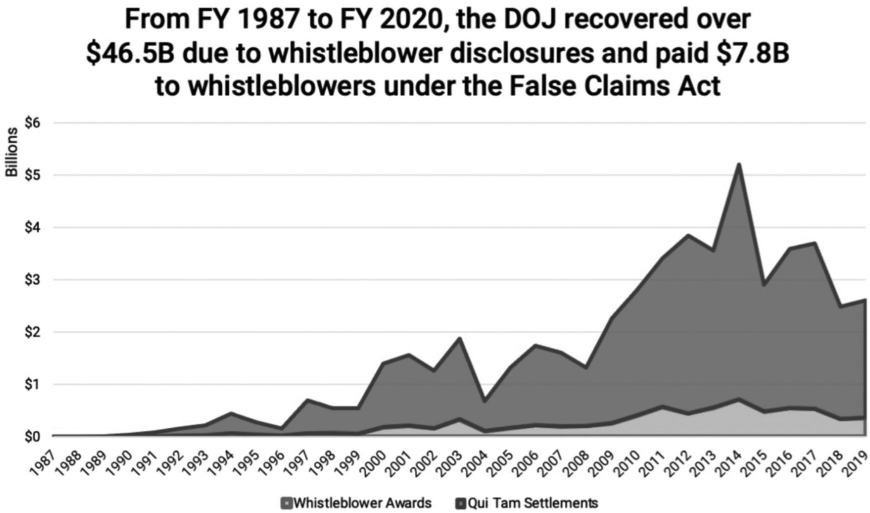

Figure 1.[157]

D. U.S. Securities and Exchange Commission's Whistleblower Program

While the FCA's whistleblower provision is the focus of this Note, the SEC has seen similar successes with its own whistleblower program. Created by Congress in 2011, this program monetarily rewards whistleblowers who report information regarding potential violations of U.S. securities laws.[158] Like the FCA's monetary reward, this reward likely acts as a catalyst for eligible whistleblowers to report information regarding violations of securities laws, helping the SEC increase its detection efforts.[159] Since its creation just over ten years ago, the SEC has issued more than $1 billion in awards to whistleblowers.[160] Despite its importance as a statutory framework in the whistleblower legal landscape today, the DoJ should not adopt the SEC's whistleblower provision for its Leniency Program because its reporting process is more complicated and burdensome than that of the FCA.[161] Specifi-

156. *Id.*
157. *Id.*
158. *See* U.S. Sec. & Exch. Comm'n, *Office of the Whistleblower: Frequently Asked Questions*, https://www.sec.gov/whistleblower/frequently-asked-questions#faq-1 (last visited Mar. 23, 2022) [https://perma.cc/4BTX-BFKG]; U.S. Sec. & Exch. Comm'n, *Whistleblower Awards over $1 Billion for Tips Resulting in Enforcement Actions*, https://www.sec.gov/page/whistleblower-100million (last visited Mar. 23, 2022) [https://perma.cc/65T7-9LKP].
159. *Office of the Whistleblower: Frequently Asked Questions*, *supra* note 158.
160. *Whistleblower Awards Over $1 Billion For Tips Resulting in Enforcement Actions*, *supra* note 158.
161. *Id.*

cally, it involves a ten-step process in which whistleblowers submit tips and the SEC intensely analyzes the tips over a long period of time.[162] For the DoJ Leniency Program, an elaborate reporting process such as this one would be inappropriate because it would likely disincentivize reporting and clog up the processing system. Notwithstanding the complicated procedural aspects of the SEC whistleblower program, its successful track record for identifying instances of fraud and abuse demonstrate the large impact DOJ Leniency Program reporting mechanisms can have.

VI. BUTTRESSING THE LENIENCY PROGRAM WITH A MONETARY INCENTIVE ANALOGOUS TO THE *QUI TAM* PROGRAM

The DoJ could detect and prosecute collusion more effectively by supplementing the Leniency Program with a *qui tam* provision that includes a monetary incentive like the FCA's *qui tam* provision. This incentive mitigates the risk whistleblowers face in coming forward with sensitive criminal information. Combining criminal and civil schemes that consider the perspectives of prospective whistleblowers will result in more favorable outcomes for the DoJ.[163] The DoJ should use the existing tip centers of Citizen Complaint Center (CCC) and PCSF to create a solution that aligns with these powerful incentives and uncover instances of corruption.

A. Identifying Gaps in the Leniency Program and How the DoJ Can Fill Them

Detecting and prosecuting collusion remains a challenge for the Antitrust Division.[164] The barriers for reporting are extremely high given the potential threats of jail time, unemployment, fees, and more. [165] Further, the DoJ has finite resources available to eradicate collusion. Only those engaged in

162. The ten-step process is as follows: (1) "Whistleblowers submit tips to the SEC"; (2) the SEC initially investigates and analyzes the tips; (3) the SEC files cases and orders penalties; (4) the SEC provides "notices of covered actions"; (5) "Whistleblowers file claims"; (6) the SEC reviews and analyzes the filed claims; (7) the SEC provides initial determinations; (8) the SEC may consider "record and reconsideration requests"; (9) the SEC conducts additional analysis; and (10) the SEC provides final orders and resolves appeals. *Id.*

163. *See* Connolly & Justice, *supra* note 20 (discussing company employees as a ripe source for whistleblowing, particularly when a financial incentive is introduced).

164. *See* Glad, *supra* note 5 ("Reducing illegal and anticompetitive collusion in procurement could save U.S. taxpayers tens of billions of dollars per year—approximately $117 billion in FY 2019 alone, based on the OECD statistic.").

165. *See* Robert Connolly, *It Is Time for an Antitrust Whistleblower Statute—Part I*, Cartel Capers (Oct. 30, 2017), http://cartelcapers.com/blog/time-antitrust-whistleblower-statute-part ("It is costly for a potential whistleblower to come forward. Any member of a cartel, even the least culpable, faces the possibility of significant jail time. In order for a low-level cartel participant to come forward, he needs to engage a qualified attorney and negotiate a non- prosecution agreement with the Antitrust Division. This is an expensive, potentially life changing decision. Long-term unemployment may well follow. Hefty attorney fees surely will. Even the most desirable whistleblower—one with no culpability at all, such as a secretary, or customer— will not ensnare herself in a cartel investigation without some means to cover significant attorney costs and reap some compensation for doing "the right [but very costly] thing.") [https://perma.cc/J88E-Y78C].

illegal antitrust acts are able to come forward to the DoJ to get leniency.[166] If there were more opportunities for reporting and prosecuting collusion, and an incentive to do so, it is likely more cartels would be exposed and removed from the procurement process.

This Note suggests that the implementation of a whistleblower bounty like the FCA could be the answer.[167] The collusive practices commonly used by cartels in government procurement, such as price fixing or bid rigging, are particularly susceptible to being exposed by whistleblowers because of the sheer number of actors—both corporations and individuals—involved in the formation and performance of government contracts.[168] Some of the biggest government contracting entities, namely Raytheon Technologies, the Boeing Company, and Lockheed Martin, employ 174,000[169] 140,000,[170] and 114,000[171] individuals, respectively. From contractors and subcontractors to executives and low-level officials, many individuals may learn of an illegal antitrust activity despite no direct involvement.[172] Under the current statutory regime, these individuals have no clear path or incentive by which to report and, thereby, support the Antitrust Division's enforcement efforts.[173]

Currently, staff, customers, and some lower ranking officials do not qualify for "leniency" under the Antitrust Division's Leniency Program because they are not involved in a given collusive scheme.[174] However, this is the Program's primary motivation, and it is only available to a limited group of people.[175] Additionally, those involved in the cartel sometimes view the rewards of price fixing or bid rigging as more valuable than coming forward to the DoJ, further concealing the cartel's actions despite the risk of fines and jail time.[176] Most significantly, no monetary reward is available for these individuals should they report the collusive acts.[177] It begs the question, what's in it for them?

Under the current statutory regime, these individuals may weigh the costs of reporting the collusive acts, such retaliation or termination, more heavily

166. *See* Dep't of Just., *supra* note 9, at 7.

167. *See* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 427, 482 ("The United States could implement a whistleblower-reward, or bounty system, for individuals who turn in cartels, and perhaps even corporations. Bounty proposals have the potential to enhance cartel detection and to destabilize cartels even more than the current leniency programs.").

168. *See generally id.*

169. Raytheon Techs., Workforce 2030 Infographic 12 (2022), https://prd-sc101-cdn.rtx.com/-/media/rtx/social-impact/our-esg-vision/2022-05/2021-rtx-esg-report.pdf [https://perma.cc/QA9Y-FTXP].

170. Boeing, *General Information*, https://www.boeing.com/company/general-info/index.page (last visited Feb. 4, 2023) [https://perma.cc/2C5T-GWF2].

171. Lockheed Martin, *About Lockheed Martin*, https://www.lockheedmartin.com/en-us/who-we-are.html (last visited Feb. 5, 2023) [https://perma.cc/U5AG-WYD9].

172. *See* Connolly & Justice, *supra* note 20.

173. *Id.* ("A whistleblower needs a financial incentive to come forward because of the huge risk and financial cost doing so may entail.").

174. *See id.*

175. *See id.*

176. *See* Connolly, *supra* note 165.

177. *See id.*

than the benefits of reporting the actions, which are virtually nonexistent. While CAARA seeks to protect these individuals from employer retaliation, the everyday employee may be unaware of this Act, afraid to challenge their employer, or may question how much protection they are afforded from the Act.[178] The desperation from the cartels to keep their actions hidden, coupled with a lack of monetary reward or other incentive for innocent insiders to report, leaves a gap in the detection and prosecution of illegal antitrust actions.[179] If more opportunity for reporting collusion existed, along with an incentive to do so, more cartels would be exposed.

B. Meshing Criminal with Civil Statutory Schemes

In buttressing the Leniency Program with a *qui tam* provision analogous to the FCA, this Note must reconcile how to mesh a civil statutory scheme with a criminal one. As discussed *supra*, the Leniency Program prosecutes criminal antitrust actions[180] while the FCA covers civil fraud actions.[181] Although this Note does not suggest complete civil enforcement of criminal laws, it proposes that the DoJ reform the Leniency Program to permit some private assistance in enforcing criminal statutes through the use of bounties.[182] By using civil remedies to address criminal actions, the DoJ can implement a whistleblower program similar to that of the FCA to see increased success in terms of reporting collusion. This Note urges further dialogue on the topic of meshing civil and criminal legal schemes, as it is one of contested debate today.[183]

CAARA hints at the notion of an antitrust whistleblower program, upholding the idea that employees who report their employers for involvement in criminal antitrust violations deserve protection.[184] In addition to this protection, the DoJ should consider a monetary reward for those who report and help to bring successful suits against criminal cartels.[185] Robert Connolly, a former Antitrust Division attorney of nearly thirty years, has spoken to this idea on his blog.[186] Connolly makes two important points regarding the valuable potential of enacting a monetary incentive feature to the Leniency Program. First, he argues that "offering a potential whistleblower reward to a single

178. *See* U.S. Dep't of Just., *supra* note 111.

179. *See* Connolly, *supra* note 165 ("There are many potential whistleblowers in virtually every price-fixing/bid rigging conspiracy. The culpability level of the many players ranges from Masters (top-level) to Sherpas (working group guy). Offering a potential whistleblower reward to a single cartel member still leaves a target rich enforcement of culpable executives to focus on.").

180. U.S. Dep't of Just., *supra* note 10, at 1.

181. U.S. Dep't of Just., *supra* note 137.

182. Connolly, *supra* note 165 ("A whistleblower statute would not replace, nor . . . undercut, leniency policies, but would add a new tool to uncover cartels that exist, and deter new cartels from forming.").

183. *See generally* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 Hastings L. J. 1325, 1325–29 (1991).

184. *See* U.S. Dep't of Just., *supra* note 111.

185. Connolly, *supra* note 165.

186. *Id.*

cartel member . . . leaves a target[-]rich enforcement of culpable executives to focus on . . . ."[187] Second, he asserts that it is costly to be a whistleblower and that a monetary incentive would serve as a motivation for many individuals to come forward.[188] This Note has touched on these ideas already, and such ideas confirm the valuable source whistleblowers present in detecting collusion in government procurement.

C. Using Existing Centers for Screening Tips and Administering Bounties

The DoJ currently uses the CCC to field public concerns regarding potential antitrust violations.[189] The Center should implement a system under which whistleblowers can report criminal antitrust activity and begin to file suit. Currently, the first "step" in using the CCC requires individuals to describe their concern.[190] The DoJ provides a list of questions to guide the individual in accurately describing a possible criminal antitrust violation.[191] The next step is to simply submit this written report by email, phone, or physical mail.[192] The CCC then makes a record of the submission, reviews the submission, and refers the submission to the Antitrust Division if the information is promising.[193] Finally, the CCC reaches out to the individual if they need more information, but the Center also notes that it may not respond to the submission at all if there is a sizeable volume of submissions.[194]

This system is the first step in creating a whistleblower program within the Leniency Program. Because the Antitrust Division already has the CCC in place to filter these submissions, it would be relatively simple to modify the program to process whistleblower tips and handle *qui tam* suits. When a whistleblower brings forward valuable information leading to criminal activity and begins to file a suit, the whistleblower should be paid a bounty[195] of a certain percentage[196] like the FCA.[197] By providing the DoJ with valuable information on criminal antitrust cartels and stating the grounds for suit,

187. *Id.*

188. *Id.*

189. *See generally Citizen Complaint Center*, U.S. Dep't of Just., https://www.justice.gov/atr/citizen-complaint-center (last visited Feb. 5, 2023) [https://perma.cc/5HCX-5NKS].

190. *Id.*

191. *Id.* ("What are the names of companies, individuals, or organizations that are involved? How do you believe they have violated the federal antitrust laws? (For details on federal antitrust laws, see Antitrust Laws and You. Can you give examples of the conduct that you believe violates the antitrust laws? If so, please provide as much detail as possible. What is the product or service affected by this conduct? Where is the product manufactured or sold, or where is the service provided? Who are the major competitors that sell the product or provide the service? What is your role in the situation in question? Who is harmed by the alleged violations? How are they harmed?").

192. *Id.*

193. *Id.*

194. *Id.*

195. Aleksandra Lamontanaro, *Bounty Hunters for Algorithmic Cartels: An Old Solution for a New Problem*, 30 Fordham Intell. Prop., Media & Ent. L. J. 1259, 1259 (2020).

196. Connolly & Justice, *supra* note 20.

197. Under the FCA, individuals who bring suit earn between fifteen to thirty percent of the DoJ's total recovery. Nat'l Whistleblower Ctr., *supra* note 138.

whistleblowers assist the DoJ with detection and prosecution of antitrust crimes and deserve a monetary reward. The CCC should provide materials to the public on how to file a suit along with details of the monetary reward. The CCC should also have a robust website complete with these materials, making them easily accessible to the public. Further, the DoJ should bolster the CCC with more employees to process such whistleblower tips and suits, given that the CCC struggles with volume already. Although providing more staffing to the CCC would impact the DoJ's budget, the DoJ would likely see ample returns in government funds by running an effective Leniency Program. The structure of this program is a promising starting point for filling collusion detection gaps.

A similar complaint center exists within the PCSF.[198] Because this Note focuses on rooting out collusion in the government procurement space, meshing the CCC with the PCSF Tip Center as well is another possible solution for creating an entity to process *qui tam* suits and complaints. Currently, the DoJ splits these centers to hear different types of complaints. Individuals only report collusion related to government procurements, grants, and funding to the PCSF.[199] All other tips go to the CCC.[200] The DoJ should view both the CCC and the PCSF Tip Center as a valuable foundation for implementation a robust whistleblower program, particularly in the pooling staffing and other resources to process complaints.

VII. CONCLUSION

Collusion is unfortunately commonplace in government procurement.[201] It is the government's duty to uphold free and fair competition in our nation's markets and government procurement procedures.[202] From bid rigging to price fixing, government contractors and the American people have experienced the negative effects of corruption from cartels for far too long.[203] While the U.S. government has taken a number of steps to address the ubiquitous nature of collusion, more can be done to detect and prosecute cartels engaging in anticompetitive criminal actions. First and importantly, the Sherman Act declares collusive schemes to be *per se* violations of the law.[204] The focus of this Note, the Antitrust Division's Leniency Program, serves as another important tool for the DoJ in detecting and prosecuting collusion.[205] This Program creates an incentive for those parties involved in illegal antitrust acts to self-report, as it provides criminal leniency to those parties who self-report their involvement,

198. *See generally PCSF Citizen Complaint*, U.S. Dep't of Just., https://www.justice.gov/atr/pcsf-citizen-complaint (last visited Feb. 5, 2023) [https://perma.cc/FLE5-WBLY].

199. *Id.*

200. *See generally* U.S. Dep't of Just., *supra* note 189.

201. *See* Glad, *supra* note 5.

202. *See* Manuel, *supra* note 27, at 8.

203. *See generally* 15 U.S.C. §§ 1–38 (codification of the Sherman Act of 1890).

204. Dep't of Just., *supra* note 6, at 2.

205. *See* Dep't of Just., *supra* note 10, at 1.

avoiding hefty fines and jail time.[206] In addition to the Leniency Program, the government also has the PCSF, ACPERA, and CAARA at its disposal. However, there are holes in the government's current approach and this Note suggests that looking to other statutory schemes may be the solution.

The FCA has been extremely successful since its enactment nearly 160 years ago, part and parcel because of its unique whistleblower feature.[207] The monetary reward earned by relators in bringing suit on behalf of the U.S. government will drive a high detection rate.[208] While a reward is only provided to relators if the suit is successful, it is the detection of fraud and the surveillance by the public that has served an invaluable tool.[209] By supplementing the DoJ leniency program with a whistleblower program, complete with a monetary incentive, individuals would increase the instances of collusion reporting. The DoJ and its statutory tools and programs alone have been the primary force for detecting and prosecuting collusion. Further opening up the financial rewards of collusion detection to prospective whistleblowers could provide the DoJ with another critical resource in the fight to detect and prosecute collusion—a detrimental force to the American economy, everyday taxpayers, and the government procurement system as a whole.

206. *Id.* at 2.
207. Nat'l Whistleblower Ctr., *supra* note 138.
208. *See* Connolly, *supra* note 165.
209. *Id.*

IS THAT PURCHASE AUTHORIZED?: HOW THE DEPARTMENT OF DEFENSE SHOULD AMEND ITS GOVERNMENT PURCHASE CARD PROGRAM TO PROACTIVELY PREVENT IMPROPER USE

*Alexander Cardinal**

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ABSTRACT

Government purchase card transactions are responsible for over $20 billion of government spending every year. Following Congress's push to combat fraud, waste, and abuse within the purchase card program, recent audits highlight continuing problems that pervade the program. This Note focuses on reforming the Department of Defense's (DoD) government purchase card program policies and procedures and suggests a slight program adjustment that trades a small portion of the program's efficiency to reduce the amount of risk that the government participants in the program incur. This Note recommends that Approving/Billing Officials pre-approve all purchases to ensure that the card is being properly used. This Note also suggests a training model that will assist the DoD in ensuring that individuals with roles in the government purchase card program have practical experience in reviewing, approving, and managing a billing account.

I. INTRODUCTION

With the ease of swiping a credit card, government employees can purchase supplies or services under an established dollar threshold without involving contracting personnel.[1] In Fiscal Year (FY) 2021, purchase card spending eclipsed twenty-one billion dollars across seventeen million transactions.[2] These frequently-used purchase cards remain an efficient way for government employees to make purchases under the micro-purchase threshold to satisfy various agency mission requirements without the need to undertake in onerous procurement processes.[3] For that reason, the General Services Administration (GSA) estimates that using purchase cards saves the government approximately $1.7 billion annually in administrative costs.[4] However,

1. *See* Garrett Hatch, Cong. Rsch. Serv., R46106, Misuse of Government Purchase Cards: Background, Legislation, and Analysis 1 (2019) [hereinafter Misuse of Government Purchase Cards]. The micro-purchase threshold is defined *infra* note 16.

2. Of the $21,118,910,592 spent with the government purchase card in FY 2021, $12,026,990,062 accounted for spending less than or equal to the micro-purchase threshold. U.S. Gen. Servs. Admin., *Purchase Card Statistics Reports for FPDS*, https://smartpay.gsa.gov/content/gsa-smartpay-purchase-card-statistics-reports-fpds (last visited Jan. 19, 2023) [https://perma.cc/5TS6-758X]. Out of the 17,336,468 transactions in FY 2021, only 223,235 were for purchases above the micro-purchase threshold. *Id.*

3. The micro-purchase threshold is defined *infra* note 16.

4. U.S. Gen. Servs. Admin., *SmartPay Benefits*, https://smartpay.gsa.gov/content/about-gsa-smartpay#sa26 (last visited Jan. 19, 2023) [https://perma.cc/7NBJ-ECXG]; *see* Misuse of Government Purchase Cards, *supra* note 1, at 2.

the purchase card program continues to be plagued with improper use, which has the potential to lead to fraud, waste, and abuse.[5]

Although there have been several reforms to the government purchase card program since its inception, cardholders continue to make improper purchases at the expense of the U.S. taxpayer.[6] Misuse of government purchase cards is often attributable to a lack of training or understanding of the program's requirements.[7] Government actors have an obligation to protect the public treasury and taxpayer dollars.[8] However, Approving/Billing Officials (A/BOs) in the Department of Defense (DoD) are currently only required to review and approve cardholder purchases when approving the monthly statement, well after the purchase card has been swiped at the vendor.[9] As billions of dollars are spent annually with purchase cards, this government program should strike a balance between efficiency, accountability, and transparency by requiring purchases to be reviewed and approved by an A/BO before a cardholder makes the purchase. This additional administrative step will allow the government to adjust its posture from reactive to proactive, which not only protects the participants in the program from the legal perils of improper use but effectuates public policy by ensuring that cardholders are buying from mandatory sources when required.

This Note first addresses the historical origins and status of the government purchase card program across the whole government, before focusing on the DoD's purchase card policies and procedures specifically to illustrate the structure and practical implications of the program. The section that follows includes three hypothetical scenarios to illustrate potential contemporary issues with the program and suggests reasons why these issues happen. The Note concludes by proposing a method to reduce improper use of the government purchase card, an explanation of how to incorporate the requirement, and an example of a program to help alleviate issues that have pervaded the purchase card program since its inception.

5. *See generally* Council of the Inspectors Gen. on Integrity and Efficiency, Report on the Government Purchase Card Initiative (2018) [hereinafter CIGIE Report].

6. *See generally* Misuse of Government Purchase Cards, *supra* note 1; Jessica Tillipman, *The Breakdown of the United States Government Purchase Card Program and Proposals for Reform*, 12 P.P.L.R. 229 (2003) [hereinafter *The Breakdown of the United States Government Purchase Card Program*].

7. *See* CIGIE Report, *supra* note 5, at 5.

8. FAR 3.101-1 establishes the manner in which government personnel should conduct themselves, especially when spending tax dollars. It states that "[g]overnment business shall be conducted in a manner above reproach . . . with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct." FAR 3.101-1.

9. *See* U.S. Dep't of Def., Department of Defense Government Charge Card Guidebook for Establishing and Managing Purchase, Travel, and Fuel Card Programs 2-10–2-11 (2020) [hereinafter DoD Government Charge Card Guidebook].

II. HISTORICAL OVERVIEW OF THE GOVERNMENT PURCHASE CARD PROGRAM: 1982 TO TODAY

The government purchase card program was developed to streamline the small-dollar purchase of supplies and services while simultaneously reducing the administrative burden on contracting entities across the federal government by putting in place a usable purchasing method to simplify small-dollar purchases.[10] However, widespread fraud, waste, and abuse of government purchase cards drove Congress to pass the Government Charge Card Abuse Prevention Act of 2012.[11]

A. What Problem Was the Government Purchase Card Program Intended to Solve?

Before the introduction of the government purchase card, the task of procuring small-dollar items, such as common tools or office supplies, was handled by the procurement office of the agency that required the supply or service.[12] The process was slow and arduous, requiring every purchase to be funneled through a single office, leading to increased administrative burdens.[13] Instead of focusing on major, large-dollar procurements, agency contracting professionals had to devote their time and effort making all the purchases for the agency.[14] This administrative burden and time commitment on agency contracting professionals was a major factor that led the government to develop the purchase card program.[15] In order to fix these issues, the government implemented the purchase card program to save time and reduce costs by allowing personnel outside of the contracting office to make purchases under the micro-purchase threshold.[16] This new program would not only help focus the agency procurement office on larger and more complex purchases, but it would also reduce, by law, the competition procedures required for other purchases.[17] With the swipe of a card, government employees at the user level could go out and buy small-dollar items needed to accomplish their agency's

10. *See* Misuse of Government Purchase Cards, *supra* note 1, at 1.

11. *See id.* at 4–5, 9.

12. *See* Jeff P. MacHarg, *Doing More with Less—Continued Expansion of the Government Purchase Card Program by Increasing the Micropurchase Threshold: A Response to Recent Articles Criticizing the Government Purchase Card Program*, 31 Pub. Cont. L.J. 293, 298 (2002) [hereinafter *Doing More with Less*].

13. *See id.*

14. *See id.*

15. *See* Misuse of Government Purchase Cards, *supra* note 1, at 1.

16. *See Doing More with Less*, *supra* note 12, at 298. A micro-purchase as "an acquisition of supplies or services using simplified acquisition procedures, the aggregate amount of which does not exceed the micro-purchase threshold." FAR 2.101. FAR 2.101 establishes the micro-purchase threshold at $10,000, implementing the Federal Acquition Regulation (FAR) Council's final rule, Increased Micro-Purchase and Simplified Acquisition Thresholds, 85 Fed. Reg. 40064 (July 2, 2020) (to be codified at 48 C.F.R. pts. 2, 3, 9, 13, 16, 22, 25, and 52).

17. *See Doing More with Less*, *supra* note 12, at 298.

mission without burdening contracting officers and their teams in the agency procurement office.[18]

B. Creation and Implementation of the Government Purchase Card Program

During the 1980s, the U.S. government began devising ways to reduce administrative burdens related to small-dollar purchases. This started in 1982, with the Reagan administration's issuance of Executive Order (EO) 12352, which specifically directed executive agencies to "[e]stablish programs to reduce administrative costs and other burdens which the procurement function imposes on the Federal Government and the private sector."[19] Following the EO, several agencies participated in the Department of Commerce's pilot program, which evaluated the feasibility of allowing non-procurement personnel to acquire goods and services with commercial credit cards.[20] The success of the pilot program led the Office of Management and Budget (OMB) to request the GSA to manage and expand the availability of government purchases cards throughout the executive agencies.[21]

However, the expected widespread use of the GSA's purchase card program failed to materialize.[22] This lack of expansion led the Clinton administration to establish the National Performance Review (NPR) in 1993 to conduct a six-month review of government procedures and identify ways to improve efficiency and implement cost-savings throughout government operations.[23] The NPR published a separate procurement-specific report where it estimated that the government would realize annual savings of $180 million in administrative costs if the purchase card was used in half of the simplified acquisitions going forward.[24] In the same report, the NPR recommended that the Federal Acquisition Regulation (FAR) be amended to promote the use of government credit cards to make small-dollar purchases.[25]

18. *See id.*

19. Exec. Order No. 12352, 47 Fed. Reg. 12,125 (Mar. 22, 1982); *see also* Misuse of Government Purchase Cards, *supra* note 1, at 1; Neil S. Whiteman, *Charging Ahead: Has the Government Purchase Card Exceeded Its Limit?*, 30 Pub. Cont. L.J. 403, 407 (2001) [hereinafter *Charging Ahead*].

20. *See* Gen. Acct. Off., GAO/NSIAD-96-138, Acquisition Reform: Purchase Card Use Cuts Procurement Costs, Improves Efficiency 2–3 (1996); *see also* Misuse of Government Purchase Cards, *supra* note 1, at 1; *Charging Ahead*, *supra* note 19, at 408; *The Breakdown of the United States Government Purchase Card Program*, *supra* note 6, at 231; Mahendra Gupta & Richard J. Palmer, *A Brief History and Review of Purchasing Card Use by the U.S. Government: 1990-2005*, 8 J. of Pub. Procurement 174, 178 (2008) [hereinafter *A Brief History and Review of Purchasing Card Use*].

21. *See* Misuse of Government Purchase Cards, *supra* note 1, at 1 (citing Gen. Acct. Off., GAO/NSIAD-96-138, Acquisition Reform: Purchase Card Use Cuts Procurement Costs, Improves Efficiency 2–3 (1996)).

22. *Id.* (citing Ass'n of Gov't Accts., The Federal Purchase Card: Use, Policy and Best Practice 5 (2006)).

23. *Id.* (citing Al Gore & The NPR, From Red Tape to Results: Creating a Government That Works Better & Costs Less (1993)).

24. *Id.*

25. *Id.*

The NPR recommendations sparked reform efforts in both the legislative and executive branches.[26] Congress wasted no time by implementing, within a year of the review, several of the NPR's purchase card program recommendations by passing the Federal Acquisition Streamlining Act (FASA).[27] Among other things, FASA established and set the micro-purchase threshold at $2,500.[28] If the cardholder views the purchase as reasonable and under the established threshold, the purchase card allowed them to skip the lengthy competition requirements and acquire the needed supply or service immediately with the swipe of a credit card.[29] Ultimately, these streamlined methods lowered the administrative burdens on procurement officials that were associated with acquiring small-dollar goods and services, allowing them to focus their efforts on more complex contracts.[30]

The Clinton administration followed Congress's lead by issuing EO 12931 in 1994 to implement the NPR's recommendations.[31] The EO required agencies to increase use of government purchase cards and to delegate the micro-purchase authority down to the end-user level, allowing the personnel needing the supplies or services to use the purchase card to quickly and efficiently make the purchase instead of waiting for the contracting activity to procure the requirement.[32] Also in 1994, the FAR Council[33] amended the FAR to establish the purchase card as the preferred method for micro-purchases.[34]

Agency compliance with these reforms led to a proliferation of government purchase card use between FY 1993 and 2011.[35] The amount of money spent with government purchase cards increased from $527 million in 1993 to $19.5 billion in 2011.[36] The flexibility of the purchase card allowed (and continues to

26. *Id.* at 1–2.

27. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243; Misuse of Government Purchase Cards, *supra* note 1, at 2.

28. *See* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243; The National Defense Authorization Act (NDAA) for FY 2018 raised the current simplified acquisition threshold to $250,000 and raised the current micro-purchase threshold to $10,000. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, §§ 805–06, 131 Stat. 1456 (2017); Misuse of Government Purchase Cards, *supra* note 1, at 2; *A Brief History and Review of Purchasing Card Use*, *supra* note 20, at 179.

29. Misuse of Government Purchase Cards, *supra* note 1, at 2.

30. *See Doing More with Less*, *supra* note 12, at 298–99.

31. *See* Misuse of Government Purchase Cards, *supra* note 1, at 2 (citing Exec. Order No. 12931, 59 Fed. Reg. 52,387 (Oct. 17, 1994)).

32. *Id.*; *Doing More with Less*, *supra* note 12, at 298.

33. The FAR Council is the regulatory body established to "ensure that procurement regulations, promulgated by executive agencies, are consistent with the Federal Acquisition Regulation (FAR)." U.S. Gen. Servs. Admin., *About the FAR Council*, https://www.acquisition.gov/far-council (last visited Jan. 19, 2023) [https://perma.cc/BK8J-W3LS]. The Council is responsible for managing, coordinating, controlling, and monitoring "the maintenance and issuance of changes in the FAR." *Id.*

34. FAR 13.201(b) ("The Governmentwide commercial purchase card shall be the preferred method to purchase and to pay for micro-purchases."); Misuse of Government Purchase Cards, *supra* note 1, at 2.

35. Misuse of Government Purchase Cards, *supra* note 1, at 2.

36. *See id.* (citing U.S. Gov't Accountability Off., GAO-01-119, Small Business: Trends in Procurement in the 1990s 21 (2001); U.S. Gen. Servs. Admin., Sales, Transactions, and

allow) cardholders to purchase necessary, mission-essential supplies and services rapidly and effectively from a vendor with the swipe of a credit card.[37]

C. *Fraud, Waste, and Abuse and the Government Charge Card Abuse Prevention Act of 2012 and Beyond*

During the early years of the federal government's use of the purchase card program, there were few controls placed over purchases made by cardholders.[38] The ease and convenience of making micro-purchases with a government credit card, combined with the lack of adequate controls over the program, led to widespread fraud, waste, and abuse of taxpayer dollars.[39] The government responded to these issues throughout the 2000s and early 2010s by initiating audits of purchase card programs conducted by the General Accounting Office (GAO) and agency inspectors general (IGs) across the executive branch.[40]

These audits identified several cases where cardholders wasted taxpayer dollars by severely abusing the government purchase card.[41] Government purchasers were using their cards to purchase personal items, such as jewelry and clothing.[42] This abuse was compounded by agency inability to properly document and account for cardholder purchases.[43] Audits showed that government purchase cards were used without being properly accounted for in agency property books and many items went missing.[44]

The audits also identified that cardholders were not making purchases from statutorily-mandated sources of supplies and services.[45] Instead of buying supplies or services from Federal Prison Industries, Inc. (FPI) or AbilityOne,[46] cardholders were buying from commercial sources, including high-end commercial sources.[47]

Account Holder Data (FY 2009 - September 2022), https://smartpay.gsa.gov/content/sales-transactions-account-holder-data [https://perma.cc/52PU-REHN].

37. Misuse of Government Purchase Cards, *supra* note 1, at 2.

38. *See generally The Breakdown of the United States Government Purchase Card Program*, *supra* note 6.

39. *The Breakdown of the United States Government Purchase Card Program*, *supra* note 6, at 234.

40. *See id.*; Misuse of Government Purchase Cards, *supra* note 1, at 4. The General Accounting Office officially changed its name to the Government Accountability Office in 2004. GAO Human Capital Reform Act of 2004, Pub. L. 108-271, § 8(a), 118 Stat. 811.

41. *The Breakdown of the United States Government Purchase Card Program*, *supra* note 6, at 234.

42. Misuse of Government Purchase Cards, *supra* note 1, at 4–5.

43. *The Breakdown of the United States Government Purchase Card Program*, *supra* note 6, at 235.

44. *Id.*

45. *Id.* at 235–36.

46. FPI is a federal correctional program designed to prepare inmates for their release from prison by helping them acquire vocational skills. Unicor, *FPI Inmate Program*, https://www.unicor.gov/About_FPI_Programs.aspx (last visited Jan. 19, 2023) [https://perma.cc/4VDA-ZT2E]. The AbilityOne Program "provide[s] employment opportunities for people who are blind or have significant disabilities in the manufacture and delivery or products and service to the Federal Government." U.S. AbilityOne Comm'n, *AbilityOne Program Fact Sheet*, https://www.abilityone.gov/media_room/documents/2019_AbilityOne_Fact_Sheet_v20190807.pdf (last visited Jan. 19, 2023) [https://perma.cc/J3WJ-U3YE].

47. *The Breakdown of the United States Government Purchase Card Program*, *supra* note 6, at 235; FAR 8.704 prescribes mandatory purchase priorities for both supplies and services. Supplies: (1) Federal Prison Industries, Inc.; (2) AbilityOne participating nonprofit agencies; and

Auditors also identified that cardholders were "splitting" purchases to get around the micro-purchase threshold.[48] A split purchase occurs when a requirement is separated into smaller purchases to keep the transactions under the micro-purchase threshold or circumvent formal contracting and competition requirements.[49] This practice violates the FAR and is considered an unauthorized purchase because the entire requirement exceeds the cardholder's authorized limit.[50]

Congress reacted to these issues by passing the Government Charge Card Abuse Prevention Act of 2012 to place internal controls and reporting requirements regarding the government purchase card program.[51] The Act implemented different provisions for civilian agencies and the DoD, but each functionally shares the same requirements.[52] The Act requires that "[t]he executive agency uses effective systems, techniques, and technologies to prevent or identify illegal, improper, or erroneous purchases."[53] The Act specifically requires cardholders to reconcile the purchases on their card statements with receipts and supporting documentation.[54] It also requires that those involved in the purchase card program be appropriately trained on how to properly use the purchase card.[55] Additionally, the Act requires the agency IG to assess its agency's purchase card program to "identify and analyze risks of illegal, improper, or erroneous purchases" to establish "the scope, frequency, and number of periodic audits."[56] The IG is also required to audit purchase card transactions as needed.[57]

Since the implementation of the Government Charge Card Abuse Prevention Act, the GAO and the Council of the Inspectors General on Integrity and Efficiency (CIGIE) issued separate reports assessing agency compliance

(3) Commercial Services. Services: (1) AbilityOne participating nonprofit agencies; and (2) Federal Prison Industries, Inc., or commercial sources. FAR 8.704; FAR 8.605 provides the following exceptions to the requirement to use Federal Prison Industries to purchase supplies if "[t]he contracting officer makes a determination that the FPI item of supply is not comparable to supplies available from the private sector that best meet the Government's needs in terms of price, quality, and time of delivery"; "[p]ublic exigency requires immediate delivery or performance; "[s]uitable used or excess supplies are available; the supplies are acquired and used outside the United States; [a]cquiring listed items totaling $3,500 or less; [a]cquiring items that FPI offers exclusively on a competitive (non-mandatory) basis, as identified in the FPI Schedule; or [a]cquiring services." FAR 8.605.

48. *See* Misuse of Government Purchase Cards, *supra* note 1, at 14.

49. *See id.*; *see also* U.S. Army Med. Rsch. and Dev. Command, Government Purchase Card Standard Operating Procedures 11 (2020), https://www.usamraa.army.mil/Shared%20Documents/GPC%20SOP.pdf [https://perma.cc/K3HP-5CRS].

50. FAR 1.603-3; FAR 13.003(c)(2).

51. *See* Misuse of Government Purchase Cards, *supra* note 1, at 9 (citing Gov't Purchase Card Prevention Act of 2012, Pub. L. No. 112-194, 126 Stat. 1445).

52. *See id*. The requirement for the civilian agencies is codified at 41 U.S.C. § 1909 and the requirement for the DoD is codified at 10 U.S.C. § 4754 (renumbered from 10 U.S.C. § 2784 on Jan. 3, 2023).

53. 41 U.S.C. § 1909(a)(11); 10 U.S.C. § 4754(b)(11).

54. 41 U.S.C. § 1909(a)(3); 10 U.S.C. § 4754(b)(3)(A).

55. 41 U.S.C. § 1909(a)(9); 10 U.S.C. § 4754(b)(9).

56. 41 U.S.C. § 1909(d); 10 U.S.C. § 4754(b)(14).

57. 41 U.S.C. § 1909(d); 10 U.S.C. § 4754(b)(15).

with the Act.[58] The CIGIE report was a compilation of FY 2017 purchase data audits from twenty agency IG reports.[59] The IGs sampled 1255 "high risk" transactions and issued and sent reports to CIGIE.[60] 501 of these transactions did not comply with government purchase card policies.[61] These IG reports did not find evidence of fraudulent behavior, but they did identify:

> [W]eaknesses in certain areas—such as policy, monitoring, and training—that reduced program efficiency and increased the risk of unauthorized purchases on Government purchase cards. The [Office of Inspectors General] found that agencies' cardholders need additional training in properly using their cards; agencies need to develop additional policies and procedures for the cards; and approving officials need to better review transactions.[62]

The policy, monitoring, and training issues identified in the CIGIE report persist to this day.

III. THE DOD'S GOVERNMENT PURCHASE CARD PROGRAM

Understanding the regulatory background behind the establishment and implementation of the DoD's government purchase card program is critical to analyzing the program and identifying ways to improve it. As the following sections will demonstrate, the FAR, Defense Acquisition Regulation Supplement (DFARS), Appendix B of OMB Circular A-123, and the establish, operate, and oversee the government purchase card program in the DoD.[63]

A. Requirements of the FAR and DFARS

The FAR only provides general guidance on the rules and requirements of the government purchase card program. As discussed earlier, the FAR establishes a preference for purchases made under the micro-purchase threshold to be made with the government purchase card.[64] One might expect to find detailed guidance on the government purchase card program at FAR 13.301, but they would be disappointed to find that the FAR only touches on the program at a macro level.[65] This FAR subpart authorizes contracting officers and cardholders authorized by FAR 1.603-3 to use the government purchase card to buy

58. Misuse of Government Purchase Cards, *supra* note 1, at 11; *see generally* U.S. Gov't Accountability Off., GAO-17-276, Government Purchase Cards: Little Evidence of Potential Fraud Found in Small Purchases, but Documentation Issues Exist (2017).

59. CIGIE Report, *supra* note 5, at 11; Misuse of Government Purchase Cards, *supra* note 1, at 11–12.

60. CIGIE Report, *supra* note 5, at 5; Misuse of Government Purchase Cards, *supra* note 1, at 11–12.

61. CIGIE Report, *supra* note 5, at 5; Misuse of Government Purchase Cards, *supra* note 1, at 11–12.

62. CIGIE Report, *supra* note 5, at i, 5.

63. *See* FAR 13.301; DFARS 213.301; DFARS PGI 213.301; Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Circular No. A-123 App. B, A Risk Management Framework for Government Charge Card Programs, (2019) [hereinafter OMB Circular No. A-123 App. B]; DoD Government Charge Card Guidebook, *supra* note 9.

64. FAR 13.201(b); *see also supra* note 16.

65. *See* FAR 13.301.

supplies, services, and construction.[66] The FAR then requires agencies using government purchase cards to "establish procedures for use and control of the card."[67] The only other guidance the FAR provides agencies in using the purchase card program is that the cards should not be limited to micro-purchases, but should be used to "[p]lace a task or delivery order" when authorized and to pay for contracts where the contractor agrees to accept the purchase card as payment.[68] The FAR provides a regulatory framework for the government purchase card but passes the intricacies of establishing, operating, and overseeing the program to each individual agency.[69]

The DFARS does not provide much more guidance than the FAR to demystify the rules regarding the government purchase card program. DFARS 213.301 instructs the reader to "[f]ollow the procedures at PGI [(Procedures, Guidance, and Information)] 213.301 for authorizing, establishing, and operating a Governmentwide commercial purchase card program."[70] Despite the preceding guidance, neither DFARS 213.301 nor DFARS PGI 213.301 provide any guidance on how to establish or manage a government purchase card program.[71] Both regulations direct those looking for specific guidance on the government purchase card program to the "Department of Defense Government Charge Card Guidebook for Establishing and Managing Purchase, Travel, and Fuel Card Programs."[72] While the DFARS and DFARS PGI do not provide any guidance on how to establish, operate, or oversee the government purchase card program, they both legitimize the Government Charge Card Guidebook as the primary purchase card authority within the DoD.[73]

B. Requirements of Appendix B of OMB Circular A-123

While the FAR and DFARS provide general guidelines regarding the government purchase card program, the Government Charge Card Abuse Prevention Act of 2012 required the OMB to provide guidance on implementation of the Act's requirements.[74] The OMB issued that guidance within Appendix B

66. FAR 13.301(a). The requirements of FAR 1.603-3 will be discussed *infra* Part III, Section C.
67. FAR 13.301(b).
68. FAR 13.301(b)–(c).
69. FAR 13.301(b).
70. DFARS 213.301.
71. *See id.*; DFARS PGI 213.301.
72. DFARS 213.301(5) ("Guidance on DoD purchase . . . card program [sic] is available online in the "Department of Defense Government Charge Card Guidebook for Establishing and Managing, Travel, and Fuel Card Programs" at https://www.acq.osd.mil/dpap/pdi/pc/policy_documents.html.") The hyperlink currently in the DFARS no longer works and redirects to https://www.acq.osd.mil/asda/dpc/ce/pc/docs-guides.html.; DFARS PGI 213.301(2) ("Further guidance regarding establishment, operation, and oversight of Governmentwide commercial purchase card programs can be found in the "Department of Defense Government Charge Card Guidebook for Establishing and Managing, Travel, and Fuel Card Programs" at https://www.acq.osd.mil/dpap/pdi/pc/policy_documents.html."). The hyperlink currently in the DFARS PGI no longer works and redirects to https://www.acq.osd.mil/asda/dpc/ce/pc/docs-guides.html; *see also* DoD Government Charge Card Guidebook, *supra* note 9.
73. DFARS 213.301(5); DFARS PGI 213.301(2).
74. 41 U.S.C. § 1909(b).

of the OMB Circular No. A-123.[75] The purpose of Appendix B is to establish baseline requirements for all executive agency government purchase card programs.[76] Before becoming a stakeholder in the purchase card program, personnel must complete all required training which currently consists of one online course that teaches a general overview of roles and responsibilities.[77] The cardholder must reconcile their purchases with the monthly statement, and the approving official must approve those transactions no later than thirty days after the billing cycle ends.[78] These guidelines require the agency to develop a Charge Card Management Program to properly implement the guidance in Appendix B and update the program within a year of any changes in the law or every two years unless needed based on findings from an IG report.[79] Appendix B also requires that purchases made with the purchase card are not charged state sales tax.[80] The guidance continues by requiring the agency to identify purchases as government property and properly account for them by using agency procedures.[81]

Appendix B recommends some best practices regarding the type of documentation that should accompany a purchase.[82] For example, it recommends that cardholders should document purchases if their agency procedures do not require written requests or pre-approval of purchases.[83] Appendix B continues by stating that policy should require approval prior to purchase when a cardholder makes a purchase without a request.[84]

C. Requirements of the DoD Government Charge Card Guidebook

The DoD Government Charge Card Guidebook satisfies the Charge Card Management Program requirement from Appendix B.[85] The policies and procedures set forth are used by contracting activities within the DoD to establish and maintain their specific government purchase card programs.[86] One of these critical management controls is a requirement to review all billing accounts and their associated cards at least once a year.[87] The Guidebook requires personnel involved in the purchase program to complete one online course, "CLG 0010: DoD Governmentwide Commercial Purchase Card Overview," developed by the Defense Acquisition University.[88] It describes

75. *See generally* OMB Circular No. A-123 App. B, *supra* note 63.
76. *Id.* at 1.
77. *Id.* at 7; DoD Government Charge Card Guidebook, *supra* note 9, at 2-14.
78. OMB Circular No. A-123 App. B, *supra* note 63, at 7.
79. *Id.* at 18.
80. *Id.* at 39.
81. *Id.* at 46.
82. *Id.* at 9.
83. *Id*.
84. OMB Circular No. A-123 App. B, *supra* note 63, at 9.
85. DoD Government Charge Card Guidebook, *supra* note 9, at 2–7.
86. *Id*. at 2-3 to 2-4.
87. *Id*. at 2-6.
88. *Id.* at 2-14; CLG 010 replaced CLG 001 in 2020. Def. Acquisition Univ., CLG 0010 DoD Governmentwide Commercial Purchase Card Overview, https://icatalog.dau.edu/mobile/CLModuleDetails.aspx?id=12372 (last visited Jan. 19, 2023) [https://perma.cc/9ULB-RK8Q];

the different prohibited purchases that cardholders are unauthorized to purchase.[89] The Guidebook also defines the roles and responsibilities of the different stakeholders within the government purchase card program.[90] The Army, Air Force, and Navy each have their own policies and procedures in accordance with the DoD Guidebook.[91] There are three major stakeholders in the government purchase card program: the Agency/Organization Program Coordinator (A/OPC), the A/BO, and the cardholder.[92]

The A/OPC possesses overall responsibility for managing the purchase card program.[93] In the author's experience, an A/OPC generally works in the installation contracting command and is responsible for establishing cardholder and billing accounts for the installation.[94] The A/OPC is also responsible for establishing and maintaining the training required for the program.[95] Other potential A/OPC duties include conducting compliance reviews and monitoring transactions of their established billing accounts, although these are not mandatory responsibilities set forth in the Guidebook.[96]

Next, the A/BO must ensure that all the cardholder transactions within their billing account are "legal, proper, mission essential, and correct in accordance with Government rules and regulations."[97] The A/BO is generally responsible for several cardholders and must approve and review their statements and reconcile them when the cardholder fails to do so.[98] However, A/BOs are only required to review cardholder statements at the end of the billing cycle, not before a purchase is made.[99]

Cardholders are the personnel that swipe the government purchase cards and acquire the supplies or services necessary to meet agency mission requirements.[100] Micro-purchase authority is delegated to cardholders in writing, allowing them to spend appropriated funds with their purchase cards.[101] This

see also Mahendra Gupta & Richard J. Palmer, *Government Efficiency versus Accountability: How an Emerging Control Model for Purchase Card Use May Enable U.S. Government Agencies to Achieve Both Goals*, 36 Pub. Cont. L.J. 175, 196 (2007) [hereinafter *Government Efficiency versus Accountability*] ("self-paced purchase card course[] . . . for cardholders and billing officials on the mandatory requirements and other guidelines of the purchase card program.").

89. DoD Government Charge Card Guidebook, *supra* note 9, at A-14 to A-21.

90. *Id*. at 2-7 to 2-13.

91. *See generally* U.S. Dep't of the Army, AFARS App. EE, Government Purchase Card Operating Procedures (2015); U.S. Dep't of the Air Force, Air Force Instruction 64-117 (2022); U.S. Dep't of the Navy, Simplified Acquisition Procedures Guide (2018).

92. Another crucial stakeholder in the government purchase card program is the Certifying Officer. This person is responsible for disbursing funds onto the purchase cards. DoD Government Charge Card Guidebook, *supra* note 9, at 2-12 to 2-13.

93. *Id*. at 2-9.

94. This information comes from the author's experience as the A/BO in a government purchase card program.

95. DoD Government Charge Card Guidebook, *supra* note 9, at 2-9.

96. *Id.* at 2-10.

97. *Id.* at 2-11.

98. *Id.*

99. *Id.*

100. *See generally id.* at 2-11 to 2-12.

101. FAR 1.603-3.

responsibility is not to be taken lightly, as these personnel are entrusted with "acting on behalf of the American taxpayer."[102] Cardholders are required to make sure that all their purchases are "proper, legal, and reasonable, and satisfy a bona fide need."[103] Cardholders must maintain files and records and obtain supporting documentation, such as receipts, as required by their program guidance.[104]

IV. ILLUSTRATIVE HYPOTHETICAL SCENARIOS[105]

Despite the successes of the Government Charge Card Abuse Prevention Act of 2012, there are still several issues that permeate the DoD's government purchase card program.[106] This Note will demonstrate these issues by using hypothetical scenarios to show the ease in which these situations can occur during daily operation. The setting for these hypotheticals is a Continental United States (CONUS) installation belonging to any of the service branches within the DoD.[107] For comparative ease, Army unit and rank structure will be used.[108] The service branch's government purchase card program implements and complies with the guidance set forth in Appendix B of OMB Circular A-123 and the DoD Government Charge Card Guidebook for Establishing and Managing Purchase, Travel and Fuel Card Programs with no significant deviations.[109] All of the personnel involved in government purchase card program have been properly trained in accordance with the above guidelines and guidebook. Three hypothetical scenarios follow with commentary on the issues presented in each scenario.

A. *Hypothetical Scenario One: The Cardholder's Rater Directs a Prohibited Purchase*

This scenario begins the same way all government purchase card purchases do, with the realization that the mission requires a purchase. Here, the mission happens to be the execution of the unit's military ball. The venue is reserved at a banquet hall in a downtown hotel located in the closest city to the installation. Based on the price of the venue rental, the unit logistics officer (also the action officer assigned to plan the event) proposes a ticket price of

102. FAR 1.102-2(a).

103. DoD Government Charge Card Guidebook, *supra* note 9, at 2-11.

104. *Id.* at 2-12.

105. The following hypotheticals are not based on real people or events.

106. *See generally* CIGIE Report, *supra* note 5.

107. The service branches of the DoD are the Army, Air Force, Navy, National Guard, Space Force, Coast Guard (operates under the Navy during times of war), and Marine Corps (component of the Navy). U.S. Dep't of Def., *Our Forces*, https://www.defense.gov/About?Our-Forces (last visited Jan. 19, 2023) [https://perma.cc/T53J-3TEF].

108. This is based on the author's familiarity with the Army.

109. *See generally* OMB Circular No. A-123 App. B, *supra* note 63; DoD Government Charge Card Guidebook, *supra* note 9.

$30 each for the enlisted personnel and $50 each for the officers.[110] The unit commander approves the proposed ticket price, and the ticket information is disseminated to the entire unit.

Unfortunately, due to poor planning, the cost of individual meals is not included in the price for the venue rental. To cover all the expenses from the rental and the meals, the updated ticket prices would need to be increased to $50 per enlisted ticket and $70 per officer ticket, for a total of $11,000. The unit commander, understandably upset at this turn of events, tells the logistics officer that they are not going to increase the prices of the tickets and to find a way to fund the meals.

Luckily for the logistics officer, the unit's cardholder is rated[111] by the logistics officer because the cardholder is a direct subordinate.[112] Embarrassed and desperate to fix the situation (because the unit commander is the logistics officer's senior rater), the logistics officer tells the cardholder to use the government purchase card to pay for the meals. The cardholder hesitantly makes two transactions to pay for the meals, despite vaguely remembering food being on the prohibited purchases list from purchase card training, because the cardholder's evaluation is due next month, and the cardholder is afraid that delaying or questioning the food purchase will have a negative impact on the upcoming evaluation.[113]

There are multiple problems raised in this scenario. The first major issue is that the cardholder committed a split purchase when they made two transactions to pay for the meals.[114] The purchase exceeds the $10,000 micro-purchase threshold and the cardholder could only pay the full amount by making two transactions.[115] Not only was the purchase split, but it was made for a prohibited purchase.[116] This scenario implicates inadequate training based on the cardholder not quite remembering whether food is a prohibited purchase. But underlying the entire scenario is the pressure that superior officers can exert over cardholders. These personnel may not be familiar with every nuance of the rules and regulations of the government purchase card program. The program places the responsibility on the cardholder to inform their

110. Due to the differences in pay scale between enlisted personnel and officers, the unit usually subsidizes the enlisted personnel's ticket price by requiring officers to pay more for their tickets.

111. Being "rated" means that the logistics officer is responsible for writing the cardholder's annual evaluation report. These evaluation reports are the primary documents used to determine whether the Servicemember is promoted to the next rank.

112. In the military, non-commissioned officers and officers have raters and senior raters that write their annual evaluations. These evaluations can have a positive or negative impact on the promotion potential of the rated individual.

113. Lists of prohibited purchases can be found at DoD Government Charge Card Guidebook, *supra* note 9, at A-14 to A-21.

114. For a discussion on split purchases, see Misuse of Government Purchase Cards, *supra* note 1, at 14.

115. *See supra* note 16 (discussing micro-purchase threshold).

116. DoD Government Charge Card Guidebook, *supra* note 9, at A-17.

superiors that a purchase is unauthorized.[117] In this situation, instead of falling victim to pressure from a superior, the cardholder should have reviewed the installation purchase card policy or consulted with their A/BO to ensure compliance with that policy.

B. Hypothetical Scenario Two: Commercial Products from Non-Mandatory Sources

This scenario involves a situation where a cardholder makes several purchases that are either available at AbilityOne or through the military supply system. A unit is preparing for a change of command at the company level.[118] As a part of the preparation, there will be a change of command inventory, where all the property belonging to the unit must be inventoried to determine whether any components or sub-components are missing. During pre-inventories, a hammer is identified as missing. The unit asks the government purchase card holder if they can buy them a hammer as a replacement. The cardholder agrees and goes to Home Depot to purchase a new hammer to replace the missing hammer.

As a part of the change of command inventories, the outgoing unit commander wants to simultaneously clean the motorpool while inspecting the equipment. The commander tells their supply personnel that the unit needs one hundred garbage bags and ten reams of copy paper in preparation for the motorpool cleanup and change of command inventories. The supply personnel go to the same cardholder and submit a purchase card request for the garbage bags and reams of paper. The cardholder makes the purchases at the local Walmart.

At the end of the billing cycle, the A/BO sees these purchases and calls the cardholder to ask for bona fide need justification for the hammer, the garbage bags, and the copy paper. The A/BO then asks if the cardholder looked for the supplies in the supply system or from an AbilityOne vendor before making the purchase at Home Depot and Walmart. The cardholder says that the outgoing commander does not want to have a financial liability investigation of property loss (FLIPL) and that the supplies were needed quickly and other methods would have taken too long. The A/BO, not wanting to cause trouble for themselves and the cardholder, approves and certifies the purchases.

This scenario highlights several issues that happen while using government purchase cards. First, it identifies the mission essential or bona fide need requirement that cardholders must adhere to.[119] In this scenario, there was not an urgent or compelling need to purchase these supplies with the government purchase card. The cardholder should have ordered the supplies through the military supply system or purchased them from an AbilityOne retailer but

117. *See id.* at 2-11 ("[Cardholders] [e]nsure all purchases are proper, legal, [sic] reasonable, and satisfy a bona fide need.").

118. A change of command occurs when the unit commander relinquishes command to another commander after completion of their command.

119. DoD Government Charge Card Guidebook, *supra* note 9, at 2-11.

decided instead to purchase the items from two large box stores.[120] The other problem this hypothetical presents is the efficiency lost when A/BO's are only required to review purchases at the end of the billing cycle.[121] Here, the A/BO was put in an uncomfortable situation when determining that the purchases were not mission-essential, creating an ethical dilemma on whether to authorize the purchase or dispute it as unauthorized.

C. Hypothetical Scenario Three: A/BO Fails to Properly Review Purchases

This scenario involves a situation where the A/BO does not properly execute their duties within the government purchase card program. The A/BO is responsible for reviewing and certifying each of their seven cardholder's purchases monthly by comparing each cardholder's bank statements with the purchase receipts.[122] One of the billing accounts on the installation recently replaced their A/BO because the previous A/BO was assigned to a new duty station. The billing account and A/BO reside in the logistics section of a brigade combat team-sized unit with one of the seven government purchase cards assigned to each of the seven subordinate battalion-sized units.[123]

Although the new A/BO completed the mandatory online training for their new position, the A/BO is overwhelmed by all the rules and regulations surrounding the government purchase card program. The A/BO is a junior officer that is new to the military, and their role as A/BO is an additional duty. Because the A/BO is trying to figure out how to do their main job, understanding the requirements and ramifications of violating the government purchase card program is troubling them. The A/BO understands how to certify purchases but does not grasp how to carefully review purchases at the end of the billing cycle. Without matching the purchases to requests and receipts, the A/BO certifies their cardholder's statements, missing questionable purchases and failing to highlight discrepancies.

At the end of the year, the A/OPC audits the A/BO's billing account. There are numerous questionable purchases on several of the A/BO's cardholder accounts. When asked to see documentation for these questionable purchases, the A/BO admits that there is no available documenation. The A/OPC

120. *See supra* note 46 for a description of the AbilityOne program; *see supra* note 47 for the FAR requirement to use AbilityOne as a mandatory source.

121. DoD Government Charge Card Guidebook, *supra* note 9, at 2-11.

122. Certification is the process where the A/BO goes into the bank's system and approves each cardholder's purchases made with the government purchase card.

123. A brigade combat team consists of about 4,000–4,700 personnel and a battalion consists of about 400–1,000 personnel. Barbara Salazar Torreon & Andrew Feickert, Cong. Rsch. Serv., IF10571, Defense Primer: Organization of U.S. Ground Forces 1 (2021). A brigade combat team is roughly equivalent to a wing (Air Force), a carrier/group/wing (Navy), and a regiment (Marine Corps) while a battalion is roughly equivalent to a squadron (Air Force), a ship/squadron (Navy), and a battalion/squadron (Marine Corps). U.S. Dep't of Def. Inspector Gen., *Army / Air Force / Navy / Marine Equivalence*, https://www.dodig.mil/Portals/48/Service%20Rank%20Equivalency%20Chart(Aug%202010).pdf?ver=2017-10-26-092106-920 (last visited on Jan. 19, 2023) [https://perma.cc/N66J-BHVZ].

suspends the billing account and submits a report to the installation IG to investigate the billing account for any fraud, waste, and abuse.

This scenario demonstrates a general lack of training and understanding of the policies and procedures of the government purchase card program. The A/BO completed the mandatory training but was unsure how to properly review and certify cardholder statements at the end of the billing cycle. The A/BO should have gone to the A/OPC to clarify roles and responsibilities and develop a better understanding for the requirements of the government purchase card program. Receiving this guidance and on-the-job training would have helped the A/BO better understand how to manange their cardholder accounts and ensure that cardholders comply with the program's requirements.

V. A SOLUTION TO REDUCE IMPROPER PURCHASING PRACTICES

Improper use of the government purchase card is still happening today.[124] There are simple changes that the DoD can make to reduce the number of improper purchases that presently occur across the service components. First and foremost, the DoD should institute a requirement that all purchases must be approved by an A/BO before the purchase is made. Second, the DoD should direct the service components to develop an in-person course to teach A/BOs how to properly approve and manage their billing accounts.

These recommendations can be incorporated into law or policy in several different ways. The first way would be for Congress to include the updated requirements in the annual NDAA.[125] Including the requirements into the NDAA would eventually require the DFARS to be updated to reflect the changed requirements from the NDAA. Another way to implement these changes is through presidential issuance of an EO.[126] An EO would either instruct the executive agencies to enact the requirements or instruct OMB to issue guidance on how to change the government purchase card program. Finally, the most practical and immediate way to effectuate this change across the DoD would be for DoD leadership to amend its Government Charge Card Guidebook by adding the requirements as new DoD policy.

A. Require A/BOs to Pre-approve Purchases

The DoD Guidebook only requires A/BOs to review and certify cardholder purchases at the end of each billing cycle.[127] Requiring that A/BO's approve each transaction before the cardholder makes a purchase should reduce the number of improper purchases throughout the program. A/BOs provide a level of objectivity, based on generally being removed from the cardholder's chain

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124. *See generally* CIGIE Report, *supra* note 5.

125. *See generally* Valerie Heishusen & Brendan W. McGarry, Cong. Rsch. Serv., IF10515, Defense Primer: The NDAA Process 1 (2021).

126. For an example of the effectiveness of an EO on the government purchase card process, see *supra* Part II, Section B.

127. DoD Government Charge Card Guidebook, *supra* note 9, at 2-11.

of command, that would allow them to identify and reject more improper purchases.[128] Objective freedom allows A/BOs to proactively identify improper purchase attempts and subsequently provides the A/BO an opportunity to conduct corrective training for cardholders to learn how to make proper purchases and improve the institutional knowledge within the government purchase card program.[129]

The hallmark of the government purchase card program has been the efficiency gained by reducing the administrative burdens associated with making small-dollar purchases.[130] Government procurement policy has several procurement objectives: "(1) competition; (2) integrity; (3) transparency; (4) efficiency; (5) customer satisfaction; (6) best value; (7) wealth distribution; (8) risk avoidance; and (9) uniformity."[131] Although IG audits have already provided some reform to increase transparency of the program, the purchase card continues to value efficiency over integrity.[132] The program requires proper supervisory review of cardholder purchases to maintain the level of integrity expected of government officials spending taxpayer dollars.[133] A/BO pre-approvals provide an extra layer of checks on improper purchases before the cardholder can make the purchase. This additional step in the purchasing process increases the purchase card program's integrity in exchange for only a small amount of the program's efficiency.

Adding a requirement for A/BOs to pre-approve purchases is consistent with the goal of eliminating administrative burdens in the purchase card program. Addressing improper or erroneous purchases after the fact can be more time-consuming and account for additional administrative burdens on end-users in the form of A/OPC audits and IG investigations.[134] The instances of improper purchases will likely decrease when a culture of accountability and teamwork is developed across the entire billing account based on a required A/BO pre-approval process for cardholder purchases.[135]

To further prevent undue delays in using the purchase card for mission requirements, the DoD should develop an exemption process to the proposed pre-approval requirement. This exemption would be for requirements that need to be purchased immediately when the A/BO is unable to be contacted within a reasonable time for pre-approval. In these instances, a person with

128. *See supra* Part IV, Section A.

129. This proposition comes from the author's personal experience as an A/BO in a government purchase card program.

130. *See Charging Ahead*, *supra* note 19, at 435–36.

131. Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Pub. Procurement L. Rev. 103 (2002); *see also* Aaron S. Ralph, *Transaction Management: A Systematic Approach to Procurement Reform*, 43 Pub. Cont. L.J. 621, 646–47 (2014).

132. *See Doing More with Less*, *supra* note 12, at 307–09.

133. *See Government Efficiency versus Accountability*, *supra* note 88, at 198–99.

134. The need for audits and investigations undeniably adds administrative burdens to the purchase card program. Both require the cardholder, A/BO, and A/OPC to take time away from their purchase card duties and other job duties to identify the improper purchases.

135. This proposition is based on the author's personal experience as an A/BO in a government purchase card program.

command authority would be allowed to sign a memorandum stating the bona fide need for the supply and services and the urgency of the purchase.[136] These signed memoranda would need to be sent to the A/BO as soon as practicable to ensure that the A/BO retains proper documentation throughout the billing account. These exemptions would be the exception and not the rule and would allow the government purchase card program to maximize its efficiency while maintaining an adequate level of review to increase the integrity of the program.

B. Bring Practical Training to the Purchase Card Program Participants

One of the most glaring issues facing the government purchase card program is a lack of adequate, thorough, government purchase card program training that provides participants enough information to fully understand the requirements of the program. Currently, the DoD only requires completion of one online training course before joining the program.[137] Some programs also require new members of the purchase card program to attend a one or two day in-person class run by the A/OPC at the installation contracting command.[138] Even with the in-person training, many cardholders still do not understand the requirements and the processes necessary to avoid violating the rules of the government purchase card program.[139] By not providing a basic understanding of purchasing policies and program restrictions, these minimal training requirements can lead cardholders to make errors while actually using the card in practice.[140]

To close this gap, the DoD should direct and fund each service component to develop a one-week course dedicated to the proper use of the government purchase card and proper management of the program. In conjunction with the annual online refresher course, this course would be geared towards A/BOs and would assist them in understanding what purchases are unauthorized and how to properly document their cardholder's purchases. This course would be executed best by use of Mobile Training Teams (MTTs)[141] that would travel to installations to bring the training to the end-user instead of relying on the initiative of the unit to send the A/BOs on Temporary Duty Assignment (TDY) to a central training location.

136. This process would be similar to the Justification and Approval requirement necessary when a contracting officer pursues other than full and open competition for unusual and compelling urgency. *See generally* FAR 6.302-2.

137. DoD Government Charge Card Guidebook, *supra* note 9, at 2-14.

138. This information comes from the author's personal experience as an A/BO in a government purchase card program.

139. *Id.*

140. *See Charging Ahead*, *supra* note 19, at 433.

141. An MTT is an Army concept where course instructors "bring training to students where they are deployed and work." John C. Morey et al., United States Army Research Institute for the Behavioral and Social Sciences, Best Practices for Using Mobile Training Teams to Deliver Noncommissioned Officer Education Course 1 (2009).

It is naïve to believe that all A/BOs will be able to attend the MTT before starting their duties as an A/BO.[142] In these cases, the DoD should implement a requirement for A/OPCs to conduct a monthly review of billing accounts that do not yet have an A/BO trained by the MTT. This review will be a small sample of purchases to ensure that the A/BO is reviewing requests before the cardholder makes a purchase and is requiring proper documentation from their cardholders to prevent improper purchases. This process allows the A/OPC to be more involved in the program outside of their required annual audit function and also gives them an opportunity to provide on the job training to A/BOs and cardholders. In addition to an increased audit requirement by the A/OPC for untrained A/BOs, the DoD should institute a "Three Strike" rule when an A/OPC identifies an improper purchase. Since the A/OPC usually works at the installation contracting activity,[143] they have the authority to suspend billing accounts during their required management of the billing account.[144] Allowing untrained A/BOs and cardholders to make mistakes gives the A/OPC the opportunity to provide on-the-job training before taking away an important means to acquire supplies and services by suspending the account after the first error. After the first and second instance of improper purchase practices (ex. unauthorized purchases, undocumented purchases, lack of A/BO approval), a third violation would grant the A/OPC the discretion to either suspend all the A/BO's cardholder accounts or just the specific cardholder's account for a specified amount of time.

VI. THE FUTURE OF THE GOVERNMENT PURCHASE CARD PROGRAM

The information discussed above is a cautionary look at the past and future of the government purchase card program. Congress and the GSA have recently been trying to expedite the process in which the government acquires commercial products and commercial services.[145] In the FY 2018 NDAA, Congress directed the GSA to assess the viability of an electronic commercial platform.[146] GSA chose to pursue existing commercial marketplaces, such as Amazon, based on the idea that purchasers are familiar with how to use them through their own personal experience.[147] Although Congress allowed purchases up to the simplified acquisition threshold in the NDAA, GSA decided

142. This is naïve because it takes time for MTT's to go to each installation and teach the course. Additionally, personnel serving cardholder and A/BO roles in the program can cycle in and out of these roles. This makes keeping trained personnel in those positions more difficult.

143. This proposition comes from the author's personal experience as an A/BO in a government purchase card program.

144. *See* DoD Government Charge Card Guidebook, *supra* note 9, at 2-9.

145. *See generally* Christopher Yukins et al., *GSA's Commercial Marketplaces Initiative: Opening Amazon & Other Private Marketplaces to Direct Purchases by Government Users*, 20-13 Briefing Papers 2 (2020) [hereinafter *GSA's Commercial Marketplaces Initiative*]; Ralph C. Nash, *Market-Based Competition: A Coming Trend?*, 34 Nash & Cibinic Rep. ¶ 20 (2020).

146. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 846, 131 Stat. 1456 (2017); *GSA's Commercial Marketplaces Initiative*, *supra* note 145, at 3.

147. *GSA's Commercial Marketplaces Initiative*, *supra* note 145, at 2.

to restrict purchases to the micro-purchase threshold.[148] GSA has even recommended that the micro-purchase threshold be increased for any purchase on a GSA approved e-commerce platform.[149]

These GSA e-commerce initiatives will undoubtedly make purchasing easier and more efficient. But recall the beginning of the government purchase card program.[150] Increased ease and efficiency of e-commerce has the potential to replicate the issues of improper use throughout the history of the purchase card program.[151] GSA will have to be very careful in the types of commercial products and commercial services for sale on their e-commerce platforms. As demonstrated in one of the earlier hypotheticals, the ease of purchasing commercial products from box stores and now emerging e-commerce platforms may lead cardholders to continue to circumvent purchasing from mandatory sources, like AbilityOne.[152]

These government purchase card program issues are amplified when considering the ease in which cardholders will be able to make purchases on an e-commerce platform. This bolsters the argument that A/BOs should be required to approve all cardholder purchases before the purchase is made to ensure that cardholders are not abusing the e-commerce platform. Cardholders, without proper training and supervision, will only have more access to improperly use the purchase card with the emergence of an e-commerce platform.

VII. CONCLUSION

The government purchase card program continues to have issues with training and supervision. Unauthorized and unnecessary purchases made with government purchase cards waste taxpayer dollars. The DoD can reduce the risk of improper purchases by requiring A/BOs to approve their cardholders purchases prior to swiping the card. The DoD can also ensure that its government purchase card personnel are properly trained by designing a training program that provides practical experience and instruction on how to manage a purchase card program. These simple policy changes have the potential to reduce improper use of purchase cards while only adding a minimal administrative burden on the government purchase card participants.

148. *Id.* at 4.

149. *Id.*; Sara Johnson, The Recommended Micro-Purchase Threshold Increase—An Opportunity!, GSA Com. Platforms Initiative (July 19, 2018, 3:03 PM), https://interact.gsa.gov/blog/recommended-micro-purchase-threshold-increase-opportunity [https://perma.cc/B8JM-JH68] (blogging a discussion with Mark Lee, Assistant Commissioner of the Federal Acquisition Service Office of Policy and Compiance).

150. *See supra* Part II, Section C.

151. *See supra* Part II, Section C.

152. *See supra* Part IV, Section B.

MINIMIZING PRISON ABUSES AND CONTRACT OPPORTUNITIES: BIDEN'S END TO PRIVATE PRISONS AND IMPLICATIONS OF PROCUREMENT, EMPLOYMENT, AND REFORM

*Kelly A. Kirchgasser**

ABSTRACT

In January 2021, President Biden announced Executive Order 14006 to eliminate all federal prison contracts with private prison companies. The new Executive Order raised questions regarding the future for government contractors in the private prison business and criminal policy reform. This Note explores potential consequences of Executive Order 14006 and implications for existing contract employees in the private prison management industry. Further topics include the historical development of the U.S. prison system towards privatization, the issues within contract prisons that generated action from the Biden administration, and the challenges associated with transitioning government resources and federal inmates to exclusively federally run facilities. This Note advocates for the Department of Justice to change its hiring processes in light of the strict scrutiny anticipated to be held against former contract prison employees, who did not receive the qualified immunity protection in their roles. This Note further encourages the Biden administration to enforce Executive Order 14006 through varying methods to ensure the durability and effectiveness of the Order to serve its associated policy goals.

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I. INTRODUCTION

Within the borders of a nation that prides itself on democratic ideals, technological advances, and medical innovation, over two million people are living a harshly different reality devoid of these values. This is the United States prison population.[1] Of those over two million individuals, more than 150,000 are federal inmates incarcerated in facilities run by either the U.S. government via the Department of Justice (DOJ) or a private prison contractor.[2]

The Biden administration has taken policy steps toward mitigating the abuses that are a byproduct of the for-profit prison system in an attempt to eliminate the source of increased reports of crime and violence within the greater federal prison complex.[3] Prisoners living under the governance of contracted prison companies have reported staff neglect and mistreatment for decades, reflecting a "differentially high rate of violence at privately operated prisons when compared to those operated by the state," and igniting advocacy efforts that have reached the executive branch.[4] Although staff neglect and mistreatment of prisoners are not exclusive to the private prison system, privately run prisons—also known as "contract prisons"—have a notorious reputation for higher rates of crime and violence among inmates in comparison to their government-run counterparts.[5] This underscores a recurring theme and the fundamental root of the contract prison problem—inadequate staff oversight.

The principal difference that distinguishes a contract prison from an exclusively federally run prison is the level of government oversight. Inside the facilities, federally run prisons are managed solely by government employees to ensure operations are truly "in compliance with security, safety, and environmental requirements," whereas contract prisons lack a government

1. *See* Proclamation No. 14006, 86 Fed. Reg. 7483 (Jan. 29, 2021) [hereinafter Proclamation No. 14006].

2. *See Population Statistics*, Fed. Bureau of Prisons, https://www.bop.gov/about/statistics/population_statistics.jsp [https://perma.cc/UG44-8ZCT] (last visited Jan. 23, 2022) [hereinafter *Population Statistics*].

3. *See* Proclamation No. 14006, *supra* note 1.

4. Elaine Rizzo & Margaret Hayes, *An Assessment of the Risks and Benefits of Prison Privatization*, Prison Legal News 6 (Jan. 30, 2012), https://www.prisonlegalnews.org/media/publications/rizzo_report_on_assessment_of_risks_and_benefits_of_prison_privatization_2012.pdf [https://perma.cc/E4XY-85A2].

5. *Id.*

watchdog in their hallways to hold contracted employees accountable when they act outside of the standards established by the DOJ.[6] Although the DOJ generally requires a degree of government involvement within contract prisons to monitor operations, contracted employee conduct is predominantly overseen and managed by the contractor.[7]

Amid rising public apprehension surrounding the billion-dollar private prison industry and the dawn of a new presidency, it came as no surprise when President Biden announced Executive Order 14006, "Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities," less than a week after his inauguration.[8] Executive Order 14006 (EO 14006) commands that the "Attorney General shall not renew [DOJ] contracts with privately owned criminal detention facilities," which effectuates the Biden administration's goal to end the for-profit prison system and emerges as a success for prisoners, their families, and human-rights advocates alike.[9] Supporters of EO 14006 posit that federal prisons operate "more cost effectively . . . and much safer than their for-profit counterparts."[10] The elimination of DOJ's use of contract prisons is seen as a step towards disincentivizing for-profit incarceration, and EO 14006's intended transition from independent contractor to government management may allow prisoners who were experiencing abuse in private facilities to live in a more secure environment, run by government-hired employees and in compliance with DOJ standards.

The implementation of EO 14006 raises other legal questions surrounding the status of existing contract workers, current standards for federal employment, and the viability of President Biden's plan to transfer all federal inmates to DOJ management within the ambitious timeline of only two years.[11] Further, effective execution of EO 14006 is challenged by the significant growth in the U.S. prison population since the late-twentieth century and the introduction of tough on crime policies, which have led to an increase in incarceration.[12]

This Note analyzes potential consequences of and solutions to best maintain President Biden's plan to terminate contract detention facilities. Part II of this Note introduces the historical development of the U.S. prison system, the controversy surrounding contract prisons, Executive Order 14006, and the role of government contracts in this context. Part III examines the

6. *Organization*, *Mission and Functions Manual: Federal Bureau of Prisons*, U.S. Dept. of Just., https://www.justice.gov/jmd/organization-mission-and-functions-manual-federal-bureau-prisons [https://perma.cc/59MY-GXK5] (last visited Jan. 29, 2022).

7. *See* Dept. of Just., Off. of the Inspector Gen., Evaluation & Inspections Div., Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons 32 (Aug. 2016), https://oig.justice.gov/reports/2016/e1606.pdf [https://perma.cc/LKP5-M4M6] [hereinafter Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons].

8. *See* Proclamation No. 14006, *supra* note 1.

9. *Id.*

10. *President Issues EOs on Contract Prisons*, *Racial Equity*, *Climate Change*, *Pandemic Supplies*, 63 Gov't Contractor, Feb. 3, 2021, at 1, ¶ 30.

11. *See Federal Prison System (BOP): FY 2022 Budget Request at a Glance*, U.S. Dept. of Just., https://www.justice.gov/d9/pages/attachments/2021/05/27/bop.pdf [https://perma.cc/K76L-XA2U) (last visited Feb. 20, 2023).

12. *See* Peter H. Kyle, *Contracting for Performance: Restructuring the Private Prison Market*, 54 Wm. & Mary L. Rev. 2087, 2090 (2013).

implications of qualified immunity following Executive Order 14006 and the likely consequences of transitioning all federal inmates to government management without any purported plan for government hiring reform. In light of Executive Order 14006, the Department of Justice must wholly reassess the qualified immunity impact on prison employability and consider how to best effectuate the Biden administration's goals to create a federal prison structure built to last.

II. BACKGROUND

Contract prison management remains a relatively new scheme. Modern prison privatization practices began less than thirty years ago.[13] Understanding the historical context of prison management sheds light on the gravity and challenges associated with EO 14006. The following section serves to contextualize the topics discussed in this Note, including the prison management history of the United States, the debate surrounding private prison contractors, the details of President Biden's recent Executive Order, and the common design of government contracts for prison management.

A. The History of U.S. Prison Management

Federal prisons have long used contracting as a method to maintain and manage correctional facilities, but the nature of prison contracts has scaled exponentially. Prior to the late twentieth century, the government garnered prison assistance by hiring inmates to perform labor in the facilities, differing immensely from the multi-billion-dollar contracts that the federal government has awarded and renewed with private prison monoliths to obtain management assistance and alleviate costs for the last three decades.[14]

The Federal Bureau of Prisons, colloquially referred to as the "BOP," is a government agency within the Department of Justice that operates under the direction of the U.S. Attorney General.[15] The Bureau was created pursuant to the enactment of the Federal Prison Act of 1930 (codified as the "Act of May 14, 1930"), which consolidated to a single agency the responsibility of federal prison management and the regulation "of all Federal penal and correctional institutions" (excluding military penal institutions).[16] BOP points to the lack of DOJ supervision over the outdated 1890's Federal Prison System (FPS) as the reason for its establishment.[17] This is because the DOJ's limited involvement in the now inactive FPS led to overcrowded prisons, which were

13. *See* James Austin & Garry Coventry, Emerging Issues on Privatized Prison iii (Bureau of Just. Assistance 2001); *see also* Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons, *supra* note 7, at 1.

14. *See* Sharon Dolovich, *State Punishment and Private Prisons*, 55 Duke L.J. 437, 450–51 (2005).

15. Act of May 14, 1930, Pub. L. No. 71-218, 46 Stat. 325 (1930).

16. *See id.*

17. *See Historical Information*, Fed. Bureau of Prisons, https://www.bop.gov/about/history/timeline.jsp [https://perma.cc/2P3Q-JUM5] (last visited Nov. 22, 2021).

devoid of any meaningful programs geared toward inmate rehabilitation.[18] The Federal Prison Act details the organizational and financial structure of the BOP, including designated appropriations to fund the necessary leasing or constructing of facilities and quality-of-life standards.[19] The Federal Prison Act states that BOP "shall . . . provide suitable quarters for the safe-keeping, care, and subsistence of all persons convicted," and be responsible for inmates' "protection, instruction, and discipline."[20] In section three of the Act, Congress expressly authorizes the BOP Director to contract, "for the imprisonment, subsistence, care, and proper employment," of prisoners, likely in light of the prison system's historical use of prisoners and private companies.[21]

Towards the end of the twentieth century, significant shifts in U.S. criminal law and incarceration rates occurred, and DOJ was assigned the responsibility of managing an influx of federal inmates.[22] President Ronald Reagan ushered in a new "tough on crime" policy approach when he signed into law the Comprehensive Crime Control Act of 1984. This Act was comprised of legislative reforms that aligned with Reagan's campaign promise to mitigate crime and increase preventative and punitive measures in the United States, especially given the rise in the crack cocaine market and the government's lack of ability to manage its rapid spread.[23] The Comprehensive Crime Control Act is recognized for included "some of the most significant changes in the federal criminal justice system every enacted at one time," and notably gained bipartisan support due to its unprecedented, strong punitive responses to issues like sentencing, bail conditions, and drug use.[24] The Act contributed to a massive surge in the federal inmate population by creating new crimes and imposing sentencing guidelines.[25]

Within the two decades following the enactment of the Act, the population of U.S. federal inmates quadrupled from roughly 30,000 to 136,000,[26] and the total number of persons incarcerated—across federal prisons, state prisons, and local jails—increased by hundreds of thousands.[27] Exponential rates

18. *See id.*

19. Act of May 14, 1930, § 2. While valuable to note the appropriations of the congressional budget to the Bureau of Prisons, the scope of this note is limited to government contract implications and will not expand on the topic of appropriations.

20. *Id.*

21. *Id.* § 3.

22. *See* Austin & Coventry, *supra* note 13, at 13.

23. John Hagan, Who Are the Criminals?: The Politics of Crime Policy from the Age of Roosevelt to the Age of Reagan 25 (2012); *see also* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 2, 98 Stat. 1976 (1984) (codified as amended at 18 U.S.C. § 1).

24. Stephen S. Trott, *Implementing Criminal Justice Reform*, 45 Pub. Admin. Rev. 795, 795 (1985).

25. *See About the Federal Bureau of Prisons*, Fed. Bureau of Prisons 2 (June 2015), https://www.bop.gov/resources/pdfs/ipaabout.pdf [https://perma.cc/2F5J-NPN3] [hereinafter *About the Federal Bureau of Prisons*].

26. *See id.*

27. Allen J. Beck & Christopher J. Mumola, *Bureau of Justice Statistics Bulletin: Prisoners in 1998*, Dept. of Just. (Aug. 1999), https://bjs.ojp.gov/content/pub/pdf/p98.pdf [https://perma.cc/86HE-PVD9].

of imprisonment, coupled with the federal government's growing interest in using private corrections management to alleviate costs, led to the expansion of the private-prison contracting model used today.[28] Discussion of the U.S. prison population naturally raises the question of whether current criminal justice policies are effective, or whether existing laws lead to over-incarceration.

Inmates who do not reside in contract prison facilities have been housed within institutions run by the federal government. Federally run prisons operate under the self-proclaimed mission to protect society by "confining offenders in the controlled environments of prisons and community-based facilities that are safe, human, cost-effective, and appropriately secure," and promise to maintain all facilities in "operationally sound conditions and in compliance with security, safety, and environmental requirements."[29] While this rhetoric sets a high standard for staff conduct, the DOJ further emphasizes its expectations for federal prison operations in a BOP report: "[A]ll Bureau staff are expected to conduct themselves in a manner that creates and maintains respect for the agency, the DOJ , the Federal Government, and the law."[30] The juxtaposition of this standard of excellence in management against leaked reports of prisoner abuse portrays an alarming contradiction that has fueled prison reform activists for decades.

1. The Private Prison Debate

The contemporary use of federal procurement methods began in the 1980s when the government became interested in paying for a prison service, as opposed to taking on prison management with in-house resources after witnessing a significant spike in the federal inmate population in the 1980s.[31] While the privatization movement alleviated the DOJ's initial overcrowding issues, it simultaneously created an impression to the public that there were for-profit incentives to incarceration. By 2010, the annual revenue made from government contracts between just two major federal prison contractors surpassed $2.9 billion.[32] Because contract facilities are funded by DOJ contracts, reports of abuses and mismanagement in contract facilities raise flags to the taxpayers, who pay for federal contracts, and who worry that "profit motives, coupled with a lack of oversight, can create incentives to minimize costs and care for inmates."[33]

28. *See* Austin & Coventry, *supra* note 13, at 13.

29. *Organization, Mission and Functions Manual: Federal Bureau of Prisons*, U.S. Dept. of Justice, https://www.justice.gov/doj/organization-mission-and-functions-manual-federal-bureau-prisons (last visited Feb. 18, 2023).

30. *About the Federal Bureau of Prisons*, *supra* note 25.

31. Ira P. Robbins, *Privatization of Corrections: A Violation of U.S. Domestic Law, Int'l Human Rights, and Good Sense*, 13 Hum. Rts. Brief, No. 3, at 12 (2006).

32. *See* Rizzo & Hayes, *supra* note 4, at 1. The two major prison contractors referenced are Correctional Corporation of America and GEO Group.

33. John M. Eason, *Why are Private Prisons Controversial?*, The Conversation (Sept. 26, 2019, 7:21 AM), https://theconversation.com/why-are-private-prisons-controversial-3-questions-answered-116774 [https://perma.cc/26RZ-X7QR].

The modern-day private prison houses approximately "116,000 individuals—or 8.1 percent of the nation's total prison population" and is almost surely managed by one of the two largest private prison companies.[34] Together, contractor monoliths GEO Group and CoreCivic (formerly CCA, Corrections Corporation of America), earned a combined annual revenue of almost $4.5 billion in 2019.[35] Nearly one quarter of this revenue was from DOJ contracts, and an even higher percentage[36] came from contracts with the U.S. Immigration and Customs Enforcement (ICE).[37]

Federal prison operations as of 2022 remain similar to those in 2019. At the start of 2021, DOJ was in contract with companies CoreCivic, the GEO Group, and Management and Training Corporation (MTC), who collectively managed twelve private prison facilities for the federal government.[38] However, in light of Executive Order 14006, contracts expiring as a result of their agreement terms are not being renewed by the federal government. For example, federal inmates at the North Carolina-based Rivers Correctional Institution, operated by the GEO Group, were transferred to public facilities in March 2021 when the contract between DOJ and the GEO Group naturally expired.[39] Both the GEO Group and CoreCivic anticipated further transfers as contracts naturally expired without government renewal.[40] The terms of the remaining government contracts were set to naturally expire by the end of 2022, allowing the Biden administration to meet its Fiscal Year 2022 expectation "to vacate all 11 secure privately managed facilities, or private prisons, it currently occupies by the end of calendar year 2022,"[41] meaning the Biden administration need not proactively terminate contracts.[42]

An ongoing debate surrounds the benefits and risks of private contract facilities in dealing with such a large federal inmate population.[43] In an article

34. Alyce McFadden, *Biden Phases Out Private Prisons, Which Spent Big Backing Trump*, OpenSecrets (Feb. 2, 2021, 1:24 PM), https://www.opensecrets.org/news/2021/02/biden-phases-out-private-prisons [https://perma.cc/3TJD-TZAH].

35. *See id.*

36. *See id.*

37. *See id.* ICE and immigration detention facilities are outside the scope of this Note, but these statistics show the financial impact of government contracts to these businesses' revenue.

38. Louisa Valentin, *The First Step to Stop Corporations From Profiting from Incarceration in the United States*, Transnat'l Inst. (Mar. 30, 2021), https://www.tni.org/en/article/the-first-step-to-stop-corporations-from-profiting-from-incarceration-in-the-united-states [https://perma.cc/PH48-358C].

39. *See id.*

40. Lauren-Brooke Eisen, *Breaking Down Biden's Order to Eliminate DOJ Private Prison Contracts*, Brennan Ctr. for Just. (Aug. 27, 2021), https://www.brennancenter.org/our-work/research-reports/breaking-down-bidens-order-eliminate-doj-private-prison-contracts [https://perma.cc/NN4Y-5BWD].

41. U.S. Dept. of Just.: FY 2022 Budget Request at a Glance (2021), *supra* note 11; *see also BOP Ends Use of Privately Owned Prisons*, Fed. Bureau of Prisons (Dec. 1, 2022), https://www.bop.gov/resources/news/20221201_ends_use_of_privately_owned_prisons.jsp (last visited March 14, 2023) [https://perma.cc/Z9QU-KXGS] [hereinafter BOP Ends Use of Privately Owned Prisons].

42. Termination for convenience is a doctrine of government contracts that exceeds the scope of this Note.

43. *See* Austin & Coventry, *supra* note 13, at 13.

published by the Bureau of Justice Assistance pursuant to a DOJ initiative, analysts from the National Council on Crime and Delinquency reviewed the incentives and risks of private prison contracts.[44]

2. Benefits to Contract Prisons

The benefits of contract prisons are dominated by themes of time and cost efficiency, as "contracting with the private sector allows prospective prisons to be financed, located, and constructed quicker and cheaper than government prisons."[45] For example, such benefits are exemplified by a Corrections Corporation of America (CCA, now CoreCivic) contract with the U.S. Immigration and Naturalization Service (INS).[46] Here, INS contracted with CCA to build a Texas detention center in less than six months because the U.S. Immigration and Naturalization Service anticipated that the same project would have taken the agency over two years to complete on its own and would have cost nearly double the amount that it cost the INS to pay the contractors.[47]

3. Risks to Contract Prisons

Yet not all project comparisons are equal. There are risks implicated in contracts for prison management. For instance, there is the possibility that a contractor will reject high-cost inmates that require certain and more expensive needs, such as those with physical disabilities, mental illnesses, or chronic conditions.[48] The potential for contract prisons to reject high-cost inmates is problematic and differs from federally run and state prisons, which "must provide services to all inmates."[49] By denying high-cost inmates, the apparent cost for private facilities is lowered in comparison to the public prison facilities that cannot turn inmates away and are responsible for providing special accommodations. This creates a false perception that contract prison operations are cheaper, when the reality may be that contract prisons are denying costly inmates.[50]

Additional disadvantages to privatization include the fear that "private prisons have financial incentives to cut corners" and the concern that inmate rights may be violated without the close monitoring of private management by the government.[51] For instance, in 2008, the GEO Group was sued for $595 million after an inmate died in solitary confinement.[52] Incidents like this one

44. *See id.* at 14.
45. *See id.* at 15.
46. *See id.* By way of comparison, the context surrounding this government contract for the U.S. Immigration and Naturalization Service is analogous to the contracts employed by the U.S. Bureau of Prisons and serves as a valuable example.
47. *See id.* at 15.
48. *See* Rizzo & Hayes, *supra* note 4, at 3.
49. *See id.*
50. *See id.*
51. Austin & Coventry, *supra* note 13, at 14.
52. *See* Rizzo & Hayes, *supra* note 4, at 4.

trigger public concern about inmate safety. A 2016 DOJ Office of Inspector General (OIG) report illustrates the truth of inmate safety concerns, finding that "contract prisons incurred more safety and security incidents per capita than comparable BOP institutions."[53] The report identifies a higher rate of incidents at contract prisons in multiple categories, such as contraband and inmate discipline.[54]

Further, the very process of federal procurement is referenced as a disadvantage to privatization. For example, the 2016 DOJ OIG report notes that the procurement process to obtain prison contractors is "slow, inefficient, and open to risks."[55] In addition to the daunting task of creating a clear solicitation and contract, the report asserts that the "lack of enforcement remedies in contracts leaves only termination or lawsuits as recourse," which may lead to more lenient government oversight in enforcing contract terms to avoid costly and time-consuming litigation.[56] As such, using government contracts for prison management can easily lead to oversight issues that, in turn, can harm inmates in contract facilities. These risks associated with privatization are a product of contracts drafted without a strong enforcement or watchdog component.

B. Executive Order 14006

While there are notable advantages and disadvantages to private facility management, Executive Order 14006 has shifted the dialogue to the de-privatization of the federal prison complex.[57] Obama-era Deputy Attorney General, Sally Yates stated that "the goal of the Justice Department is to ensure consistency in safety, security and rehabilitation services by operating its own prison facilities."[58] President Biden speaks to this in EO 14006: "[W]e must ensure that our Nation's incarceration and correctional systems are prioritizing rehabilitation and redemption."[59] Pivoting a full 180-degrees from former-President Donald J. Trump's policy intentions of "robustly support[ing] private prisons" and to increasing federal private prison contracts, EO 14006 attempts to revitalize policy goals reminiscent of the Obama-era by focusing on switching entirely to federally owned prisons.[60] Notably, EO 14006 specifies that "the Attorney General shall not renew [DOJ] contracts with privately operated criminal detention facilities," leaving out Immigration and Customs Enforcement (ICE) facilities managed by the Department of Homeland Security and

53. Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons, *supra* note 7, at 44.

54. *See id.* at ii.

55. Austin & Coventry, *supra* note 13, at 14.

56. *Id.*

57. Proclamation No. 14006, *supra* note 1.

58. Rebecca Beitsch, *Biden Directs DOJ to Phase Out Use of Private Prisons*, The Hill (Jan. 26, 2021), https://thehill.com/homenews/administration/535973-biden-directs-doj-to-phase-out-use-of-private-prisons [https://perma.cc/X3DQ-YXZF].

59. Proclamation No. 14006, *supra* note 1.

60. Hauwa Ahmed, *How Private Prisons Are Profiting Under the Trump Administration*, Ctr. for Am. Progress (Aug. 30, 2019, 9:02 AM), https://americanprogress.org/article/private-prisons-profiting-trump-administration [https://perma.cc/4Z5X-HP2L].

any military prison operated by the Department of Defense.[61] According to the BOP, as of November 18, 2021, there were approximately seven thousand federal inmates in privately managed facilities.[62] For reference, 1.7 million inmates were incarcerated across all United States prisons in Spring 2021, meaning that EO 14006 will impact less than one percent of the United States prison population.[63] The BOP Fiscal Year 2022 Budget Request expanded on the Executive Order's strategy, stating that "the BOP expects to vacate all 11 secure privately managed facilities, or private prisons, it currently occupies by the end of the calendar year 2022," which eventually included the transition of nearly seven thousand federal inmates to public facilities.[64]

With the number of prisoners impacted by EO 14006 in mind, driving policy factors in the Biden administration's decision to end private prison contracts are causing the administration to take a closer look at the conduct in contract facilities, including a lack of confidence in contract prison staff compliance. In 2019, DOJ's Office of Inspector General found that ICE "routinely waives its own standards" in overseeing its contracted detention facilities.[65] These OIG reports further found that "ICE often fails to include its quality assurance surveillance plan (QASP)—a key tool for ensuring that facilities meet ICE's performance standards—in facility contracts and rarely imposes financial consequences for facilities that are noncompliant."[66] While ICE, an agency under the Department of Homeland Security, is not included in Biden's EO 14006, many ICE facilities are run by the same companies that DOJ contracts for prison management.[67] Thus, ICE QASP violations under the management of popular contract prison companies may provide the government a more transparent view into contract facility operations, perhaps allowing the government to terminate for default more easily.

Additionally, due to the Trump administration's support of private prisons, many federal inmates have been left under the management of several renewed and existing contracts with private prison companies.[68] This raises questions on how to effectively transfer prisoners, hire sufficient federal prison employees, and prepare for a prison system that proactively meets the goals of Biden's Executive Order 14006.

C. Government Contracting for Prison Management

The formation and executive of prison contracts emphasize the risks of privatization. These highlight some of the systemic issues that the Biden

61. Proclamation No. 14006, *supra* note 1.
62. *See Population Statistics*, *supra* note 2.
63. Jacob Kang-Brown et al., *People in Jail and Prison*, Vera Inst. of Just. (June 2021), https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-spring-2021.pdf [https://perma.cc/78V9-RFUB].
64. U.S. Dept. of Just.: FY 2022 Budget Request At A Glance (2021), *supra* note 11; *see also* BOP Ends Use of Privately Owned Prisons, *supra* note 41.
65. Ahmed, *supra* note 60, at 7.
66. *Id.*
67. *See id.*
68. *See id.*

administration will face in implementing EO 14006. For example, government is incentivized to capitalize on fixed-price contracts with contract prison companies. This abuse is one of the fundamental failures of the system. Further, the government's emphasis on cost efficiency has led to a lack of government oversight of contract prisons, resulting in harm to both inmates *and* contract prison employees. The employees are stigmatized by having worked in facilities that received poor performance marks from the federal government.

1. Development of Modern Private Prison Contracts

Any service or good that the government outsources from a private vendor requires a specific type of government contract to fit the demands of the government given the nature of the service or good, and that is precisely how the government began contracting for its prison management.[69] For the majority of the twentieth century, the federal government managed prison facilities on its own.[70] This arrangement eliminated any need for negotiating and perfecting contract terms for prisoner management; oversight and care for inmates was handled internally and at the discretion of the BOP, its advisors, and its vetted employees who were given qualified immunity.[71] Government contracts were employed for lower-stakes needs, such as food services, commissary, health care, and education, in favor of keeping the spending budget low with fewer and less expensive contracts.[72] Consistent with Reagan-era criminal policy reform interests, the federal "crack down" on crime seemingly necessitated some degree of private sector aid in managing the number of inmates, which continued to soar upwards into the 2000s.[73] Both the administrations of former Presidents Bill Clinton and George W. Bush continued the trend of privatizing prisons, asserting a vision of "market-based government" that allowed the private sector to become part of historically inherent governmental functions, like operating a prison.[74]

Even Congress was in favor of the shift towards privatization, indicating a government-wide acceptance of the private market's growing role in federal matters. Congressional appropriations for Fiscal Year (FY) 1997 required the DOJ to contract out federal prison management and served as a test-run to see whether the United States should allow the private sector to handle correctional facility operations.[75] To achieve this goal, the DOJ followed traditional

69. Sean Bryant, *The Business Model of Private Prisons*, Investopedia (Nov. 2, 2021), https://www.investopedia.com/articles/investing/062215/business-model-private-prisons.asp [https://perma.cc/8NJK-N8ZW].

70. *See* Douglas C. McDonald & Kenneth Carlson, Contracting for Imprisonment in the Federal Prison System: Cost and Performance of the Privately Operated Taft Correctional Institution 1 (Abt Associates Inc., Oct. 1, 2005).

71. *See id.*

72. Gregg Satula, *Using Contractors in Correctional Facilities: Key Policy Considerations*, Lexipol (June 15, 2018), https://www.lexipol.com/resources/blog/using-contractors-in-correctional-facilities-key-policy-considerations [https://perma.cc/VXL3-H8CT].

73. McDonald & Carlson, *supra* note 70, at 1.

74. *Id.*

75. *See id.*

government contracting rules but was able to choose the type of solicitation and contract awarded.

2. Substance of Private Prison Contract

Significant benefits and risks are associated with modern-day private prison contracts, which are best exemplified by an actual contract's terms. One of the earliest instances of the contemporary form of private prison contracts involved a 1996 BOP request for proposals for the management of a new prison facility in Taft, California.[76] The winner of this contract, which was the first of its kind, was the international company Wackenhut Corrections Corporation, which ultimately became one of the biggest correctional center names in United States' contracting, the GEO Group, Inc.[77] The Taft facility contract was designed to be a firm fixed-price performance-based contract, which is still the default type of agreement for private prison agreements employed in the modern day.[78]

The use of performance-based contracts for prison contracts signals that the government's contract shall include a performance work statement (PWS) that includes measurable performance standards for quality, time, and quantity, and performance incentives, if appropriate.[79] The PWS should describe the work in terms of agency expectations and provide a way to assess the contractor's work performance.[80] Fixed-price contracts "provide for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract."[81] In the case of the Taft contract, the contractor was paid $27.6 million each year to operate the facility, and left operational planning for nearly 2,000 inmates primarily up to the contractor, giving the contractor a high level of operational power. The government implemented some safeguards to ensure Wackenhut's compliance with the contract, including assigning federal employees with the responsibility of contract oversight.[82] These safeguards were to confirm that the contractor was meeting performance standards and to incentivize the contractor "to perform well, above and beyond mere compliance, [and] the Bureau designed a procedure for determining if semi-annual awards should be given to the contractor."[83] However, so long as the government's performance standards were met, management was up to the contractor.

3. Lack of Oversight and Hiring Implications

Grave ethical concerns exist when the well-being of thousands of inmates is in the hands of private contractors. Without strict government oversight,

76. *See id.* at 2.
77. *See id.*
78. *See id.* at 3; *see also* Kyle, *supra* note 12, at 2110.
79. FAR 37.601(b).
80. FAR 37.602(a–b).
81. FAR 16.202-1.
82. *See* McDonald & Carlson, *supra* note 70, at 2.
83. *Id.* at 3.

contracted prison employees are free to operate in ways that may prioritize keeping costs low as opposed to creating the best rehabilitative environment for inmates.[84] The firm fixed-price method puts an onus on the contractors to keep costs low because the government will not pay anything more than the fixed-fee, even if contractor maintenance costs require more funding. Simultaneously, this type of contract puts pressure on the government to get its money's worth of the fixed-price paid because "prison contracts are billed at a flat rate regardless of the number of prisoners housed."[85] Government contract experts suggest that contractors may build a cushion of extra money into their fixed-price contracts to account for risks. If the DOJ is not performing sufficient oversight checks to confirm the contractor is in compliance with its contract terms, then contract prison companies may be profiting off of their fixed-price contracts without adequately taking care of inmates.[86]

The primary issue is oversight. If the contractor and the government are both working to keep costs low, there is no incentive to use resources for increased oversight or facility checks to maintain DOJ standards for "operationally sound conditions . . . in compliance with security, safety, and environmental requirements."[87] With this background on government prison contract logistics, the role of the contract prison employee becomes even more important because of their ability to act behind the curtain of private employment. At the same time, the Biden administration's plan to eliminate private prison management requires the transition of thousands of inmates to federal oversight. As a result, this will create a demand for more federal prison guards and staff, but the government protects federal employees with a qualified immunity to which private prison guards are not entitled.[88] With the end goal of EO 14006 being the elimination of private prisons, private prison staff will be unemployed. If those private employees—lacking qualified immunity—have been disciplined or fired for misconduct, they likely will face challenges in attempting to join the DOJ's federal prison staff. The issue of prison staff hiring is a key challenge of President Biden's ambitious goal of eliminating all private prison management. The DOJ must hire enough government employees to manage the influx of federal inmates, but its applicants lack qualified immunity and carry the reputation of having worked in these problematic contract facilities. The DOJ should consider reforming its hiring standards and reassessing qualified immunity.[89]

84. *See* Rebecca Jones, *Government Prison Contracts Gamble with Taxpayer Dollars*, Project on Gov't Oversight: Accountability (Feb. 27, 2018), https://www.pogo.org/analysis/2018/02/government-prison-contracts-gamble-with-taxpayer-dollars [https://perma.cc/7CSW-E3S3].

85. *Id.*

86. *Can There Be Too Much Profit on a Fixed-Price Federal Government Contract?*, Cassidy Law PLLC (July 13, 2020), http://cassidylawpllc.com/toomuchprofitfixedpricefederalgovernmentcontract [https://perma.cc/8BWD-DT6W].

87. *Organization*, *Mission and Functions Manual: Federal Bureau of Prisons*, *supra* note 29.

88. *See generally* Richardson v. McKnight, 521 U.S. 399 (1997) (holding that prison guards employed by private contractors were not entitled to the defense of qualified immunity).

89. *See generally* U.S. Dept. of Just.: FY 2022 Budget Request At A Glance (2021), *supra* note 11.

III. ANALYSIS AND SOLUTIONS

Executive Order 14006 presents issues that President Biden and the DOJ must carefully consider to seamlessly eliminate privately operated detention facilities to meet its desired policy objective and manage oversight concerns. These issues are coupled with the likely introduction of new government employees who were once staff members at problematic contract prison facilities. First, the Biden administration must reassess the qualified immunity impact on prison staff employability. Then, the Biden administration must take measures to equip the DOJ with sufficient time, staff, and resources to create durable federal prison management, including reflecting on potential policy reforms.

IV. QUALIFIED IMMUNITY AND EMPLOYABILITY

The government first turned to private contractors to manage federal inmates given a significant increase in federal incarcerations, to the point where the government could not comfortably manage the growing number of inmates without outside assistance.[90] The government needed additional prison staff, and, by contracting prison management companies, the contractors could hire more staff or sub-contract employees if needed. This alleviated many of the concerns associated with the government's complicated and untimely hiring process. Unfortunately, outsourcing prison staff eventually led to an increase in unsafe prisons: "employing fewer and lower-skilled guards leads to significantly higher employee turnover rates in privately operated prisons, which ultimately results in safety and security risks for the imprisoned people, due to the inexperience of the guards."[91] Addressing the qualified immunity doctrine and its impact on DOJ hiring processes is essential to assess hiring implications for EO 14006.

A. Qualified Immunity Doctrine

Qualified immunity is a legal principle that shields government officials and employees from having to go to trial. Specifically, it protects the official from lawsuits "alleging that the official violated a plaintiff's rights" and "only allow[s] suits where [the] official[] violated a clearly established statutory or constitutional right."[92] Because the official represents the government and maintains official authority, courts protect the government official's discretion to make decisions for the sake of the public interest. This way, officials are less hesitant to make official decisions, as they do not live in constant fear of a future lawsuit.[93]

90. *See* McDonald & Carlson, *supra* note 70, at 4.
91. Valentin, *supra* note 38, at 6.
92. *Qualified Immunity*, Legal Info. Inst., https://www.law.cornell.edu/wex/qualified_immunity [https://perma.cc/JBK5-LZ9U] (last visited Jan. 30, 2022).
93. *See id.*

In *Harlow v. Fitzgerald*, the Supreme Court determined qualified immunity applied to federal government officials.[94] Rather than rule on the merits of the individual's argument against the federal aides, the Supreme Court determined that a government official had qualified immunity from such claims, so long as he did not know and should not have known that his actions were illegal.[95] However, this holding did not give guidance as to whether a prison guard, employed by a private prison contracting company, received qualified immunity as an extension of the federal government's "employees."

The Supreme Court determined the applicability of qualified immunity protections in *Richardson v. McKnight*, concentrating exclusively on private federal prison employees.[96] The suit involved a prisoner, McKnight, who was housed at a privately managed federal correctional center in Tennessee.[97] McKnight filed a tort action against prison guards at the facility, who he claimed caused him physical injuries.[98] The prison guards attempted to raise the qualified immunity defense as employees at a federal correctional center.[99] The Court held that, while prison guards employed by the federal government were protected by this doctrine, prison guards employed by private firms in contract with the government were not entitled to qualified immunity.[100] The Court explained that the "mere performance of a governmental function does not support immunity for a private person, especially one who performs a job without government supervision or direction."[101] The Court underscored that a private prison's guards do not require immunity because they are part of an organizational structure within the private market, whereas government prison employees are held accountable by the democratic system and, therefore, their governmental role invokes the ability to use the qualified immunity defense.[102]

Thus, private prison guards are held to a private citizen standard because their employment is dictated by the private competitive market, which is held accountable by the supply and demand of the industry. While the private market is likely to have another role for a job-hunter because of the plethora of private businesses with differing standards for hiring, the federal government is not as forgiving. With EO 14006's elimination of a significant number of prison staff positions, private prison staff members will look to government-controlled facilities for work.

B. Implications of Contract Prison Employment

Some driving forces behind EO 14006 were the increased safety and security risks connected to private prisons and their staff. President Biden has made

94. Harlow v. Fitzgerald, 457 U.S. 800, 800 (1982).
95. *See id.*
96. *See* Richardson v. McKnight, 521 U.S. 399, 401 (1997).
97. *See id.*
98. *Id.* at 399.
99. *Id.*
100. *See id.* at 399–400.
101. *See generally id.*
102. *See id.* at 412.

clear that "privately operated criminal detention facilities consistently underperform Federal facilities with respect to correctional services, programs, and resources."[103] Relatedly, the underperformance of contract prisons has led to higher staff turnover rates, because contract prison staff who are not protected via qualified immunity are more likely to be terminated.[104]

With the termination of private staff comes the issue of federal hiring. Private employees who were terminated at their last place of employment are significantly less likely to meet DOJ hiring standards. This implies a double standard for private prison staff conduct: if an employee with the GEO Group was terminated for his interaction with an inmate, then the private employee may not pass preliminary DOJ background checks due to the employee's termination for his conduct. On the other hand, a federal prison employee may have an identical interaction with an inmate in a federal facility but would likely face zero ramifications because he is protected by qualified immunity, which often defers to the discretion of the federal employee. This difference not only prejudices the private employee, but also creates an even bigger issue for the federal government: it may not be able to hire a sufficient number of prison staff members to manage all federal prisoners, including the influx of transferred inmates who used to be in private facilities because those applicants worked for a contractor rather than the government.

It is also unclear whether the DOJ is partly to blame for the high turnover rate and employee-related issues that arose in contract prisons. In 2016, a DOJ investigation of contract prison compliance, done by the Office of the Inspector General (OIG), raised the question of "whether the Justice Department conducts sufficient oversight of the private prisons to identify and preempt problems."[105] The OIG report explains how the DOJ failed to properly observe its contractors, adding that "onsite monitors at the contract prisons . . . did not use the checklist or monitoring logs to track contractors' corrective actions."[106] While the contract companies have the responsibility of managing their facilities, they are still contractors—not DOJ employees. The DOJ is still principally responsible for the faults of contract prisons that result in problems for inmates. For example, once the DOJ identified a systematic failure in contract prison discipline, private prisons made moves towards correcting their failures "after being put on notice by the government. . . . [T]he Inspector General later discovered that the problems persisted because the Justice Department did not change its inspection and evaluation policies to prevent these same problems from recurring."[107]

With regard to former private prison employees seeking federal employment, should EO 14006 successfully terminate the remaining private prison

103. Proclamation No. 14006, *supra* note 1.

104. *See* Valentin, *supra* note 38, at 6.

105. Jones, *supra* note 84, at 3.

106. Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons, *supra* note 7, at 32.

107. Jones, *supra* note 84, at 3.

contracts,[108] the DOJ states loose expectations for hiring guidelines on its Bureau of Prisons website.[109] A BOP webpage provides that employment with the agency "is subject to a satisfactory completion of a background investigation . . . [including] law enforcement and criminal record checks, and inquiries with previous employers," with the caveat that "suitability determinations are made on a case-by-case basis and are based upon . . . conduct that could affect how the agency accomplishes its duties or responsibilities."[110] By taking a hands-off approach to its contract prisons without reassessing contractors' policies or paying attention to records of incidents, the DOJ effectively allowed for disciplinary issues to arise in its contract facilities. The DOJ's failure to sufficiently oversee its contractor's operations has led to poor compliance reports on these contractors and their employees and ultimately, high staff turnover that may, for example, leave a former CoreCivic prison guard with a blacklisted resume.[111] A former contract prison employee should not be prejudiced in the federal hiring process due to the differing consequences for federal and contract prison staff when the industry is a revolving door between the public and private sector, especially given the DOJ's high demand for prison personnel. For an effective transition from contract prison to exclusively federal prison management, this should be a key focus for the Biden administration's consideration.

When EO 14006 plays out as intended, management of an influx of federal prisoners is a challenge that can be alleviated by a reassessment of hiring standards. EO 14006 will predictably create a demand for more federal prison staff, and the DOJ is at risk of losing out on qualified candidates due to its elevated standard for federal hiring. It is critical to the success of the EO 14006 that during the assessment of federal applications for prison staff employment, the DOJ considers the following: (1) that the termination status of a contract employee could have been due to the lack of DOJ supervision over its contractors, and (2) that contract employees may fail traditional background checks for prison staff actions that would have otherwise been defended by qualified immunity in the federal system.

The DOJ must take into consideration the nature of the prison employee's role, and whether concerns on a candidate's application that would have traditionally disqualified his candidacy are products of the lack of qualified immunity in the private prison context. The BOP website states that candidates are considered on a case-by-case basis, and as such, the DOJ should make a temporary internal hiring notice that considers the actions of a candidate who was formerly employed by a private prison company.[112] Further, DOJ

108. *See generally Our Locations*, Fed. Bureau of Prisons, https://www.bop.gov/locations/list.jsp# [https://perma.cc/3WZS-C8QE] (last visited Jan. 30, 2022) [hereinafter *Our Locations*].

109. *See Our Hiring Process*, Fed. Bureau of Prisons, https://www.bop.gov/jobs/hiring_process.jsp [https://perma.cc/4XXM-6XXX] (last visited Jan. 30, 2022).

110. *Id.*

111. *See* Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons, *supra* note 7, at 31.

112. *See Our Hiring Process*, *supra* note 109.

should implement a process that considers whether an employee's application is tainted for a legitimate conduct reason, or because the applicant made a difficult decision while acting in the role of a prison employee that would have been protected by qualified immunity if the employee were working for the government. Further, DOJ should reflect on whether an applicant's termination or poor marks were due to internal contractor mismanagement as a result of DOJ's lack of guidelines and oversight for its contractors, per concerns raised by the DOJ's OIG report in 2016.[113]

V. EFFECTIVE FEDERAL MANAGEMENT

The next major question raised by EO 14006 is how the DOJ will have ample time, staff, and resources to transfer all privately housed inmates safely and efficiently to federal management. Among the four existing private prison facilities, there are more than six thousand inmates housed who will require location transfers to federal facilities upon the termination of remaining contracts.[114] Seeing that the agency has relied on private contractors for housing and management services for thousands of inmates at a fixed-price since the 1990s, recent political leaders and agencies have not had to manage the full number of federal inmates without the help of private contractors. Additionally, there have been no major criminal policy changes that would suggest an end in sight to the high rate of incarceration in the United States. While the federal prison population of 153,855[115] has been reported to be at its lowest since the early 2000s, "the day after Biden's inauguration, the BOP population clocked in at 151,646, and that number has been rising ever since."[116] Because the BOP has historically struggled to keep up with simply managing its contract facilities,[117] it is difficult to imagine that the agency is equipped structurally and organizationally to handle all federal inmates in the near future for the full elimination of contract facilities.[118]

Corporate contracting loopholes may be a further risk to the policy objectives of EO 14006. As the Brennan Center for Justice summarized, "[T]he executive order may unintentionally create a scenario where for-profit firms sign more contracts with counties that then directly contract with the federal government, allowing the firms to essentially circumvent the order."[119] Should contracting companies find business via this method, the purpose of EO 14006 is defeated.

113. *See* Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons, *supra* note 7, at i.
114. *See generally Our Locations*, *supra* note 108.
115. *See Population Statistics*, *supra* note 2.
116. Eisen, *supra* note 40, at 5.
117. *See* Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons, *supra* note 7, at i.
118. U.S. Dept. of Just.: FY 2022 Budget Request at A Glance (2021), *supra* note 11.
119. Eisen, *supra* note 40, at 4.

In light of the growing number of federal inmates, the Biden administration's executive order does not appropriately tackle the root of the United States' criminal justice issues. The increasing number of prisoners will only require more federal staff and spending or will result in less supervision. The Biden administration must acknowledge that this executive order only touches the tip of the criminal justice reform iceberg. A solution would be to propose an accompanying policy bundle that aims to minimize the number of federal inmates, rather than approach the issue by shuffling inmates to different facilities. The administration is also recommended to approach criminal justice policy reforms by decriminalizing certain non-violent crimes, and creating a task force to re-examine cold cases with new technologies; these efforts may free wrongly incarcerated or overly sentenced inmates. Additionally, the DOJ is recommended to reassess their sentencing guidelines for inmates who are sentenced for crimes committed under the age of eighteen and to perhaps take a more rehabilitative approach in the case of lower-stakes crimes.

The increasing rate of federal inmates will only pose management challenges to the federal government, and by instating policies with the intent of lowering the number of federal inmates, the Biden administration can set future administrations up for success by alleviating some of the factors that contribute to a higher population. Further, such policies may take time, and the effects may not be clear immediately. But even the gradual decrease in federal prisoners may disincentivize a future President from re-employing private contracts, if numbers are more manageable and less costly for the federal government.

VI. CONCLUSION

Executive Order 14006 is an ambitious, policy-driven plan. President Biden's strategy to terminate private detention facilities raises complicated questions for current contractors and the future of government contracting, federal hiring, and the complex U.S. prison system. As such, the Biden administration should take measures to ensure that federal hiring guidelines are aligned with the influx of government employee applicants, and that President Biden's policy objectives are wholly served by the execution of Executive Order 14006 in pursuit of an entirely federal prison system.

DISABLED BUSINESS OWNERS AND THE 8(A) PROGRAM: CREATING A SET-ASIDE FEDERAL CONTRACT SPECIAL INTEREST GROUP FOR DISABLED-OWNED SMALL BUSINESSES

*Michaela McDowell**

ABSTRACT

Congress should create a new special interest group within the 8(a) program for disabled business owners. This proposal will achieve the legislative goals of the Rehabilitation Act and the Americans with Disabilities Act (ADA), particularly as they pertain to disability rights and employment policy. The Rehabilitation Act and the ADA focus on supporting and integrating disabled individuals in the business sector. Establishing a special interest group for disabled-owned businesses will support the disabled community through a federal small business assistance program. This proposal would also circumvent any issues resulting from AbilityOne's restrictive nature. AbilityOne, a federal program designed to encourage nonprofit organizations to employ disabled individuals, allows participating nonprofits to pay disabled workers a subminimum wage. This proposal would give disabled individuals more economic opportunities and federal aid outside of an AbilityOne participant. Similarly, disabled business owners would be able to avoid several problems related to the 8(a) program that have prevented them from fully utilizing the program in the past, including restrictive eligibility requirements, drifting oversight of the program, and misallocation of program resources. By creating a special interest group in the 8(a) program specifically for disabled business owners, the federal government and Congress can support an invaluable source of economic activity and make progress towards realizing the congressional goals surrounding disability rights and employment policy within the existing government framework.

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I. INTRODUCTION

According to the Centers for Disease Control and Prevention (CDC), sixty-one million adults in the United States, or twenty-six percent of the adult population, currently live with a disability.[1] There is legislative history surrounding disability rights policy dating back to 1938, when President Franklin D. Roosevelt signed the Wagner-O'Day Act into law, establishing the Committee on Purchases of Blind-Made Products, which created AbilityOne, a federal procurement program for nonprofit organizations that employed disabled individuals.[2] Ever since, Congress has regularly passed disability rights legislation, often in tandem with other relevant civil rights policies.[3] These actions suggest that Congress not only wants to support the disabled community, but is actively advocating for their equal opportunity and inclusion in American society.[4]

For years, there has been a documented congressional commitment to promoting social and economic policy for disabled individuals; however, these policy goals have been severely lacking in the field of federal procurement.[5]

1. *Disability Impacts All of Us*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html (last visited Feb. 23, 2023) [https://perma.cc/CPN8-AMF7].

2. *AbilityOne Program History*, AbilityOne Program, https://www.abilityone.gov/abilityone_program/history.html (last visited Feb. 11, 2023) [https://perma.cc/7HXY-H8VT].

3. *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213, 104 Stat. 327; Rehabilitation Act, 29 U.S.C. § 701, 87 Stat. 355.

4. *See* Javits Wagner-O'Day Act, 41 U.S.C. §§ 8501–8506, 52 Stat. 1196; 42 U.S.C. §§ 12101–12213; 29 U.S.C. §§ 701, 791, 793–794; AbilityOne Program, *supra* note 2.

5. *See* Jenny J. Yang, Note, *Small Business, Rising Giant: Policies and Costs of Section 8(a) Contracting Preferences for Alaska Native Corporations*, 23 Ala. L. Rev. 315, 316 (2006).

There have been many criticisms of the government procurement process as it relates to small businesses and public contracts, including the AbilityOne program limiting employment opportunities for disabled individuals and the Small Business Act language stifling full and open competition among small businesses.[6] Yet, these issues have persisted in these programs in ways that often conflict with their original policy goals.

The Small Business Administration (SBA), the agency in charge of administering the 8(a) program under the Small Business Act, is one such federal agency that has not been immune to the common functional difficulties of executing public policy.[7] Congress, by establishing a new special interest group within the 8(a) program for disabled business owners, can help the SBA adequately support disabled-owned businesses within the existing government procurement framework, as congressional policy has intended for decades.

In 1953, Congress authorized the SBA through sections 636(j)(10) and 637(a) of the Small Business Act to establish a business development program focused on aiding "socially and economically disadvantaged" small businesses; thus, the 8(a) Small Business Program was born.[8] The SBA established a nine-year program through which small businesses owned and controlled by socially and economically disadvantaged individuals would receive specialized technical assistance, training, and contracting opportunities designed to stimulate effective competition in the economy.[9] One of the biggest benefits of participating in the 8(a) program is that members receive prioritized consideration when bidding on set-aside and sole source contract awards from federal agencies.[10] Set-aside and sole source contracts provide a restricted market for specific federal contract awards to allow small businesses the ability to compete in a market in which they might otherwise be unsuccessful.[11] The 8(a) small businesses were awarded over $34 billion in federal contracts in fiscal year 2020.[12] As Congress hoped, it seemed the 8(a) program was providing federal aid to thousands of small businesses.[13]

However, the 8(a) program has faced several challenges. In recent years the program has shown a steep decline in participation, varying interpretation and implementation of standardized policies and procedures, inconsistent metrics

6. Noga Baruch, Note, *Disability Employment Policy and AbilityOne: Ending a 1930s Program in the 21st Century*, 50 Pub. Cont. L.J. 317, 320 (2021); Yang, *supra* note 5, at 339–40.

7. *See* Yang, *supra* note 5, at 339–40.

8. Small Business Act of 1953, 15 U.S.C. §§ 631, 637(a); *8(a) Business Development Program*, U.S. Small Bus. Admin., https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program (last visited Feb. 11, 2023) [https://perma.cc/T2Z6-QBE5].

9. Small Bus. Admin., *supra* note 8.

10. Robert Dilger, Cong. Rsch. Serv., R44844, SBA's "8(a) Program": Overview, History, and Current Issues 1 (2021) [hereinafter 8(a) Program Overview].

11. *See* Robert Dilger et al., Cong. Rsch. serv., R45576, An Overview of Small Business Contracting 16 (2022) (explaining the bidding and award process for set-aside and sole source contracting which includes a restricting competition for eligible small business such as 8(a) program participants).

12. 8(a) Program Overview, *supra* note 10.

13. *Id.* at 33–34 (Tbl. 3. 8(a) Program Statistics, Selected Years).

for determining small business eligibility, and difficulties in measuring the program's success.[14] Unfortunately, this is not the only example of government execution falling short of congressional intent. For instance, the federal government has an annual goal of utilizing the 8(a) program to award at least five percent of all federal contracting dollars to disadvantaged small businesses every year.[15] Yet, the program precludes certain disadvantaged businesses from being competitive within the program or even from being eligible for the program entirely for the reasons discussed below.[16]

This Note suggests Congress create a new special interest group within the 8(a) program for disabled business owners. By creating a special interest group in the 8(a) program specifically for disabled business owners, Congress and the SBA can finally support an invaluable source of economic activity while making significant progress towards realizing the congressional goals surrounding disability rights and employment policy that have existed for decades. The 8(a) program is an ideal venue for such a change because the program was designed to help socially and economically disadvantaged small business owners, such as disabled business owners, and this change would modify the program in such a way that it would better achieve the goals of its creation.[17] Furthermore, this change would allow Congress and the SBA to adequately support disabled business owners and individuals within the existing government procurement framework, as Congress has been advocating for since President Roosevelt signed into law the Wagner-O'Day Act in 1938.[18]

After evaluating relevant legislative history, this Note will look in depth at the issues surrounding the 8(a) program and how those issues affect the disabled community. Next, this Note will outline the proposal for creating a special interest group for disabled-owned businesses under the 8(a) program and how that will achieve the legislative intent of Congress by providing various benefits to the disabled community. Lastly, this Note will discuss how this proposal will address the problems disabled business owners face within the 8(a) program specifically. Congress has made it explicitly clear through legislation that disabled business owners, disabled employees, and their working conditions should be considered when administering federal programs such as the 8(a) program, and this proposal will aid in realizing that intent.[19]

14. *Id.* at 36–44.
15. U.S. Small Bus. Admin., *supra* note 8.
16. *See generally id.*
17. Small Business Act of 1953, 15 U.S.C. §§ 636(j)(10), 637(a); U.S. Small Bus. Admin., *supra* note 8.
18. *See generally* 15 U.S.C. § 637(a); Javits Wagner-O'Day Act, 41 U.S.C. §§ 8501–8506, 52 Stat. 1196.
19. *See generally* Rehabilitation Act, 29 U.S.C. § 701; Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213, 104 Stat. 327; 41 U.S.C. §§ 8501–8506.

II. HISTORY OF LEGISLATIVE INTENT TO SUPPORT THE DISABLED COMMUNITY

Landmark legislation has endorsed economic and employment policy that has supported the disabled community for decades.[20] In 1938, Congress began taking significant action to offer more opportunities for disabled Americans, including by enacting the Wagner-O'Day Act, which created what is now known as the AbilityOne Program.[21] Other examples of important disability rights legislation affecting the federal procurement system are the Rehabilitation Act and the Americans with Disabilities Act (ADA).[22] Each of these acts signaled the intent of Congress as well as of the rest of the country to support the disabled community through whatever means possible, including instituting new employment and disability rights policies in the field of government contracting.[23]

This section of the Note will begin by explaining the specifics of the Wagner-O'Day Act and the creation of AbilityOne, a federal program—designed to provide employment to disabled individuals—that has faced significant criticism in the modern era. Next, this section will analyze the Rehabilitation Act of 1973, which focused on prohibiting federal programs and federal contractors from discriminating on the basis of disability. Lastly, this section will discuss the ADA, the most comprehensive piece of civil and disability rights legislation in recent American history.

A. The Javits Wagner-O'Day Act and AbilityOne

The Wagner-O'Day Act was signed into law on June 25, 1938.[24] The Act established the Committee on Purchases of Blind-Made Products (products made by blind people), which would go on to become the U.S. AbilityOne Commission in 2011.[25] The original purpose of the Act was to support blind citizens in the employment sector as they worked to provide goods and services to the government, and the program's mission has since expanded to include more members of the disabled community.[26] Congress amended the Act to become the "Javits Wagner-O'Day Act" in 1971, and expanded the

20. *See* AbilityOne Program, *supra* note 2.
21. 41 U.S.C. §§ 8501–8506; AbilityOne Program, *supra* note 2.
22. 42 U.S.C. §§ 12101–12213; 29 U.S.C. §§ 701–795.
23. 41 U.S.C. §§ 8502, 8504 (The Javits Wagner-O'Day Act created an initiative aimed at providing meaningful employment to blind individuals and was later expanded to provide employment opportunities to those with more significant disabilities.); 29 U.S.C. §§ 701–794 (The Rehabilitation Act prohibited federal agencies from discriminating against disabled individuals and was one of the first times disability and employment policy came together in legislation.); 42 U.S.C. §§ 12101–12213 (The Americans with Disabilities Act was the first time Congress passed legislation prohibiting discrimination on the basis of disability in any workplace and in other social settings.).
24. 41 U.S.C. §§ 8501–8506; AbilityOne Program, *supra* note 2.
25. AbilityOne Program, *supra* note 2.
26. *See* 41 U.S.C. § 8503; AbilityOne Program, *supra* note 2; U.S. AbilityOne Comm'n, AbilityOne Program Fact Sheet 1 (2021), https://www.abilityone.gov/media_room/documents/2021_AbilityOne_Fact_Sheet_v20210902.pdf [https://perma.cc/S9HK-4D25].

legislation to include people with significant disabilities, such as severe cognitive and physical disabilities, who were previously uncovered by the Act.[27]

Today, AbilityOne has become one the country's largest employers of disabled individuals, employing more than 42,000 people who are blind or have other significant disabilities.[28] The AbilityOne program functions by creating nationwide partnerships with nonprofit agencies who train and employ individuals with significant disabilities and by providing a framework in which these nonprofit participants can sell their goods or services to the federal government.[29] As a noncompetitive federal government contracts program, AbilityOne participants do not have to bid on available federal contracts and compete for them like most other federal contractors.[30] Rather, the AbilityOne Commission, as an extension of the federal government, determines the fair market price for goods and services offered by participating nonprofits in the AbilityOne program.[31] AbilityOne then regularly publishes a list in the Federal Register of the goods and services at set prices determined by the Commission to be eligible for the federal government to procure.[32]

Participating nonprofits must have disabled individuals perform at least seventy-five percent of their overall direct labor hours to qualify for the AbilityOne program.[33] AbilityOne seems to close the gap between small business owners and disabled workers by allowing disabled individuals to participate in the field of government procurement.[34] This is because the AbilityOne program provides a forum through which disabled workers can theoretically better participate in federal procurement.[35] However, contract practitioners and legal academics have been critical of AbilityOne. The criticism most significant for the purposes of this Note is that the AbilityOne program overly relies on paying disabled workers a subminimum wage, thereby decreasing competitive integrated employment rates for disabled employees in the workforce.[36]

Competitive integrated employment, as outlined in § 705 of the Rehabilitation Act, requires that employees with disabilities be paid no less than the

27. U.S. AbilityOne Comm'n, *supra* note 26.

28. *Id.*

29. 41 U.S.C. § 8503; *AbilityOne Program*, AbilityOne Comm'n, https://www.abilityone.gov/abilityone_program/#:~:text=The%20AbilityOne%20Program%20uses%20the,blind%20or%20have%20significant%20disabilities (last visited Feb. 24, 2023) [https://perma.cc/AY5G-MKXT].

30. 41 U.S.C. §§ 8501–8506.

31. *Id.* at § 8503; Baruch, *supra* note 6 at 321–22.

32. Baruch, *supra* note 6, at 321–22.

33. 41 U.S.C. § 8501(6)(c), (7)(c); Baruch, *supra* note 6, at 322.

34. *See* Baruch, *supra* note 6, at 320.

35. *AbilityOne*, U.S. Gen. Servs. Admin., https://www.gsa.gov/buying-selling/new-to-gsa-acquisitions/how-to-sell-to-the-government/for-businessesvendors/abilityone-program#:~:text=The%20Javits%2DWagner%2DO',services%20from%20designated%20nonprofit%20agencies (last visited Feb. 24, 2023) [https://perma.cc/5WNE-BHJ6]; *see* 41 U.S.C. § 8503.

36. Baruch, *supra* note 6, at 336–37.

federal minimum wage.[37] Yet many nonprofit participants of AbilityOne hold special certificates, known as 14(c) certificates, issued by the Department of Labor through the Fair Labor Standards Act, that allows them to pay a subminimum wage to disabled employees.[38] Based on the notion that disabled employees are not as productive as able-bodied employees, 14(c) certificates allow employers to pay a subminimum wage to disabled employees in order to reflect that difference in work production.[39] Because the Fair Labor Standards Act includes an exception to the federal minimum wage that allows employers of disabled individuals to pay a subminimum wage, nonprofits who participate in AbilityOne can utilize that exception and permanently reduce their business costs by ensuring they never pay their disabled employees more than a subminimum wage.[40]

Allowing employers to pay disabled employees a subminimum wage places them in a particularly vulnerable position because they are less likely to negotiate or compete for better employment.[41] Since every AbilityOne nonprofit employer can receive a 14(c) certificate to cut operating costs, they have no incentive to offer disabled employees a fair wage. Hence, the AbilityOne Program, while intending to support the disabled community, restricts the employment opportunities available to these workers, and the program cannot be considered to close the gap between small business owners and disabled workers.

B. The Rehabilitation Act of 1973

Congress passed the Rehabilitation Act in 1973, since amended, which prohibits discrimination on the basis of disability in programs receiving federal financial assistance as well as in the employment practices of federal agencies and federal contractors.[42] As the predecessor to the ADA, the Rehabilitation Act was the first piece of legislation to adequately address the idea of equal access for the disabled community by removing employment, transportation, and architectural barriers while also creating federal affirmative action

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37. Rehabilitation Act, 29 U.S.C. § 705 ("competitive integrated employment" being the same as "supported employment").

38. Employment of Workers with Disabilities Under Special Certificates, 29 C.F.R. § 525 (2022); Nat'l Council on Disability, From the New Deal to the Real Deal: Joining the Industries of the Future (2018), https://ncd.gov/sites/default/files/Documents/NCD_Deal_Report_508.pdf (report on national disability employment policy that heavily emphasizes the detrimental nature of 14(c) certificates and that allows employers to pay disabled employees a subminimum wage) [https://perma.cc/HN6N-U38J].

39. *See Subminimum Wage*, U.S. Dep't of Lab., https://www.dol.gov/agencies/whd/special-employment (last visited Feb. 24, 2023) [https://perma.cc/M586-SL84].

40. Baruch, *supra* note 6, at 336–37.

41. Alina Selyukh, *Workers with Disabilities Can Earn Just $3.34 an Hour*, NPR (Sept. 17, 2020, 05:00:00 AM), https://www.npr.org/2020/09/17/912840482/u-s-agency-urges-end-to-below-minimum-wage-for-workers-with-disabilities [https://perma.cc/73G9-DMW2].

42. 29 U.S.C. §§ 701, 791, 793–794; *Rehabilitation Act of 1973 (Rehab Act)*, Emp. Assistance & Res. Network on Disability Inclusion, https://askearn.org/page/the-rehabilitation-act-of-1973-rehab-act (last visited Feb. 11, 2023) [https://perma.cc/KS7P-BBCH].

programs.[43] The federal government has since been working to achieve these goals. For example, a rule requiring federal contractors to implement new self-identification procedures and determine whether they are meeting a seven percent utilization goal for disabled employees was introduced in March 2014 by the Office of Federal Contract Compliance Programs, since adopted in the Rehabilitation Act.[44]

More specifically, sections 503 and 504 of the Rehabilitation Act illustrate congressional intent to preserve and bolster the employment rights disabled Americans currently possess.[45] Section 503 of the Rehabilitation Act requires federal contractors who make in excess of $50,000 to take affirmative steps to hire, retain, and promote disabled employees.[46] Section 503 also includes the seven percent representation goal for disabled workers, which was the first of its kind and only furthers the government's policy commitment to supporting the disabled community.[47] The purpose of the seven percent utilization goal for disabled employees was to set a fair, attainable benchmark for equal employment objectives for every federal contractor without imposing a rigid quota.[48] Therefore, the disabled worker utilization goal is not a legal requirement, and failure to maintain a seven percent disabled workforce does not violate the law.[49]

Section 504 prohibits discrimination against individuals with disabilities by any program receiving federal funding or by any federal executive agency.[50] The Rehabilitation Act standards for determining disability are the same as Title I of the ADA.[51] This means that the judicial shortcomings of the ADA, including its narrow interpretation of disability as discussed in the next section of the Note, also apply to the Rehabilitation Act.[52] Similarly, § section 504 of the Rehabilitation Act relies on the ADA for its interpretation of employment discrimination, which includes equal employment policies such as a

43. 29 U.S.C. §§ 793–795; Shirley Wilcher, *The Rehabilitation Act of 1973: 45 Years of Activism and Progress*, Insight into Diversity (Sept. 17, 2018), https://www.insightintodiversity.com/the-rehabilitation-act-of-1973-45-years-of-activism-and-progress/ [https://perma.cc/2QEX-ZKR3].

44. 29 U.S.C. § 794; Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 41 C.F.R. Part 60-741 (2023).

45. *See* 29 U.S.C. § 794; Baruch, *supra* note 6, at 325–27.

46. Emp. Assistance & Res. Network on Disability Inclusion, *supra* note 42.

47. *See* 41 C.F.R. Part 60-741.45; Emp. Assistance & Res. Network on Disability Inclusion, *supra* note 42.

48. 41 C.F.R. Part 60-741.45.

49. *Id.*

50. 41 C.F.R. Part 60-741.43; *see* 29 U.S.C. § 795; Emp. Assistance & Res. Network on Disability Inclusion, *supra* note 42.

51. *See* Americans with Disabilities Act, 42 U.S.C. § 12102; Emp. Assistance & Res. Network on Disability Inclusion, *supra* note 42.

52. 42 U.S.C. § 12102; *see* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002); Barnhart v. Walton, 535 U.S. 212 (2002); *Introduction to the ADA*, Civ. Rts. Div., U.S. Dep't of Just., https://www.ada.gov/ada_intro.htm (last visited Feb. 11, 2023) [https://perma.cc/MGS8-H66N]; Julian Cardillo, *The Americans with Disabilities Act: 25 Years Later*, BrandeisNow (July 23, 2015), https://www.brandeis.edu/now/2015/july/parish-ada-qanda.html [https://perma.cc/3TKK-HXKV]; *see also infra* Section II.C.

prohibition on the segregation of an employee due to a disability.[53] Section 504, however, is only applicable to programs or activities "receiving federal funding" and not to federal contractors themselves.[54] Courts have interpreted federal contractors to be exempt from § section 504 because, in order for the Rehabilitation Act to apply, the government must intend to provide a subsidy to the program rather than compensate it for performance of a contract, permanently delineating "federally funded programs" from contractors who have federal customers.[55] Thus, the congressional goal of providing equal opportunity to the disabled community in the employment sector has a demonstrated history of being limited by judicial action.[56] Nonetheless, the intent of Congress to support the disabled community has been codified and should not be ignored.[57]

C. The Americans with Disabilities Act of 1990

The ADA is one of the country's most comprehensive pieces of civil rights legislation.[58] On July 26, 1990, President George H.W. Bush signed the ADA into law.[59] Modeled after the Civil Rights Act, the ADA prohibited discrimination against people with disabilities while guaranteeing that the disabled community could participate in all aspects of mainstream society.[60] Congress wanted to ensure that disabled individuals could purchase goods and services, seek out employment opportunities, and participate in state-sponsored programs and services, just as any American citizen would.[61] The ADA, with its ambitious goals, has fallen short of achieving its purpose of eliminating disability-based discrimination. This is because the ADA is a voluntary compliance law which allows employers to ignore its provisions and the courts have heavily restricted the ADA definition of "disability" to include fewer members of the disabled community than Congress intended.[62]

Even though the ADA is based on the Civil Rights Act and the Rehabilitation Act, the ADA is a voluntary compliance law, and employers are expected to voluntarily comply with the equal opportunity employment provisions.[63] As such, there are no employer reporting requirements or any other legal

53. 42 U.S.C. § 794(d); 42 U.S.C. § 12112(a).
54. 41 C.F.R. Part 60-741.45; Emp. Assistance & Res. Network on Disability Inclusion, *supra* note 42.
55. Abdus-Sabur v. Hope Village, Inc., 221 F. Supp. 3d 3, 13 (D.D.C. 2016).
56. Cardillo, *supra* note 52.
57. *See* 42 U.S.C. § 12101; Rehabilitation Act, 29 U.S.C. § 701.
58. *See* 42 U.S.C. § 12101; Civ. Rts. Div., *supra* note 52.
59. Civ. Rts. Div., *supra* note 52.
60. *Id.*
61. 42 U.S.C. §§ 12112, 12131, 12182; Civ. Rts. Div., *supra* note 52.
62. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 479 (1999); Cardillo, *supra* note 52.
63. 42 U.S.C. § 12112. The employment discrimination provisions of the ADA list numerous actions an employer should or must take to comply with the law, but it fails to provide any mechanism through which an employer can or must report whether they are indeed taking these actions. The main enforcement mechanisms of the Act are relying on individuals or the Attorney General to bring civil discrimination suits against bad employers.

mechanisms for accountability included in the legislation.[64] This significantly weakens the ADA and makes it distinctly different from other civil rights legislation, such as the Civil Rights Act—for which compliance is legally mandatory.[65]

Courts also have severely narrowed the ADA's scope by limiting the definition of "disabled."[66] The ADA was meant to be an "equal opportunity law for the disabled community."[67] Because the ADA had been interpreted differently by several federal agencies shortly after its passing, a series of Supreme Court decisions at the turn of the century imposed a very limited interpretation of the word "disabled," which caused certain conditions or impairments to warrant legislative protection and agency resources over others.[68] The Supreme Court has defined "disability" within the scope of the ADA to apply only to (1) an individual with a physical or mental impairment that substantially limits one or more major life activities; (2) a person who has a history or record of the impairment; or (3) an individual who is perceived by others as having such an impairment.[69] This is largely the definition of "disability" today under Title I of the ADA.[70] Consequently, the ADA, while well-meaning, has fallen short of achieving its legislative goals. However, the ADA is still an unique piece of civil rights legislation showcasing congressional support for the disabled community in all aspects of life.[71]

In conclusion, Congress has a demonstrated history of advocating for better, more nuanced disability policy by passing the Javits Wagner-O'Day Act, the Rehabilitation Act, and the ADA.[72] Each of these acts, as inclusive economic and employment policies, signals the intent of Congress as well as of the rest of the country to support the disabled community as active members of society.

III. THE 8(A) PROGRAM

This section of the Note will examine the SBA's 8(a) program, its congressional purposes, and how the program functions in practice. This section will also enumerate the problems disabled business owners face within the 8(a) program. The 8(a) program issues discussed in this section will be revisited in

64. *Id.*; Cardillo, *supra* note 52.
65. Civil Rights Act, 42 U.S.C. § 2000; Cardillo, *supra* note 52.
66. Cardillo, *supra* note 52.
67. Civ. Rts. Div., *supra* note 52.
68. Sutton v. United Air Lines, Inc., 527 U.S. 471, 479 (1999); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 202 (2002); Barnhart v. Walton, 535 U.S. 212, 219–20 (2002) (recent amendments to the ADA and other civil rights and disability legislation having since widened the definition of "disabled" but the new definition being largely untested in the courts); Civ. Rts. Div., *supra* note 52.
69. *See Sutton*, 527 U.S. at 511; U.S. Dep't of Just., Civ. Rts. Div., *supra* note 52.
70. Americans with Disabilities Act, 42 U.S.C. § 12102.
71. Cardillo, *supra* note 52; Civ. Rts. Div., *supra* note 52.
72. Javits Wagner-O'Day Act, 41 U.S.C. §§ 8501–8506; Rehabilitation Act, 29 U.S.C. § 701–794, 87 Stat. 355; Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213, 104 Stat. 327.

the following section to illustrate how creating a special interest group in the 8(a) program for disabled-owned businesses will solve or address them. The SBA is an agency dedicated to uplifting and supporting marginalized business owners through programs like the 8(a) program, but those principles can be threatened by the very actions taken to preserve them.[73]

The Small Business Act was enacted on July 30, 1953.[74] The Act was meant to aid, counsel, assist, and protect, insofar as is possible, the interests of small businesses across the country.[75] Many programs and resources were created and distributed to thousands of small businesses across the country as the result of the Act.[76] The 8(a) program, which aims to help small businesses owned and controlled by socially and economically disadvantaged persons, was one such program created by the Small Business Act.[77] By partnering with federal agencies, the SBA can promote the use of the 8(a) program to provide various forms of assistance to eligible small businesses including management, technical, financial and procurement related support.[78]

In the 1980s, Congress amended the 8(a) program to include special interest groups for four types of organizations: Alaska Native Corporations, Community Development Corporations (an eligible "nonprofit organization responsible to residents of the area it serves"), Native American Tribes, and Native Hawaiian Organizations.[79] Congress included these groups because of their uniquely disadvantaged status within the American economy among other competing small businesses, and altered the 8(a) program to offer certain specialized benefits to each special interest group.[80] These special interest groups and the implications of their certain specialized benefits will be discussed in further detail in part IV of this Note.

The 8(a) program and the SBA were created in the 1950s with the vision of supporting small business endeavors in the United States.[81] As the U.S. economy has shifted and transformed from the post-war industrialization of the 1950s to the service economy of the modern day, the SBA has had to adapt to provide the federal assistance small businesses have needed, with mixed results.[82] As a result, the 8(a) program as it exists today is administered without the disabled community in mind, in direct conflict with congressional intent.[83]

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73. U.S. Small Bus. Admin., *supra* note 8.
74. Small Business Act, 15 U.S.C. §§ 631–657.
75. *Id.*
76. 8(a) Program Overview, *supra* note 10, at 33 tbl. 3.8.
77. 15 U.S.C. §§ 636(j); U.S. Small Bus. Admin., *supra* note 8.
78. 15 U.S.C. §§ 636(j)(10), 637(a).
79. *Overview of the 8(a) Program*, U.S. Dep't of the Interior, https://www.doi.gov/hawaiian/overview-8a-program (last visited Feb. 24, 2023) [https://perma.cc/N9WQ-LVR8].
80. *See* U.S. Small Bus. Admin., *supra* note 8.
81. *See* 15 U.S.C. § 637(a)(1)(A)–(C).
82. *See generally* Yang, *supra* note 5, at 319–20.
83. Rehabilitation Act, 29 U.S.C. § 701; Americans with Disabilities Act, 42 U.S.C. § 12101; Javits Wagner-O'Day Act, 41 U.S.C. §§ 8501–8506.

A. Issues the Disabled Community Face Within the 8(a) Program

Several significant issues within the 8(a) program affect disabled business owners. These issues include the following: (1) the requirements for eligibility in the 8(a) program are unduly restrictive for disabled-owned businesses; (2) a lack of program oversight prevents disabled-owned businesses from receiving adequate assistance; and (3) the misallocation of program resources for disabled business owners renders the program largely ineffective.[84] Creating a new special interest group for disabled business owners within the 8(a) program will not only address these issues but also allow the SBA to better accomplish its legislative purpose of supporting small businesses by expanding its program to accommodate the disabled community.

First, to participate in the 8(a) program, a small business must meet several intensive eligibility requirements.[85] To begin, small business owners must fit within the governmental definition of socially and economically disadvantaged, which is who the 8(a) program was designed to support.[86] The government has defined "economically disadvantaged" as "individuals whose ability to compete in the free enterprise system has been impaired due to the diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."[87] Disabled business owners undoubtedly fit within the SBA definition of economically disadvantaged because the disabled community's ability to compete in the economy has been impaired due to the diminished capital and credit opportunities offered to them as compared to those who are not socially disadvantaged.[88] Among the many other criteria for eligibility are (1) limits on personal net worth and limits on all personal assets for the duration of program participation; (2) demonstrating "good moral character" as a business owner; (3) providing ample evidence of the business's "potential for success," (4) being owned and controlled by a socially and economically disadvantaged individual; and (5) continued economic scrutiny during participation in the program.[89] These eligibility requirements are the same for all program participants regardless of disability status, except for special interest groups, whose eligibility requirements were congressionally tailored for each group's demographics.[90]

According to an annual study conducted by the U.S. Bureau of Labor Statistics, which accounts for discrepancies involving age and technical ability, disabled individuals are severely underemployed and underutilized in society,

84. *See* U.S. Small Bus. Admin., *supra* note 8 (under "Program Qualifications"); 8(a) Program Overview, *supra* note 10, at 36–42.

85. U.S. Small Bus. Admin., *supra* note 8.

86. *Id.*

87. *See* 13 C.F.R. 124.104; 8(a) Program Overview, *supra* note 10, at 12; 15 U.S.C. § 637(a)(6)(A).

88. *See* 13 C.F.R. 124.104.

89. *Id.*

90. 13 C.F.R. § 124.109 (statutory special rules and eligibility requirements for Native American tribes and Alaska Native corporations for the 8(a) program); 13 C.F.R. § 124.110 (statutory special rules ad eligibility requirements for Native Hawaiian organizations for the 8(a) program); 13 C.F.R. § 124.111 (statutory special rules and eligibility requirements for Community Development Corporations for the 8(a) program).

perhaps as a result of barriers or other obstacles preventing them from entering in or being competitive within the workforce.[91] The current eligibility requirements could be an obstacle preventing disabled-owned businesses from being able to participate in the program. Placing the same social, economic, and financial obstacles to eligibility before disabled individuals and able-bodied individuals, without accounting for disability, can affect the likelihood of disabled applicants being accepted into the 8(a) program. This is in direct opposition of the intent of Congress to ensure the disabled individuals would not be overlooked or excluded when administering federal programs when passing the Rehabilitation Act and the ADA.[92]

Next, another issue disabled business owners face in the 8(a) program is the unfair treatment and unequal distribution of program benefits to eligible small businesses. Witnesses at congressional hearings have testified that the interpretation and implementation of standardized policies and procedures related to the 8(a) program have varied between SBA offices, especially those in different states.[93] This means that a small business who applied to the 8(a) program may or may not be accepted based on the SBA office to which they applied; or the resources and federal assistance offered to a small business can wildly vary depending on the SBA office they report to.[94] Similarly, members of Congress have even argued that SBA offices are influenced by competing business interests rather than neutrally overseeing the 8(a) program and its participants as intended, essentially awarding more resources to certain small businesses over others.[95] These actions, whether intentional or not, result in inconsistencies in the distribution of program benefits and the unequal treatment of program participants.[96] Congress, by passing the ADA, the Rehabilitation Act, and the Small Business Act, has demonstrated its intention to support the disabled community and other socially and economically disadvantaged business owners through federal assistance programs.[97] By failing to equally provide federal resources to the disabled community, the 8(a) program is actively working against Congress's intent.

The last problem related to the 8(a) program addressed in this Note is the misallocation of resources to eligible small businesses. The SBA is statutorily required to provide oversight to the 8(a) program, and that includes regular evaluations of 8(a) small businesses to ensure continued eligibility for the

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91. *Persons with a Disability: Labor Force Characteristics Summary*, U.S. Bureau of Lab. Stat. (Feb. 24, 2022), https://www.bls.gov/news.release/disabl.nr0.htm#:~:text=Unemployment%20The%20unemployment%20rate%20for,for%20those%20without%20a%20disability (noting that 19.1% of disabled individuals were employed in 2021. Also, the conclusion was reenforced that "across all age groups, persons with disabilities were much less likely to be employed than those with no disabilities," which the Bureau stated precludes age and technical ability as factors in the poll) [https://perma.cc/8JUZ-YB3Z].

92. *See* Rehabilitation Act, 29 U.S.C. §§ 701, 791, 793–795; Americans with Disabilities Act of 1990, 42 U.S.C. § 12132.

93. 8(a) Program Overview, *supra* note 10, at 36–37.

94. *See id.*

95. *Id.* at 37–38.

96. Yang, *supra* note 5, at 340; 8(a) Program Overview, *supra* note 10, at 37–38.

97. *See* 42 U.S.C. § 12132; 29 U.S.C. § 701; Small Business Act, 15 U.S.C. § 631.

program.[98] However, a 2016 SBA Office of the Inspector General (OIG) audit found that SBA staff reviewed less than half of the small businesses required to be included in annual evaluations.[99] Among other errors, this failure prevented the SBA from detecting nearly two dozen small businesses that were no longer eligible for the 8(a) program, yet were still receiving the benefits of program membership for years, including the ability to bid on set-aside and sole source contracts as well as financial and technical assistance.[100]

Following the conclusion of the audit, the OIG made several recommendations to the SBA "to improve the overall management and effectiveness" of the 8(a) program.[101] While this demonstrates that management and oversight of the 8(a) program are significant areas for concern, it also implicates that the resources, financial or otherwise, delegated to the 8(a) program for administration were inappropriately allocated.[102] Small business participants, including disabled-owned businesses, rely on the resources offered through the 8(a) program to grow and expand their business as well as successfully compete in the field of federal procurement.[103] When the federal resources meant for disabled-owned businesses are being poorly distributed, the purpose of the 8(a) program as well as the goals of the Rehabilitation Act and the ADA cannot be realized because the demographics congressionally targeted for federal assistance are not receiving assistance.

The 8(a) program has several issues that are particularly pertinent to disabled business owners because they negate Congress's goal of supporting the disabled community.[104] The requirements for participants in the 8(a) program are unfairly restrictive to disabled-owned businesses, the ineffective oversight of the program prevents disabled-owned businesses from receiving adequate federal assistance, and the misallocation of program resources burdens disabled business owners.

IV. CREATING A DISABLED-OWNED BUSINESS SPECIAL INTEREST GROUP IN THE 8(A) PROGRAM

Based on Congress's intent to support the disabled community through disability rights and employment policy and the current issues disabled business owners face within the 8(a) program, this Note recommends creating another

98. 8(a) Program Overview, *supra* note 10, at 37.

99. Off. of the Inspector Gen., Small Bus. Admin., Rep. No. 18-22, Improvements Needed in SBA's Oversight of 8(a) Continuing Eligibility Processes 4 (2018), https://www.sba.gov/sites/default/files/oig/SBA-OIG-Report_18-22.pdf [https://perma.cc/6XTC-NXQQ]; 8(a) Program Overview, *supra* note 10, at 36–37.

100. 8(a) Program Overview, *supra* note 10 at 36–37.

101. *Id.* at 36 n.226 (providing an itemized list of specific recommendations the OIG made to the SBA regarding the 8(a) program).

102. *See id.*; 8(a) Program Overview, *supra* note 10, at 36–37; Off. of the Inspector Gen., *supra* note 99.

103. *See* Small Business Act, 15 U.S.C. § 636(j).

104. *See* Americans with Disabilities Act, 42 U.S.C. § 12101; Rehabilitation Act, 29 U.S.C. § 701.

special interest group under the 8(a) program specifically for disabled business owners. Most importantly, this proposal would finally realize decades old congressional policies regarding disability rights on a national scale; specifically, creating a special interest group for disabled-owned businesses would mark substantial progress towards better employment rates and improved economic opportunities for disabled citizens.[105] As more disabled-owned businesses become competitors in the economy, the more opportunities become available to the entire disabled community, as legislation like the ADA and the Rehabilitation Act have intended for decades.[106] Similarly, the congressional goal of the 8(a) program is to provide federal assistance to socially and economically disadvantaged business owners, which makes it the ideal venue for instituting change to further support the disabled community, a recognized socially and economically disadvantaged group.[107] Disabled business owners would be able to avoid many of the 8(a) program's issues because they would receive specialized assistance under the purview of the program.[108] A closer examination of the other special interest groups that already exist within the 8(a) program will better illustrate why there should be a disabled-owned business special interest group within the 8(a) program.

Amendments to the Small Business Act of 1953, the 8(a) program, and subsequent legislative acts of the 1980s created special interest groups for small businesses at least fifty-one percent owned by Alaska Native corporations (ANCs), Community Development Corporations (CDCs), Native American tribes, and Native Hawaiian organizations (NHOs) because Congress recognized the need to provide additional federal support to these groups.[109] These special interest groups receive specialized benefits, including tailored management, technical, financial, and procurement related assistance from the SBA. This support is like that offered to socially and economically disadvantaged small business owners under the 8(a) program, but special interest group benefits are specifically curated for their special interest group, making them more valuable to program participants.[110]

105. *See generally* 29 U.S.C. § 701; Javits Wagner-O'Day Act, 41 U.S.C. §§ 8501–8506, 52 Stat. 1196; 42 U.S.C. § 12101–12213.

106. *See* 42 U.S.C. § 12101; 29 U.S.C. § 701.

107. 15 U.S.C. § 636(j); U.S. Small Bus. Admin., *supra* note 8.

108. U.S. Small Bus. Admin., *supra* note 8 (explaining that the four existing special interest groups [Alaska Native corporations, Community Development Corporations, Native American tribes, and Native Hawaiian organizations] are already recognized along with socially and economically disadvantaged small business owners).

109. U.S. Dep't of the Interior, *supra* note 79; Community Economic Development Act of 1981, 42 U.S.C. § 9801–9877, 95 Stat. 489 (creating CDCs); 13 C.F.R. § 124.109 (making Native American tribes and ANCs eligible for the 8(a) program); 13 C.F.R. § 124.110 (recognizing that NHOs are eligible for the 8(a) program).

110. 13 C.F.R. § 124.109 (providing special 8(a) program rules and eligibility requirements for Native American tribes and ANCs); 13 C.F.R. § 124.110 (providing special 8(a) program rules and eligibility requirements for NHOs); 13 C.F.R. § 124.111 (providing special 8(a) program rules and eligibility requirements for CDCs); 8(a) Program Overview, *supra* note 10, at 18–23 (explaining the 8(a) program requirements for ANCs, CDCs, Native American tribes, and NHOs as compared to socially and economically disadvantaged small business owners).

Notably, ANCs, CDCs, Native American tribes, and NHOs are identified as "disadvantaged groups" rather than "disadvantaged individuals."[111] Disabled business owners are undoubtedly individuals, not groups. However, Congress identified ANCs, CDCs, Native American tribes, and NHOs for the 8(a) program specifically because they were struggling to compete in the American economy despite the federal resources and support already offered to small businesses.[112] The disabled community—specifically disabled business owners—are facing similar economic struggles Congress has historically identified and relied on while creating the current special interest groups under the 8(a) program, such as the nature of the demographic and the unique obstacles they faced when competing in the economy.[113] The disabled community is a group of individuals that have faced severe social and economic prejudice within American society based on others' perceptions, just as ANCs, CDCs, Native American tribes, and NHOs historically have.[114] For this reason, disabled-owned businesses are similar enough to ANCs, CDCs, Native American tribes, and NHOs that the 8(a) program would be an ideal setting for creating a special interest group for disabled-owned businesses.

Disabled business owners also, as a participating 8(a) small business, are eligible for prioritized set-aside contracts.[115] Disabled business owners would receive the same assistance as a special interest group recognized by the set-aside and sole source contracting provisions without being subjected to the additional requirements of other 8(a) participants.[116]

The remainder of this section will focus on evaluating the effects of this Note's proposal. First, this Note will revisit all relevant legislation mentioned in the legislative history section to evaluate how the creation of a special interest group for disabled business owners under the 8(a) program finally fulfills the congressional intent of these acts. Then, this Note will explore how this proposal will solve or address the struggles disabled business owners currently face within the 8(a) program, as previously discussed. Lastly, this section will address potential downsides and counterarguments to this proposal.

For the purposes of this proposal, it is important to understand the legal and cultural nuances of defining a term such as "disability," as well as its potential effects on the disabled community, specifically for those individuals who

111. 8(a) Program Overview, *supra* note 10, at 11–13.

112. *Id.*

113. 13 C.F.R. § 124.109(b)(1)–(2) (granting presumptions of social disadvantage for Native American tribes and social and economic disadvantage for ANCs); 13 C.F.R. § 124.110(a)–(c) (establishing different requirements for NHOs to be considered socially and economically disadvantaged); 13 C.F.R. § 124.111 (creating unique requirements for CDCs to be socially and economically disadvantaged); 13 C.F.R. § 124.103(d)(1) (SBA requirements for including a group of small business owners as presumptively socially disadvantaged).

114. *See* 13 C.F.R. § 124.109(b)(1)–(2); 13 C.F.R. § 124.110(a)–(c); 13 C.F.R. § 124.111; 13 C.F.R. § 124.103(d)(1); Carli Friedman, *Most People Are Prejudiced Against People with Disabilities*, Council on Quality & Leadership (Sept. 4, 2019), https://www.c-q-l.org/resources/articles/most-people-are-prejudiced-against-people-with-disabilities [https://perma.cc/XA8Z-3EA4].

115. U.S. Small Bus. Admin., *supra* note 8 (under "Program Qualifications").

116. *Id.*

identify as disabled, yet may be excluded from any one definition of "disability." For these reasons, defining a term like "disability" is a delicate issue that goes beyond the scope of this Note. The definition of "disability" as it relates specifically to the 8(a) program should be left to Congress and the SBA to determine.

A. Achieving Congressional Goals for the Disabled Community

Establishing a special interest group for disabled-owned businesses within the 8(a) program would help to realize decades old congressional policies regarding disability rights on a national scale. Legislation, such as the Javits Wagner-O'Day Act, the Rehabilitation Act, and the ADA, has clear aspirations for the disabled community as productive members of American society through supportive employment and disability rights policies.[117] The benefits the 8(a) program could offer disabled-owned businesses would help them become more competitive in the U.S. economy. As more disabled-owned businesses become efficient economic competitors, the more opportunities become available to the entire disabled community.[118]

First, establishing a special interest group for disabled-owned businesses in the 8(a) program achieves the congressional goals of the Javits Wagner-O'Day Act while avoiding AbilityOne's reliance on paying disabled workers a subminimum wage.[119] The intent of the Javits Wagner-O'Day Act was to increase employment rates among the disabled community.[120] Creating a new special interest group for disabled-owned businesses would give disabled workers freedom when exploring their employment options. Disabled business owners are more likely to pay a living wage to disabled employees than AbilityOne nonprofits which hold a 14(c) certificate.[121] Disabled employers are also less likely to carry negative perceptions of disability than able-bodied employers, which means they are not likely to view disabled employees as less impactful or less valuable than able-bodied employees.[122] Thus, disabled business owners are more open to hiring disabled individuals for a living wage.[123] If disabled-owned businesses are given the resources and assistance to better compete in the American economy, employment rates for the disabled community will likely rise.[124] As a result, the goals of the Javits Wagner-O'Day Act would be realized without employers relying on 14(c) certificates to pay a subminimum wage to disabled workers.[125]

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117. *See* Rehabilitation Act, 29 U.S.C. § 701; Javits Wagner-O'Day Act, 41 U.S.C. §§ 8501–8506; Americans with Disabilities Act, 42 U.S.C. § 12101.

118. *See generally* U.S. Bureau of Lab. Stat., *supra* note 91.

119. Baruch, *supra* note 6, at 336–38.

120. 41 U.S.C. § 8503; AbilityOne Program, *supra* note 2.

121. *See generally* U.S. Bureau of Lab. Stat., *supra* note 91; Iryna Babik et al., *Factors Affecting the Perception of Disability: A Developmental Perspective*, 12 Frontiers in Psychology (June 2021), https://www.frontiersin.org/articles/10.3389/fpsyg.2021.702166/pdf [https://perma.cc/2DJK-SJHK].

122. *See* Iryna Babik, *supra* note 121.

123. *See id.*

124. *See generally id.*; U.S. Bureau of Lab. Stat., *supra* note 91.

125. *See* U.S. Gen. Servs. Admin., *supra* note 35; Babik, *supra* note 121.

Next, implementing a special interest group for disabled-owned businesses in the 8(a) program would further the congressional intent of the Rehabilitation Act. The Rehabilitation Act was the first significant piece of legislation to prohibit discrimination on the basis of disability in the employment practices of federal agencies and in programs receiving federal assistance.[126] The Rehabilitation Act was also one of the first examples of Congress attempting to address the idea of equal access for the disabled community by removing societal barriers while supporting targeted affirmative action programs specifically for disabled employees.[127] Creating a new special interest group for disabled business owners under the 8(a) program would not only allow the federal government to better support and assist disabled-owned businesses, but it would encourage all of American society to recognize disabled business owners as substantial players in the economy—finally carrying out the goals of the Rehabilitation Act.

Lastly, the ADA—while like the Rehabilitation Act in scope and intent—is much more comprehensive in establishing disability rights policy in the United States and would also benefit from this Note's proposal. The main aspiration of the ADA was to ensure that disabled individuals could engage in all aspects of mainstream society.[128] Activities that have historically been difficult or unobtainable for those in the disabled community such as purchasing goods and services, seeking out employment opportunities and advancement, and participating in state and federal sponsored programs and services are all mentioned as goals for the ADA.[129] Creating space for disabled-owned businesses to participate in the 8(a) program meets these goals by removing obstacles which discourage or bar participation of disabled individuals in the business sector.[130] Through the 8(a) program and its access to set-aside and sole source contracts, disabled-owned businesses can engage in purchasing and selling goods and services with various federal agencies, actively seek out employment opportunities and advancement in the field of federal procurement, and reap the benefits of the 8(a) program and its services by being program members.[131] Creating a special interest group for disabled business owners within the 8(a) program would realize Congress's intent when passing the ADA.

B. Addressing the Problems of the 8(a) Program for Disabled-Owned Businesses

Creating a special interest group for disabled-owned businesses would address several of the issues disabled business owners face within the 8(a) program. The issues within the 8(a) program, including the restrictive eligibility requirements, the ineffective oversight of the program, and the misallocation

126. Rehabilitation Act, 29 U.S.C. §§ 793–794; Emp. Assistance & Res. Network on Disability Inclusion, *supra* note 42.

127. 29 U.S.C. §§ 701–795; Wilcher, *supra* note 43.

128. Civ. Rts. Div., *supra* note 52.

129. Americans with Disabilities Act, 42 U.S.C. §§ 12112, 12131, 12182; Civ. Rts. Div., *supra* note 52.

130. *See* 42 U.S.C. §§ 12112, 12131, 12182.

131. U.S. Small Bus. Admin., *supra* note 8.

of program resources, would be mitigated with this Note's approach, thus making the 8(a) program an ideal venue.[132]

First, members of special interest groups within the 8(a) program can bypass certain program eligibility requirements.[133] The SBA automatically presumes that Native American tribes, owners of ANCs, owners of NHOs, and owners of CDCs are socially disadvantaged so long as they meet the other requirements of their special interest group.[134] Similarly, the SBA presumes ANCs and CDCs to be economically disadvantaged.[135] All other eligibility requirements for businesses in special interest groups were created with each particular special interest group in mind, resulting in more equitable eligibility requirements; this was done to promote program participation among the special interest groups.[136] If disabled-owned businesses had their own requirements for program eligibility, program participation among disabled-owned businesses could also increase. For example, if disabled individuals were granted a presumption of social and economic disadvantage, eligibility requirements for disabled-owned businesses could be limited to (1) demonstrating a good moral character; (2) proving the business is at least fifty-one percent owned by a disabled individual; and (3) demonstrating the business meets current SBA standards to be classified as a small business. For disabled-owned businesses, having a presumption of social or economic disadvantage would make eligibility for the 8(a) program much more attainable and further support the economic activities of the disabled community.[137]

Next, creating a special interest group for disabled business owners under the 8(a) program would remedy the issues of ineffective oversight and unfair resource distribution within the program as it relates to disabled-owned businesses. Native American tribes, ANCs, NHOs, and CDCs can receive individually tailored assistance through the 8(a) program, such as the 8(a) Mentor-Protégé program and industry specific financial counseling.[138] While this assistance is similar to that received by all program participants, the oversight and management of the assistance provided to Native American tribes, ANCs, NHOs, and CDCs is often stricter because there are fewer eligible

132. *See id.* (under "Program Qualifications"); 8(a) Program Overview, *supra* note 10, at 36–47.

133. 13 C.F.R. § 124.109.

134. 13 C.F.R. § 124.109(b)(1)–(2) (granting presumptions of social disadvantage for Native American tribes and social and economic disadvantage for ANCs); 13 C.F.R. § 124.110(a)–(c) (establishing different requirements for NHOs to be considered socially and economically disadvantaged); 13 C.F.R. § 124.111 (creating unique requirements for CDCs to be socially and economically disadvantaged); 13 C.F.R. § 124.103(d)(1) (providing SBA requirements for including a group of small business owners as presumptively socially disadvantaged); 8(a) Program Overview, *supra* note 10, at 18–19.

135. 13 C.F.R. § 124.109(b)(1)–(2) (granting presumptions of social and economic disadvantage for ANCs); 13 C.F.R. § 124.111 (creating unique requirements for CDCs to be socially and economically disadvantaged); 8(a) Program Overview, *supra* note 10, at 18–20.

136. 8(a) Program Overview, *supra* note 10, at 18–23.

137. *See* Small Business Act, 15 U.S.C. § 637; 41 C.F.R. Part 60-741.45; Americans with Disabilities Act, 42 U.S.C. § 12101.

138. 8(a) Program Overview, *supra* note 10, at 18–23.

businesses to monitor.[139] Because of this, the 8(a) program is more effective for participants in these special interest groups.[140] By creating a new special interest group under the 8(a) program for disabled business owners, there would be increased access to federal resources and assistance as well as stricter program oversight.[141] This proposal would modify the 8(a) program to further support the disabled community as Congress intended by providing federal resources and assistance to disabled-owned businesses.[142]

Finally, the last issue within the 8(a) program addressed by this proposal is the misallocation of program resources for disabled-owned businesses. Like the last issue of ineffective oversight and management, those small businesses who qualify for a special interest group designation in the 8(a) program largely avoid the problem. Many of the resources offered to small businesses belonging to these special interest groups are industry- and business-specific, which, by virtue of the special interest group's subject matter, is much more closely monitored.[143] The act of being closely monitored would likely lessen the misallocation of program resources.[144] Creating a special interest group for disabled business owners within the 8(a) program would give disabled-owned small businesses the opportunity to receive adequate specialized federal assistance.[145]

C. Potential Downsides and Counterarguments

As discussed throughout this Note, many problems surround the disabled community and civil rights and employment policy, and no one solution will provide the changes and innovation necessary to fix them. Even if one proposal could rectify the employment and accessibility issues affecting the disabled community, it would take time for such results to manifest. Similarly, creating a special interest group for disabled small business owners under the 8(a) program is not likely to have a significant effect on the disabled community immediately because substantial change takes time to achieve. However, the impact of this proposal will be felt for generations as the congressional vision for disability rights is eventually achieved. Any progress, regardless of how small it may appear at its inception, is worth advocating for. The disabled community is worth advocating for, and this proposal is one method of doing so.

A potential downside to this proposal is that it is likely that the definition of "disability" will be statutorily or judicially narrowed once again. Once disabled-owned businesses start receiving benefits, federal agencies may vary

139. *See id.* (listing specific program eligibility requirements for ANCs, Native American tribes, NHOs, and CDCs and the program's restrictions on their business operations and federal contracting capabilities).

140. *See id.* at 21–22, 30.

141. *See id.*

142. *See* Americans with Disabilities Act, 42 U.S.C. § 12101; 41 C.F.R. Part 60-741.45.

143. *See* U.S. Small Bus. Admin., *supra* note 8; 8(a) Program Overview, *supra* note 10, at 30.

144. *See* 8(a) Program Overview, *supra* note 10, at 27 (describing how "Businesses Opportunity Specialists" provide industry specific support to program participants).

145. *See* 42 U.S.C. § 12101.

in their interpretation of "disabled," requiring the courts to intervene. The Supreme Court has already shown a willingness to substantially limit disability rights by narrowly defining "disability" in a series of court cases after the ADA was passed.[146] One way to combat this is to homogenize the governmental definition of disability as a legal term of art. For example, when Congress is legislating disability policy the definition of "disability" could be the same as Title I of the ADA. The ADA defines "disability" with respect to an individual as "a physical or mental impairment that substantially limits one or more major life activities."[147] By establishing a unified definition of "disability," the federal government can be more consistent when creating and enforcing disability rights legislation. As previously stated, this Note makes no assessment as to what the definition of "disability" should be; it merely provides one potential example for a homogenous definition.

Lastly, some may argue that disabled business owners should petition the SBA under 13 C.F.R. 124.103(d)(1) to be included "as a presumptively socially disadvantaged group" under the 8(a) program.[148] However, this approach is inadequate compared to a statutory change because it would not address all the problems disabled business owners face within the 8(a) program. A successful petition under 13 C.F.R. 124.103(d)(1) for disabled business owners, while offering a presumption of social disadvantage, would still require disabled applicants to adhere to every other eligibility requirement for the program, including limitations on personal income and assets, moral character, and economic viability.[149] These restrictions could prevent disabled-owned businesses from being able to participate in the program, which conflicts with Congress's intent when passing the Rehabilitation Act and the ADA to ensure that disabled individuals would not be overlooked participants of federal programs.[150] Similarly, a petition under 13 C.F.R. 124.103(d)(1) does not address the program problems of inadequate program management or misallocation of program resources.[151] The best approach would be a statutory change to create a special interest group under the 8(a) program for disabled business owners because it more fully realizes congressional goals for the disabled community.[152]

146. Sutton v. United Air Lines, Inc., 527 U.S. 471, 479, 511 (1999); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 202 (2002); *see* Barnhart v. Walton, 535 U.S. 212, 219–20 (2002); Civ. Rts. Div., *supra* note 52.

147. 42 U.S.C. § 12102.

148. 13 C.F.R. § 124.103(d)(1).

149. *See id.*; U.S. Small Bus. Admin., *supra* note 8.

150. *See* 42 U.S.C. § 12101; 41 C.F.R. Part 60-741.45.

151. 8(a) Program Overview, *supra* note 10, at 36–39.

152. *See* 42 U.S.C. § 12101; 41 C.F.R. Part 60-741.45.

V. CONCLUSION

Landmark legislation endorsing economic and employment policy that specifically supports the disabled community has existed for years.[153] Beginning in 1938 with the Wagner-O'Day Act, Congress began a pattern of passing legislation that offered more social and economic opportunities for disabled Americans.[154] Other pertinent examples of disability rights legislation are the ADA and the Rehabilitation Act, both of which promote supporting the disabled community through various methods such as instituting nondiscrimination policies in the business sector and allowing for equal access and opportunity in federal assistance programs.[155] Each of these acts signals the intent of Congress as well as of the rest of the country to support the disabled community in meaningful and beneficial ways. This Note suggests Congress create a special interest group for disabled-owned businesses within the 8(a) program. Not only would creating special interest group for disabled business owners within the 8(a) program achieve the intent of Congress, but disabled business owners would also be able to escape many of the problems of the 8(a) program that have prevented them from fully utilizing the program in the past, including restrictive eligibility requirements, ineffective program oversight, and misallocation of program resources. By having Congress create a special interest group within the 8(a) program for disabled business owners, the SBA can adequately support disabled business owners and businesses within the existing government procurement framework, as congressional policy has intended for decades.

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153. *See* 42 U.S.C. § 12101; Rehabilitation Act, 29 U.S.C. §§ 701–795; 41 C.F.R. Part 60-741.45; AbilityOne Program, *supra* note 2.

154. Javits Wagner-O'Day Act, 42 U.S.C. §§ 8501–8506.

155. 41 U.S.C. § 12101; 29 U.S.C. §§ 701-795; 42 U.S.C. §§ 8501–8506; Small Business Act, 15 U.S.C. §§ 631–657.